

**CABOT
MANTANONA LLP**
 929 South Marine Corps Dr., Ste. 200
 Tamuning, Guam 96913
 Telephone: (671) 646-2001
 Facsimile: (671) 646-0777

RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS
 DATE: 04-15-16
 TIME: 3:50 AM PM BY: [Signature]
 FILE NO OPA-PA: 16-002

**OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS**

IN THE APPEAL OF)	APPEAL NO. OPA-PA-16-002
)	
1-A GuamWEBZ,)	PURCHASING AGENCY'S
)	MOTION FOR EXPEDITIOUS
)	DISPOSITION (DISMISSAL)
Appellant.)	ON THE MERITS
)	
_____)	

Pursuant to 2 GAR, Div. 4, § 12109(a), Purchasing Agency Guam Community College (“GCC”) requests that the Hearing Officer find there are no material facts in dispute and therefore an expeditious disposition of the instant case is warranted. For the reasons articulated below, the instant matter should be expeditiously dismissed because the undisputed facts in the record reveal that Appellant 1-A GuamWEBZ’s (“GuamWEBZ”) Appeal fails on its merits.

BACKGROUND

On January 25, 2016, GCC issued Bid Invitation No. GCC-FB-16-006 (“IFB”) for a redesign, hosting and maintenance of its website. (See generally Agency Report [cited “GCC AR”] -Tab 7 (Apr. 12, 2016).) The IFB, as amended, stated that all submitted bids were to be “publicly opened” on February 15, 2016, in the “GCC SSA Conference Room, 2nd Floor (Building 2000).” (GCC AR-Tab 7-0001-02; see id. at 0035 (extending Bid Opening date from February 9 to February 15).).

ORIGINAL

Three prospective bidders attended that Pre-Bid Conference held on February 1, 2016: (1) GuamWEBZ, (2) Ledge Light Technologies ("Ledge Light"), and (3) WSI – Internet consulting & Education ("WSI"). (See GCC AR-Tab 9-0015-16; GCC AR-Tab 8-0003.) On February 5, GCC issued the IFB's Amendment #1 to these three bidders in response to questions it had received from Ledge Light and WSI. (See GCC AR-Tab 7-0033-35.) In response to Ledge Light's question regarding a preference on development tools, Amendment #1 answered: "[GCC has] no preference at this point, *but both proprietary and non-proprietary options are welcome (you can submit both options in your bid proposal if you would like to).*" (GCC AR-Tab 7-0034 (emphasis added).)

Although there were three prospective bidders for the IFB, only two bids were submitted and publicly opened in GCC's SSA Conference Room on February 15, 2016. (See GCC AR-Tab 8-0003.) The two publicly-opened bids, submitted by GuamWEBZ and WSI, offered the following prices for development (only in the 1st Year), maintenance and hosting of the website.

Bidder	Development Tool	1st Year	2d & 3d Years	4th & 5th Years	Grand Total
WSI	Proprietary	\$23,100	\$16,200/yr.	\$16,200/yr.	\$87,900
WSI	Drupal	\$26,500	\$18,000/yr.	\$19,200/yr.	\$100,900
GuamWEBZ	Drupal	\$31,306	\$17,076/yr.	\$17,076/yr.	\$99,610

(See GCC AR-Tab 8-0002.)

GCC's Web Site Advisory Group ("Web Group") reviewed the two bids on February 16, 2016, and "[b]ased on a thorough analysis of each company's packets, [the Web Group] deemed that both companies ha[d] met the bid specifications." (GCC AR-

Tab 8-0004.) And, because GCC "did not specify a preference for either proprietary or open source CMS (content management system) in the [IFB]," the Web Group concluded, "the lowest bidder deemed qualified is WSI's proprietary bid at \$23,100.00 for the first year" and, therefore, "selected WSI as the redesign/developer/host/administrator for [GCC's] web site." (*Id.*)

On February 24, 2016, GCC sent GuamWEBZ a Notice of Non-Award that advised the contract would be awarded to WSI. (*See* GCC AR-Tab 9-0017-18.) GuamWEBZ acknowledged receipt of the Notice of Non-Award on February 25 (*see* GCC AR-Tab 9-0017) and that same day sent a Sunshine Act request to GCC regarding WSI's bid and the evaluation of all bids submitted for the IFB (*see* GuamWEBZ's Appeal [cited "Appeal"] at Ex. 15). Also on February 24, GCC sent a Notice of Bid Award to WSI, of which WSI acknowledged receipt on February 25. (*See* GCC AR-Tab 9-0019.)

