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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

*IN THE OFFICE OF THE PUBLIC AUDITOR*

In the Appeal of  
1-A GuamWEBZ,

Appellant

DOCKET NO. OPA-PA -16-002

**OPPOSITION TO  
PURCHASING AGENCY'S MOTION  
FOR EXPEDITIOUS DISPOSITION  
(DISMISSAL) ON THE MERITS**

**Introduction**

Appellant 1-A GuamWEBZ ("GuamWEBZ"), via its undersigned counsel, responds herein to Purchasing Agency Guam Community College's ("GCC's") Motion for Expeditious Disposition (Dismissal) On the Merits ("Motion"). Because several material facts remain hotly disputed between the parties, GCC's motion should be denied. Because it is in the Best Interest of the Territory, the contract should be summarily awarded to GuamWEBZ.

**Several Material Facts Remain Hotly Disputed**

Right at the outset, in its Motion for Dismissal, GCC makes *several* factual assertions that remain in dispute. GCC claims on page 2 of its Motion that it selected WSI "[b]ased on a thorough analysis" of the bid packets. One of the central grounds for GuamWEBZ's appeal has

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been that GCC hastily rushed through the evaluation process to quickly select WSI as the winning bidder<sup>1</sup>.

On page 3 of its Motion, GCC asserts as part of its “background” that, “because GCC ‘did not specify a preference for either proprietary or open-source CMS’...the Web Group concluded, ‘the lowest bidder deemed qualified is WSI proprietary’...and therefore ‘selected WSI.’” Yet, [the fact] *that* the Web Group selected WSI “because” of the bid specifications, what it actually “concluded,” and the reasons it “therefore,” selected WSI, that is, the *reason(s)* WSI was selected in the first place, are *all* contested fact issues. It is undisputed that, after GCC selected WSI, it waited over a week to inform GuamWEBZ of its selection. GCC concedes that GuamWEBZ acknowledged receipt of the notice awarding WSI, and “**that same day** sent a Sunshine Act [aka Freedom of Information Act or “FOIA”] request.”[emphasis added].

GCC places what is clearly legal *argument* in its supposedly ‘factual’ “background,” *arguing*, “Despite **the fact 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...GuamWEBZ waited until March 10.” [emphasis added]. Obviously, and presented throughout this brief, GuamWEBZ disputes this. GuamWEBZ further disputes GCC’s *argument* mischaracterizing its Protest as, “primarily grounded on WSI’s bid submission.” GuamWEBZ protested on several grounds, including but not limited to WSI’s lack of a business license, GCC’s blatant errors made in evaluating GuamWEBZ’s proposal, and that GuamWEBZ’ Drupal CMS plan was more demonstrably reliable given its proven track record on Guam and GCC’s inability to meaningfully evaluate WSI’s “proprietary” CMS.<sup>2</sup>

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<sup>1</sup> See GuamWEBZ’s 3/28/16 Appeal ¶¶26-27.

<sup>2</sup> See 3/28/16 Appeal at ¶ 16.

### GuamWEBZ's Protest Was Timely Filed

“The plain meaning of 26 GAR 16901(c)(2), which states that “[p]rotestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer,” supports an interpretation that there may be multiple events in any given solicitation that could legitimately trigger protests. 26 GAR § 16901(c)(2). *Guam Imaging Consultants, Inc. v. GMHA, 2004 Guam 15, ¶28.*

On page 4 of its Motion, GCC introduces its formal arguments by claiming it is “Setting aside – but in no way conceding – the issue of issue of whether GuamWEBZ’s Protest was timely.” However, GCC has since resurrected this argument in its Rebuttal<sup>3</sup>. Thus, GuamWEBZ addresses the timeliness of its Protest herein.

