

In the Office of Public Accountability

Hagåtña, Guam

TLK Marketing Co., Ltd.

vs.

Guam Visitors Bureau

OPA-PA-16-003

Guam Visitors Bureau's

Rebuttal to Comments on an

Agency Report

Filed Pursuant to

2 Guam Admin. R. and Reg. §12104(C)(4).

RECEIVED
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PROCUREMENT APPEALS

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Rebuttal

1. TLK, Invoice Irregularity, and Irreparable Harm

TLK asks this Office to determine that “GVB should immediately begin negotiations with TLK and award the contract to TLK”. *Response to Agency Report at p. 16.*¹ Based upon newly discovered irregularity in TLK’s performance of its prior contract though, the likelihood of any future relationship between TLK and GVB is remote.² *See Attachment, Declaration of Gina Kono.*

During its past contract performance, TLK represented to the Bureau that it had paid certain tour companies and other vendors when it had not, and sought reimbursement pursuant to its contract. That contract states, “Contractor shall submit invoices itemized in U.S. Currency within thirty (30) days following completion of projects approved by GVB.” *See Exhibit A at p. 37 (emphasis added).* On 12 February 2016 an employee of GVB sent email to TLK regarding the tour company complaints. In that email, the employee stated,

I have reviewed the invoices in question against your invoices that we have made beginning from March 2015 to January 2016. According to your invoices and our payment records all these unpaid invoices claimed by these

¹ TLK cites to no authority allowing such an expansion of power in the Office of Public Accountability.

² The GVB is considering action under 5 Guam Code Ann. §5426

Korean travel agencies have been paid by GVB to TLK except for the January 2016 invoices Are you aware of these unpaid invoices? Can you please let us know why these Korean travel agencies are claiming they have not been paid by your company? And we are wondering why they were sent to Senator Barnes about this matter and not to GVB head office.

Agency Report, Exhibit A at pp. 57-59.

These facts as known to GVB indicate a breach of contract by TLK and may implicate a violation of Guam's criminal code. Remarkably, TLK admits in its Response to an Agency Report that it did not make the payments as represented.

"GVB fails to disclose that TLK paid in full all of these invoices in February 2016, one month prior to the filing of the Protest."³ *Response to Agency Report, p.14.*

Despite this, TLK claims the specter of criminality is irrelevant. In light of its vigorous attempts to wrest the contract from the successful proposer for its own gain, past irregularities are very relevant.

TLK also pleads for an imposition of a stay and states it suffers irreparable harm based upon the possibility it will be awarded the contract. *Id at p. 15.* Today TLK has no contract with the GVB; its past month to month contract was terminated and, to be charitable, past performance does not recommend it for a new one. *See supra.*

³ TLK says GVB did not disclose to this Office that TLK had paid these invoices. In fact, GVB did. *See Agency Report at p. 6. Fn.2*

2. HIC was a Responsive Offeror

TLK does not challenge Happy Idea Company's (HIC) responsibility, only the responsiveness of its proposal. HIC was first ranked offeror; TLK does not dispute this but believes HIC to be disqualified since it "did not meet the mandatory five (5) year experience requirement." *TLK Response to Agency Report at p. 2*. Quoting itself, TLK refers to this as a mandatory requirement. *Id.* It is upon this single point that TLK asserts non-responsiveness.⁴

When examining the record, the Office of Public Accountability "will not evaluate the proposal anew, but instead will examine the agency's evaluation to ensure that it was reasonable and in accord with the evaluation criteria listed in the solicitation." *Pitney Bowes Government Solutions, Inc. v. United States*, 94 Fed. Cl. 1, 11 (2010). And, as the Court of Federal Claims states in federal contracting,

[A]pplicable federal procurement law requires that agencies evaluate proposals and make awards based solely on the factors specified in the Solicitation. A proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and a contract award based on such an unacceptable proposal violates the procurement statutes and regulations. A proposal that, on its face, leads an

⁴ TLK's Protest and Appeal might have been better grounded in contractor responsibility. *See Northeast Construction Co. v. Romney*, 485 F.2d 752 (Fed. Cir. 1973). TLK has chosen its horse however and an issue of responsibility was never raised at the agency level.

agency to the conclusion that an offeror could not and would not comply with a material term of solicitation is technically unacceptable and may not form the basis for an award. However, where a defect in a proposal is trivial or a mere formality, not material, the proposal is not required to be rejected out of hand.

A solicitation term is material where it has more than a negligible impact on the price, quantity, quality, or delivery of the subject of the proposal. De minimis errors are those that are so insignificant when considered against the solicitation as a whole that they can safely be ignored and the main purposes of the contemplated contract will not be affected if they are. A court should only overturn an agency's determination that an offeror's proposal satisfied the material requirements of the solicitation if such a finding was arbitrary and capricious. An agency's determination that a proposal is acceptable may be deemed arbitrary and capricious if the proposal did not provide what was called for in the solicitation.

