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FILED  
SUPERIOR COURT  
OF GUAM

2007 OCT 10 AM 9:17

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**

**RESPONDENTS RESPONSE AND  
SHOW OF CAUSE  
FOR NONCOMPLIANCE**

Comes now the Respondents, by and through Legal Counsel Robert G.P. Cruz, and pursuant to the Alternative Writ of Mandate, demonstrates why Respondents need not comply with the Alternative Writ of Mandate and why a peremptory writ should not issue. Respondent's Response and Show of Cause for Non-Compliance is based upon this memorandum and any oral argument or evidence that may be introduced at any hearing on this matter.

**MEMORANDUM**

**HISTORY**

In the award of GPA-RFP-07-002, Continuous Emission, Monitoring Systems an appeal of a procurement of Guam Power Authority ("GPA") was filed with the Office of the Public Auditor ("OPA") by Emission Technologies, Inc. ("ETP") on the issue of whether its

competitor TRC Environmental Corporation (“TRC”) was licensed to do business on Guam. OPA –PA-07-002. A hearing was held on July 6, 2007 before the Office of Public Auditor Hearing Officer Therese M. Terlaje, Esq. ETI was represented by Kevin J. Fowler, Esq. GPA was represented by Anthony R. Camacho, Esq. who argued that OPA did not have jurisdiction. The Written Record of the Hearing indicates that TRC Manager Paul Clark gave testimony as a witness, although TRC was not a named party in the appeal..

The Findings of Fact and Recommendations of the Hearing Officer were issued on July 17, 2007. The Decision was issued by the Public Auditor Doris Flores Brooks on August 1, 2007, finding jurisdiction and ordering that TRC be eliminated from consideration for procurement based upon their lack of a Guam business license. A Writ of Mandamus was presented by James M. Maher, Esq., Attorney for Petitioner TRC Environmental Corporation to Superior Court Judge Michael Bordallo on August 23, 2007. TRC argued that OPA lacked jurisdiction. OPA was not represented by legal counsel at the time and Judge Bordallo signed the Alternative Writ which was served on legal counsel for the Office of Public Auditor on October 4, 2007.

### **ARGUMENT**

OPA had jurisdiction to hear this procurement appeal when the matter was raised by ETI in OPA-PA-07-002. OPA has the power to review and determine *de novo* any matter properly submitted to her or him. 2 GAR Section 12103. No prior determination shall be final or conclusive on the Public Auditor. 5 GCA Section 5703. As the decision and record of hearing indicate, the OPA carefully looked at the issue of jurisdiction and made a reasoned determination that it had jurisdiction.

Absent a finding of being arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law, any decision of the Public Auditor regarding the interpretation of the procurement law or regulations shall be entitled to great weight and the benefit of reasonable doubt. 4 GCA Section 5704. We contend that the Superior Court should defer to the judgment of the OPA when it found jurisdiction to hear the appeal. A writ of mandamus must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued on the verified petition of the party beneficially interested 7 GCA Section 34203

An alternative writ of mandamus gives a public official the choice of either doing the act commanded or showing cause why it need not be done. 55 C.J.S. 608. 7 GCA Section 31204. In the instant case, OPA determined that jurisdiction existed. This Court should give deference to the interpretation by OPA of the appropriateness of finding that jurisdiction exists. In her Findings and Recommendations of the Hearing Officer, Attorney Therese Terlaje spells out her analysis of why jurisdiction exists over the appeal despite the arguments presented by the attorney for GPA. See pages 6-9 of the attached Decision of Public Auditor Doris Flores Brooks, which accept the findings and formally address the issue jurisdiction, concluding that OPA in fact did have jurisdiction *de novo*. It seems obvious that GPA's interest was in completing the procurement process by awarding the procurement contract. TRC is buying time to obtain licensure. OPA's original finding of jurisdiction should be honored, and the GPA now be allowed to continue with award of the contract to ETI.

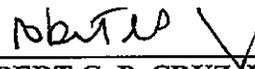
## RELIEF

WHEREFORE, OPA prays for the following relief:

1. That the Court deny the relief requested by Petitioner and dismiss Petitioner's Alternative Writ with prejudice.
2. That with regard to jurisdiction to hear the appeal of ETI, the Court affirm all the findings and conclusions contained in the Findings and Decision issued by the OPA,
- 3 That the Court award OPA costs; and
4. That the Couirt award such other and further relief at law or in equity as may be just and proper.