The relevant analysis is not when GuamWEBZ “could have” known under 5 GCA § 5425(a) of the facts “giving rise to [its protest]” but when it *should* have known them in light of the factual and procedural circumstances. Here, GuamWEBZ had no reason to *suspect* any of the facts and circumstances leading to its protest until, at the very earliest, March 1, 2016; the date GCC released to GuamWEBZ just 25 pages GCC selected from the procurement record.

On page 4 of its Rebuttal, GCC claims GuamWEBZ did not timely file its Protest “because WSI’s bid submission – *on which GuamWEBZ primarily grounded its Protest* [original italics] – 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.” Given the undisputed facts that each and every page of WSI’s bid was marked “Confidential” so as to be withheld from GuamWEBZ and that even after a FOIA request for the records, GCC released just 25 pages, it is incomprehensible that GCC would make such a patently false claim.

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<sup>3</sup> See 4/22/16 Purchasing Agency’s Rebuttal to Comments On Statement Answering Allegations of the Appeal

Any demand by GuamWEBZ on February 15, 2016 to see WSI's "confidential" proposal would have been futile, as confirmed by GCC's own recent filings. There is no dispute that GCC permitted WSI to get away with marking every single page of its proposal "confidential" and took no action to challenge this practice by WSI until GuamWEBZ sent GCC its FOIA request. Even then, GCC would not release a single page to GuamWEBZ without getting 'permission' from WSI to (partially) comply with the FOIA request.

According to Joleen Evangelista, GCC Procurement & Inventory Administrator, after receiving the FOIA request, "[Evangelista] contacted...(WSI) by phone....advised [its management]...[in light of FOIA Request] Since all the pages on WSI's bid was marked confidential...I went through each page with Mr. Halehale [WSI management] so that he could determine which ones were approved to be copied."<sup>4</sup> [emphasis added].

Per the bid packet, any materials WSI wished to remain confidential were to be "readily separable from the bid in order to facilitate public inspection of the non-confidential portion."<sup>5</sup> Aside from violations of the FOIA law outside the scope of this brief, the record reveals that GCC and WSI colluded to violate procurement transparency laws.<sup>6</sup> As a result of this Appeal, GCC has been forced to concede, "WSI advised GCC that certain pages of the Bid were not confidential [yet marked them as such when submitting its proposal] and approved disclosure of these certain pages [only as a result of the FOIA request]. Additionally, certain pages are not

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<sup>4</sup> See 4/22/16 Purchasing Agency's Submission Under Seal for *in Camera* Review, Exhibit B, which, to be clear, was first made available to GuamWEBZ on 4/22/16 and not turned over as part of GCC's FOIA response.

<sup>5</sup> Exh. 3, pp 3-5 of 3/28/16 Appeal at ¶ 11.

<sup>6</sup> Subsection 3109(1)(2) requires that, "The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection 3109(1)(3) of this section. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid." Subsection 3109(1)(3) puts the onus on the GCC to affirmatively examine claimed confidential information to verify it qualifies as a trade secret or proprietary data: "**The Procurement Officer shall...determine the validity of any request for non-disclosure of trade secrets and other confidential or proprietary data identified in writing.**" [emphasis added].

confidential in nature but part of the Bid [GuamWEBZ's translation: never should have been deemed "confidential" by anyone at any time had they been acting in good faith]."<sup>7</sup>

Thus, by February 15, 2016, aside from zero pages being 'available,' GuamWEBZ still had no reason to protest because it was not yet *aggrieved*. GuamWEBZ's President Rajesh "Rhaj" K. Sharma, dutifully present at the bid opening to find out if he won, was simply told by GCC officials, 'we'll let you know.' GCC's argument on page 4 of its Rebuttal that public policy requires that a review of FOIA materials can't be grounds for a timely protest because otherwise a "losing bidder could wait months – or even years – after award of a contract" is a disingenuous attack upon a straw man. Here, not only did GCC *immediately* FOIA the procurement record the very day it acknowledged it lost the bid, but the "should have known" statutory language precludes losing bidders from opportunistically sitting around and doing nothing for years.

