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**Re:** OPA-PA-16-003 Decision and Order

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 Auditor  
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OFFICE OF PUBLIC ACCOUNTABILITY  
Doris Flores Brooks, CPA, CGFM  
Public Auditor  
**BEFORE THE PUBLIC AUDITOR  
PROCUREMENT APPEALS  
TERRITORY OF GUAM**

**IN THE APPEAL OF**  
**TLK MARKETING CO. LTD. (TLK),**  
**Appellant.**

**Docket OPA-PA-16-003**  
**DECISION AND ORDER**

A motions hearing was held on June 6, 2016 before Public Auditor Doris Flores Brooks, CPA, CGFM, and Hearing Officer Peter C. Perez, Esq. Thomas J. Fisher, Esq. appeared on behalf of Appellee, Guam Visitors Bureau (“GVB”) along with GVB President and CEO, Jon Nathan Denight. Joshua D. Walsh, Esq. appeared on behalf of Appellant, TLK Marketing Co. Ltd. (“TLK”) along with Joyce C.H. Tang, Esq., who appeared by telephone. The following motions were filed, heard, argued, and taken under advisement: (1) TLK Motion for Orders Confirming the Automatic Stay and Requiring the Guam Visitors Bureau to Issue a Final Decision on Protest 2; (2) GVB’s Opposition to a Hearing in this Matter; (3) TLK Request for Subpoenas; and (4) TLK Motion for Order to Supplement Procurement Record; Motion for Discovery. Having considered the motions and pleadings filed, the procurement record, the documents and exhibits submitted by the parties, and the oral arguments presented, the following is ORDERED:

**1. TLK Motion for Orders Confirming the Automatic Stay and Requiring the Guam Visitors Bureau to Issue a Final Decision on Protest 2**

On May 6, 2016, TLK filed a Motion for Orders Confirming the Automatic Stay and Requiring the Guam Visitors Bureau to Issue a Final Decision on Protest 2. GVB has issued a Final Decision on Protest 2 so that issue is moot.

1 With respect to TLK's motion for orders confirming the automatic stay, TLK recites and relies  
2 upon a chronology stated as follows:

- 3 • A Memorandum dated February 25, 2016, was prepared by Christine Lizama, a  
4 Management Analyst, directed to Mr. Denight, regarding "EVALUATION SUMMARY  
5 OF ORAL PRESENTATIONS."
- 6 • At the end of the 2/25/2016 Final Evaluation Summary, Mr. Denight checked "PROCEED  
7 WITH NOTICES" and signed and dated it March 9, 2016.
- 8 • On March 4, 2016, Ms. Gina Kono, a GVB Marketing Officer, notified HIC that it was  
9 selected as the highest rated and most qualified offeror.
- 10 • To the best of its knowledge, TLK and the other two offerors, did not receive any  
11 information regarding the ranking of best qualified offerors until March 10, 2016.
- 12 • On **March 9, 2016**, Ms. Kono wrote to Mr. Don Park (HIC) regarding the RFP. It stated  
inter alia:

13 *Don, I am emailing you to request if you can urgently respond to our GVB  
14 RFP2016-006 Retainer Fee Negotiation communication? GVB General  
15 Manager would like to finalize the RFP and finalize all the necessary  
16 paperwork and communications to the offerors.*

17 *Please refrain from publicly mentioning this until we have finalized the  
18 negotiations and signed a contract. We do not want any protest from the  
19 other offerors. Thank you for your understanding.*

- 20 • Mr. Park responded to Ms. Kono on the same day at 3:06 p.m.

21 *I promise [sic] you that we have not mentioned about the result of RFP, and  
22 also will not mention it until the contract is all done.*

- 23 • On March 10, 2016, Ms. Kono sent two emails to Mr. Park.
- 24 • The first email was sent at 12:32 a.m. attaching the *Notice of Award* and the *Contract* that  
25 GVB asked HIC to "review, accept by signing, and then send the contract back as soon as  
26 possible."
- 27 • The second email was sent at 7:11 p.m. attaching the *Notice of Intent to Award* and noting  
28 on her email that she "was to send this letter with our previous negotiation email I sent  
yesterday".

- 1 • On **March 11, 2016**, Ms. Kono sent a follow up email to Mr. Park notifying him that TLK’s  
2 contract will be terminated by March 31, 2016, and attached a handover item list.
- 3 • On March 14, 2016, Ms. Kono sent an email to Mr. Park asking for a signed copy of the  
4 Contract. She explained “[GVB] want[s] to have the signed contract so that we can say the  
5 RFP process has been completed and finished.”
- 6 • The HIC Contract was signed by Sedong Park for HIC, Inc. and dated March 11, 2016 by  
7 Mr. Denight for GVB and dated March 14, 2016.
- 8 • On March 10, 2016, TLK along with Promac and Edelmann received a notice of non-  
9 selection, attaching a copy of the Evaluation Summary.
- On March 24, 2016, TLK filed its Protest.