Respectfully submitted this 10<sup>th</sup> day of October 2007.

Office of the Public Auditor  
DORIS FLORES BROOKS  
CPA, CGFM  
Public Auditor

by   
ROBERT G. P. CRUZ, ESQ.  
Legal Counsel

DATE: 7-17-07

TIME: 2:57pm

BY: [Signature]

F. E. No. OPA-PA 07-002

**PROCUREMENT APPEALS**

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	)	
<b>In the Appeal of</b>	)	<b>Appeal No.: OPA-PA-07-002</b>
	)	
	)	
<b>Emission Technologies, Inc.</b>	)	<b>FINDINGS AND</b>
	)	<b>RECOMMENDATIONS</b>
<b>Appellant</b>	)	<b>OF HEARING OFFICER</b>
	)	
	)	
	)	

**I. INTRODUCTION**

A hearing on this procurement appeal was held on July 6, 2007, before the Public Auditor and Hearing Officer, Therese M. Terlaje. Kevin Fowler represented the Appellant, Emission Technologies, Inc. (hereafter "Appellant" or "ETI"). Anthony Camacho represented the Guam Power Authority (hereafter "GPA"). ETI appealed the April 12, 2007, decision by the Guam Power Authority relative to GPA-RFP-07-002 (Continuous Emission Monitoring Systems) (hereafter RFP).

The Hearing Officer, having considered the Procurement Record, witnesses' testimony, and presented evidence, hereby submits the following findings of fact and recommendations to the Public Auditor pursuant to 5 GCA § 5701.

**II. FINDINGS OF FACTS**

1. GPA first published the GPA-RFP-07-002 (RFP) on or about October 17, 2006.<sup>1</sup> It included two amendments and a Special Reminder.
2. Amendment I dated October 23, 2006,<sup>2</sup> changed the closing date to November 3, 2006; and Amendment II dated October 26, 2006,<sup>3</sup> changed the closing date to November 17, 2006 plus announced the pre-bid conference to be held on November 8, 2006 with a site walk-thru. Except for those addressed by the two amendments, there were no written questions submitted to GPA by potential offerors regarding the RFP and no official responses by GPA.

<sup>1</sup> See Procurement Record, Front Section for the complete RFP; also see ETI 1<sup>st</sup> Protest Section, Memo from Melissa J.S. Cruz (Buyer II) to Pacific Daily News Classified, Attn: Eve. The RFP was introduced at hearing by Guam Power Authority as Exhibit A.

<sup>2</sup> See Procurement Record, front section.

<sup>3</sup> Id.

3. The following provisions of the RFP are relevant to this appeal:

**(a) Section 2.4 Awards or Rejection of Proposals<sup>4</sup>**

... It is the policy of the Guam Power Authority to award proposals to offerors duly authorized and licensed to conduct business in Guam.

**(b) Section 2.16 LICENSING<sup>5</sup>**

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. Specific information on licenses may be obtained from the Director of Revenue and Taxation.

**(c) GPA Special Reminder to Prospective Individuals/  
Firms<sup>6</sup>**

[X] OTHERS: Business License (applicable to RFP) and additional requirements must be submitted at the time of RFP Closing.

4. GPA sent a letter dated January 22, 2007 to ETI informing ETI of TRC's selection as the "best offeror to provide the Annual Emission Testing for GPA Power Generating Units."<sup>7</sup>

5. ETI sent a protest letter dated January 30, 2007<sup>8</sup> to GPA protesting the selection of TRC as the best offeror. As the basis of its protest, ETI listed the evaluation criteria and how ETI's expertise fit that criteria, and suggested that the evaluation results were biased and should be re-done.

6. GPA on January 31, 2007 executed a "Stay of Procurement" on the RFP as a result of the protest letter "until such concerns are resolved."<sup>9</sup>

7. GPA denied the January 30 protest in a letter to ETI dated March 26, 2007:

(a) GPA found ETI's protest allegation that the evaluation review committee's results were biased in favor of TRC Environmental (TRC) had no merit; that GPA did not reject

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<sup>4</sup> Id. at RFP, Page 7 of 42, Section 2.4.

<sup>5</sup> See Procurement Record, RFP, Page 11 of 42, Section 2.16 Licensing.

