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FILED  
SUPERIOR COURT  
OF GUAM

2007 OCT -9 AM 9:00

CLERK OF COURT

BY: \_\_\_\_\_

Attorney for Respondent – Office of the Public Auditor

IN THE SUPERIOR COURT  
HAGATNA, GUAM

IN THE MATTER OF: )  
TRC ENVIRONMENTAL )  
CORPORATION, )  
 )  
Petitioner, )  
 )  
vs )  
 )  
OFFICE OF THE PUBLIC )  
AUDITOR, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**SPECIAL PROCEEDING  
CASE NO. SP0160-07**


**DECLARATION AND  
CERTIFICATION OF RECORD**

I, **THERESA V. GUMATAOTAO**, declare under penalty of perjury that the following statements are true to the best of my knowledge and belief.

I am a Management Analyst assigned to the Procurement Appeals unit, Office of the Public Auditor. The attached is a partial transcription of the procurement appeals hearing held on July 6, 2007 on OPA-PA-07-002. .

FURTHER, AFFIANT SAYETH NOT,

DATED: 10/8/2007

  
**THERESA V. GUMATAOTAO**  
Management Analyst  
Procurement Appeals

<b>WRITTEN RECORD OF HEARING</b>		<b>September 2, 2007 11:16 am</b>
<b>JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)</b>		
Hearing Officer	Therese M. Terlaje	
Hearing	Emission Technologies, Inc. – Guam Power Authority	
OPA Hearing No.	OPA-PA-07-002	
Time of Hearing	10 a.m.	
Where	DVR Conference Room Pacific News Building 6 <sup>th</sup> Floor 238 Archbishop Flores Street Hagatna, Guam 96910	
Parties Present	Doris Flores Brooks, Public Auditor Therese M. Terlaje, Hearings Officer, Procurement Appeals, OPA Zeny Nace, CPA, OPA JoAnnalynn Fullerton, AA, Procurement Appeals, OPA  Kevin J. Fowler, Counsel for ETI Robert Wilson, President, ETI  Anthony R. Camacho, Counsel for GPA Rosalind “Rose” Cruz, Buyer II, GPA Procurement Office Jesse Reyes, Buyer Supervisor, GPA Procurement Office	
Identification of Documents Presented	Mr. Camacho presented 5 exhibits submitted as evidence in this order from the Procurement Record:  <b>Exhibit F – ETI April 6, 2007 Protest Letter re official request for an administrative review of this award to GPA, See Procurement Record, 2<sup>nd</sup> Stay Section (GPA Exhibit F)</b> <b>Exhibit G – GPA April 12, 2007 Procurement Protest Decision to ETI, See Procurement Record, 2<sup>nd</sup> Protest Reply (GPA to ETI) Section (GPA Exhibit G)</b> <b>Exhibit A – Amendment II, Amendment I and RFP, See Procurement Record, Front Section (GPA Exhibit A)</b> <b>Exhibit D – GPA March 26, 2007 Procurement Protest Decision to ETI, See Procurement Record, 1<sup>st</sup> Protest Response (GPA to ETI) Section (GPA Exhibit D)</b>	
List of Witnesses who Testified	Robert Wilson, President, ETI Salvador Managa, Special Projects Engineer, GPA Roger Pabunan, Environment Engineer II, GPA Paul Clark, Manager, TRC Rose Cruz, Buyer, Buyer II, GPA Procurement Section  <i>Should you wish to hear their full testimonies, please go to the OPA Website <a href="http://www.guamopa.org">www.guamopa.org</a> and click on Procurement Appeals, go to OPA-PA-07-</i>	









**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

evidence when we stipulated to that in the pre-hearing?

Hearing Officer: We did. Is there any objections? This is the procurement record. This will be admitted into evidence – Procurement Record and Exhibits F & G are in here.

Attorney Camacho handed out the following exhibits:

Exhibit F (ETI's April 6, 2007 protest)

Exhibit G (GPA's April 12, 2007 Protest Decision)

**Witnesses:**

None

**Closing Statements:**

Hearing Officer is now presenting the Procurement Record and is formally admitted as evidence. Also, Exhibits F and Exhibit G are in the Procurement Record. No objections.

Hearing Officer: GPA argues that the issue of the business license was first brought up on appeal but you admit that it was addressed in Exhibit F the April 6, 2007 letter and the way it was addressed was not part of the protest?

Attorney Camacho: ... The basis of the protest was not the licensure of TRC the basis of the protest was alleged bias, now this was their words not GPA's.

Hearing Officer: GPA alleges that it incurred prejudice by the May 1 amendment because it only had 72 hrs to respond? Please specify the prejudice.

Attorney Camacho: GPA is supposed to have 10 working days to respond to a procurement appeal ... I received that very late on May 1 so really that is less than 72 hours to respond to the allegations of the business license after we had worked very hard to respond to allegations concerning bias and their existing contract end.

Hearing Officer: But in subsequent documents did GPA have the opportunity to address the issue brought up in the amended appeal?

Attorney Camacho: Well, to the best of our ability, based on the short

timeline, we did address it. But keep in mind that certainly even you look at the time we had, instead of 10 days we had less than 2 days – that is actual prejudice I will submit ...

Hearing Officer: Mr. Fowler on the issue of prejudice, do you have any comment?

Attorney Fowler: Yes, there can absolutely be no prejudice. TRC was either licensed or it was not and that is a matter of public record and they, of course, know whether TRC was licensed or not and they know that TRC was not licensed on Guam to conduct business. In fact, GPA responded to the licensure issue in their Agency Report they state that this requirement of a business license does not exist. So I do not know how they could be prejudiced. They either know they are licensed or are not licensed and you cannot be prejudiced since it is a matter of public record. Their substantive response to whether licensure was required is that the RFP did not require a business license. So they fully responded that is the total sum of their argument, I don't know how they can claim any prejudice.

Attorney Camacho: One objection. On the record, our response was a Guam Business License was not required and not that a general business license was not required, ...

Hearing Officer: Could the parties please address – if the April 6 letter was to be viewed, as a reconsideration – what are the deadlines for filing an appeal - is it 15 days from the original decision being reconsidered or is it 15 days from the decision on the reconsideration?

Attorney Fowler: 15 days from the decision on the reconsideration date.

Hearing Officer: Any authority on this?

Attorney Fowler: Not right on me but I can certainly brief it, if requested.

Attorney Camacho: This whole argument that this is somehow a request for reconsideration – that is just simply is not true! Now they made their January 30 protest, we gave our March 28, 2007 protest decision, clearly the 15 day period for that March 28, 2007 protest decision has fully expired. Their April 6 letter, if you look at it, a plain reading and reading nothing else into it. It is titled a procurement protest. That is what it is titled. They even go on to say I think it is the second sentence 'the basis for our protest is' so in terms of what GPA had to respond to the April 6 letter had to be treated the way it was titled, it is a protest. Now in there they want an



administrative review, well, the Guam law specifically mandates for a protest decision GPA has to state the ... I guess the basis of its decision has to tell the protestor what the decision is and it also has to say now this is according to statute law Guam Procurement Law, we have - to the protestor that they have a right to administrative and judicial review and that is it. And according to Guam law, of course, the administrative review of the protest decision is the appeal to the Public Auditor and that is in accordance to Guam law. They are trying to somehow argue now that that language is for GPA to review its own decision, such does not exist under Guam law and that their request for administrative review is really a request for reconsideration. Well, that is not quite true, if you look at how they title their April 6 letter it clearly says procurement protest. It does not say we request reconsideration. Now GPA actually addressed this request for administrative review in its procurement decision and the way GPA dealt with that was by politely telling ETI that GPA does not have the jurisdiction to conduct an administrative review and only the Public Auditor has the jurisdiction to conduct the administrative review. We also denied their protest on the ground that as they knew or should have known all the information of their protest concerning GPA's selection of ETI [sic] as the best qualified offeror back in January 22, 2007 that these same allegations that they are bringing in the second protest are no longer timely. The basis of the January 30, 2007 protest was that the evaluation was bias and in favor of TRC same allegation again on April 6. The only difference between the two protests was the additional allegation that GPA was somehow using this procurement to bring an untimely end to their contract with GPA, their existing contract with GPA. So we denied on grounds of untimeliness as well, they no longer could bring, they can't ... Guam Procurement Law essentially does not allow a protestor to make a string of protest on the same subject.