**Guamwebz Could Prepare for a Zombie Apocalypse; Not That It Should.**

On page 4 of its Motion, GCC stubbornly claims, "GuamWEBZ argues that its Protest was timely because it could not have known the facts giving rise to the Protest until March 1." [emphasis added]. As an initial matter, GCC's claim is yet another falsely premised straw-man argument. GuamWEBZ argued it should not have known the facts giving rise to its protest until March 1<sup>st</sup> when it received the FOIA responses; not that it could not have known.

GCC has truly spent quite a bit of time and everyone's money arguing GuamWEBZ's Protest was untimely. This issue needs to be forever put to rest. On page 1 and 2 of GuamWEBZ' Comments, GuamWEBZ briefly pointed out that GCC had equivocated on the terms "could" versus "should," fallaciously reasoning that GuamWEBZ *could* have FOIA'd GCC immediately upon the February 15<sup>th</sup> Bid Opening, therefore, GuamWEBZ *should* have done so. GuamWEBZ briefly illustrated the obvious fallacy, cited sound and *controlling*

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<sup>7</sup> See 4/22/16 Purchasing Agency's Service on Appellant Regarding Submission Under Seal for *in Camera* Review,

authority demonstrating unequivocally the common-sense proposition that *should* means ‘prudently, given a cost/benefits analysis of available facts and options,’ and *moved on*. Apparently, and quite ironically, GCC, a renowned educational institution, refuses to abandon this obviously flawed logic.

Thus, yet another demonstration: Most *prudent* businesses *should* carry fire insurance. Fires are an *improbable* occurrence, yet, *prudently*, given the cost/benefits analysis of available facts and options, it is *wise* to do so. In contrast, GuamWEBZ *could* buy Zombie Apocalypse<sup>8</sup> Insurance, because, based on the known scientific properties of the universe, zombies really *could* exist. However implausible their existence, it is scientifically *possible* that zombies could soon exist and pose a threat to property and the safety of GuamWEBZ’s personnel<sup>9</sup>.

Yet, *prudently*, GuamWEBZ *should not* and does not carry Zombie Apocalypse Insurance, because, currently, given the facts known to GuamWEBZ at this time, there are no reasons to believe zombies are a threat. Purchasing such a policy would not make for a *prudent* business decision, even at just \$9.95 for lifetime coverage! Likewise, no business *should* file a premature protest as ‘insurance.’ It is simply not worth risking the time, money, and professional goodwill unless and until there is a *solid* factual basis for doing so.

### **WSI Did Not Qualify for the Local Procurement Preference**

On page 5 of its Motion GCC one again disputes a material fact, “allegedly, WSI lacked a current business license on the date of the bid opening.” GCC has cast doubt on the credibility of the records<sup>10</sup> Guam Department of Revenue and Taxation officials gave to GuamWEBZ’s

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<sup>8</sup> This is not sarcasm but a real phenomenon, albeit mostly for entertainment purposes. See for examples <http://www.propertycasualty360.com/2012/02/15/insure-against-the-walking-dead>, <http://zombiesurance.com/explanation-coverages/>, and [http://www.consumerinsuranceguide.com/home\\_insurance/zombie-insurance-covers-everything-but-the-brains/](http://www.consumerinsuranceguide.com/home_insurance/zombie-insurance-covers-everything-but-the-brains/).

<sup>9</sup> E.g., military experiments gone terribly wrong and other implausible but science-based movie plots.

<sup>10</sup> See Exh 1 to 3/28/16 Appeal

Hillary Toves, which prove WSI's business license (prior to the award at issue) was last renewed September 4, 2012 expiring June 30, 2013 and was not renewed again until March 11, 2016, the day after GuamWEBZ complained about WSI's lack of a license. Toves stands ready, willing, and able to further authenticate what, in any event, are public records readily available to anyone. Notably, GCC has not produced any records to the contrary, *because they don't exist*.