<sup>6</sup> See Procurement Record, RFP, Page 1 of 42.

<sup>7</sup> See Procurement Record, ETI 1<sup>st</sup> Protest Section; also see Appellee Guam Power Authority's Exhibit List as Exhibit B.

<sup>8</sup> Id.

<sup>9</sup> See Procurement Record, 1<sup>st</sup> Stay Section.

ETI's Proposal due to deficiency; and that the solicitation complied with Guam Procurement Law and Regulations, specifically 5 G.C.A. §5216(e) and 2 G.A.R., Div. 4, Chap. 3, §3114(f)(2), because the Evaluation Review Committee correctly evaluated and graded the content of the proposals, to include ETI's proposal, based on all of the evaluation criteria set forth in the RFP.

(b) GPA granted ETI's request to inspect the Evaluation Review Committee's Evaluations pursuant to 5 GCA §5249 and §5251 because it is a record of a meeting concerning this procurement action, ...

(c) GPA denied ETI's request to review TRC 's Proposal because a purchasing agency must not disclose any information contained in the Offeror's proposals until after award of the contract is made, 2 GAR, Division 4, Chapter 3 §3114(h) and (i)(2).

(d) The letter informed ETI that it had the right 'to administrative or judicial review' of this decision.

8. GPA faxed a letter on March 28, 2007 to other offerors (TRC, Otte, and Co-Tech) and an informational copy to the OPA to advise all that the Stay of Procurement had been lifted for ETI's protest letter of January 30, 2007.

9. ETI responded to GPA's denial of its protest with a letter dated April 6, 2007,<sup>10</sup>officially requesting for an "administrative review of this award." Specifically, ETI raised alleged bias against ETI in the evaluation process, acknowledged not being able to review TRC's proposal due to procurement laws; and requested the following:

...we do request a written confirmation stating TRC has complied with all Government of Guam laws regarding business and contractor licenses. ETI has continuously maintained these licenses as required from the time we started providing theses services to you. Please note it can take several months to legally acquire a CEMS contractor's license.<sup>11</sup>

10. GPA hand delivered an informational copy of ETI's April 6 letter to the OPA on April 11, 2007.

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<sup>10</sup> See Procurement Record, ETI 2<sup>nd</sup> Protest Section; also see, Appellee Guam Power Authority's Exhibit List, Exhibit E.

<sup>11</sup> Id.

11. On April 10, 2007 GPA wrote to ETI advising that it had executed a stay of procurement as a result of ETI's April 6 letter, and until such time as the concerns were resolved, that they were reviewing the Request for Proposals submitted and would formally advise of the outcome.<sup>12</sup>

12. GPA's Reply to the April 6 letter was dated April 12, 2007,<sup>13</sup> and faxed to ETI on April 13, 2007<sup>14</sup>. GPA stated, in pertinent part, that

1. GPA does not have the jurisdiction to decide a procurement protest appeal and such appeal must be filed with Guam's Public Auditor in accordance with the requirements and procedures set forth in 2 G.A.R., Div. 4, Chap. 12, §12101 *et seq.*

2. ETI's allegations that the evaluation process was biased in favor of TRC Environmental, which is the same allegation it made in its first protest, and its new allegation that GPA appears to be using the Procurement Process to improperly end their existing contract, are both hereby denied because such allegations are now untimely, further ETI's new allegation has no merit.

3. ETI's request for a written confirmation stating that TRC Environmental has complied with all Government of Guam laws regarding business and contractor licenses is hereby denied because GPA is not required to provide such documents, and if GPA had them, such documents would be part of TRC Environmental's proposal which GPA must not publicly disclose, pursuant to 2 G.A.R. Div. 4, Chap. 3, §3114(h) and (i)(2), unless it awards the contract to TRC Environmental.<sup>15</sup>

13. GPA by letter dated April 13, 2007<sup>16</sup> to interested parties (TRC, Otte, and CoTech) informed all that the Stay of Procurement in response to ETI protest letter of April 6, 2007, had been lifted.

14. On April 18, 2007, Rose Cruz wrote in her Purchase Order Summary Log for Vendor TRC:

PO cost @ \$169,850.00. PO for Jess review prior to budget.<sup>17</sup>

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<sup>12</sup> See Procurement Record, 2<sup>nd</sup> Stay Section.

