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**OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS**

IN THE APPEAL OF	)	<b>APPEAL NO. OPA-PA-16-002</b>
	)	
1-A GuamWEBZ,	)	<b>PURCHASING AGENCY'S</b>
	)	<b>REBUTTAL TO COMMENTS ON</b>
	)	<b>STATEMENT ANSWERING</b>
Appellant.	)	<b>ALLEGATIONS OF THE APPEAL</b>
	)	
_____	)	

Pursuant to 2 GAR, Div. 4, § 12104(c)(4), Purchasing Agency Guam Community College ("GCC") submits this rebuttal to Appellant 1-A GuamWEBZ's ("GuamWEBZ") comments ("Comments") on GCC's statement answering the allegations ("Statement") of GuamWEBZ's above-captioned appeal ("Appeal"). For the reasons articulated below, GuamWEBZ's Comments do not bestow merit on its Appeal.

**BACKGROUND SUMMARY<sup>1</sup>**

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.) The IFB, as amended, stated that all submitted bids would be "publicly opened" on February 15, 2016. (GCC AR-Tab 7-0001-02; *see id.* at 0035 (extending Bid Opening date from February 9 to February 15).)

<sup>1</sup> Because GCC's Statement provides a detailed background, only a brief summary is provided herein.

**ORIGINAL**

On February 5, GCC issued the IFB's Amendment #1 to three prospective bidders responding to inquiries it had received. (See GCC AR-Tab 7-0033-35.) In response to a 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.)

Only two bids were submitted in response to the IFB. (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.

<b>Bidder</b>	<b>Development Tool</b>	<b>1st Year</b>	<b>2d &amp; 3d Years</b>	<b>4th &amp; 5th Years</b>	<b>Grand Total</b>
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, 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 a Notice of Bid Award to WSI and sent GuamWEBZ a Notice of Non-Award that advised the contract would be awarded to WSI. (*See* GCC AR-Tab 9-0017-19.) The following day, GuamWEBZ delivered 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.)

On March 10, 2016, GuamWEBZ filed 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.) GCC denied the Protest as untimely on March 14. (*See* GCC AR-Tab 3-0001.)

GuamWEBZ filed the instant appeal with the Office of Public Accountability ("OPA") on March 28, 2016. (*See* Appeal (Mar. 28, 2016).) On April 12, GCC filed its Agency Report, with a Statement Answering Allegations of the Appeal ("Statement"). (*See* GCC AR-Tab 1 [cited "Statement"].) GuamWEBZ had until April 22 to respond with its Comments. *See* 2 GAR, Div. 4, § 12104(c)(4). On April 15, GuamWEBZ filed its Comments on the Agency Report. (*See* Appellant's Cmts. to Purch'g Agency's Report [cited "Comments"] (Apr. 15, 2016).) The same day, GCC filed a motion for an expeditious dismissal of the Appeal. (*See* Purch'g Agency's Mot. for Exped. Dispos. (Dismissal) on the Merits (Apr. 15, 2016).)

The Public Auditor convened a status conference on April 18, 2016. During the status conference, the Public Auditor disclosed that GuamWEBZ is currently under contract as the provider of OPA's website. Also during the status conference, it was decided that GCC would file under seal, for *in camera* review, the entirety of WSI's bid packet — which includes pages deemed confidential by WSI — and that GCC would provide GuamWEBZ with a confidentiality log summarizing the content of the confidential pages.

### **REBUTTAL TO GUAMWEBZ'S COMMENTS**

In its Statement, GCC explained, with ample citations, why GuamWEBZ's various grounds for Appeal lacked merit based on both the law and the record. (*See* Statement 5-8.) With its Comments, GuamWEBZ attempts to resuscitate its Appeal with misguided interpretations of both the record and the law (*see* Comments 1-4), and baseless accusations (*see id.* at 5-7). GuamWEBZ's Comments does not breathe merit into its Appeal.

#### **A. Despite GuamWEBZ's Insistence to the Contrary, Its Protest was Untimely**

In its Statement, GCC explained how GuamWEBZ's Protest was untimely because WSI's bid submission — *on which GuamWEBZ primarily grounded its Protest* (*see* Appeal at Ex. 16) — had been available for review since the public bid opening on February 15, 2016 where GCC announced that WSI's bid was nearly \$12,000 lower than GuamWEBZ's. (*See* Statement at 4-5.) Thus, on February 15, GuamWEBZ should have known that WSI would be the successful bidder and should have requested to review WSI's bid on that date. (*See* Statement at 4-5.) Pointing to its Sunshine Act materials, GuamWEBZ argues that its Protest was timely because it could not have known of the facts giving rise to the Protest until March 1. (*See* Comments at 1-2.) GuamWEBZ's argument misses the mark.