Hearing Officer: Does the Guam Procurement Law allow a party to request reconsideration of a protest decision?

Attorney Camacho: It does and there is a procedure for that and that procedure was clearly not followed here. It is not titled to a request for reconsideration, they titled it a procurement protest, so GPA has to respond to the plain reading of their demand, this is a procurement protest. In every case, we had to investigate the protest, determine its merits and issue a procurement protest decision. GPA did that.

Hearing Officer: What are you referring to when you say title?

Attorney Camacho: If you look at Exhibit F, where it says Subject that is

**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

ETI's April 6 letter it says procurement protest.

Hearing Officer: Under subject?

Attorney Camacho: Yes. It does not say request for reconsideration. If you read that whole document, you will never find request for reconsideration. If you look at the second sentence, the basis of our protest is. This is a procurement protest.

Hearing Officer: That is the 3<sup>rd</sup> sentence. The 2nd sentence is actually, this will now serve as ETI's official request for an administrative review of this award.

Attorney Camacho: Yeah, I have addressed that. We have addressed that in our decision. Okay. We addressed that by stating we do not have the jurisdiction to conduct an administrative review that they are requesting.

Hearing Officer: What are the effects of GPA after receipt of the April 6 letter, putting a stay on this procurement, notifying the parties of the stay and issuing a decision on the 12<sup>th</sup>, which is the deadline?

Attorney Camacho: Well, we can only respond to – nothing – I submit that absolutely nothing prevented ETI from filing an appeal with the Public Auditor 15 days after receiving GPA's March 28, 2007 protest decision. There is absolutely nothing. We did not prevent them from doing that instead we had to respond to their April 6, 2007 protest. We followed all the procedures. We stayed. Okay. Whenever someone files a protest, GPA is required to 'stay of procurement' – that is required by the statute. We can only lift that if we find that the appeal has no merit, we issue a decision, and we did that, as well, on April 12.

Hearing Officer: So is it GPA's position then -- is that basis of the protest in the April 6 letter is the same as the basis of the protest in the earlier protest?

Attorney Camacho: Yes, it would be the same with the exception of the additional allegation that GPA was improperly using this RFP to end ETI's existing contract, which GPA found had no merit and also, the other difference is that they requested a written confirmation of TRC's compliance and, also a copy, if we could provide it, of TRC's business license that they submitted with their proposal. So, we denied that, we denied that request.

Hearing Officer: Does anyone have anything further to submit on any of

these issues?

Attorney Fowler: Yes, ... this protest was processed by Rob Wilson in his lay capacity as president of ETI. He got a protest decision from GPA that said that he had a right for to administrative review. It is quite obvious that he did not know what exactly that meant, but he wrote to GPA and said that I'd like the administrative review and that is equally consistent with a request for reconsideration. The agencies by statute and regulation can reconsider their protest decisions. So, after ETI submits that April 6 letter, GPA said that it is staying the procurement and 'we are currently reviewing the request for proposal submitted and we will formally advise the outcome.' So they did reconsider it and, quite frankly, and in truth, they reconsidered it and they denied it and they also said that they were not going to discuss the issue of licensure because it was confidential, it is also at that point in time when the OPA told ETI that they had to file a formal appeal. So, it did that. Every step of the way, ETI did what it was told to do in the best it could in its lay capacity.

But I believe the initial question, I believe, was when an appeal to the OPA had to be filed in relation to the reconsideration by the agency and in fairness, the only way that can be reviewed is after the agency issues the decision on reconsideration and then your clock runs to appeal to the OPA.

Hearing Officer: Do you have any questions on that issue? (Attorney Camacho)

Attorney Camacho: Yeah. The law just does not support that argument. If you look at 5 GCA §5425 (c) that law specifically details what has to go into a procurement protest decision and it states that the decision has to inform the protestant of its right to administrative and judicial review. That is what it says and we complied with that statute. Our notice of administrative and judicial review mirrors the language of that statute. I submit that there is absolutely nothing that prevented ETI from filing an appeal with the OPA for that March 28, 2007 decision. This whole request for reconsideration if you look at that regulation and that is actually covered in 2 GAR Div. 4, Chap. 9, §9101(h) and it says that you have to request each one for reconsideration. For starters, no request for reconsideration was made, the April 6 letter clearly states that it is a protest, there is a procedure covering that that GPA has to follow, we did. Also, if you look at the form of that letter, the request for reconsideration, ETI did not even comply with that, it says a request for reconsideration shall contain a detailed statement of the factual and the legal grounds upon which reversal or modification is deemed warranted specifying any errors of law or

**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

information not previously considered, well, in this case, he doesn't make any statement of how GPA's March 28, 2007 protest decision was not made in accordance with the law, he simply repeats his initial allegations made in his January 30, 2007 protest. He does make that additional allegation concerning his contract, he does make that request for the information. Those are the only two things different, but I submit that this whole argument that this is a request for reconsideration is not true, if you compare that letter with the statute that governs that the procedure for making such a request, it doesn't comply. Also, if you look at the plain reading of the letter itself, it is a protest. It is not a request for reconsideration. These are just allegations that he is making, I guess, making the same protest twice to GPA which he is not entitled to do ... GPA is entitled to conduct procurement and use a fair procedure, we have done so in this case and this repeat protests on the same issue that we have already been decided merely delay GPA's lawful exercise in its power to procure this contract. Thank you.

Hearing Officer: Did GPA at anytime address the timeliness (prior to the appeal) of the request for business license information?

Attorney Camacho: We did, that is Exhibit G. We denied his request on the grounds that there was no law requiring the GPA to create written confirmations of anything and also the information that ETI was requesting (if GPA had it) was part of TRC's proposal, and GPA was not permitted by Guam Procurement Law and Regulations to disclose anything from the proposals of the offerors.

Hearing Officer: The parties are aware that this April 6 letter was received by the Public Auditor ... from GPA, the letter says request for administrative review, the parties are asking the Public Auditor to either rule that this was actually a request for reconsideration or actually a second protest but what about it as an appeal received by the Public Auditor's Office in not the form as requested by the rules and from GPA? Do you have any position on that?

Attorney Camacho: Yes, the Public Auditor has ruled on this issue. I believed the Public Auditor after receiving the April 6 letter from ETI had already stated to ETI that if this was truly an appeal that they would have to file an appeal in the format required by the regulations governing procurement appeals. I believe there is that correspondence and this was the official response by the OPA to that April 6 letter.

Hearing Officer: Mr. Fowler?

Attorney Fowler: I don't think it is truly significant whether you consider the April 6 letter as a second protest or a request for reconsideration. What ETI asked for was an administrative review, which is what the agency told him he had the right to do. What is critical, regardless of what you call that April 6 letter, what is critical is that the GPA wrote a letter on April 10 staying the procurement until they could resolve the issues raised in that letter and frankly, the agency can do one of two things after it has denied a protest and the bidder protests the same thing again, they can either say we have already resolve that or they can consider it again. And it does not matter if it is formal request for reconsideration. An agency, as we have briefed in our comment on the agency report, an agency has the absolute right in its discretion to reconsider its decisions and the law supports that because you want things resolved at the administrative level. So regardless of what you call the April 6 letter, what is critical is that the GPA wrote a letter on April 10 saying it was staying the procurement until it resolves the issued raised in that letter. And when they make a decision on that then ETI's clock to appeal to the OPA begins to run. Now whether ETI should have turned around after the April 12 decision denying its protest and trying some other form of protest with GPA? The fact is it was told to go to the OPA, which it did. ETI has raised all the issues properly and they are all on appeal to be resolved by OPA properly.

**5 Minute Break**

**B. GUAM BUSINESS LICENSE REQUIRED**

Hearing Officer: same parties are present. Part B – Should GPA consider TRC for the award of the RFP even with TRC's lack of a Guam Business License? We will start with the appellant. Will you be calling any witnesses?

**Opening Statements:**

Attorney Fowler: Well, the way you phrased this is whether TRC could be considered for licensure? The only witness evidence I would present today is testimony from ETI that it complies with the local procurement preference statute 5 GCA §5008. That is really kind of a separate issue from whether TRC could be considered for award. TRC cannot be considered for award because TRC is not licensed to conduct business on Guam and the RFP required licensure. The Special Reminder to Prospective Individuals/Firms issued by GPA provided that business license (applicable to RFP) and additional requirements must be submitted at the



part of the appeal.