<sup>13</sup> See Procurement Record, 2<sup>nd</sup> Protest Reply GPA to ETI; also see Appellee Guam Power Authority's Exhibit List, Exhibit G.

<sup>14</sup> See Procurement Record, 2<sup>nd</sup> Protest Reply GPA to ETI; also see Appellee Guam Power Authority's Exhibit List, Exhibit H.

<sup>15</sup> See Procurement Record, 2<sup>d</sup> Protest Reply (GPA to ETI).

<sup>16</sup> See Procurement Record, 2<sup>nd</sup> Lift Section.

<sup>17</sup> See Procurement Record, ETI 1<sup>st</sup> Protest Section – Purchase Order Summary Log and Comments on Agency Report, page 6 last paragraph).

Testimony at trial evidenced that GPA had obtained TRC's best and final offer, and the draft PO was based on that offer.

15. ETI formally appealed the April 12 decision to the Public Auditor on April 20, 2007. Among other claims, ETI states the following in its April 19, 2007, letter to the Public Auditor, included in the Notice of Appeal:

ETI goes to great lengths to demonstrate compliance with all Guam Laws such as business license, contractors license, and GRT, therefore ETI appreciates GPA including Section 1.0: INSTRUCTIONS TO RESPONDENTS, SubSection 2.6 (*sic*) LICENSING, which states 'Offers are reminded that GPA will not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law.

ETI conducted field checks at Rev and Tax and determined as of April 10, 2007, or any time prior, that TRC has not maintained a Guam Business License as was required to even be determined responsive to GPA-RFP-07-002 as per Section 1, Part 2.6 (*sic*) of the mentioned RFP.<sup>18</sup>

16. GPA by letter to ETI dated April 24, 2007<sup>19</sup> informed ETI of the Stay of Procurement in effect in response to ETI's Notice of Appeal of April 20, 2007.

17. On May 1, 2007, Attorney Fowler representing ETI submitted an Amended Notice of Appeal<sup>20</sup> (hereafter "Amended Appeal") which focused on the licensure issue only, and provided:

- (a) TRC is not licensed to conduct business on Guam. The RFP required that offerors to be licensed under Guam law and that GPA would 'not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law.' Additionally, 5 G.C.A. §5008 requires that procurements be made from companies licensed to conduct business on Guam.
- (b) ETI requested that the Office of Public Auditor rule that GPA cannot consider TRC for award because it was not licensed to conduct business on Guam.

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<sup>18</sup> See Notice of Appeal, April 20, 2007, Attachment - ETI letter to the Public Auditor, April 19, 2007, page 2.

<sup>19</sup> Please note that this GPA letter to ETI dated April 24, 2007 was not included in the Procurement Record but can be found in the Guam Power Authority's Confirmation of Procurement Record and Proof of Notification of Interested Parties submitted by Anthony R. Camacho, Counsel for GPA on May 15, 2007.

<sup>20</sup> See Amended Notice of Appeal dated May 1, 2007.

(c) ETI attached to its appeal<sup>21</sup> a May 1, 2007 Dept of Rev and Tax Certification which stated, 'This is to certify that this office has no records of any entity registered under TRC Environmental Corporation.'<sup>22</sup>

18. GPA received the Amended Notice of Appeal on May 3, 2007 and GPA claimed in its Agency Report that it did not have time to answer all the new allegations before turning in the Agency Report on May 4, 2007.<sup>23</sup>

19. GPA's Agency Report neither admitted nor denied whether TRC had a Guam Business License. GPA stated that GPA-RFP-07-002 does not require offerors to obtain a Guam Business License prior to submission of its proposal.

20. ETI was a Guam-licensed foreign corporation that was qualified as a local business entitled to a preference under 5 GCA §5008.<sup>24</sup>

21. As of the July 6 hearing, TRC had an application for a Guam Business License pending with the Department of Revenue and Taxation.<sup>25</sup>

### III. ANALYSIS AND RECOMMENDATIONS

#### A. The Public Auditor has jurisdiction over this appeal pursuant to Guam Procurement Law.

The Public Auditor has *de novo* jurisdiction over appeals of decisions relative to protested solicitation or awards pursuant to §5425 and Article 12 of the Guam Procurement Law, found in Chapter 5 of Title 5, Guam Code Annotated. Subsection (e) of §5425 describes jurisdiction over appeals of protest decisions relative to solicitation or awards:

(e) Appeal. A decision under Subsection (c) of this Section including a decision thereunder regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.