Transatlantic Lines, LLC v. United States, 122 Fed.Cl. 624, 632 (Fed. Cl.2015), (internal quotations, citations, omitted).

Here, GVB has determined that the HIC proposal answered the call of the solicitation. TLK states that GVB “conveniently disavows its own work product and claims that the offeror does not need to have the five year experience (*sic*), because such a specification would be unduly restrictive, would disqualify joint offers or teaming agreements and would tend to advantage an incumbent over competitive efforts ((*sic*), “offers” in the original).” *Id at p. 3 quoting the Agency*

Report at p. 8. GVB has not said this. What GVB did say is that the RFP did not require the offering *entity* to have five years' experience. This is a rational construction of the RFP. Certainly it is within the agency's discretion to find that an entity which demonstrates it employs personnel having five years or more necessary experience is both responsive to the call and qualified. TLK was, and is, aware of this. In its Response to Agency Report, "TLK asserts that Section II of the RFP states that '[s]election of the best Offeror will be based on the **qualifications, experience and commitment of Offerors lead and support individuals** proposed for this RFP, and the Offeror's plan of action.'" *Response to Agency Report at p. 2, quoting Request for Proposals , GVB RFP No. 2016-006, at ¶2.0.(Agency Procurement Record, Vol. I, p.28)(emphasis added).* Here, the "qualifications, experience and commitment of Offerors lead and support individuals" more than meet the five year period of experience and TLK doesn't gainsay this. HIC stated;

- As SD Pharm it entered marketing contracts with various entities as far back as 2006
- Happy Idea Company's founding member has close to 15 years of experience in the field of public relations and is a successful public relations and marketing professional.
- A Director at Happy Idea Company has marketing experience and over 10 years' experience in magazine publishing

- A deputy general manager has at least 5 years' experience organizing overseas trips for clients
- A manager for HIC has more than 5 years in the hospitality industry as well as experience in sales and marketing

See Agency Procurement Record, Guam Visitors Bureau, 02 May 2016, Vol. II, Tab C at passim.

Adopting TLK's position though, a proposal from a newly formed company with three principals each possessing twenty years experience would be non-responsive while a proposal from a five year old company whose personnel each possessed less than five years' experience would be. Such a result would be silly and contrary to law. Further, would an agency determination that the newly formed company with sixty years of experience met the solicitation be arbitrary and capricious? The answer seems evident. Assuming that HIC as an entity has existed for less than five years, and recognizing the experience of the principals of HIC, the absence of existence for five years has less than a negligible impact on the "price, quantity, quality, or delivery of the subject of the proposal". In short, the GVB determined that the successful proposer was responsive; this is an acceptable agency conclusion.

3. There is nothing to “Stay”

5 Guam Code Ann. §5425(g) states, “In the event of a timely protest under Subsection (a) of this Section or under Subsection (a) of §5480 of this Chapter, the Territory shall not proceed further with the **solicitation** or with the **award** of the contract prior to final resolution of such protest . . .” *Id.*(*emphasis added*).

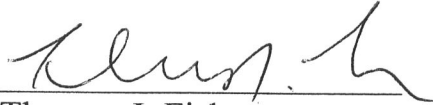
Regardless of TLK’s opinion of the propriety of doing so, at this point the contract has been awarded, and the solicitation completed. These events occurred before the protest and there is nothing to “stay”. *See Guam Imaging Consultants, Inc. vs. Guam Memorial Hospital, 2004 Guam 15, ¶34 (Guam 2004)* “We therefore hold that the interim sole source contract was awarded to GRC prior to May 16, 2003. Accordingly, RADS’ protest of the interim sole source contract did not trigger the automatic stay.”

TLK believes (or at least argues) that there was no Board approval of the contract. The evidence is otherwise. According to the Board motion provided by TLK, a GVB Board member moved to recommend that the General Manager “enter into negotiation and contract” with the successful proposer. *Response to Agency Report at p. 9*. This motion passed and the General Manager did as instructed. Thus a person able to bind the GVB entered into an enforceable agreement with a vendor at the Board’s instruction. A contract was made and exists.

4. TLK is not Entitled to Relief

TLK repeatedly states, and perhaps believes, that the GVB is engaged in repeated attempts to extinguish its “substantive right to protest under 5 GCA §5703”. *Id at 13*. If so, GVB has been singularly unsuccessful in doing so. *See filings, Office of Public Accountability, OPA-PA-16-003*. It is worth noting on this point that the GVB’s “agent in collusion” also rated TLK’s proposal superior to HIC. This may prove no more than that God is an ironist but it does weaken TLK’s argument that GVB is engaged in procurement legerdemain.