Attorney Camacho: That is correct. This is TRC's business license not the inventory of ...

Hearing Officer: Your response to that

Attorney Fowler: Well the licensure is the core element of this appeal. TRC is not licensed. ETI is licensed. When ETI wrote a letter to the Public Auditor on the 19<sup>th</sup> it stressed in its letter that is part of this appeal. ETI goes to great lengths to demonstrate compliance with all Guam laws such as business license, contractors license and GRT – and it states that it appreciated that GPA would only consider awarding to businesses licensed on Guam. Part of its protest is that we are licensed on Guam, you have to consider us and that TRC was not licensed on Guam. And the statute exists, the statute simply has to be applied by GPA, the local procurement preference.

Hearing Officer: Do you have any other argument or comment on this issue?

Attorney Fowler: No, simply that the RFP issued by GPA required that companies had to be licensed on Guam as referenced in three different sections of their RFP and, as well, that Guam Law requires GPA to prefer locally licensed businesses for award and that was not done in this case.

Hearing Officer: How do you know that Mr. Fowler?

Attorney Fowler: Well, because they issued a notice I forget the date saying that they were considering for award TRC and TRC is not licensed on Guam.

Hearing Officer: Mr. Camacho, Part B.

Attorney Camacho: Well, he testified that he was licensed on Guam and he is trying to testify that somehow he is a Guam business. I would like to explore the validity of those statements.

Attorney Fowler: Well, we have submitted his Guam Business License as part of this record. He is licensed to conduct business on Guam. That is what the statute requires.

Attorney Fowler: We will stipulate that ETI is registered to do business on

**WRITTEN RECORD OF HEARING**                      **September 2, 2007 11:16 am**  
**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Guam as a foreign corporation and that it was incorporated in Washington state and that it has been licensed to conduct business on Guam.

Attorney Camacho: Yes, I would like to give my 10 minutes or so opening statement and present GPA's evidence concerning this issue. GPA asserts for the record its continuing objection that this matter is not properly before the OPA and that the OPA does not have jurisdiction to consider this matter but that objection is for the record. I believe that the OPA has already decided to continue with these proceedings, therefore, it is also important to know that although the issue is raised could GPA consider TRC for award of the RFP due to TRC's lack of a Guam Business License? Well, there has been no award of the RFP to any offeror including TRC, and that GPA only got as far as selecting TRC as the most qualified offeror and was in the process of negotiating with TRC when ETI filed its first protest in this matter. Thus, there has been no award of the RFP and no offeror was being considered for award because negotiations between TRC and GPA had not concluded at the time these protests were filed and, of course, the actions were stayed. On the issue itself, TRC did not need a Guam Business License to submit its proposal. I am handing you what has been marked as Exhibit A. This is just a copy of the RFP itself likewise this has been entered into evidence and is also part of the Procurement Record. Of course, there is Amendment II and there is Amendment I but if you were to turn, or look at the upper right-hand corner, where it says page 1 (1 of 42) yeah, 1 of 42 okay. Page 1 of Exhibit A which is the RFP, indicates that at the time of the RFP closing, if you will look here where it says the language 'Business License applicable to the RFP.' The offerors were only required to submit a Business License applicable to the RFP. Thus, to submit a proposal the Guam Business License was not required and a business license from any jurisdiction would have been sufficient. Why was a Guam Business License not required? Well, the facts will show that GPA advertised the RFP on the Internet in the hopes of fostering competition by obtaining the largest number of offerors. TRC did not need a Guam Business License to be selected as the most qualified offeror. Generally, Guam Procurement Laws and Regulations specifically 5 GCA §5216(e) and 2 GAR Div. 4, Chap. 3, §3114(f)(2) mandated that proposals shall be evaluated only on the basis of the evaluation factors stated in the RFP. Here if we turn to Exhibit A, if you go to page 20 of 42 Section 5.0 on page 20 that actually sets forth for 5 selection criteria and their respective maximum point values that GPA selection committee used to evaluate the proposals. These are the evaluation factors that GPA must use and did use to select TRC as the most qualified offeror. If you read these 5 criteria, none of them required an offeror to have a Guam Business License. Therefore, the RFP did not require TRC to have a Guam Business License to submit a proposal



**WRITTEN RECORD OF HEARING**                      **September 2, 2007 11:16 am**  
**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

and get selected as the most qualified offeror. Which is really only as far as we got in this procurement, of course, ETI has a contrary opinion on this issue. ETI argues that the language on page 1 of 42 required the offerors to submit a Guam Business License, however, a plain reading of that language clearly shows that the offerors were only required to submit a business license applicable to the RFP and not a Guam Business License. ETI argues that the language in Exhibit A page 11 Section 2.6 (go to page 11 of 42) – It argues that Section 2.6 on page 11 which basically states ‘offerors are reminded that GPA will not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law’ required TRC to have a Guam Business License, however, the key part of this language is the word award. Here no award has been made and TRC has only been selected as the most qualified offeror, if negotiations are completed and GPA and TRC agree on a fair and reasonable compensation, then TRC would certainly be required to obtain a Guam Business License as a condition of its award. However, the Guam Business License is not required at this time. ETI argues that 5 GCA §5008 that requires procurements to be made only from companies licensed to conduct business on Guam. ETI also is improperly trying to argue that it is also entitled to a local procurement preference under that statute; however, this is a complete misstatement of the law. That same statute also states that procurement of supplies and services from off Guam may be made if no business for such supplies or services may be found on Guam or if the total FOB job site unloaded a procurement from off island is no greater than 85% of the total cost of the FOB job site unloaded of the same supplies or services when procured from the business license to do business on Guam. Thus, this statute actually allows procurement from off island vendors such as TRC and ETI, which is also a foreign corporation. In support of these arguments I would like to call Mr. Salvador Managa to the stand as GPA’s first witness.

Attorney Camacho called his witnesses Mr. Managa, GPA Special Project Engineer and Mr. Roger Pabunan.

Mr. Managa: The RFP is for services for the operation of what we call the CEMS continuous emission monitoring system that is installed at Tenjo and we also have one at Cabras.

Attorney Camacho: Okay. Now going back to the RFP – what if any of your duties was specific to this RFP?

Mr. Managa: I was made part of the committee to evaluate the proposals that were submitted by the offerors.

**WRITTEN RECORD OF HEARING**                      **September 2, 2007 11:16 am**  
**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Attorney Camacho: I am going to hand you, it has been marked as Exhibit A – let me go back – I am going to start with page 1 of Exhibit A – okay using the Procurement Record which was filed with the OPA, if you look on the first page where it states business license applicable to RFP and additional requirements. Did this require the offerors to submit a Guam Business License?

Mr. Managa: No.

Attorney Camacho: Why not?

Mr. Managa: It says here business license, it can be a business license from other parts of – outside Guam.

Attorney Camacho: Outside Guam - and how, to the best of your knowledge, how was this RFP advertised?

Mr. Managa: I believe the RFP was put on the GPA web so that others may submit an offer for this RFP.

Attorney Camacho: Why would GPA seek to put this RFP on its website?

Mr. Managa: I understand that there is very limited resources here on Guam so they opted to put it on the web so at least other companies outside of Guam could submit an offer on this.

Attorney Camacho: So, in essence, it would be correct to say that the Guam Power Authority was trying to get the largest number of offerors?

Mr. Managa: That is correct.

Attorney Camacho: Okay. Well, let us go back to your duties on the selection committee. Now what was used to evaluate the proposals?

Mr. Managa: There was a criteria that was set up, I believe a 5-point criteria for the evaluators to consider for the RFP.

Attorney Camacho: I am going to turn to page 20 of the copy of the Procurement file that was filed with the Office of Public Auditor. If you go to page 20 (also my Exhibit A), under Section 5.0. Do you recognize that particular section?

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Mr. Managa: Yes, this was criteria that was used to rate the offerors.

Attorney Camacho: Okay. Is it correct to say that you evaluated all the proposals based on these 5 criteria?

Mr. Managa: Yes, that is correct.

Attorney Camacho: And did you record the results of the evaluation?

Mr. Managa: Yes, there was a tabulated form that we had to evaluate each of the offerors, go through all the proposals, and we had tabulated forms for each individual, I mean each person on the committee.

Attorney Camacho: Okay, I am going to hand, marked as Exhibit D although this is the March 26, 2007 procurement protest, if you could turn to Exhibit A of that Exhibit can you identify Exhibit A that has been marked as Exhibit D?

