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PROCUREMENT APPEALS

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

Docket No. OPA-PA-16-003

Docket No. OPA-PA-16-005

**TLK MARKETING CO. LTD'S
HEARING BRIEF**

I. INTRODUCTION

On March 24, 2016 and April 21, 2016¹, TLK Marketing Co., Ltd. (“TLK”) filed its protests, challenging the actions of the Guam Visitors Bureau (“GVB”) in wrongfully awarding the purported contract from the Korean Marketing solicitation (GVB RFP No. 2016-006 (the “RFP”)) to HIC, Inc (“HIC”). Protest 1 was denied by GVB on April 8, 2016, and Protest 2 was denied on May 24, 2016². One of the grounds alleged by GVB denying Protest 1 was that TLK’s protest was not timely filed. At the June 6, 2016 hearing on motions regarding Protest 1, Mr. Fisher, counsel for GVB admitted that Protest 1 was timely filed:

[B]ut we can’t look at that in a vacuum, we have to also be aware of the fact that they [TLK] knew of the existence of the contract prior to filing the protest, a short time, I recognize that. Uh, **but they did in fact know about it prior, and their protest, um, was timely.** That’s a different question from whether the stay exists.

See, Audio Tape of June 6, 2016, Hearing on Motions at 00:32:19. The timeliness of TLK’s Protest 1 was also confirmed in the Public Auditor’s 6/15/16 Decision and Order: “[i]n the instant Appeal [Protest 1], GVB concedes that TLK filed a timely Protest.” *See, 6/15/16 Decision and Order* at 3. Because GVB conceded that Protest 1 was timely filed, this issue is now moot.

TLK timely appealed the GVB agency decisions denying TLK’s protest, and immediately requested consolidation of the appeals of Protest 1 and Protest 2. The Public Auditor granted TLK’s request for consolidation on June 24, 2016. *See, 6/24/16 Order Consolidating Appeals*. An expedited hearing on the merits for the consolidated proceedings is scheduled for Wednesday, July 6, 2016.

¹ The Protests filed by TLK on March 24, 2016 (“Protest 1”) and April 21, 2016 (“Protest 2”), were timely appealed and docketed as OPA-PA-16-003 and OPA-PA-16-005, respectively.

² TLK received the May 24, 2016 letter of denial by mail on May 25, 2016.

II. ISSUES TO BE DETERMINED IN THE CONSOLIDATED APPEALS

The issues to be determined in the consolidated appeals are as follows:

1. HIC, Inc. (“HIC”) misrepresented its experience when it stated in its proposal that had the requisite five (5) year mandatory experience required in §1.1 of the RFP.
2. HIC knowingly and fraudulently represented that it had the five (5) year minimum requisite experience when it used an unrelated entity named “SD Pharm” (a Korean medical marketing company) to meet the Korean marketing experience requirement.
3. HIC did not disclose in its *Affidavit Disclosing Ownership and Commissions* (Affidavit No. 1) submitted under penalty of perjury with its proposal, the fact that Karl Pangelinan, a former employee and General Manager of GVB, was a consultant for HIC and was involved with the RFP.
4. GVB violated the underlying purpose and policy of Guam Procurement Law, 5 GCA §5001(b)(3) and (b)(4) by intentionally failing to notify non-selected proposers of the ranking and/or award of the contract. GVB’s transparent attempt to limit the protesting period and avoid the automatic stay resulted in a “fundamental unfairness” to the non-selected parties. *See, 6/15/16, Decision and Order* at 3.
4. GVB violated §3.32 of the RFP which required GVB to notify “all Offerors of the results of the award. Written notice of award will be public information and made a part of the contract file.” TLK, along with the two other offerors, were not given a notice of intent to award or the notice of award to HIC.
5. GVB violated §3.10 and §3.15 of the RFP when it failed to obtain the required Board approval to proceed with negotiation and award of the putative contract to HIC, *after* the evaluation committee completed the evaluation and ranked the proposals.
6. The acts of GVB and HIC, including, but not limited to: obtaining a signed contract with HIC without notifying the three other offerors of the results of the evaluation and ranking until the contract was signed; failing to issue a notice of intent to award and a notice of award to the three other offerors; not conducting negotiations with HIC and failing to maintain records of a negotiation memorandum; and, acknowledging in email communications between GVB and HIC the intention of GVB and HIC to keep the signing of the contract secret in order to deprive the other offerors the right and opportunity to file protests before an award, constituted willful or reckless violations of Guam Procurement Law, and support a finding of collusion to award the contract to HIC.

* * *

Based on the foregoing, there are sufficient grounds for the Public Auditor to find that:

1. HIC's made misrepresentations and fraudulent statements in its proposal. In making these false statements and misrepresentations HIC acted in bad faith.³ The putative contract should be declared null and void under 5 GCA §5452(2)(A) .