But TLK argues that this Office is empowered with a general warrant to do all things it deems necessary to “promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5” *Response to Agency Report at p. 13*. To TLK a power to promote integrity is capacious, shapeless, boundless, If this power to act exists though, why would the Legislature also have required this Office to promulgate rules and do so through the Administrative Adjudication law? *See 1 Guam Code Ann. §1909(g)*, It may be that the relief TLK requests can exist within the “power to promote”, if so though it must be reified through law and not happenstance.


Thomas J. Fisher

ATTACHMENT

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8 BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
9 HAGÁTÑA, GUAM

10 IN THE APPEAL OF) OPA-PA-16-003
11)
12 TLK MARKETING CO., LTD.) **DECLARATION OF REGINA KONO**
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1. I am Regina Kono, your Declarant herein, an adult over the age of 18, and competent to testify to the matters stated herein in a court of law.
2. I swear or affirm that the matters stated herein are true, or I believe them to be true and state them under penalty of perjury of the laws of Guam.
3. I am an employee of the Guam Visitors Bureau.
4. As part of my duties I oversee and am involved with destination marketing services for the Republic of Korea.
5. Formerly, TLK Marketing Co., Ltd. served as our tourism destination marketing representative in Korea.

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6. As part of their contract performance they would employ or use certain entities to market Guam as a tourist destination for citizens of Korea.

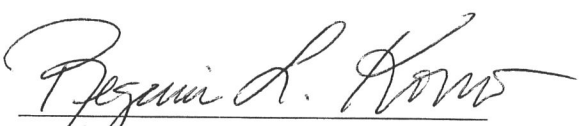
7. When TLK did so, they would pay the entity and then apply to GVB for reimbursement.

8. I have since learned that TLK's representations to us of payment were, on at least 13 occasions, false. *See Attached Table.*

9. TLK provided to us invoices representing a reimbursable expense when, in fact, TLK had not yet paid the entity.

10. As of this date, I have discovered that TLK's misrepresentation and deception caused the Guam Visitors Bureau to pay to TLK more than \$90,000.00 that was not yet owed

FURTHER your declarant sayeth naught.


Regina Kono
26 May 2016

TLK BILLING INFORMATION

TLK INVOICE	DATE RECEIVED	GVB DATE PROCESSED	3RD PARTY VENDOR	INVOICE AMOUNT	DATE 3RD PARTY VENDOR RECEIVED PAYMENT
GVB08-054	July 2, 2012	August 6, 2012	KOTFA	US\$13,044.25	Mar. 8, 2013
GVB08-057	November 9, 2012	November 9, 2012	BITF	US\$5,060.76	Aug. 16, 2013
GVB08-065	June 3, 2013	July 8, 2013	KOTFA	US\$13,572.74	Mar. 18, 2014
GVB08-069	October 1, 2013	November 5, 2013	BITF	US\$5,235.29	June 12, 2014
GVB08-095	March 6, 2015	March 30, 2015	YB Tours	US\$3,541.86	Feb. 22, 2016
			YB Tours	US\$2,023.92	Feb. 22, 2016
			KRT	US\$2,023.92	Feb. 22, 2016
			Hanjin	US\$2,023.92	Feb. 22, 2016
GVB08-097	May 11, 2015	May 22, 2015	Hanjin	US\$1,190.00	Feb. 26, 2016
			YB Tours	US\$3,500.00	Feb. 25, 2016
			KRT	US\$2,000.00	Feb. 26, 2016
			Hanjin	US\$3,000.00	Feb. 26, 2016
GVB08-100	June 16, 2015	June 30, 2015	KRT	US\$3,500.00	Feb. 26, 2016
			Interpark	US\$2,000.00	Feb. 22, 2016
			Hanjin	US\$2,000.00	Feb. 22, 2016
			KRT	US\$2,000.00	Feb. 22, 2016
GVB08-101	July 6, 2015	July 28, 2015	KRT	US\$1,500.00	Feb. 26, 2016
			YB Tours	US\$1,000.00	Feb. 26, 2016
			Hanjin	US\$2,000.00	Feb. 26, 2016
GVB08-104	September 30, 2015	September 30, 2015	Interpark	US\$3,512.58	Feb. 26, 2016
GVB08-107	November 2, 2015	November 30, 2015	YB Tours	US\$941.79	Feb. 26, 2016
GVB08-110	December 1, 2015	December 24, 2015	Jau Tour	US\$1,883.58	Jan. 7, 2016
			KRT	US\$3,296.26	Feb. 26, 2016
			YB Tours	US\$1,883.58	Feb. 26, 2016
			KRT	US\$1,883.58	Feb. 26, 2016
GVB16-002	January 4, 2016	February 4, 2016	Hanjin	US\$1,883.58	Mar. 24, 2016
			Interpark	US\$1,883.58	Feb. 26, 2016
			Jau Tour	US\$1,883.58	Feb. 25, 2016
GVB16-003	February 5, 2016	March 8, 2016	Jau Tour	US\$3,334.03	Apr. 26, 2016