Mr. Managa: I guess this was the letter from committee saying that we have selected the most qualified offeror.

Attorney Camacho: Okay, if we go through Exhibit A go to about the 3<sup>rd</sup> page, can you identify what these documents are?

Mr. Managa: Oh, this is the evaluation form that was given to each individual in the committee to provide their ratings on each of the offerors.

Attorney Camacho: Okay, and where it says evaluation criteria, is that the same criteria that is found in Section 5.0 of the RFP?

Mr. Managa: Yeah, I believe it is, it mirrors that.

Attorney Camacho: Okay, so if you look at those 5 criteria, do any of those criteria mandate that the proposal where the offerors have to have a Guam Business License?

Mr. Managa: No.

Attorney Camacho: Yes or No?

Mr. Managa: No.

Attorney Camacho: At what point to the best of your knowledge – when a

Guam Business License be required of offeror?

Mr. Managa: When - I believe the Guam Business License will come in once we have, I mean once we have awarded a contract and then you will ask the contractor a Guam Business License to make sure similar to a performance bond, I believe it is similar to a performance bond wherein before you award a contract you ask the contractor whether he complies or he has a performance bond, submit the performance bond and then you award him the contract. I believe it is the same thing with the business license. If he can comply with the Guam Business License, then you award him the contract.

Attorney Camacho: Now in this case, has an award of this contract been made?

Mr. Managa: I don't think so.

Attorney Camacho: In fact to the best of your knowledge, how far did the Guam Power Authority get with or how much further did the Guam Power Authority go after it selected TRC as the most qualified offeror?

Mr. Managa: I believe that after it was selected, the Guam Power Authority made the initial negotiations with TRC.

Attorney Camacho: Okay, thank you, I have no further questions.

Hearing Officer: Mr. Fowler, any questions?

Attorney Fowler: So are you considering TRC for award?

Mr. Managa: Considering TRC for award? They are selected as the best offeror.

Attorney Fowler: That means that you are considering them for an award, correct?

Mr. Managa: I believe so yes.

Attorney Fowler: That is all the questions I have, thank you.

Hearing Officer: I have a question, Mr. Managa, are you involved in the negotiations?

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Mr. Managa: No, I was not.

Hearing Officer: How do you know the status of the negotiations?

Mr. Managa: Well, I understand from procurement that they are in position all ready. I mean I was informed by procurement that they did have all ready started negotiations in the contract, because I remember they came to me and they were asking me if I wanted to be in the committee. I think I did not. I was not available for that committee.

Hearing Officer: So, could you tell us then GPA's official place in the negotiations, you said they have done initial negotiations?

Mr. Managa: I understand that they are going, I mean what I understand is that they have made initial negotiation because at one point I was asked to be in that committee but I was not available for that committee.

Attorney Camacho: We have another witness that can talk about how far they got with negotiations.

Hearing Officer: Okay, have you been involved in other evaluations?

Mr. Managa: Yes.

Hearing Officer: Have any of the evaluations you have been involved in at GPA had the same notice on the front of the RFP?

Mr. Managa: Let see, you mean to say...

Hearing Officer: Page 1 of 42 of the RFP entitled Special Reminder to Perspective Individuals?

Mr. Managa: Yes, I think that this is a standard document that GPA puts in there.

Hearing Officer: Have you made any awards to an off-island firm?

Mr. Managa: Yes.

Hearing Officer: Did you require them to get a Guam Business License?

Mr. Managa: Not at the point of like I said not at the point of during the evaluations, no. For example, here, if that is a requirement on the

submission of the RFP, yes I believe. But in this point, it is not a requirement.

Hearing Officer: Does this RFP require - what type of licenses does this RFP require?

Mr. Managa: It says here I mean the ... of course a license which is in reference to the RFP make license that they are in business in doing the same continuous monitoring or other systems that are similar to the same systems.

Hearing Officer: Any other questions?

Attorney Camacho: Yes, I would just like to clarify a point. Normally for the Guam Power Authority, isn't it correct that someone is really not considered for award until after negotiations are completed?

Mr. Managa: That is correct.

Attorney Camacho: But to your knowledge, you just know that negotiations had begun, is that correct?

Mr. Managa: That is correct.

Attorney Camacho: Thank you.

Attorney Camacho's next witness, Mr. Pabunan, Environmental Engineer with the Guam Power Authority.

Attorney Camacho: Now I will start asking you questions on GPA-RFP-07-002 I am just going to call that the RFP. Now what if any of your duties as an environmental engineer work for that RFP?

Mr. Pabunan: Well, I helped in forming the scope of work for the RFP.

Attorney Camacho: Are you familiar with the terms of condition of the RFP?

Mr. Pabunan: Yes, I am.

Attorney Camacho: So along with formulating the scope of work for the RFP what other duties, if any, concern the RFP.

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Mr. Pabunan: Well, to understand the RFP and to make sure all of the requirements are met.

Attorney Camacho: Okay. Now, did you serve on any committees concerning the RFP?

Mr. Pabunan: Previous to this one?

Attorney Camacho: Well, for this RFP, did you serve on any committees?

Mr. Pabunan: Yes, I did serve on the committee.

Attorney Camacho: Which one?

Mr. Pabunan: Selection Committee.

Attorney Camacho: Is that same committee that Mr. Salvador Managa had also served on?

Mr. Pabunan: Yes, that is correct.

Attorney Camacho: And what were your duties concerning this RFP on the selection committee?

Mr. Paguana: My duties were to evaluate all of the proposals that were sent to me by offerors.

Attorney Camacho: What did you use to evaluate all the proposals that were submitted in response to the RFP?

Mr. Pabunan: We had a criteria of ... 5 criteria to rate all the proposals and to rate the offerors.

Attorney Camacho: Okay, and where did you get these criteria from?

Mr. Pabunan: From the scope of work.

Attorney Camacho: If you will turn to page 20 of Exhibit A, page 20 – RFP – Section 5.0 would you identify what that section is?

Mr. Pabunan: This section numerates the selection criteria.

Attorney Camacho: Okay. Was that the criteria that you used to evaluate all

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

the proposals?

Mr. Pabunan: That is correct.

Attorney Camacho: And do any of those 5 criteria require any of the proposals to have a Guam Business License?

Mr. Pabunan: No, they do not.

Attorney Camacho: And if you could turn to page 1 of Exhibit A, one of the procurement file submitted to the OPA, which states Others – Business License applicable to the RFP and additional requirements. Does that section require the offerors to submit a Guam Business License with their proposals?

Mr. Pabunan: No, not specifically a Guam Business License.

Attorney Camacho: What kind of business license does it require?

Mr. Pabunan: It just says business license and that can mean any business license from anywhere.

Attorney Camacho: Okay, now who was selected as the... who did the selection committee pick as the best qualified offeror?

Mr. Pabunan: The committee selected TRC.

Attorney Camacho: and what happened, what if anything occurred after TRC was selected the best qualified offeror?

Mr. Pabunan: We started with negotiations, we opened up the price bid, and from there we started negotiations with TRC.

Attorney Camacho: Okay, now were you involved in these negotiations?

Mr. Pabunan: Yes, I was.

Attorney Camacho: Okay, did the Guam Power Authority complete negotiations?

Mr. Pabunan: No, we didn't.

Attorney Camacho: So if negotiations were to fall through at this point,



**WRITTEN RECORD OF HEARING**

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Attorney Camacho: And do any of those 5 criteria require any of the proposals to have a Guam Business License?

Mr. Pabunan: No, they do not.

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Attorney Camacho: Okay, did the Guam Power Authority complete negotiations?

Mr. Pabunan: No, we didn't.

Attorney Camacho: So if negotiations were to fall through at this point,

what would happen?

Mr. Pabunan: I believe we would choose the next qualified bidder and then follow through with them.

Attorney Camacho: Has any offeror been awarded this contract?

Mr. Pabunan: Not yet.

Attorney Camacho: Has TRC been awarded this contract?

Mr. Pabunan: No.

Hearing Officer: Is there something Mr. Pabunan about price?

Mr. Pabunan: Yes.

Hearing Officer: What was that?

Mr. Pabunan: Well, after an offeror is selected as the most qualified that is when we open up price proposal or their cost proposal so from there we negotiate with the offeror as to the best pricing.

