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FILE NO OPA-PA: 16-003

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

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

**REPLY TO RESPONSE TO MOTION FOR  
AN ORDER TO SUPPLEMENT THE  
PROCUREMENT RECORD; MOTION FOR  
DISCOVERY**

**I. INTRODUCTION**

TLK Marketing Co. Ltd. (“TLK”) hereby submits its Reply to the Guam Visitors Bureau’s (“GVB”) Response to TLK’s Motion for an Order to Supplement the Procurement Record; Motion for Discovery (“Response”). On May 27, 2016, TLK filed a Motion for Order to Supplement Procurement Record; Motion for Discovery (“Motion”), on the basis that the Guam Visitors Bureau failed in its obligation to file a complete Agency Report and Procurement Record with the OPA. TLK identified at least four categories of documents GVB failed to produce in connection with the Procurement Record and Agency Report: (1) a log of all communications between government employees and any member of the public, potential bidder, vendor, or manufacturer which is in any way related to the procurement;

(2) audio recordings of the negotiations arising relating to the RFP; (3) audio recordings of the presentations; and (4) any and all documents, communications and records relating to the RFP, including billing issues, before, during and after the filing of the Protest.

## II. ARGUMENT

### A. **GVB Violated 5 GCA §5249 By Failing To Maintain A Communication Log and Audio Recordings Required Under Guam Procurement Law.**

GVB's Response leaves no question that GVB has failed to follow the requirements of 5 GCA §5249.

Guam law requires the procuring agency to maintain a log of all communications:

Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:

...(b) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement.

*See* §5249(b). GVB admitted that it failed to maintain such a communications log, stating that “[t]he Visitors Bureau has not created a ‘log’ of communications, we have taken the further step of providing the actual communication.” *See* Response at 3. GVB's selective production of GVB communication does not meet the requirements of §5249(b), requiring GVB to maintain a communication log of “all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement.” Because of GVB's failure to maintain a log, there is no record of communications or meetings between GVB Board members and employees with HIC, Inc. (“HIC”) and third parties regarding this procurement, unless GVB voluntarily discloses the information. The log allows the Public Auditor and the public to determine whether there were any oral or phone communications and meetings, or written

communications not provided in the Procurement Record. A log also allows parties to track patterns in communications in a way that merely reprinting source documents does not. Finally, the very act of keeping a log of all communications and meetings helps maintain and promote transparency and government accountability.

GVB also attempts to side-step its obligation to provide audio recordings of all negotiations arising from a request for proposals. *See* 5 GCA §5249(c). Section 5249(c) requires GVB to maintain and keep “sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement.” GVB states that “Records of negotiations that exist are provided” without stating whether any phone or oral communications occurred, and whether or not those communications were recorded as required by 5 GCA §5249(c). *See* Response at 3. The audio recordings included in Procurement Record do not contain recordings of the presentations made by the offerors, the evaluation of offers and the negotiation of the contract.

In not keeping a log and audio recordings of presentations, negotiations and discussions with offerors, agencies would be able to circumvent the protections of fair play and a level playing field, which the procurement laws are designed to protect.

**B. GVB Failed to Produce a Complete Agency Report Required by Title 2 GAR Div. 4 §12105.**

GVB’s Response completely ignores the requirements in 2 GAR Div. 4 §12105, requiring in addition to the documents included in the Procurement Record pursuant to 5 GCA §5249, the agency must produce in its Agency Report and “[a]ny other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings.” *See* 2 GAR Div. 4 §12105(c). GVB skirts this

issue with a naked unsupported statement that it has complied with the requirements of 5 GCA §5249, when it clearly has not. Guam Procurement law requires the agency to produce *all* documents which are relevant to the protest. As stated in TLK's Motion, GVB has not produced all relevant documents. Instead GVB has apparently produced only those selected documents GVB believes would advance its case.

For example, GVB attached some post-protest documents, including communications between GVB and HIC as Appendix A to its Agency Report, but GVB did not produce any other emails and communications between GVB and HIC after the contract award. Similarly, GVB attached an alleged chart of TLK's billing information to the Declaration of Regina Kono filed with its May 26, 2016 Rebuttal to TLK's Comments to their Agency Report. *See* Declaration of Regina Kono filed 5/26/16. TLK disputes these assertions and contends that the payment issues are designed to distract the OPA from the issues in this appeal. GVB has withheld payments to TLK to punish TLK for pursuing its rights under Guam Procurement law. If this matter was relevant to procurement issues in this appeal, which TLK disputes, GVB should have included the chart and the underlying documents in the Procurement Record. GVB did not include any record regarding payment in the Procurement Record. This is a clear example of GVB's selective production of information it thinks would be useful to GVB, rather than producing all relevant documents as required by Title 2 GAR Div. 4 §12105.

In its Response, GVB invited TLK to "inspect the record and note anything they wish to have copied." Guam procurement law requires GVB, to agency to produce a complete Procurement Record to the OPA and submitted a Certification under oath of its completeness. This is not a discovery dispute to be resolved by parties inspecting records.

TLK has provided unrebutted evidence that it is an incomplete Procurement Record. The OPA should order GVB to immediately comply by with Guam law and to amend its certification to reflect the true status of the procurement record.

### III. CONCLUSION

Based on the foregoing, the arguments made in TLK's Motion, and any arguments made at a hearing on this issue, TLK respectfully requests that the OPA issue an Order:

1. Commanding GVB to supplement its procurement record as TLK requests, or in the alternative provide discovery regarding the documents omitted from the record by no later than noon, June 5, 2016.

2. Determining that, if any of the four categories of missing documents is not available, then the Procurement Officer for GVB be required to submit a statement under penalty of perjury that the missing documents, records or files were not maintained and kept or were destroyed.

4. Awarding TLK its attorney's fees and costs in bringing this motion.

Respectfully submitted this 3<sup>rd</sup> day of June, 2016.

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