Per the "General Terms And Conditions [of the] Sealed Bid Solicitation And Award,"<sup>11</sup> "Bidders are cautioned that the College will not [**notice the future tense**] consider for award any offer submitted by a bidder who has not [**past tense**] complied with the Guam Licensing Law." On Appeal, GuamWEBZ has never maintained the position that, notwithstanding the contrary language above, WSI could not present its license "upon award."

"But consider the necessity of having a business license to obtain the **benefit of the local preference provision** (see Article II.L above) [referencing the local preference form which references a business license]. In that case, the local preference is a factor in determining the lowest acceptable bid. Since that is a matter determined at bid opening, it should follow that having a Guam business license is an issue of responsiveness solely for the purpose of determining if the bid of the bidder claiming the preference is entitled to the local preference." *John Brown, Procurement Law Primer (version 2.1), pp 103*. [emphasis added].

GCC has presented no *factually* similar legal authority for its proposition that a bidder who *actually does not* have a current local business license when it signs the local preference form, particularly where the other bidder does have one, is nonetheless entitled to the locally licensed business preference. The matter would be 'form over substance' *only* if it there was no factual dispute that both parties were in fact locally licensed business, at least by the time of bid opening, *for purposes of the local procurement preference*. That is not the case here.

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<sup>11</sup> See Exh 3, pp 6-12 of 3/28/16 Appeal

**The Office of the Public Auditor Can and Should Re-Evaluate the Proposals**

Contrary to GCC's claims on page 7 of its Motion, the Hearing Officer has every right and every reason to 'second guess' the review panel as GCC phrases it. GCC has not refuted the obvious errors<sup>12</sup> of its Web Group in evaluating GuamWEBZ's proposal. GCC has never even *acknowledged*, much less refuted, the fact that its Web Group ostensibly selected WSI only because it appeared cheaper and not because, as Evangelista would misrepresent to GCC's final decision-maker, because it was the "lowest, most responsive and responsible vendor."

It does not take an 'IT person' to see that GCC's Group gave full credit to WSI even where WSI was unresponsive in explaining *how* it would meet requirements. GCC provides no actual evidence that its group was made of "IT persons." The title of Jayne Flores, Associate Director, Communications and Promotions, who headed the Group does not sound like the title of an "IT person". Nor does Wesley Gima's, as Program Specialist and Vice President of Finance. Presuming *arguendo* the remainder of GCC's Group were in fact "IT persons," GCC offers only authority for the proposition that the Hearing Officer should give *some deference* to the Purchasing Agency.

Posits GCC in its Motion, "As a general rule, the minutiae of the procurement process criteria are best left to the purchasing agency's expertise...Particularly when such minutiae involves a technical evaluation of the bid submissions." Once again, GCC argues by equivocation, jumping to the unsupported conclusion, it is "highly improper" to "reevaluate the substance of the bid submission." It does not take a technical expert to figure out that "WSI understands and will comply" is simply not responsive to the bid's requirement that WSI explain *how* its proposal will meet the specifications.

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<sup>12</sup> See, *inter alia*, 3/28/16 Appeal at ¶ 16 for details



## GCC's Unlawful Withholding of Public Records Prejudiced GuamWEBZ's Appeal

GCC head note on page 8 of its Motion reads, "GuamWEBZ Was Not Entitled to Review WSI's Proprietary Information." GuamWEBZ does not concede that WSI, *inter alia* by failing to follow correct submittal procedures, has not waived proprietary/confidentiality rights. However, in any event, the Hearing Officer in this case has made a ruling that such confidential proprietary materials not turned over to GuamWEBZ will be reviewed by the Hearing Officer *in camera*.