Hearing Officer: When you helped formulate the RFP what business license is applicable to this RFP?

Mr. Pabunan: Well, my part I did formulate for the scope of work which is part of RFP but from the scope of work, I do not believe anything was mentioned about a business license in the scope of work.

Hearing Officer: Mr. Pabunan, have you been involved in other negotiations for GPA?

Mr. Pabunan: Negotiations ... I have been involved with other RFPs but not in negotiations.

Hearing Officer: In the other RFPs, I guess I just want to get a feel for how often they require the price quotations together with the RFP?

Mr. Pabunan: From what I have experienced so far, they are submitted for RFPs. So we have one for the qualifications and we one for the pricing that they are pricing.

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Hearing Officer: From all the offerors?

Mr. Pabunan: Yes.

Hearing Officer: Would you say that that is standard practice at GPA for the RFPs?

Mr. Pabunan: From what I have experience so far it is.

Attorney Camacho's final witness, Paul Clark, Manager of TRC's Northwest Air Measurements Office.

Attorney Camacho: Prior to you coming here did TRC seek to, I guess it ...submit its position on this matter to the Public Auditor?

Mr. Clark: Yes, we did submit.

*Attorney Camacho asked Mr. Clark to identify a letter addressed to the Hearing Officer dated July 2, 2007. Attorney Camacho identified this letter as Exhibit I. Attorney Fowler Objected. Hearing Officer never received this letter formally via fax, email or hard copy.*

**3 Minute Recess**

Hearing Officer – Okay, we are back on the record. Mr. Camacho, what are your intentions with this document?

Attorney Camacho - Mr. Clark essentially has come a long way, it is a different time zone, I believe he is a little tired and I just think that this is just something to assist him for him to refer to. ... to assist him with his testimony that's all.

Hearing Officer: Do you intend to introduce this as evidence?

Attorney Camacho: I would like to as well, and I think it is also relevant. TRC is also an interested party although not a direct parties to these proceedings and this is their position on matters before the Public Auditor and I believe that this are relevant and will assist the Public Auditor in making a decision in this matter.

Attorney Fowler: I object, TRC had the ability to formally enter its appearance, they could have filed comments on the agency report, they could have commented on ETI's briefings before this body, they have not

done that. So essentially, they are trying to come in to the hearing to throw all these arguments down and it should not be allowed.

Hearing Officer: There is a rule that says that comments on the agency report by interested parties ... however, since Mr. Clark is here to testify and he was on the witness list, we will allow his testimony and if, and we will deal with this document when you ...

Attorney Camacho: Okay, at any event, Mr. Clark we have discussed your background. Now I would like to ask you some questions about GPA-RFP-07-002, which for the rest of your testimony I am just going to refer to as the RFP.

Mr. Clark: Okay.

Attorney Camacho: What of anything, do you know about this RFP?

Mr. Clark: I know a great deal, I was the proposal manager for TRC's proposal and so I was directly responsible for our proposal.

Attorney Camacho: When did TRC first learn or how did TRC first learn about the RFP?

Mr. Clark: Guam Power maintains a web page as a procurement section, and I regularly monitor that and that is when we first obtain this RFP off that web page.

Attorney Camacho: So essentially, you got it off the Internet from GPA's website, is that correct?

Mr. Clark: Yes.

Attorney Camacho: And are you familiar with the terms and conditions of the RFP?

Mr. Clark: Yes, I am.

Attorney Camacho: In fact, to prepare TRC's proposal you had to review all the terms and conditions, is that correct?

Mr. Clark: That is correct.

Attorney Camacho: Did the terms and conditions of the RFP require that

the offeror possess a Guam Business License prior to submitting or at the time, it submits its proposal?

Mr. Clark: No, they don't and I asked for clarification of that at the pre-bid meeting.

Attorney Camacho: Whom did you ask that clarification to?

Mr. Clark: Rose Cruz

Attorney Camacho: And what was your response, to that, what was GPA's response to your question?

Mr. Clark: The business license requested is to document the experience of the company. TRC has claimed 35 years experience in this field and we submitted a business license to show that we have been licensed for more than 35 years.

Attorney Camacho: We are going to get to that issue in a minute. But...

Hearing Officer: I am sorry, where did you say you requested clarification?

Mr. Clark: There was pre-bid meeting and site visit in November of last year.

Attorney Camacho: Has TRC to date been awarded the contract to the RFP?

Mr. Clark: No, we have not.

Attorney Camacho: To your knowledge, after TRC submitted its proposal, what action if any has the Guam Power Authority taken concerning TRC's proposal?

Mr. Clark: We were selected as the most qualified offeror and we have had a conference call to discuss some of the terms and pricing of it and that is as far as we got.

Attorney Camacho: Now to your knowledge, did you participate in the negotiations?

Mr. Clark: Yes.

Attorney Camacho: Are these negotiations between TRC and GPA completed?

Mr. Clark: No, they are not.

Attorney Camacho: And concerning a Guam Business License what efforts, if any, has TRC made to become licensed on Guam?

Mr. Clark: Well, I handled the proposal part of this, one of our attorneys, ... reviewed Guam license and laws, Guam business laws, and has applied for a Guam Business License and as of today, I do not know if it has been granted or not.

Attorney Camacho: Now, had TRC not been selected as the best qualified offeror would you have sought a Guam or made any attempts to get a Guam Business License?

Mr. Clark: No, if we're in negotiations because we are not doing any other business on Guam.

Attorney Camacho: And concerning licensing and this review of licensing law was conducted that you state was conducted, what if any have you learned about foreign corporations needing a Guam Business License to submit proposals in response to RFPs?

Mr. Clark: There is no law stating any requirements for an RFPs as long as we are not doing business so we are complying with Guam business law.

Attorney Camacho: Now ETI has made the allegation that TRC cannot be the most qualified offeror without a Guam Business License, how do you feel about that allegation?

Mr. Clark: That is not supported by the RFP. The RFP is a request to document experience and the criteria it is evaluated on is based on experience. Experience at similar plants, similar types of units so TRC the largest emission testing company in the United States. We have 16 offices and over 140 people doing this work.

Attorney Fowler: Objection, if he is going to testify of what is in the proposal, I think it is time to unwrap the proposal and make it public. I thought this information was confidential?

Attorney Camacho: No, actually the question was merely what they felt

**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

about the allegation – that they needed a Guam Business License for the – to be selected as the most qualified offeror. I believe his answer was no and I believe...

Attorney Fowler: But then he

Attorney Camacho: ... describing the corporation

Hearing Officer: We will allow Mr. Clark's testimony. Do you have another question?

Attorney Camacho: Sure. Concerning getting another business license to your knowledge, are there any bars or anything that would prevent TRC from obtaining a Guam Business License as you are planning to do?

Mr. Clark: No, TRC has been a licensed US corporation since 1971. We have individual licenses for the separate states. We have never been denied a business license.

Attorney Camacho: 40 separate states. So you are actually licensed in the majority of US states, is that correct?

Mr. Clark: That is correct.

Attorney Camacho: Did TRC comply with all the RFP requirements at the time it submitted its proposal?

Mr. Clark: Yes, it did.

Attorney Camacho: Did TRC to the best of your knowledge comply with all that existed at the time you were selected as the most qualified offeror?

Mr. Clark: Yes, we have.

Attorney Camacho: No further questions.

Hearing Officer: Mr. Fowler?

Attorney Fowler: No questions.

Hearing Officer: Mr. Clark at the RFP meeting when you asked Rose Cruz about a business license could you tell me the question that you asked her?

**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Mr. Clark: I asked whether we needed to obtain a Guam Business License as far as the proposal or just prior to doing the work.

Hearing Officer: Is there a response that you documented anywhere?

Mr. Clark: I don't know. It is documented in my notes.

Hearing Officer: Is this a private conversation between the two of you?

Mr. Clark: No, it was not.

Hearing Officer: What was it?

Mr. Clark: I don't remember exactly, I mean this was more than 6 months ago where the pre-bid meeting was held.

Hearing Officer: Is there anyone else who would be privy to this response?

Mr. Clark: There were other people at the meeting, other Guam Power people, Mr. Wilson and a second ETI employee, I don't recall his name. But I don't ...

Hearing Officer: Do you think that everybody in the room would have heard this conversation?