Despite the fact that GuamWEBZ should have known the IFB's contract would be awarded to WSI when the bids were publicly opened and made available on February 15, 2016 (*see* GCC AR-Tab 8-0003; GCC AR-Tab 7-0006), GuamWEBZ waited until March 10 to file a bid protest ("Protest") (*see* GCC AR-Tab 7). The Protest was primarily grounded on WSI's bid submission. (*See* GCC AR-Tab 4-0001-03.) On March 14, GCC denied the Protest as untimely. (*See* GCC AR-Tab 3-0001.) That same day, GCC's President signed a contract with WSI. (*See* GCC AR-Tab 9-0004.)

GuamWEBZ filed the instant appeal on March 28, 2016. (*See* Appeal.) For the reasons articulated below, GuamWEBZ's alleged grounds for appeal lack merit.

LEGAL STANDARD

Under 2 GAR, Div. 4, § 12109(a), the Hearing Officer has the authority “to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.” And Hearing Officers have used “such authority to find that there are no genuine issues of material fact concerning an issue when the facts are clear from the record and the parties do not dispute them.” *In re Appeal of Korando Corp.*, No. OPA-PA-15009, Dec. & Order re Appellant's Mot. for Summ. J. (Dec. 3, 2015); *In re Appeal of Korando Corp.*, No. OPA-PA-15009, Dec. & Order re Purch. Agency's Mot. for Summ. J. (Dec. 3, 2015).

As explained below, there are no disputed facts in the record regarding the merits issues raised by GuamWEBZ's Appeal. Therefore, the Hearing Officer should expeditiously dismiss the instant appeal.

ARGUMENT

In its Appeal, GuamWEBZ complains that: its Protest was timely, WSI's bid failed to qualify for the local procurement preference, GCC inadequately compared the bids, and GCC erred by not providing WSI's confidential information. (*See* Appeal at ¶¶ 19-32.) Setting aside — *but in no way conceding* — the issue of whether GuamWEBZ's Protest was timely,¹ a de novo review of the undisputed facts in the record, *see* 5 GCA § 5703, reveals that, on its merits, GuamWEBZ's Appeal is unavailing.

¹ In its Purchasing Agency's Statement Answering Allegations of the Appeal, GCC responded to and rebutted the Appeal's allegations regarding the Protest's timeliness. (*See* GCC AR-Tab 1 at 4-5.)

A. WSI Qualified for the Local Procurement Preference

GuamWEBZ complains that it should have prevailed on the IFB because only it was entitled to the local procurement preference since, allegedly, WSI lacked a current Guam business license on the date of the bid opening and, therefore, GuamWEBZ's bid should have been adjusted downward by 15%. (*See Appeal at ¶¶ 23-25.*) This complaint lacks merit because it makes a mountain out of a molehill.

First, the Public Auditor has determined that submission of local procurement preference applications is inconsequential when all the bidders are "local companies known to [the purchasing agency]" because no bidder suffers harm or prejudice. *See In re Appeal of Pacific Data Systems*, No. OPA-PA-12-011, Dec. at 6 (Guam Office of Pub. Accountability Sep. 5, 2012); *accord* 5 GCA § 5008 (providing the "Policy In Favor of Local Procurement," but in no way mandating that local bidders must certify that they are entitled to preference). Here, GCC undoubtedly knew that WSI and GuamWEBZ — the only bidders — were both local companies. As stated in their respective IFB bid submissions, both companies have been established on Guam for more than a decade and GCC is a client of both companies. (*See* GCC AR-Tab 5-0005; GCC AR-Tab 6-0002.) Thus, like in *Pacific Data Systems*, the local preference application was inconsequential, "and as such, [GuamWEBZ] suffered no prejudice or harm." No. OPA-PA-12-011, Dec. at 6; *accord* 2 GAR, Div. 4, § 3109(m)(4)(B) (providing that the purchasing agency shall waive minor informalities in a bid when such a waiver does not inflict prejudice on the other bidders).

Second, the IFB specifically required that the successful bidder must provide a "[c]opy of current business license expiring June 30th, 2016 (*upon issuance of the award*)."

(GCC AR-Tab 7-0003 (emphasis added).) And this requirement was specifically reiterated at the pre-bid conference, which GuamWEBZ attended. (See GCC AR-Tab 9-0016 (“*Vendors present: . . . Rajesh ‘Rhaj’ K. Sharma (GuamWEBZ)*”) (emphasis in original); *id.* (“Procurement Requirements under the *Special Reminders to Prospective Bidders* reviewed: . . . a copy of your *Business License* expiring on June 30, 2016 (*required upon award*)”) (emphasis in original).) WSI complied with this requirement before GCC’s President signed the contract.² (See GCC AR-Tab 9-0004, 0021.)

