

**In the Office of Public Accountability**

**Hagåtña, Guam**

TLK Marketing Co., Ltd.

vs.

Guam Visitors Bureau

OPA-PA-16-005

Guam Visitors Bureau's

Rebuttal to Comments on an

Agency Report

Filed Pursuant to

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

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## Rebuttal

TLK offers no comment in regard to the Agency Report with which the Office of Public Accountability (OPA) is not familiar. The Guam Visitors Bureau offers the following observations in rebuttal;

1. TLK's Prayers for Relief are Beyond the OPA's Present Authority

TLK asks for certain types of relief and states the Office of Public Accountability has authority to grant the prayer. *See Response to Agency Report, OPA-PA-16-005 at pp. 2-5.* In support of its assertion of legislative largesse, it cites 5 Guam Code Ann. §5703. This code section however is a jurisdictional statement, not a grant of remedial authority. "Cut and pasted" in its entirety, the operative sentence states, "The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5." *5 Guam Code Ann. §5703.* By relying upon this section for relief, TLK asks this Office to paint not only with a broad brush, rather do so with a roller. It would be interesting to ask TLK to define the limits of OPA authority under its interpretation. Like the Constitution's commerce clause, TLK believes the boundary of authority is limited only by the human imagination.

TLK asks the Office of Public Accountability ("OPA") to prohibit contract prior to informing other offerors that they have not been selected. *Appeal, OPA-*

*PA-16-005 at p. 11-12.* TLK also asks that the OPA promulgate a rule that all offerors be informed of a selection at the same time. *Id at 12.* These injunctions do not exist in statute or rule and the OPA may only create them (if at all) as new rules through the Administrative Adjudication law. *See 1 Guam Code Ann. §1909(g)*, “The Public Auditor shall have the following powers and duties . . . (g) [t]o make rules and regulations, subject to the provisions of the Administrative Adjudication Law, as may be necessary to carry out the duties and powers of the Office.” Currently, as to award of a contract arising from a request for proposals, the agency must award the contract to “the offeror determined in writing by the head of the purchasing agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable.” *5 Guam Code Ann. §5216(e)*. *See also 2 Guam Admin. R. and Regs. §3114(l)(5)* “Notice of Award. Written notice of award shall be public information and made a part of the contract file.” Nowhere in either statute or rule is there a requirement that all offerors receive notice of award simultaneously nor that awards of contract be prohibited prior to notice.

TLK also asks that the ranking of the successful offeror be set aside. *Appeal, OPA-PA-16-005 at p. 12.* It is evident though that the successful offeror accumulated more points in an evaluation of proposals than others, including TLK.

*See Agency Procurement Record, OPA-PA-16-005 at Tabs I-O.* In this prayer for relief then, TLK invites the OPA to upset a ranking without supporting facts or authority.

TLK also asks that it be declared first ranked responsive offeror and that the Guam Visitors Bureau be ordered to immediately begin negotiations with it.

*Appeal, OPA-PA-16-005 at p. 12.* In source selection by requests for proposals though, an agency may negotiate with next best ranked offeror but need not do so.

*See 5 Guam Code Ann. §5216(e),* “If proposals were submitted by one or more other offerors determined to be qualified, negotiations may be conducted with such other offeror or offerors, in the order of their respective qualification ranking, and the contract may be awarded to the offeror then ranked as best qualified if the amount of compensation is determined to be fair and reasonable.” *Id.* Accordingly, the decision to negotiate with next best offeror rests with the agency. In any event, at this stage, and in light of information in Guam Visitors Bureau’s possession, GVB would not likely choose to negotiate with TLK; an offeror whose responsibility is in doubt<sup>1</sup>.

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<sup>1</sup> As competent defense counsel would, TLK’s attorneys dismiss questions of honest contract performance as “irrelevant” and “false”. Information received however indicates TLK caused the GVB to disburse money to it based upon knowing misrepresentation. This Office may well pass upon these facts and their consequence. *See 5 Guam Code Ann. §5705(c).*

2. TLK's Accusations of "Collusion" are Based in Fancy, not Fact

When you only have a hammer, every problem looks like a nail. So it is with TLK and the Kono email. Far from being a simple request to avoid publicizing the progress of an ongoing procurement, to TLK Ms. Kono's communication is the missing 18 minutes of tape. Though she actually ranked TLK higher than HIC, TLK believes (or at least says) she was colluding with another to strip TLK of its due, i.e. a right to protest. What TLK actually objects to is the inability to obtain a stay. The existence, or non-existence of a stay is of no importance or benefit to TLK. Their contract was cancelled and beyond any power of resuscitation.

Collusion is understood to be "an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law." *Tomiyosu v. Golden*, 400 P.2d 415,417 (Nev. 1965). TLK marshals the following facts to demonstrate fraud;

- GVB noticed HIC that they were first ranked before noticing other proposers.
- GVB asked HIC not to speak publicly about their award until after a contract was signed.

- GVB urged HIC to respond quickly to the contract offer.
- GVB sent two letters to HIC; one notifying it of an intent to award a contract and a second notifying it of award and attaching a contract.