Mr. Clark: I would think, I don't have the specific meeting 6 months ago. The RFP were it states the requirement for business license. – it does not at all state a Guam Business License and that is why we asked for clarification. The laws – there is 3 mentions of a business license.

Hearing Officer: Do you have any more questions for this witness, Mr. Camacho?

Attorney Camacho: No.

Hearing Officer: Mr. Clark, thank you very much.

Hearing Officer: Do you have a witness that we could question about the procurement record?

Attorney Camacho: Yes, we have ... I think that question would be best – we could provide Jesse Reyes, who is actually the acting procurement manager for GPA, he is not on the witness list but show that the Public



**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Auditor is requesting that they take the stand.

Hearing Officer: The Public Auditor would actually like to hear from Rose Cruz ...

Ms. Cruz: I am the Buyer for this project. (From her seat)

Hearing Officer: Is there any objection Mr. Fowler if we could call ...

Attorney Fowler: No, but I would like to reserve an opportunity to call rebuttal witness on this issue when you are finished, if necessary.

Hearing Officer: Mr. Camacho is that all right with you?

Attorney Camacho: That's fine.

Hearing Officer: Ms. Cruz would you mind taking the stand?

Hearing Officer: Thank you Ms. Cruz.

Public Auditor: Ms. Cruz, please note that I will ask you to come forward is that I would like to get clarification on the statement that Mr. Clark mentioned. On or about sometime in the pre-conference was that by telephone or in person at the pre-conference meeting?

Ms. Cruz: No, this was a scheduled pre-conference as well as a site visit, where everyone is invited, whoever had picked up the package.

Public Auditor: Do you recall who were the people present at the pre-conference?

Ms. Cruz: There was Mr. Rob Wilson and another rep from ETI – Adam, I am not quite sure what is his last name, as well, Mr. Clark and 2 of the planning of the Planning and Regulatory Divisions that was Roger and Norbert. I forget the last name of Norbert.

Public Auditor: Several of the vendors as well as several of GPA's people were present?

Ms. Cruz: Yes, it was, it was just ETI and TRC.

Public Auditor: To the best of your recollection, could you recant the statement to Mr. Clark and your answer to question regarding the licensing?

**WRITTEN RECORD OF HEARING****September 2, 2007 11:16 am****JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Ms. Cruz: I apologize but I am not quite sure if I remember that conversation because we do have a lot of site visits as well as pre-conference and so there are so many questions regardless whether it is this particular one or previous pre-conference but the instructions to all the visitors are to submit their questions in writing so we can entertain them and formerly respond to them.

Public Auditor: Was one of them, Mr. Clark's question to effect that a Guam Business was required?

Ms. Cruz: I am not quite sure, I don't recall.

Hearing Officer: Ms. Cruz, are you one who responds to questions in writing the minute...?

Ms. Cruz: Yes, every question that was submitted goes through me actually, so we can go ahead and process and disseminate to whomever the response needs to be taken care of.

Hearing Officer: Have you seen the Procurement Record?

Ms. Cruz: Yes.

Hearing Officer: Do we have a complete record of questions submitted to GPA and responses.

Ms. Cruz: Yes.

Public Auditor: Do you recall if that question is one of them?

Ms. Cruz: I cannot recall, I would have to go through the records and see what questions were submitted. They were also given a deadline as far as the questions.

Hearing Officer: Thank you, Ms. Cruz. Any questions? Mr. Fowler your rebuttal question?

Attorney Camacho: No.

Attorney Fowler: No.

Hearing Officer: Thank you, Ms. Cruz.

Hearing Officer: All right, I guess at this time we will be closing with this issue?

Attorney Fowler: Could I have the rebuttal witness on that point? .

Hearing Officer: Oh, yes.

Attorney Fowler: Mr. Wilson did you attend a pre-conference or site visit meeting on this GPA-RFP?

Mr. Wilson: Yes, I did.

Attorney Fowler: Do you recall people who were present at that time?

Mr. Wilson: Yes, I do.

Attorney Fowler: Who was present?

Mr. Wilson: Myself, Adam Richman with ETI, Paul Clark of TRC, and Rose of GPA, Norbert and Roger.

Attorney Fowler: Did any body ask about a clarification about a Guam Business License?

Mr. Wilson: I never heard such a clarification, question clarification, nothing on that matter.

Attorney Fowler: Have you seen any addenda from GPA clarifying that issue?

Mr. Wilson: No, I have not and I read them very closely.

Attorney Fowler: Okay that is all the questions I have.

Public Auditor: I have a question. My recollection is all questions are supposed to be in writing. Do you recall seeing such a question in writing?

Mr. Wilson: No.

Public Auditor: Thank you.

Hearing Officer: Mr. Camacho do you have any questions of this witness?

Attorney Camacho: No, I have no further questions.

Hearing Officer: Thank you Mr. Wilson.

Hearing Officer: Anything else before we go to closing on this issue?

**Witnesses:**

Robert Wilson, President, ETI (Recalled)

Salvador Managa, Special Projects Engineer, GPA

Roger Pabunan, Environment Engineer II, GPA

Paul Clark, Manager, TRC

Rose Cruz, Buyer, Buyer II, GPA Procurement Section (Recalled during Closing Statements)

**Closing Statements:**

Hearing Officer: Mr. Fowler?

Attorney Fowler: The RFP issued by GPA clearly required a Guam Business License. The Special Reminder said that it had to be submitted at the time of the closing of the RFP which is when you submit your proposals and that is exactly how it reads on the Special Notice Special Reminder to Respective Individuals, you got to submit all that stuff there with your proposal. GPA has tried to put on some witness testimony that the language they used in their RFP did not really mean what it says it means. But you know Mr. Managa testified and I asked him is GPA considering TRC for award and he said yes. Well, that violates the very term of the RFP in Section 2.16 and that provides that GPA will not consider for award any offer submitted by an offeror who has not complied with the Guam licensing law, and, of course, we know that means a Guam Business License because GPA said it is the policy of GPA to award proposals to businesses duly licensed to conduct business in Guam that is Section 2.4. So GPA is clearly considering TRC for award, TRC clearly does not have a Guam Business License so they are violating the very terms of the RFP that they drafted. In addition, they are violating our local procurement preference statute, which requires them to consider for award those businesses licensed to conduct business on Guam and conducting a substantial business on Guam. ETI fits in every category of Section 5008, it manufactures on Guam, it regularly carries an inventory of at least 50% of the items to be supplied under this RFP. It has an inventory of \$200,000 and it does a substantial portion of its business here on Guam. Now, in order to have this procurement preference you do not have to be a company

that originally incorporated on Guam, because we know ETI was incorporated in Washington State and is now allowed to conduct business on Guam. It has a Guam Business License. So all our procurement preference Statute 5008 provides is that you have to consider businesses licensed to do business on Guam and that is ETI so it is entitled to the local procurement preference, and if you don't have to get a business license until after award, I don't know how you would ever comply with the statute. People from off island can bid once they get the contract they can then get their license and the other people are never considered. But as it stands now we got local companies that have submitted proposals and they are entitled to a preference over a company that is not licensed on Guam. So we would ask as a remedy that the proposal to award a contract or in the consideration of awarding a contract to TRC be enjoined by the Public Auditor that they cancel that. Thank you.

Hearing Officer: Mr. Camacho.