It is undisputed that ETI filed a timely appeal with the Public Auditor of an April 12 decision by GPA responding to issues raised by ETI in its April 6 letter. What is disputed, however, is (1) whether issues in the April 6 letter were previously addressed in the March 28 protest decision and thus the time for their appeal expired; (2) whether issues in the April 6 letter were untimely

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<sup>21</sup> See *id.*

<sup>22</sup> *Id.*, Page 4.

<sup>23</sup> See Appellee Guam Power Authority's Agency Report, page 9, lines 7 to 10.

<sup>24</sup> Testimony of Robert Wilson, President of ETI.

<sup>25</sup> Testimony of Paul Clark, Manager, Northwest Air Measurements Office, TRC.

because more than fourteen (14) days had passed since ETI knew or should have known of GPA's selection of TRC; and (3) whether ETI's subsequent Amended Appeal is allowed, having been filed three days after the deadline for filing an appeal, when ETI obtained counsel.

Crucial to this discussion is GPA's March 28 denial of ETI's first protest, wherein GPA informed ETI that it had a right to "administrative and judicial review of this decision." While GPA's decision did not mention an appeal to the public auditor or cite any section of the procurement law relative to appeals, its statement regarding administrative review accurately mirrored 5 GCA §5425(c). Unrepresented by counsel, ETI requested by April 6 letter to GPA "an administrative review of this award" instead of filing an appeal with OPA.<sup>26</sup>

GPA interpreted the request for administrative review as a new protest. GPA bases its finding that the April 6 ETI letter was a new protest in the second paragraph of the letter, which begins "[t]he basis of our protest is the alleged bias . . ." and in the subject line of the letter which reads "Letter of Protest to GPA-RFP-07-002. Continuous Emissions Monitoring Systems." GPA denied ETI's request on April 12 for the following reasons:

1. It should have been filed as an appeal of the March 28 denial with the Public Auditor in accordance with 2 GAR §12101, *et seq.*
2. Allegations which arose from selection of TRC as 'best offeror' were untimely because 14 days had passed in which to bring a protest pursuant to 5 GCA §5425(a) and at least one allegation was without merit.
3. GPA was not required to provide written confirmation regarding TRC's compliance with Guam licenses laws, and TRC's proposal was not subject to public inspection.

The evidence supports that it was timely for ETI to raise the issue of licensure, even as a new protest issue, in its April 6 request for administrative review, because it could not have known without reviewing TRC's proposal whether licensing was an issue. In fact, due to GPA's non-responsiveness on the issue, certification from the Department of Revenue and Taxation was the only way for ETI to determine the fact of the matter, and that was obtained on May 1, 2007.

ETI's counsel, in its pleadings, deemed the request for administrative review as a timely request for reconsideration, under 2 GAR §9101(h), of the March 28 decision and January protest. This is supported by the letter's first two sentences:

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<sup>26</sup> While ignorance of the law is no excuse, it is notable that the request for administrative review technically was received by OPA on April 11, within 15 days of the March 28 protest decision. Notwithstanding its form, GPA knew of the basis of the appeal and was not prejudiced by the form of the submission. The April 6 letter was clearly intended to invoke a review of the original (March 28) protest decision and the license issue was specifically raised in that request for review. Had it been filed with OPA directly, it would have been clearly received as an appeal of the March 28 protest decision.

ETI has received your letter dated March 28, 2007, denying our protest to the CEMS RFP-07-002. This will now serve as ETI's official request for an administrative review of this award.

When read together with these two sentences, the several references cited by GPA to the term "protest" that GPA cites are reasonably interpreted as references to the underlying protest and decision for which review or reconsideration is requested based on information not previously considered.

The request for administrative review was made within 15 days of the protest decision and was thus timely as a request for reconsideration pursuant to 2 GAR §9101(h). GPA, in agreeing to examine the procurement anew without immediately referring the parties to the Public Auditor, and in announcing a stay of the procurement pending review, gave the appearance of having accepted this request for reconsideration. In accordance with the rules relative to reconsideration, ETI posed the query as to TRC's compliance with Guam Business License requirements in its request as a detailed statement of the factual and legal grounds upon which reversal or modification was deemed warranted, and thus specified the error of law made or information not previously considered.