10 5 G.C.A. § 5425(g) provides:

11 (g)In the event of a timely protest under Subsection (a) of this Section or  
12 under Subsection (a) of § 5480 of this Chapter, the Territory shall not  
13 proceed further with the solicitation or with the award of the contract prior  
14 to final resolution of such protest, and any further action is void

15 In the instant Appeal, GVB concedes that TLK filed a timely Protest. However, as a result of  
16 the manner in which GVB awarded the contract to HIC, the Protest, as is conceded by TLK, was  
17 filed after award. The Public Auditor finds that TLK was deprived of any meaningful opportunity  
18 to protest the procurement prior to award or to receive the benefits of the automatic stay. This  
19 appears to be a trend with procuring agencies awarding contracts concurrently without notifying  
20 non-selected bidders, in an attempt to limit the protesting period and avoid the automatic stay. The  
21 resulting fundamental unfairness is an issue that will need to be addressed by the Guam Legislature  
22 in order to protect the rights of aggrieved parties. Until the Guam Legislature addresses this trend,  
23 in accordance with the Supreme Court of Guam’s decision in *Guam Imaging Consultants, Inc. v.*  
24 *GMHA*, 2004 Guam 15, the automatic stay was not triggered and therefore cannot be confirmed.  
25 TLK’s Motion for Orders Confirming the Automatic Stay and Requiring the Guam Visitors Bureau  
26 to Issue a Final Decision on Protest 2 is denied.  
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**2. GVB’s Opposition to a Hearing in this Matter**

On May 9, 2016 GVB filed its Agency Report with the Public Auditor. Comments on the agency report by an Appellant shall be filed with the Public Auditor within ten (10) days after the Public Auditor’s receipt of the report. 2 GAR § 12104(c)(4). Requests for a hearing shall be made prior to the expiration of the time period allowed for filing comments on the agency report. 2 GAR § 12108(a). TLK did not submit a request for a hearing prior to the expiration of the time period allowed for filing comments on the agency report. TLK first requested a hearing on the merits of its appeal at the May 24, 2016 Prehearing Conference. At said hearing GVB asserted that TLK waived its right to a hearing. Subsequently on May 27, 2016, GVB filed an Opposition to a Hearing in this Matter asserting that TLK’s failure to make a timely request for a hearing constitutes a waiver. Nevertheless, the Public Auditor has determined that a hearing with testimony and evidence is necessary for and conducive to the determination of the issues raised in this Appeal and the holding of a hearing furthers the policy of promoting the integrity of the procurement process. GVB’s Opposition to a Hearing in this Matter is denied.

**3. TLK Request for Subpoenas**

On May 27, 2016, TLK filed a Request for Subpoenas, requesting the Public Auditor to issue subpoenas to compel the attendance of witnesses consisting of GVB personnel, Board members, and committee members. 2 GAR §12109(c) provides that the Hearing Officer has the power to require parties to produce those relevant witnesses under their control. In the instant Appeal, GVB is a party and the persons TLK seeks to subpoena are persons within GVB’s control who appear to be relevant to the issues in this Appeal.

TLK’s request for a hearing has been granted herein. At the motions hearing, GVB did not object to the issuance of the requested subpoenas provided TLK’s request for a hearing is not

1 denied. TLK's request for subpoenas is granted. TLK may submit its proposed subpoenas to the  
2 Office of Public Accountability.

3 **4. TLK Motion for Order to Supplement Procurement Record; Motion for Discovery.**

4 The parties agree that GVB submitted an Agency Report and Procurement Record. TLK alleges  
5 the records are incomplete and filed a motion requesting the Hearing Officer to issue an order  
6 compelling GVB to supplement the Procurement Record filed on May 2, 2016 or alternatively to  
7 order GVB to produce relevant documents allegedly omitted from the Procurement Record and  
8 Agency Report. GVB asserts that it has complied with the law, that certain items requested do not  
9 exist, that TLK may inspect the GVB records and have copied any items TLK might request, and  
10 that it will continue to supplement the record.  
11

12 GVB's obligations regarding the Procurement Record include:

13 Within five (5) working days from filing the Notice of Appeal, the agency  
14 must file and deliver a copy to the Appellant the Procurement Record. 2  
15 GAR  
16 § 12104(c)(3). The Procurement Record should be in chronological order,  
numbered sequentially, tabbed, and indexed to identify the contents.