Attorney Camacho: Well, the bottom line here is that GPA did not require a Guam Business License as a condition precedent to submitting a proposal for the RFP. None of the RFP sections cited by ETI require offerors to submit a Guam Business License with their proposals and none of those sections required them to have a Guam Business License to be selected as the most qualified offeror. The Guam Business License requirement as stated by Mr. Managa is analogous to the requirement for the performance bond. It is documented that an offeror does not have to submit until he is about to be awarded the contract. Here TRC was selected as the best qualified offeror and it has not been awarded a contract. Now Mr. Managa did state that he believed, I guess, or he stated that he thought that TRC was being considered for the award but then he also testified if you look at his complete testimony that you are not considered for award till after negotiations have been completed. He also testified that he did not take part in the negotiations. Mr. Pugunan did. Mr. Pugunan testimony is clear that negotiations here had not been completed. That was his testimony and he even testified further that if negotiations breakdown between TRC and GPA then they go to the next qualified offeror. We are not at the point where anybody is being considered for award, we are just in the process of negotiating and that was also verified by Mr. Clark, himself, he testified that they were selected as the best qualified offeror, they started negotiations, negotiations had not been completed and he also testified that essentially TRC had not been awarded. No one is being considered for award at this point. But procurement regulations and procurement law even state that if the negotiations breakdown, you go to the next qualified offeror. Okay, we are just not there yet, as negotiations were never completed because they

filed a protest and the procurement was stayed. So at this time if you do a plain reading of what the RFP required to get to this point, clearly it merely required them to submit a business license applicable to the RFP. Well, why was that there? You heard the testimony from both Mr. Pugunan and Mr. Managa that this thing was advertised on the GPA website, they wanted to draw in the largest body offerors as possible to increase competition, that is the policy of the Guam Procurement Law is to enhanced competition here. So, and why didn't they have a business license? Well they also, why didn't they require a business license well they also testified Mr. Managa excuse me Mr. Pugunan testified that that requirement was there just to verify the experience that the offerors had. We have been in business in this area for X no. of years. TRC also confirmed that by stating that their business license clearly showed that they had been in this business for over 30 years. We even went through in great detail, I believe, the selection criteria that was used to determine whom the best-qualified offeror was. Five criteria – absolutely none of the 5 criteria required a Guam Business License. So to get to the point where TRC actually is the best qualified offeror in the midst of negotiations no Guam Business License was, in fact, required. To read in to that somehow that a Guam Business License was required really doesn't have a good practical effect, generally then you would be restricting all the offerors to whomever had a Guam Business License, that would be it, I don't believe the intend of the Procurement Law supports that because you are limiting competition then to a limited pool of people with a Guam Business License. You heard the testimony of Mr. Managa stating that for this service (which is very important, it affects the air we breath), there are a very limited number of businesses conducting that type of activity on Guam. In effect having that requirement would give one business a monopoly on that business, were if there was just the few, it would limit the pool and we would not have a great deal of competition. Now at this point, is a business --- have to come up with a Guam Business License. Is that unusual? No, you also heard the testimony of Mr. Managa stating that it is analogous to a performance bond. That is a document that is required before award but is not required to be submitted at the time of the RFP closing. So it is very similar to that now that is also – a performance bond is something that is also quite common in Guam Procurement and it is not unusual that you don't need one when you submit your proposal but you will definitely need one before you get your award. That is what we have here. You don't need a Guam Business License to submit your proposal, you don't need a Guam Business License to become the best-qualified offeror, you will need it though at the time you get the award, we are just not here yet in this procurement. Now, much has been said also by ETI concerning the procurement preference, well, quite frankly if that was not a part of their original proposal it can't be now nor can the

Public Auditor make it. They had the opportunity to include that in their proposal if they didn't, it shouldn't be allowed in at this point and that particular law to ... we cite 5 GCA §5008 it doesn't prohibit the procurement of supplies and services from off Guam, as I stated earlier, it actually allows it under certain circumstances so that law by itself does not bar GPA from selecting TRC as the most qualified offeror. The RFP didn't require a Guam Business License to get TRC to a place that it is now. Nothing that GPA has submitted before the Public Auditor proves that a Guam Business License was required to submit a proposal or to get selected as a best qualified offeror. On that basis, GPA asks the Public Auditor to sustain GPA 's denial of ETI's April 6, 2007 procurement protest. Thank you.

Hearing Officer: Thank you Mr. Camacho. Mr. Fowler?

Attorney Fowler: I have nothing further.

Hearing Officer: Mr. Camacho, I beg your both of your indulgence, you raised something that I would like to ask Ms. Rose Cruz about, is that possible?

Hearing Officer: Do you have any objections Mr. Camacho?

Attorney Camacho: Well, I believe the Public Auditor has absolute power to conduct this investigation, so I am not going to oppose her, I believe you have the full power to.

Hearing Officer: Ms. Cruz, thank you.

Hearing Officer: Ms. Cruz, where you part of the committee or entity that determined the best offeror?

Ms. Cruz: Yes, I was actually an observer as part of the procurement rep. And just to observe and make sure that the people that were scoring were doing it independently and not as a group or anything, I was there observing.

Hearing Officer: You have in the Procurement Record a log regarding purchase orders?

Ms. Cruz: Yes, as the process ... as we were processing every time we got a protest we would have to put a stay until we do a lift and then after the lift is done we continue the process another protest comes in you have to stop so

it was an off and on thing

Hearing Officer: There is a Purchase Order ... We are showing you a page of the procurement record that is dated April 18 it is the Purchase Order Log Sheet. You have notes there regarding a purchase order being cut at \$169,850.

Ms. Cruz: Yes, this is still on our processing site, nothing is official it is just pretty much as the lift, the protest, the stay and the lift, every time we do the lift we proceed to go on with our processing, nothing is official until we actually get certification and a purchase order signed by the GM which never materialized. The PO file was held back again after the appeals took place.

Hearing Officer: Is there any indication in there as to a ... like a cost analysis between this cost this purchase order amount and any other amount?

Ms. Cruz: As the negotiation, yes, the pricing was made there but the negotiations were still happening at the time like I said the PO was generated right after the lift was made.

Hearing Officer: But it was processed and done for an amount that you are saying is still under negotiations?

Ms. Cruz: That amount actually was based on the fiscal year and the funding for the fiscal year also. I am just reading through the summary, I just have to recall back just to see what was happened ... okay after the ... I am reading on the summary here, there was a lift on March 23, and okay, there was a committee memo to accept negotiations on 4-4 this is on the summary, April 4, and this is where TRC was to offer their best and final.

Hearing Officer: All right. So what is this amount on April 18 would you say that represented the price agreed upon?

Ms. Cruz: That was the ... it did not cover, I believe this price covered just this fiscal year. The proposal actually gives you a whole year and might be part of the package but the amount was also based on a fiscal year amount but there was – the negotiation was here – it mentions here on the summary with a best and final. I just wanted to add though because it is still internal anything could change, nothing is actually is confirmed until we actually get certification from budget so if it gets rejected and comes back we may have to go back out again and just negotiate on pricing so it is still internal.



**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

Hearing Officer: Ms. Cruz could you just read the date of the Purchase Order to whom \_\_\_?

Ms. Cruz: On April 18?

Public Auditor: To whom?

Ms. Cruz: ... no the PO cost just mentions a dollar amount and then the PO is sent to Jess for review.

Public Auditor: I am sorry?

Ms. Cruz: The Purchase Order file just the file itself is forwarded to our supervisor for my supervisor's review, and this is prior to budget certification.

Public Auditor: Not clear --- there is no mentioned as to whom?

Hearing Officer – Just go ahead and read the entry –

Ms. Cruz: PO cost @ \$169,850 PO for Jess review prior to budget.

Public Auditor: For Jess' review?

Ms. Cruz: Yeah, it is just part of our processing on the procurement side before ...

Public Auditor: No vendors mentioned on here?

Ms. Cruz: The vendor's name is on top because ...

Public Auditor: Who is the vendor?

Ms. Cruz: TRC Environmental

Public Auditor: That is my point. Mr. Clark testified that negotiations are still ongoing and yet the PO was issued.

Ms. Cruz: No, there was no Purchase Order – on our processing side this is all internal when we generate, we are working off a JDE system on a system so everything that we process is through a system, so as we are processing and generating a purchase order for budget to certify, we need to

generate a document number which is a purchase order number but everything is still internal. It is not out there for the public yet at this time.

Public Auditor: But my understanding is that you are reserving funds for a project for which you have not completed negotiations?

Ms. Cruz: Well, as far as negotiations that might change if this file had gone and was not certified because of funding issues, they would have to go back and see where else they can cut pricing whether there is something out of the proposal that they could amend as far as cost, it is still internal, if or should this file be rejected by budget ...

Public Auditor: Has it been rejected by budget?

Ms. Cruz: I am not ... I believe we have the file back returned, but I am not sure, it might have been rejected, I am not quite sure, we might have pulled it back because of the appeals:

Public Auditor: But the negotiations according to what Mr. Clark said earlier today that it is still ongoing. So why would you issue a purchase order for a project for which you are still negotiating?

Ms. Cruz: It is not issued yet. It is not issued to TRC yet. It is still in the process.

Public Auditor: The intent is to eventually issue it to TRC? The documentations are there, as if it were, yet, negotiations have not been final, is that what GPA normally does?