It is a fair assessment of these facts to state that none of them constitutes a violation of law or regulation and all constitute acceptable business practice. Absent from TLK's parade of "bad acts" is any evidence whatsoever of a fraudulent, collusive intent.

### 3. Board Approval was Obtained

TLK argues that the GVB Board did not approve the HIC contract. In relation to the conduct of the solicitation and award of the contract it is not clear why this is relevant. It doesn't undercut the fact that HIC is the highest ranked responsible and responsive proposer.

In any case, the Board instructed the GVB General Manager to enter into negotiation and contract with the highest rated and most qualified offeror. TLK doesn't explain why an instruction to contract with HIC violates this provision nor, if the Office of Public Accountability is uncomfortable accepting "contract" as a verb, the Board cannot delegate the act to the General Manager. In any case, TLK attacks the solicitation as corrupt. A "shot" at contract formation misses this mark

though and is offered in support of an argument for the existence of a stay. An issue now moot.

Finally, TLK complains that no memorandum of evaluation and negotiation was prepared. If there be a failure in this respect, it does not impeach the solicitation and award. HIC was ranked higher and was awarded a contract; TLK lost. Additionally, administrative rules and regulations do not require that such a memorandum be prepared prior to award.

4. Mr. Pangelinan's Involvement

TLK suggests that Mr. Pangelinan's presence on HIC's behalf somehow drove the selection process. How having a representative familiar with Guam and the Guam Visitors Bureau unfairly upsets the playing field is left to the imagination and not articulated. TLK observes that Ms. Kono stated that "HIC had a former GVB management on their team". Well, so she did. What of it? She also rated TLK's offer superior to HIC.

TLK fails to tie Mr. Pangelinan's participation to any violation of law or regulation. They do not like the fact that the gentleman is not a business; but we are not free to re-write the statute (5 Guam Code Ann. §5632(c)) to fit their notion. They decry a missing comma but do not say how Mr. Pangelinan was either a principal or agent with regard to a contract or a claim. Certainly there is no claim

in question and, at the time of the presentation there was no contract. What they do offer is little more than an incoherent cri de coeur (with a dash of slander; “HIC committed perjury”).

5. HIC was Responsive

This path is well-trodden. TLK says that “GVB mischaracterizes TLK’s claim, referring to the claim as raising ‘collateral issues . . . not properly before the Office of Public Accountability on appeal since they were not first raised at the agency level’, is patently false. *Agency Response at 7*”. As this Office contemplates TLK’s accusation of agency perfidy, it may be well to remember that no such statement was made in this Appeal. TLK is referring to a footnote in the Agency Report in OPA-PA 16-003. Cutting from one document to paste in another may be expedient but it requires some attention to detail.

Following TLK’s cut/paste path, GVB reiterates that it has determined the successful offeror has the necessary experience. According to HIC’s proposal;

- 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.



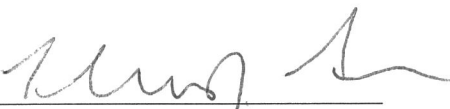
- A Director at Happy Idea Company has marketing experience and over 10 years' experience in magazine publishing
- A Deputy General Manager has at least 5 years' experience organizing overseas trips for clients
- A Manager for HIC has more than 5 years in the hospitality industry as well as experience in sales and marketing

Together and separately, these qualifications are determined by the agency to sufficiently support evaluation criteria to allow award and it cannot be said that this determination is beyond agency discretion.

Additionally, GVB RFP No. 2016-006 states that "GVB seeks to retain a qualified professional tourism destination marketing agency ("Agency") with a minimum of 5 years extensive and consistent experience working with the Republic of Korea travel trade, close relationship with the Korean government and the US Embassy to act as GVB's tourism destination marketing representative in the Republic of Korea . . ." *See Agency Procurement Record, Guam Visitors Bureau, OPA-PA-16-005, 08 June 2016, Vol. I at Tab B, p.10.* Nowhere does the RFP state that failure to meet this level of experience renders an offer non-responsive nor does it state that the offer will be rejected or the offeror disqualified. In fact, the level of experience is part of the bundle of factors used to

judge the offer as a whole. *See Id at p.28*. Additionally, nowhere does it state that an offering *entity* must have 5 years' experience. Such a specification would be unduly restrictive, would disqualify joint offers or teaming agreements and would tend to advantage an incumbent over competitive offers.

TLK states that “[t]he RFP should be construed against GVB, the author and drafter, and GVB should not be allowed to re-define or interpret provisions in the RFP after a protest is filed to suit its purpose”. *Response to Agency Report, OPA-PA-16-005 at p. 15*. Beyond ipse dixit, TLK does not say why the GVB should not be allowed to interpret provisions in its own RFP. Agencies do this every day and everywhere. Where an interpretation is reasonable, it is not disturbed. *See Chevron, USA v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)*. In any case, as composed, HIC has more than 5 years' experience and the GVB is satisfied.

  
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Thomas J. Fisher