Third, possession of a Guam business license is a matter of responsibility, not responsiveness. See 2 GARR, Div. 4, § 3116(b)(2)(iv) (providing that a factor considered for determining the responsibility of bidder is whether that bidder is “legally qualified to contract with the territory”). And, matters of responsibility are not determined solely by the bid submissions. See, e.g., *In re Appeal of Jones & Guerrero Co., Inc. dba J&G Const.*, No. OPA-PA-07-005, Findings & Recomm. of Hearing Officer at 14-15 (Guam Office of Pub. Accountability Dec. 12, 2008). Thus, no procurement violation occurred by WSI providing GCC with a business license “upon issuance of award,” as required by the IFB. (GCC AR-Tab 7-0003.)

Accordingly, GuamWEBZ’s complaint regarding the local procurement preference lacks merit.

² Although this issue is irrelevant, GuamWEBZ provided no credible evidence that WSI lacked a Guam business license at the time of the bid opening. Rather, with its Protest, GuamWEBZ merely submitted two unsubstantiated pages of a printout that contains no indication whatsoever regarding from where the printout was derived. (See GCC AR-Tab 4-0007-08.)

B. GCC's Proper Evaluation of the Bids Should Not Be Second-Guessed

GuamWEBZ complains that GCC's Web Group incorrectly evaluated the bids under 5 GCA § 5211(e) and § 5211(g) because it "rush[ed]" a review of the submissions and selected WSI's bid using a proprietary development tool. (*See Appeal at ¶¶ 27-31.*) Like GuamWEBZ's other complaints, this one also lacks merit.

Under 5 GCA § 5211(e), "[b]ids shall be evaluated based on the requirements set forth in the Invitation for Bid." The record clearly shows that (1) the Web Group's evaluation sheet tracked the IFB's criteria for *both* GuamWEBZ's and WSI's bids, and (2) both bids met the IFB's criteria. (*Compare GCC AR-Tab 7-0025-30 with GCC AR-Tab 8-0005-08.*) And, because WSI's proprietary proposal met all the criteria at the lowest price, GCC's Web Group properly selected WSI as the bidder to be awarded the contract. *See* 5 GCA § 5211(g) ("The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bid[.]")

Furthermore, it is improper for GuamWEBZ to suggest that the Public Auditor should second-guess the determination by GCC's Web Group — a group comprised of IT persons (*see GCC AR-Tab 8-0005-24*) — that WSI's proprietary proposal met GCC's needs, and for the lowest price. (*See, e.g., Appeal at ¶ 28* ("While quality can theoretically trump quantity, it is simply not plausible that WSI's proposal [41 pages] more thoroughly addressed the bid's technical requirements than did GuamWEBZ's [100+ pages]."); *id.* at ¶ 30 ("GCC would not have its own 'keys' to have full access to the website programming the way it would with GuamWEBZ's proposal").) As a general rule, the minutiae of the

procurement process criteria are best left to the purchasing agency's expertise. *See, e.g., TRC Env'tl. Corp. v. Office of the Pub. Auditor*, No. SP160-07, Dec. & Order on Pet. for Writ of Mandate at pp. 7-9 (Guam Super. Ct. Nov. 21, 2008). Particularly when such minutiae involves a technical evaluation of the bid submissions. *See, e.g., L-3 Commc'ns EOTech, Inc. v. United States*, 87 Fed. Cl. 656, 664 (Fed. Cl. 2009) ("The court gives great deference to an agency's technical evaluation of an offeror's proposal. '[T]echnical ratings . . . involve discretionary determinations of procurement officials that a court will not second guess.' *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed.Cir.1996) (citations omitted); *Omega World Travel, Inc. v. United States*, 54 Fed.Cl. 570, 578 (2002) ('It is well settled that contracting officers are given broad discretion with respect to evaluation of technical proposals.' (citing *E.W. Bliss*, 77 F.3d at 449)). '[W]here an agency's decisions are highly technical in nature, . . . judicial restraint is appropriate and proper.' *Electro-Methods, Inc. v. United States*, 7 Cl. Ct. 755, 762 (1985) (citing *Isometrics v. United States*, 5 Cl. Ct. 420, 423 (1984))") (alterations, omissions and parentheticals as in original).