Ms. Cruz: No, we have the best and final at this time, the last processing that we've done is ask for the best and final although after the best and final I worked with Roger to work on the cost for the fiscal year so I believe his processing or the dollar amount that was given to me was \$169 just to cover the fiscal year. I guess I would have to say that the negotiations at this time because we have a cost would be in place.

Hearing Officer: Any questions?

Public Auditor: I am still not clear on the process, I will admit that.

Ms. Cruz: Okay.

Hearing Officer: Any questions?

Attorney Camacho: Yeah, I have a couple of questions here. Okay, so in essence GPA can't agree on any price until it has been certified that funds are available?

Ms. Cruz: Yes.

Attorney Camacho: You testified that that was the purpose of this PO to see what funds is, if any, were available?

Ms. Cruz: Yes, after I worked with Roger on the cost, we processed it at this dollar amount. The proposals there as far as cost breakdown per month I believe or whatever job had to be done. But if the file had been rejected because of budgetary constraints, we would have to go back to TRC to see where else we could cut.

Attorney Camacho: So in essence if you don't have that amount of funds available or if you can't certify that that amount of funds are available, then we have to continue negotiations, is that right?

Ms. Cruz: Yes, we would have to go back to the table and see where else there can be some cuts made as far as cost on their proposal.

Attorney Camacho: Ok. To your knowledge were any funds certified?

Ms. Cruz: No.

Attorney Camacho: And to your knowledge did the GM approve this?

Ms. Cruz: No

Attorney Camacho: So would it be fair to say that this is more or less a draft purchase order at this point?

Ms. Cruz: I guess you could say that because everything is internal nothing is final.

Attorney Camacho: When you say internal that is just on the GPA side?

Ms. Cruz: Yes. That is still in our process.

Attorney Camacho: So would it be fair to say that if somebody gives us a price and before we can agree to that price, we have to make sure that funds

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

are available?

Ms. Cruz: Yes.

Attorney Camacho: Is this the process that you were going through?

Ms. Cruz: And we have seen other types of procurement not necessarily an RFP but you know where we may have to cut a quantity and not necessarily this particular RFP.

Attorney Camacho: Thank you, no further questions.

Hearing Officer: Mr. Fowler do you have any questions?

Attorney Fowler: What is this \$169,850 for?

Ms. Cruz: I would have to say the whole package – this is – whatever the scope of work asked for, through the negotiations there may be things that were eliminated or changed.

Attorney Fowler: So this \$169,850 is for TRC to perform the scope of work for the fiscal year. For one year?

Ms. Cruz: For the fiscal year. Just until the remaining of this fiscal year.

Attorney Fowler: Until September?

Ms. Cruz: Yes. And then

Attorney Fowler: ... \$169,000 - do you have any idea how much ETI would charge you?

Ms. Cruz: No, sir, I am not in the technical field of emission testing, I would not know.

Attorney Fowler: Does anybody at GPA care whether they can get a much lower price for this service?

Attorney Camacho: I object to this line of questioning, because now he is trying to treat this like a price bid and that is not what this was and further it is not relevant

Hearing Officer: We will allow this but no hostility to the witness please,

**WRITTEN RECORD OF HEARING**

**September 2, 2007 11:16 am**

**JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)**

this is relevant to price analysis under 5008.

Attorney Fowler: Do you know anybody who's considering whether other offerors could do this work cheaper for the remainder of the fiscal year?

Ms. Cruz: Sir, I would not know that.

Attorney Fowler: okay, that's all, thank you.

Hearing Officer: I have no more questions Ms. Cruz, thank you very much.

Hearing Officer: Any other (because of the additional info) are there any other arguments on this issue that anyone would like to present? Mr. Camacho?

Attorney Camacho: Well, just in brief, you know, this April 18 PO just to go on the timeline so that does not become confused. GPA did issue its procurement protest decision on April 12, and ETI did file its original procurement appeal on or about April the 20<sup>th</sup> so at the time that this internal process was going on we were trying to complete negotiations, essentially there was no stay, this is the point I am trying to stress. Thank you.

Attorney Fowler: I think that the critical issue again is that the RFP said that an offeror would not even be considered for an award if they did not have a Guam Business License. And I think the argument of GPA is that they are not yet even considering TRC for award, therefore, TRC does yet need a business license. But you know when they are preparing a Purchase Order for \$169,000 I think maybe they are considered for award and the shell games have to stop. Clearly, they are considering TRC for award, clearly, TRC has no business license and their proposal to award this to TRC should be cancelled and TRC should not be considered for award as required by the RFP.

Hearing Officer: This concludes Part B.

Hearing Officer: Do you want to continue right now? Part C

**C. REMEDIES**

**Opening Statements:**

Attorney Fowler: You mean on remedies, I wouldn't have witnesses on

remedies and basically I would just refer to the procurement regulations governing cancellation prior to award and I don't know what else to add on remedies, Section 9105 speaks to violations of law found prior to award and the remedy is to cancel or advise to it comply with law. We are just asking that any consideration of TRC be cancelled that GPA be forbidden to consider them for award because they have not complied with the RFP.

Hearing Officer: GPA has asked that if they prevail that they include attorney's fees. Do you have any response to that?

Attorney Fowler: Yes, first of all that statute, you know I have never had the opportunity to brief it and that was a recent amendment to the procurement code Section 5425 I think which basically says that a protestor can't get anything but bid preparation cost but the government can get attorney's fees when confronted with a frivolous appeal. I didn't realize that GPA felt this was a frivolous appeal but I think the appeal is far from frivolous. And I don't think the government can get attorney fees when a bidder can't attorney's fees so I think there is a constitutional problem with that statute but that has not been addressed here on Guam and I certainly haven't addressed it here, I didn't recall that GPA actually wanted attorney's fees. I don't remember seeing that but it can only be rewarded for frivolous appeals and this is far from frivolous appeal.

Hearing Officer: Mr. Camacho, as we are going forward, do you have witness in this part?

Attorney Camacho: No, I don't. You know we essentially asked it is a little convoluted but in essence, to us it is a simple case. Quite clearly, the decision that was before the Public Auditor and TRC where ETI's original protest was the April 12, 2007 decision, which we denied their protest. To us I think we have an almost overwhelming case that a business license is not required to submit ... a Guam Business License is not required to submit a proposal nor was a Guam Business License required to become the best qualified offeror which is really all that has taken place here; and we have asked that the Public Auditor essentially sustain GPA's denial of their April 12, 2007 protest decision, now we have also asked for attorney's fees if allowed -- clearly the Public Auditor should look at the record here and should look at the conduct of ETI in this case this is an important procurement, I know it is a balancing of interest but the public interest in this matter clearly fall in favor of the Guam Power Authority. This is an environmental requirement that we have to comply with. ETI filed the protest back in January 30, 2007, GPA denied that protest; they filed yet another protest with the same allegation again essentially on April 6 their

**WRITTEN RECORD OF HEARING**

September 2, 2007 11:16 am

JULY 6, 2007 – Hearing re OPA-PA-07-002 Emission Technologies, Inc. (ETI) – Guam Power Authority (GPA)

intend here is to delay and drag out these proceedings and prevent GPA from essentially getting its continuous emission monitoring system vendor, if they are not going to be it, basically if it can't be me then it can be no one, that essentially is what they are attempting to do here by delaying these proceedings; and we believe that clearly the second protest was very frivolous it did not comply with law and it was adequately and properly denied by the Guam Power Authority and we would like and essentially we believe the appeal is frivolous as well it is just another way that they can delay and drag out this particular procurement and try to increase the Guam Power Authority's either the ratepayers costs in procuring this needed service. So we feel that the adequate penalty for filing a second appeal on the same subject correction on filing a second protest on something that has already been resolve and to file an appeal on that frivolously, I believe deserves an award to GPA on its costs and attorney's fees on this matter and I believe that the record clearly indicates that the Guam Power Authority correctly denied ETI's April 6, 2007 protest and the OPA should sustain GPA's denial of that protest. Thank you.

Hearing Officer: Any response Mr. Fowler?

Attorney Fowler: No

Hearing Officer: That concludes Part C. Thank you all for attending and to the witnesses thank you for being here and as the rule says we will have the decision out no more than 30 days and hopefully soon.

**Witnesses:**

None

**Closing Statements:**

Please see Opening Statements.

Hearing Officer: This concludes Part C. Thank you all for attending and the witnesses thank you for being here and as the rule says we will have the decision out no more than 30 days and hopefully soon.

**Hearing ended at 12:57 pm.**

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