Regardless of whether deemed a protest or reconsideration, the license issue was first presented in the April 6 letter, and was not previously addressed in the March 28 decision, and was thus timely on appeal of the subsequent April 12 decision.

Further, GPA's decision to "deny a written confirmation that TRC has complied with all Government of Guam laws regarding business and contractor licenses" does not reasonably negate the issues brought to its attention, and does not affect the timeliness of unknown facts. Per GPA, only its denial of the information is appealable and there is no decision to appeal regarding the requirement for a license. However, GPA, in refusing to confirm the issues brought to its attention, made a decision that a Guam Business License was not required, or that TRC had complied with Guam law and the requirements of the RFP, including a Guam Business License.

Accordingly, GPA's April 12, 2007, decision to deny ETI's request for written confirmation regarding TRC's business license is properly before the Public Auditor, on appeal of the April 12 decision, as a decision by GPA that a Guam Business License was not required up to that point in the procurement.

The Amended Appeal reduced the issues on appeal to the sole issue of business licensure. This was consistent with the grounds in the original appeal and specifically detailed in page 2 of the April 19 letter from ETI attached to the appeal:

ETI goes to great lengths to demonstrate compliance with all Guam Laws such as business license, contractors license, and GRT, therefore ETI appreciates GPA including Section 1.0: INSTRUCTIONS TO RESPONDENTS,

SubSection 2.6 (*sic*) LICENSING, which states ‘Offers are reminded that GPA will not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law.

ETI conducted field checks at Rev and Tax and determined as of April 10, 2007, or any time prior, that TRC has not maintained a Guam Business License as was required to even be determined responsive to GPA-RFP-07-002 as per Section 1, Part 2.6 (*sic*) of the mentioned RFP.

As a result of the consistency between the documents, the Amended Appeal is a valid attempt after ETI obtained counsel to significantly narrow the issues on appeal, and GPA had prior notice of the licensure issue raised in the Amended Appeal. Accordingly, there was not prejudice to GPA in the narrowing of the issues it already was tasked to address and GPA had sufficient opportunity to address these issues over the course of the proceedings as evidenced by the Agency Report, the Rebuttal by GPA and the testimony and argument presented at the hearing. The Amended Appeal is therefor allowable pursuant to 2 GAR §12104(b)(8) as a clarification of the original appeal.

In light of the narrowing of the issues by the Amended Appeal and ETI’s lack of opportunity to review TRC’s proposal, the timeliness of any other issues raised on appeal, or whether they were previously addressed, are not further discussed here.

**B. GPA could not consider TRC for award of the RFP due to TRC’s lack of a Guam Business License.**

**1. The face of the RFP supports a finding that a *Guam Business License* was required prior to consideration for award, and upon submittal of the proposal.**

The RFP warned that GPA would “not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law. Specific information on licenses may be obtained from the Director of Revenue and Taxation.” See, Request for Proposal No. GPA-RFP-07-002, General Terms and Conditions, § 2.16. The RFP also warned that “[i]t is the policy of the Guam Power Authority to award proposals to offerors duly authorized and licensed to conduct business in Guam.” See, Request for Proposal No. GPA-RFP-07-002, General Terms and Conditions, §2.4.

The record is clear that upon submittal of its proposal and through May 1, 2007, TRC was not licensed to conduct business on Guam as attested by the Certification issued by the Department of Revenue and Taxation (hereinafter DRT) on May 1, 2007. See, attachment to ETI’s Amended Notice of Appeal. GPA submitted no evidence to counter the certification by DRT as to TRC’s lack of a Guam Business License, except for Paul Clark’s testimony that TRC had applied for a Guam Business License after being selected as best offeror.

Selection of TRC as best offeror, and negotiation with TRC to the point of obtaining TRC's best and final offer reasonably constitute "consideration for award." Based on the foregoing, consideration of TRC for award despite its lack of a Guam Business License was inconsistent with the terms of the RFP.

While 2 GAR §3115(e)(b) of the Guam Procurement Law allows the agency to accept corrections to a proposal "unless the solicitation states otherwise," the solicitation in this case does state otherwise. Specifically, the *Special Reminder to Prospective Individuals/Firms* was issued by GPA as page 1 of 42 of the RFP packet. This special reminder provided that the "Business License (applicable to RFP) and additional requirements must be submitted at the time of RFP Closing."