First, GuamWEBZ's reasoning that its receipt of the Sunshine Act materials started the protest clock is inherently flawed. This is so because applying GuamWEBZ's line of reason, any losing bidder could wait months — or even years — after award of a contract to send a Sunshine Act requesting the bid documents, and then file a bid protest. Such reasoning cuts against the general policy that procurement disputes should be resolved promptly. *See, e.g.*, 5 GCA § 5425 (setting forth short time periods regarding bid protests).

Second, there is no question the February 15 public bid opening revealed that WSI was the lowest bidder on the IFB. (*See* GCC AR-Tab 8-0003.) There is also no question that WSI's bid was available for review on February 15. (*See* GCC AR-Tab 8-0002.) And, there is no question that GuamWEBZ's Protest is grounded primarily on WSI's bid. (*See* GCC AR-Tab 4-001-03.) Therefore, GuamWEBZ's Sunshine Act material was, in fact, immaterial to the timeframe in which GuamWEBZ actually filed its Protest. Put another way, given that the lion's share of GuamWEBZ's Protest was grounded on facts contained in WSI's bid submission — which had been available since February 15 — the March 10 Protest was untimely because it was filed more than fourteen days after GuamWEBZ "*should [have] know[n] of the facts giving rise thereto.*" 5 GCA § 5425(a) (emphasis added).

#### **B. WSI Qualified for the Local Procurement Preference**

GuamWEBZ's arguments regarding the local procurement preference are also unpersuasive. Citing *In re Appeal of Pacific Data Systems*, No. OPA-PA-12-011, Decision at 6 (Guam Office of Pub. Accountability Sep. 5, 2012)), GCC explained how the Public Auditor has determined that the local procurement preference was inconsequential when all the bidders were known to be local companies. (*See* Statement at 6.) GuamWEBZ attempts to refute GCC's explanation with a quotation from *In re Appeal of Pacific Data Systems* that appears in the decision's "Findings of Fact" and is *attributed to the procurement officer's denial of the protest*, not the Public Auditor's determination on appeal. (*Compare* Comments at 3 *with Pacific Data Systems*, No. OPA-PA-12-011, Decision at 3, ¶ 6.) Contrary to GuamWEBZ's supposition, a quotation from a procurement officer's denial of a bid protest is not a holding by the Public Auditor. (*See* Comments at 3.)

Moreover, GuamWEBZ's cry of prejudice because "it expended the time and money to maintain and renew its license" (Comments at 3) is not the prejudice meant to be remedied by the local procurement preference. As the comments to the local preference statute explain, the goal of the law is to encourage procurement from on-island, rather than off-island, vendors. *See* 5 GCA § 5008, cmt. ("The aim is to encourage local businesses to the maximum extent possible. However, some needs of the government must be procured from off-island, especially services, and often such businesses do not have a system of agencies. Also, while local businesses are to be encouraged, they are not to be encouraged at a too-great expense to the general treasury. A safeguard is added to ensure that the comparison is equalized—so that what is compared is the total, delivered cost, not just the relative catalog costs between the on and off-island vendors."). Here, there is no doubt that neither WSI nor GuamWEBZ are off-island vendors. (*See, e.g.,* Statement at 6.) And, despite GuamWEBZ's insistence otherwise, because no bidder was off-island, no bidder was "disadvantage[d] or penalize[d]." (Comments at 4 (quoting John T. Brown, *Procurement Lore or Procurement Law?: A Guam Procurement Process Primer*, at 103 (ver. 2.1 June 2011).))

Similarly meritless is GuamWEBZ's insistence that WSI "obtained its license not 'upon award,' as required but only as a result of GuamWEBZ's [Protest]." (Comments at 4.) The IFB clearly stated 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.) And, in its Notice of Bid Award — sent February 24 — GCC advised WSI: "Your company will therefore be awarded the contract for the above services upon receipt of the following

documents: . . . . 2. *Copy of your current business license or contractor's license (expiring June 30, 2016).*" (GCC AR-Tab 9-0019 (emphasis added).) Thus, GuamWEBZ's Protest — filed on March 10 — was hardly a catalyst for WSI submitting its business license.

### **C. GCC's Proper Evaluation of the Bids Should Not Be Second-Guessed**

In its Statement, GCC explained how it is improper for GuamWEBZ to suggest that the Public Auditor should second guess the bid evaluations performed by GCC's Web Group — a group comprised of IT persons (*See* GCC AR-Tab 8-0005-24). (*See* Statement at 7-8.) GuamWEBZ nonetheless posits that the Public Auditor's re-evaluation is necessary because the Web Group committed "specific concrete errors." (Comments at 4.) Tellingly, GuamWEBZ provides no citation to the record that supports its contention that the Web Group erred in evaluating whether the bids met the IFB's technical specifications (*see* Comments at 4) — while using evaluation sheets that tracked the IFB's technical specifications (*compare* GCC AR-Tab 7 with GCC AR-Tab 8). In fact, the Web Group concluded that "*both [WSI's and GuamWEBZ's bids] have met the bid specifications,*" and relayed their conclusion to GCC's ultimate decision makers.<sup>2</sup> (GCC AR-Tab 8-004 (emphasis added).)