17 GVB is required to maintain a complete record of each procurement. 5 G.C.A. § 5249 provides:

18 Record of Procurement Actions. Each procurement officer shall maintain a  
19 complete record of each procurement. The record shall include the  
following:

- 20 (a) the date, time, subject matter and names of participants at any meeting  
21 including government employees that is in any way related to a particular  
procurement;
- 22 (b) a log of all communications between government employees and any  
23 member of the public, potential bidder, vendor or manufacturer which is  
in any way related to the procurement;
- 24 (c) sound recordings of all pre-bid conferences; negotiations arising from a  
25 request for proposals and discussions with vendors concerning small  
26 purchase procurement;
- 27 (d) brochures and submittals of potential vendors, manufacturers or  
28 contractors, and all drafts, signed and dated by the draftsman, and other  
papers or materials used in the development of specifications; and

1 (e) the requesting agency's determination of need.

2 5 G.C.A. § 5250 provides:

3  
4 No procurement award shall be made unless the responsible procurement  
5 officer certifies in writing under penalty of perjury that he has maintained  
6 the record required by § 5249 of this Chapter and that it is complete and  
7 available for public inspection. The certificate is itself a part of the record.  
8 SOURCE: GC § 6964.5 added by P.L. 18-044:18.

9 5 G.C.A. § 5251 provides:

10 The record required by § 5249 of this Chapter is a public record and, subject  
11 to rules promulgated by the Public Auditor, any person may inspect and copy  
12 any portion of the record.

13 5 G.C.A. § 5252 provides:

14 The rules promulgated pursuant to § 5251 of this Chapter shall:  
15 (a) protect the integrity of the bidding process;  
16 (b) protect the confidentiality of trade secrets;  
17 (c) establish reasonable charges for copying papers;  
18 (d) provide for transcription of sound recordings;  
19 (e) require public access to the record at the earliest possible time; and  
20 (f) not require that the record be complete or that the procurement award be  
21 made before inspection and copying are permitted.  
22 SOURCE: GC § 6964.7 added by P.L. 18-044:20.

23 In addition, 2 GAR § 12501(c) requires that the agency "shall file with the Office of the Public  
24 Auditor a copy of all determinations made..., together with any information used or considered by  
25 the agency in making that determination."

26 The present issue of whether or not GVB has complied with its Procurement Record obligations  
27 is disputed. Guam Rule of Evidence, Rule 301 provides:

28 In all civil actions and proceedings not otherwise provided for by Act of the  
Guam Legislature or by these Rules, a presumption imposes on the party  
against whom it is directed the burden of going forward with evidence to  
rebut or meet the presumption, but does not shift to such party the burden of  
proof in the sense of the risk of non-persuasion, which remains throughout  
the trial upon the party on whom it was originally cast.

1 Generally, a witness is presumed to speak the truth. 6 GCA § 2503. Pursuant to 6 GCA § 5107,  
2 certain presumptions are satisfactory if uncontradicted. They are denominated disputable  
3 presumptions, and may be controverted by other evidence. These include:

- 4 • That an official duty has been performed [5107(15)]
- 5 • That the ordinary course of business has been followed [5107(20)]
- 6 • That the law has been obeyed [5107(33)]

7 There is insufficient evidence at this time to find that GVB has not complied. In order to  
8 determine whether or not GVB has complied, GVB is ordered to do the following within five (5)  
9 business days of this Order:

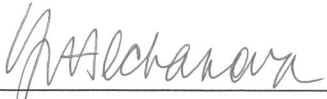
- 10 1. The responsible procurement officer shall certify in writing under penalty of perjury that he  
11 has maintained the record required by §5249 and that it is complete and available for public  
12 inspection.
- 13 2. Alternatively, the responsible procurement officer shall certify in writing under penalty of  
14 perjury that he has not maintained the record required by §5249 and that it is incomplete  
15 and unavailable for public inspection.
- 16 3. GVB shall certify whether the following materials requested by TLK exist: (1) a log of all  
17 communications between government employees and any member of the public, potential  
18 bidder, vendor or manufacturer which was in any way related to the procurement; (2) audio  
19 recordings of the negotiations arising relating to the RFP; (3) audio recordings of the  
20 presentations; and (4) any and all documents, communications and records relating to the  
21 RFP, including billing issues, before, during, and after the filing of the Protest. If the  
22 materials exist, GVB shall state whether or not the materials have been provided to TLK. If  
23 they have not been provided to TLK, to state that the materials will be provided within five  
24 (5) days of the certification, or alternatively, to state the bases as to why disclosure should  
25 not be made to TLK.  
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4. It is further ordered that GVB shall make all procurement records pertaining to this Appeal available for inspection and copying by TLK.

**SO ORDERED this 15<sup>th</sup> day of June, 2016.**

  
for DORIS FLORES BROOKS, C.P.A., C.G.F.M.  
*Public Auditor of Guam*

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Jerrick Hernandez  
Auditor