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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: June 1, 2016  
TIME: 4:27  AM  PM BY: Chris  
FILE NO OPA-PA: 16-003

8 **PROCUREMENT APPEAL**  
9 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

10  
11 In the Appeal of

12 TLK Marketing Co. Ltd.,

13  
14  
15 Appellant  
16  
17  
18

**DOCKET NO. OPA-PA-16-003**

**RESPONSE TO AGENCY'S MAY 27, 2016  
SUBMISSION**

19  
20 **I. INTRODUCTION**

21 TLK Marketing Co. Ltd ("TLK") is appealing the Guam Visitors Bureau's ("GVB") denial of  
22 its agency level protest of GVB RFP No. 2016-006. On May 24, 2016, the Office of Public  
23 Accountability ("OPA") scheduled a Pre-Hearing conference before the Public Auditor and the  
24 Hearing Officer to discuss, *inter alia*, the disposition of pending motions and "[s]uch other matters as  
25 may facilitate the just, speedy, and inexpensive disposition of the action." *See, Notice of Pre-*  
26 *Hearing Conference*, May 13, 2016. The Hearing Office established various dates for TLK's appeal,  
27 including the motion deadline date of May 27, 2016. *See, Order After Hearing/Scheduling Order*,  
28 May 25, 2016.

**ORIGINAL**

1 The hearing on the merits was also scheduled on July 6, 2016, which was confirmed in the  
2 May 25<sup>th</sup> *Order After Hearing/Scheduling Order*. During the Pre-Hearing conference, counsel for  
3 GVB expressed confusion about whether or not a hearing on TLK’s appeal would be held. In  
4 response, GVB was ordered by the Hearing Officer to file a motion if it wished to object to the July  
5 6<sup>th</sup> hearing. *See* Audio Recording of May 24, 2016 Pre-Hearing Conference at 02:43-03:30 and at  
6 04:11-04:45; *See also*, *Order After Hearing/ Scheduling Order*, May 25, 2016 (“The hearing on this  
7 appeal shall commence at 10:00 a.m., July 6, 2016.”). GVB did not file a motion on May 27, 2016,  
8 the motion cut-off date, as directed by the Hearing Officer.

9 Instead, on May 27, 2016, GVB filed a document entitled “Opposition to a Motion in Re a  
10 Hearing In this Matter” (“GVB Opp”). The Public Auditor should disregard the GVB Opp. because  
11 the filing does not comply with the order of the Hearing Officer to file a motion to vacate the hearing  
12 date, and should therefore be disregarded. Alternatively, if the Public Auditor views the GVB Opp.  
13 as a motion, to which TLK objects, GVB’s request to vacate the July 6<sup>th</sup> hearing should be denied  
14 because Guam law allows for a hearing in this instance, and because TLK has shown that GVB has  
15 not provided a complete procurement record as required by Guam law. *See Motion to Supplement*  
16 *Procurement Record*. TLK will be prejudiced if it is not allowed a hearing to call and cross-examine  
17 its witnesses.

## 18 II. ARGUMENT

### 19 A. GVB Failed to Comply with the OPA’s Order to File a Motion to Vacate 20 The July 6<sup>th</sup> Hearing Date.

21 The May 25<sup>th</sup> Order explicitly states that there “shall” be a hearing on this appeal and that the  
22 hearing will occur on July 6, 2016. At the May 24<sup>th</sup> Pre-Hearing, the Hearing Officer suggested a  
23 July 6, 2016 hearing date. GVB objected. The Hearing Officer asked TLK’s counsel whether TLK  
24 wanted a hearing. TLK confirmed that it desired a hearing, and the Hearing Officer confirmed a July  
25 6, 2016 hearing date. After a brief discussion of the timing of the hearing, the Hearing Officer  
26 instructed GVB’s counsel to file a motion by the motion cutoff date of May 27, 2016 and stated that  
27 “if you don’t, then we’ll assume that they, assume that they’ve perfected it [a request for a hearing].”  
28

1 See Audio Recording of May 24, 2016 Pre-Hearing Conference at 02:43-03:30 and at 04:11-04:45.  
2 GVB did not file a motion to vacate; instead it submitted the GVB Opp. The GVB Opp. should be  
3 disregarded because there is no motion pending to be “opposed” and because the filing does not  
4 comply with the Hearing Officer’s order.