2. HIC did not meet the five (5) year experience requirement, therefore, its proposal was non-responsive and must be rejected, and HIC should be disqualified from this solicitation. *See*, §§2.2.A.1 & 3.13, RFP. In the federal procurement system, experience requirements may be viewed as "definitive" and must be satisfied as a prerequisite to an award. In *Matter of United Materials*, B- 243669 (Comp.Gen.), 91-2 CPD P 161, 1991 WL 165242 (Aug. 16, 1991), the United States Comptroller General explained in a protest where it was claimed that there was insufficient objective evidence to support the contracting officer's determination that the bidder had the requisite experience to satisfy the explicit experience requirements. The Comptroller General explained:

Our Office generally does not review affirmative determinations that a bidder is responsible, that is, capable of performing the contract. Such determinations are based in large measure on subjective judgments. One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure an offeror's ability to perform a particular contract. *Calculus, Inc.*, B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558. These special standards put firms on notice that the class of prospective contractors is limited to those who meet qualitative or quantitative criteria deemed necessary for adequate performance. *Antenna Prods. Corp.*, B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297; Although not every experience requirement in a solicitation constitutes a definitive criterion of responsibility, *see, e.g., Power Testing Inc.*, B-197190, July 28, 1980, 80-2 CPD ¶ 72 (5-year experience requirements for the electricians and foreman to be used on the job), a solicitation requirement that the prospective contractor have a specified number of years of experience in a

³5 GCA §5003 provides: "[t]his Chapter requires all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith."

particular area is a definitive responsibility criterion. See, *Topley Realty Co., Inc.*, 65 Comp.Gen. 510 (1986), 86-1 CPD ¶ 398; *Urban Masonry Corp.*, B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48.

United Materials, 1991 WL 165252 at *1.

The Comptroller further stated:

Evidence that a bidder meets a definitive responsibility criterion must be obtained by the agency so that compliance with the requirement, which is a prerequisite to award, can be determined. *Prime Mortgage Corp.*, 69 Comp.Gen. 618 (1990), 90-2 CPD ¶ 48. Where an allegation is made that a definitive criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criterion has been met, *BBC Brown Boveri, Inc.*, B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309; although the relative quality of the evidence regarding responsibility is a matter for the judgment of the agency, the contracting officer may only find compliance with the definitive responsibility criterion based upon objective evidence. *Vulcan Eng'g Co.*, B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403.

United Materials, 1991 WL 165242 at *2.

3. HIC and GVB actively colluded to keep the ranking, award, and signing of the contract a secret in order to to deprive other offerors of the right to protest before an award is made, to avoid the automatic stay protections under 5 GCA §5425(g), and to shorten the protest period. This resulted in a fundamental unfairness to all of the non-selected offerors. Mr. Fisher, GVB's counsel, correctly recognized the fundamentally unfair nature of GVB's action with regard to divergent notices. When asked by the Public Auditor during June 6th hearing regarding Protest 1, if a government agency such as GVB can indeed provide disparate notices to offerors under the same RFP, Mr. Fisher acknowledged that such a system "... kind of rings of inequity in that it just doesn't feel right, it seems like to keep the playing field level, um, that the parties should be noticed at the same time...." See, Oral Argument Recording, 00:30:34, available at <http://www.opaguam.org/procurement-appeals/search-procurement-appeals#5271>.

4. GVB failed to discharge its duties impartially so as to assure fair competitive access to governmental procurement by responsible bidders, and failed to conduct itself in such a manner as to foster public confidence in the integrity of this procurement. *See*, 5 GCA §5001(a) & (b)(3) & (b)(4), (b)(7).

5. The award of the putative contract to HIC was fundamentally flawed, and the actions of GVB and HIC constituted willful or reckless violations of Guam Procurement Law.

6. Mr. Pangelinan resigned from his position as General Manager of GVB effective January 31, 2015. Mr. Pangelinan was barred from contracting with HIC until one year after leaving GVB, which at earliest would have been February 1, 2016. 5 GCA 5632(b) and 5632(c). Any involvement with the RFP prior to February 1, 2016, was a violation of Guam law.

7. HIC's failure to disclose Mr. Pangelinan's consultant contract and involvement in the RFP is a violation of the the RFP and the Guam law. Mr. Sedong Park, who signed HIC's *Affidavit Disclosing Ownership and Commissions* under penalty of perjury, violated 5 GCA §5233 (Disclosure of major shareholders and persons entitled to receive commissions or other compensation). The Affidavit submitted by Mr. Sedong Park contained material statements which were false. *See*, 9 GCA §52.10(b) (*material statements* are defined as "statements which affected or could have affected the course or outcome of a proceedings..."). Guam law provides that a "person is guilty of a misdemeanor if he makes a false statement under oath which he does not believe to be true and ... the falsification is intended to mislead a public servant in performing his official function." 9 GCA §52.20(b).

III. CONCLUSION

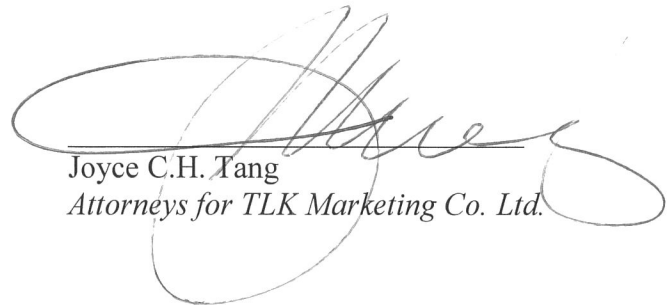
HIC's proposal was non-responsive because it failed to meet the five (5) year experience requirement and should be rejected. If the Public Auditor finds that HIC submitted a proposal

that was fraudulent, contained misrepresentations, was made in bad faith, constituted willful and/or reckless violations of Guam Procurement Law, or was obtained as a result of collusion between GVB and HIC, the putative contract should be declared null and void.

TLK's proposal is the highest-ranked proposal from a *responsive* offeror, and GVB should have negotiated with TLK. As the protestant who should have been awarded the contract, TLK is entitled to its reasonable costs if the Public Auditor sustains TLK's protest. *See* 5 GCA § 5425(h). Because GVB and HIC acted in a manner that was fraudulent and fundamentally unfair, TLK is entitled to recovery of its reasonable attorney's fees and costs.

Respectfully submitted this 5th day of July, 2016.

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