Still, it is important to point out what amounts to another argument by equivocation on the part of GCC. To the extent that certain WSI proprietary data *actually is* proprietary data which is privileged under procurement law, WSI's head note reads as nothing more than a tautology, i.e., 'you can't see my secrets because they are secret.' The relevant analysis is asking *which parts* of WSI's bid packet were *lawfully and properly* kept "confidential" by GCC? Bidders and purchasing agencies could otherwise collude to rig bids and never let the other bidders learn of their misdeeds if permitted to hide the entire process from public view simply by marking every page "confidential."

"[T]he bulk of WSI's proposal was confidential and properly not made available to the public," GCC claims. While **2 GAR §3109**, *et seq*, contemplates the fair protection of "trade secrets or other proprietary data," as indicated above, GCC has been forced to admit much of what was withheld from GuamWEBZ in its FOIA request was not properly labeled "confidential." Thus, GuamWEBZ rejects GCC's false narrative in its Rebuttal that, "GuamWEBZ propounds patently false and wholly unsubstantiated accusations of 'bad faith collusion' between WSI and GCC." GCC further claims in its Rebuttal that the issue is moot because the "confidential" materials have been identified for '*in camera* review only.' It is not

moot because the shenanigans played by WSI and GCC are *evidence* of collusive activity between the two.

Guam procurement law “requires all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith.” *5 GCA § 5003*. “Good faith means honesty in fact in the conduct or transaction concerned.” *13 GCA § 1201(13); 5 GCA § 5002*. As presented above, WSI improperly marked all of its pages “confidential” just to hide everything from public review, GCC failed in its statutory duty to verify everything marked “confidential” was lawfully so, Evangelista misrepresented to GCC’s head before she made her decision that WSI was found to be cheaper and ‘more responsive and responsible’ than WSI, GCC further colluded with WSI for its self-serving ‘permission’ to allow GCC to answer GuamWEBZ’s FOIA request to review the procurement record (as opposed to seeking legal advice regarding compliance), GCC denied GuamWEBZ’s timely appeal without good cause to do so, refused to deal at all with the merits of GuamWEBZ’s Protest, and has expended considerable public resources (probably more than the \$12,000.00 it ostensibly sought to ‘save’ by choosing WSI), all to the benefit of WSI. That is what the record reflects; telltale signs of collusion.

In fact, GuamWEBZ *still* does not know what time WSI actually submitted its proposal because GCC has withheld even that information. For all GuamWEBZ knows, a GCC official could have tipped off WSI as to GuamWEBZ’s pricing *before* WSI submitted its proposal.

#### **GCC’s Numerous Substantial Violations of Procurement Law Cannot Be Waived**

GCC’s many errors in reviewing the bid proposals have been well documented by GuamWEBZ both in its Protest and Appeal and need not be rehashed *ad nauseam*, especially in light of the fact GCC did not refute them. Needless to say, the substantive terms of the proposal

are hardly “Minor formalities [which] are matters of form,” as GCC characterizes the relevant procurement failures at issue on page 9 of its Motion.

**Conclusion**

Because several material facts remain hotly disputed, GCC cannot prevail on its Motion. For the reasons presented herein, awarding the bid to GuamWEBZ is in the Best Interest of the Territory, *inter alia*, because GuamWEBZ conformed its proposal with procurement law whereas WSI did not, because only GuamWEBZ was entitled to the local procurement preference, and because GCC can still unveil its new website approximately within its originally scheduled timeframe. Accordingly, GuamWEBZ respectfully requests it be awarded the bid and its reasonable attorney’s fees and costs incurred.



John Richard Bordallo Bell  
*Attorney for Appellant I-A Guam WEBZ*

**CERTIFICATE OF SERVICE**

I, John Richard Bordallo Bell, hereby declare that on the 25<sup>th</sup> day of April, 2016, I will cause to be served, via e-mail, a true and correct copy of the Opposition to the Motion to Dismiss upon the following counsel of record:

Rebecca J. Wrightson, Esq.  
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Respectfully submitted at Hagatña, Guam this 25<sup>th</sup> day of April, 2016.