5 **B. The Procurement Record Is Incomplete and The OPA Is Authorized**  
6 **to Schedule a Hearing.**

7 On May 2, 2016, GVB submitted its Procurement Record pursuant to 2 GAR Div. 4  
8 §12104(c)(3). On May 9, GVB submitted its Agency Report required under 2 GAR Div 4. §12105.  
9 Nathan Denight, as the General Manager and Chief Procurement Officer, submitted a certification  
10 under oath that the Procurement Record filed and maintained by GVB was complete. This was  
11 incorrect because, as shown by TLK in its Motion to Supplement the Procurement Record, vital  
12 documents and information are missing from the Procurement Record. *See, TLK Motion to*  
13 *Supplement the Procurement Record* at pp. 1-3. Missing documents include, but are not limited to:  
14 (1) “a log of all communications between government employees and any member of the public,  
15 potential bidder, vendor or manufacturer which is in any way related to the procurement,” required by  
16 5 GCA §5429(b); (2) audio recordings of the negotiations arising relating to the RFP required by 5  
17 GCA §5429(c); (3) the Negotiation Memorandum; (4) communications with the board regarding  
18 approval of the Contract terms and the award; and (5) communications regarding HIC’s  
19 qualifications.

20 Guam law requires GVB to maintain these important records so there is a clear written and  
21 audio record of the procurement necessary to promote integrity and transparency in government  
22 procurements. By failing to maintain these records and/or produce the missing documents and  
23 records with the Procurement Record and Agency Report, GVB has violated Guam procurement law.  
24 For all appeals, the OPA should have the complete factual record before it, not a selective record  
25 determined by the agency charged with maintaining the record. Likewise, an appellant should not be  
26 required to police a government agency’s compliance with its obligations to follow the procurement  
27 laws and maintain a full and complete procurement record. TLK is entitled to prosecute this appeal  
28 with a full and complete record, which TLK has demonstrated was not produced. The missing

1 documents and records are material because they relate directly to the issues raised by TLK in this  
2 procurement appeal: HIC's qualifications under the five year experience requirement, and the validity  
3 of an award made without proper board approval.

4 The Guam legislature has stated that the power and authority of the OPA under Guam's  
5 procurement laws are to be as broad as necessary and that "[t]he Public Auditor's jurisdiction shall be  
6 utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5." 5  
7 GCA §5703. Furthermore, the laws governing procurement appeals, "...shall be construed and  
8 applied to promote its underlying purposes and policies." (5 GCA § 5001(a)). §5703 authorizes the  
9 OPA to hold a hearing if the OPA deems it necessary. The importance of the role played by the OPA  
10 in safeguarding the procurement process cannot be overstated.

11 GVB relies upon 2 GAR §12108 for the proposition that the absence of a hearing request *ipso*  
12 *facto* means "hearings will not occur." *See*, GVB Opp. at 2. Nothing in § 12108 says this. Rather,  
13 §12108 specifically provides that "[e]xcept in unusual circumstances, requests for a hearing received  
14 after [the time allowed for such requests] will not be honored." 2 GAR §12108. Despite GVB's  
15 skewed reading, the regulation does not state that "hearings will not occur," or prohibit a hearing  
16 from being held. The regulation merely says that late requests need not be honored. TLK previously  
17 confirmed its request for a hearing. In light of the missing documents and incomplete Procurement  
18 Record and the resulting prejudice to TLK, a hearing is absolutely necessary. Nothing in Guam law  
19 limits the OPA from exercising her discretion and authority to hold a hearing. In this case, there are  
20 very good reasons for the OPA to order a hearing.

21 **C. TLK's Request for Consolidation of the Appeal of Protest 2 with this Appeal**  
22 **Constitutes "Unusual Circumstance" Under 2 GAR §12108**

23 TLK filed a Motion for Orders Confirming the Automatic Stay and Requiring the Guam  
24 Visitors Bureau to Issue a Final Decision on Protest 2 on May 6, 2016. At the May 24<sup>th</sup> Pre-  
25 Hearing, counsel for TLK asked the Hearing Officer to inquire with GVB when a decision would be  
26 issued in Protest 2. GVB counsel responded that a decision would be issued "soon." That same  
27 day, GVB issued a decision denying Protest 2 on May 24, 2016, and sent it by mail to TLK's  
28 counsel, which was received on May 25<sup>th</sup>. A copy of the May 24<sup>th</sup> denial of Protest 2 letter is

1 attached hereto as Exhibit A. Had GVB informed the OPA that a denial letter was being sent that  
2 day, TLK and/or the OPA would have raised and addressed the consolidation issue. TLK is  
3 concurrently filing its appeal of the denial of Protest 2 and request for a hearing in that appeal. TLK  
4 renews its request to consolidate the two appeals. There are good reasons to consolidate. The  
5 procurement records (incomplete though they may be) are identical, the factual issues bearing on  
6 Protest 1 and Protest 2 overlap, and TLK will be calling the same witnesses for Protest 1 and 2. In  
7 the interest of judicial economy and efficiency, the two Appeals should be consolidated.