Furthermore, GuamWEBZ completely disregards the general rule that the minutiae of the procurement process criteria are best left to the purchasing agency's expertise. *See, e.g., TRC Envtl. Corp. v. Office of the Pub. Auditor*, No. SP160-07, Dec. & Order on Pet. for Writ

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<sup>2</sup> Notably, GuamWEBZ fails to mention that its cherry-picked quotation from John T. Brown's Procurement Primer regarding "determinations" appears within a discussion regarding the Model Regulations for implementing the Model Procurement Code. (*Compare* Comments at 5 with John T. Brown, *Procurement Lore or Procurement Law?: A Guam Procurement Process Primer*, at 34 (ver. 2.1 June 2011).) Also notable is that GuamWEBZ does not point to any section in Guam's Procurement Regulations that mirrors the discussion in Mr. Brown's Procurement Primer.

of Mandate at pp. 7-9 (Guam Super. Ct. Nov. 21, 2008). Particularly when such minutiae involve 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).

**D. As Established at the Status Conference, GuamWEBZ Is Not Entitled to Review WSI's Proprietary Information**

GuamWEBZ expends great effort complaining about GCC honoring the confidentiality of WSI's proprietary information by not providing this information to GuamWEBZ, a competitor of WSI. (*See* Comments at 5-6.) In light of the status conference discussion regarding submitting WSI's entire bid under seal, for in camera review by the Public Auditor, and providing GuamWEBZ with a confidentiality log, this complaint is moot and need not be addressed herein.

**E. At Best, GuamWEBZ's Complaints are Minor Informalities in WSI's Bid that GCC Could Waive**

Citing 2 GAR, Div. 4, § 3109(m)(4)(B), GCC's Statement explained that even assuming 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. (See Statement at 9.) In response, GuamWEBZ propounds patently false and wholly unsubstantiated accusations of "bad faith collusion" between WSI and GCC, and charges GCC with "name-calling" due the conclusion of an argument in the Statement.<sup>3</sup> (See Comments at 6.) Because GuamWEBZ provides no cogent argument in response to GCC's explanation, a rebuttal is not necessary.

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

GuamWEBZ proffers no real response to GCC's position that, in any event, the award to WSI should be "ratified and affirmed" because "doing so is in the best interests of the Territory." (Statement at 9-10 (quoting 5 GCA § 5452).) Rather, GuamWEBZ simply claims that it could provide GCC with a redesigned website by July 1, 2016. (See Comments at 6-7.) Such a claim completely disregards the fact that 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.) Given that both bids demonstrate WSI and GuamWEBZ could create the website desired by GCC, it is unclear how it would be in the best interest of Territory for GCC to unnecessarily spend almost \$12,000 more by entering a contract with GuamWEBZ.

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<sup>3</sup> GuamWEBZ charges GCC with "name-calling" because GCC assessed the record and argued: "Indeed, the record reveals that GuamWEBZ is merely a disgruntled bidder who lost a contract because its proposal was nearly \$12,000 higher than WSI's." (Statement at 9.) This is in no way "name-calling." Rather, it is simply the conclusion to an argument grounded on the facts — facts that reveal the merits of the GuamWEBZ's Appeal are unsupported by the record. Moreover, courts frequently employ the term "disgruntled bidder" in procurement-based opinions. See, e.g., *Hoke Co. v. Tennessee Valley Auth.*, 854 F.2d 820, 825 (6th Cir. 1988) (using "disgruntled bidder"); *Nat'l Wrecking Co. v. Spangler, Jennings, Spangler & Dougherty*, 782 F.2d 101, 105 (7th Cir. 1986) (same); *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1132 (W.D. Pa. 1980) (same); *City of Durant v. Humphreys Cty. Mem'l Hosp./Extended Care Facility*, 587 So. 2d 244, 249 (Miss.


**RECOMMENDATION**

For the foregoing reasons and those articulated in its Statement, GCC recommends that the Public Auditor:

- (1) Find that GuamWEBZ's Appeal lacks merit;
- (2) Deny all relief requested by GuamWEBZ; and
- (3) Dismiss the instant matter so that GCC's properly-selected bidder may proceed with the development of GCC's new website.

Respectfully submitted this 22nd day of April 2016.

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By:   
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