Accordingly, GuamWEBZ's suggestion for the Public Auditor to re-evaluate the substance of the bid submissions is highly improper and thereby renders meritless this ground of GuamWEBZ's Appeal.

C. GuamWEBZ Was Not Entitled to Review WSI's Proprietary Information

GuamWEBZ's complaint that GCC did not provide the entirety of WSI's bid for review (*see* Appeal at ¶ 31) is also unavailing. WSI was the successful bidder based on its proposal using a proprietary development tool — i.e., a tool that WSI exclusively owns, *see* Dictionary.com (defining "proprietary" as "manufactured and sold only by the owner of the patent, formula, brand name, or trademark associated with the product"). Thus, by its very

nature, the bulk of WSI's proposal was confidential and was properly not made available to the public.³ *See* GARR, Div. 4, § 3109(l)(3).

To the extent that GuamWEBZ questions the timing of WSI's bid submission (*see* Appeal at ¶ 32), GuamWEBZ need only look at the Bid Abstract, which states WSI's proposal was timely submitted (*see* GCC AR-Tab 8-0001; *id.* at -0003 (listing the two bids submitted when the bid opening occurred at 10:00 a.m. on February 15, 2016); *see also* GCC AR-Tab 7-002 (stating that the deadline for bid submissions corresponds with the time and date of the bid opening)). Moreover, application of GuamWEBZ's query to its own submission would also call into question the timeliness of GuamWEBZ's proposal because its front page does not "indicate[] what time it was submitted." (Appeal at ¶ 32; *see* GCC AR-Tab 5-0001; *see also* Appeal at Ex. 18 p. 1.)

D. At Most, GuamWEBZ's Complaints are Minor Informalities in WSI's Bid that GCC Could Waive

Pursuant to 2 GAR, Div. 4, § 3109(m)(4)(B), GCC is entitled to waive any minor informality in a bid submission, and the IFB clearly stated this (*see* GCC AR-Tab 7-0010 ("The right is reserved as the interest of the College may require to waive any minor irregularity in bids received.")). "Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible." *Id.*

³ Of course, should the Hearing Officer care to ensure that the Web Group correctly checked the criteria boxes on their evaluation sheets, GCC will gladly submit WSI's entire bid proposal under seal for an *in camera* review.

Here, even assuming that WSI's bid contained the errors propounded by GuamWEBZ — which it did not — these errors were, at best, non-prejudicial minor informalities and therefore waivable. Indeed, the record reveals that GuamWEBZ merely is bidder disgruntled because it lost a contract due to its proposal coming in nearly \$12,000 higher than WSI's. Disgruntlement alone does not warrant undoing a properly awarded contract.

E. In Any Event, the Award to WSI is in the Best Interest of the Territory and Should be Ratified and Affirmed

Assuming *arguendo* that any or all of GuamWEBZ's complaints do have merit — which none of them do — the award to WSI should be “ratified and affirmed” because “doing so is in the best interests of the Territory.” 5 GCA § 5452. GCC plays a key role in the Territory's educational realm. And, as the IFB explains, GCC's “website (www.guamcc.edu) is one of most important marketing, recruitment, and community relations tools the college possesses.” (GCC AR-Tab 7-0025.) WSI offered to redesign, develop, host and maintain GCC's website at a price nearly \$12,000 less than the price offered by GuamWEBZ. (*See* GCC AR-Tab 8-0002.) Other than GuamWEBZ's self-aggrandizing hypothesis that it could create a better website than WSI (*see* Appeal at ¶ 28), there is no indication whatsoever that WSI's performance will not result in exactly the website that GCC desires, and for a lesser price than GuamWEBZ. In other words, GCC's contract with WSI is in the best interest of the Territory and, as such, should be ratified and affirmed.

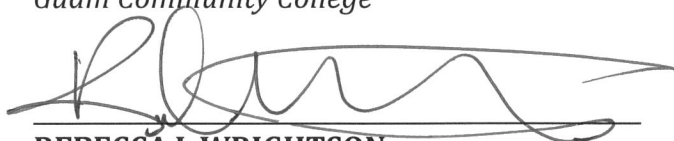
CONCLUSION

For the foregoing reasons, GCC requests that the Hearing Officer find an expeditious dismissal of the instant appeal is warranted because the record reveals that there are no material disputed facts and that, on the record's undisputed facts, GuamWEBZ's Appeal fails on its merits.

Respectfully submitted this 15th day of April 2016.

CABOT MANTANONA LLP
Attorneys for Purchasing Agency
Guam Community College

By:



REBECCA J. WRIGHTSON