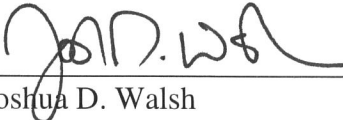
8 If the OPA consolidates the two appeals, there will be a hearing on the merits. It has been  
9 always TLK's position that the two appeals would be heard together at one hearing. These  
10 exceptional and unusual circumstances warrant consolidation and scheduling a combined hearing on  
11 the merits.

### 12 III. CONCLUSION

13 For the foregoing reasons, TLK respectfully requests that the OPA consolidate the two  
14 appeals and set one hearing date for both appeals. With respect to the hearing, TLK requests that the  
15 OPA either: (1) disregard the GVB Opp.; or (2) deny GVB's request to vacate the July 6<sup>th</sup> hearing  
16 date.

17 CIVILLE & TANG, PLLC

18  
19 Dated: June 1, 2016

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22 Joshua D. Walsh  
23 *Attorneys for Appellant TLK Marketing*  
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# EXHIBIT A



RECEIVED  
CIVILLE & TANG  
A Professional Limited Liability Company

DATE 5/25/16  
TIME: 9:15  AM  PM BY: RML

May 24, 2016

Ms. Joyce C.H. Tang  
Civille & Tang, PLLC  
Ste. 200, 330 Hernan Cortez Ave.  
Hagåtña, GU 96910

**In re a Protest, GVB RFP No. 2016-006**

Dear Ms. Tang,

On 21 April 2016 you delivered a letter to the Guam Visitors Bureau (GVB) in regard to our Request for Proposals, 2016-006 Tourism Destination Marketing Representation in the Republic of Korea (RFP). By that letter you, on behalf of your client TLK Marketing, made a second protest of the solicitation based upon 2 Guam Admin. R. Reg. §9101. *See your Letter of 21 April 2016.*

In that letter, you cite four reasons for protest; that the Guam Visitors Bureau colluded with successful offeror to deprive others of rights under Guam's procurement laws, that GVB failed to obtain Board approval of the contract with successful offeror, that successful offeror did not disclose a former General Manager's association with it, and that successful offeror misrepresented its experience. Because none of these allegations has merit or are otherwise untimely, your protest is denied.

Without any evidence, you state that the GVB "colluded" with successful offeror to "cut off the rights of parties to file protest(s)". *See your letter at p.2.* The GVB notes that you have in fact filed a protest; it is difficult to see therefore how such a right has been "cut off" nor how TLK is aggrieved. You also state that the GVB violated section 3.32 of the RFP when it failed to notify you of the results of the award. *Id at p. 3.* In this same letter though you admit you did receive notice and state "[n]either TLK nor the other Offerors received notice that HIC was selected as the 'highest rated and most qualified offeror' until March 10, 2016, when GVB sent TLK the 'Notice of Non-Selection' notifying HIC(sic) that GVB had "(sic) selected another company as the best qualified Offeror, attaching a copy of the evaluation summary." *Id.*

Next you state that the GVB failed to obtain Board approval of a negotiated contract. *Id at p.4.* Assuming the truth of this, it avails TLK nothing. A failure to obtain Board approval does not indicate the parties were unable to agree upon terms, and assuming that we had not, the GVB is not obliged to negotiate with TLK for a contract. In any case, as you state, the Board authorized the GVB to enter into negotiation and contract with the highest rated and most qualified offeror for GVB RFP 2016-006. *Id.* This happened and the contract was properly awarded.

You also state that the successful offeror failed to disclose that Mr. Karl Pangelinan was involved (as you say) in the RFP. It is your belief, we think, that Mr. Pangelinan received a "commission, gratuity, or other compensation for procuring or assisting in obtaining business related to the bid or proposal" *Id.* You also say that Mr. Pangelinan "was not listed as a member of the HIC Team

(sic). Thus , this was a false statement because Mr. Pangelinan is a consultant to HIC and assisted HIC with obtaining the business related to the bid (sic)." *Id at 5*. We have examined your protest and see that you provide no evidence that Mr. Pangelinan improperly received anything for procuring or assisting in obtaining business related to the proposal or if he did, that this was required to be disclosed in an affidavit submitted with the proposal. Additionally, assuming an ethical breach by a former employee, you have failed to provide any evidence that this injured TLK. Finally, this protest is untimely since you have been aware of Mr. Pangelinan's involvement for more than the time allotted to protest.

Finally, you again raise the issue of the length of existence of HIC. This protest is not timely raised since you have been aware of the substance of HIC's proposal for more that the allotted time to protest. In any case, and your ipse dixit relating to SD Pharm notwithstanding, the GVB has concluded based upon a review of the entire proposal that HIC does qualify for award of the contract and was the first ranked responsive and responsible offeror.

Please be aware that TLK Marketing has a right to judicial and administrative review of this decision. *See 5 Guam Code Ann. §5425(c)(2)*.

*Senseramente',*



**JON NATHAN DENIGHT**  
President & CEO  
Guam Visitors Bureau