Accordingly, the issue here is what type of business license was "applicable to RFP" and thus required to be "submitted at the time of RFP Closing." GPA argued that a business license from any jurisdiction would suffice to meet this requirement, and ETI argued that only a Guam Business License would meet the requirement. Because, as discussed above, §2.16 and §2.4 of the RFP require a Guam Business License prior to award, a Guam Business License is at least one of the licenses applicable to the RFP, and thus its submission was required upon RFP closing in accordance with the special reminder provisions to the RFP.

Based on the above, the selection of TRC as the most qualified offeror despite the absence of a Guam Business License at time of submittal of its proposal is inconsistent with GPA's RFP. Further, the requirements of 5 GCA §5216(e) and 2 GAR Div. 4, Chap. 3, §3114(f)(2) that evaluation be done based on factors as listed in the RFP, do not prohibit GPA from assessing qualifications or the responsiveness of an offeror to license requirements prior to evaluation of those factors. In fact, GPA was required by 2 GAR §3114(j) to select a best offeror only after validation of qualifications, evaluation, and discussion.

## **2. Guam Procurement Law mandates a preference for local business in this procurement.**

This procurement is subject to 5 GCA §5008,<sup>27</sup> which mandates that supplies and services be procured from qualified businesses licensed to do business on Guam and that maintain an office or other facility on Guam.

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<sup>27</sup> 5 GCA §5008 provides:

§5008. Policy In Favor of Local Procurement.

All procurement of supplies and services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

- (a) a licensed bonafide manufacturing business that adds at least twenty-five percent of the value of an item, not to include administrative overhead, using workers who are U. S. Citizens or lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United State[s] to work, based on their former citizenship in the Trust Territory of the Pacific Islands; or

Purchase from an off-island vendor is inconsistent with §5008 unless the following exception applies:

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 cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference. 5 GCA §5008.

The evidence presented at the hearing indicates that ETI is an eligible local business pursuant to 5 GCA §5008. The evidence also indicates that at the time of submittal of its proposal and up to the date of the hearing on this matter, TRC was not an eligible local business due to its lack of a Guam Business License.

While GPA may have sought increased competition from competitors who are not licensed on Guam, this policy conflicts with the stated GPA policy in Sections 2.4 and 2.16 in the RFP, and the policy of the Government of Guam codified in 5 GCA §5008.

GPA submitted no evidence of the required cost analysis or determination that this procurement fit the exception contained in §5008, which would allow it to procure from off-island. GPA

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(b) a business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the items of supplies to be procured; or

(c) a business that has a bonafide retail or wholesale business location that regularly carries an inventory on Guam of a value of at least one half of the value of the bid or One Hundred Fifty Thousand Dollars (\$150,000) whichever is less, of supplies and items of a similar nature to those being sought; or

(d) a service business actually in business, doing a substantial portion of its business on Guam, and hiring at least 95% U. S. Citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

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 cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.

contends that this protest was brought prior to the conclusion of cost negotiations with the offeror, and that until final negotiations of costs have been concluded with the offeror, it is impossible and premature for GPA and the Public Auditor to address whether this potential award fits into the exception from the local procurement preference contained in 5 GCA §5008.

However, GPA's procurement record, and testimony at the hearing indicate that a best and final offer had been obtained from TRC, and a Purchase Order drafted in the amount of \$169,850 for the remainder of fiscal year 2007 based on that best and final offer. See, April 18, 2007, entry in the Purchase Order Summary for TRC, Procurement Record, ETI 1<sup>st</sup> Protest Section. See also, testimony of Rose Cruz, Buyer II, GPA Procurement Section. Said actions indicate that an award was pending and likely would have been approved without further negotiation if not for the stay resulting from the appeal.

Award to an off-island vendor without a comparison to the price or availability of local vendors is inconsistent with 5 GCA §5008. Without the required cost analysis, the record does not support an award to TRC.

**FOR THE FOREGOING REASONS**, the Hearing Officer recommends that the Public Auditor accepts jurisdiction of this appeal; that the Public Auditor issue a decision consistent with or incorporate the findings herein; that the Public Auditor informs GPA that in the absence of a Guam business license, consideration of TRC for award is not consistent with Guam law and the GPA-RFP-07-002; and that the Public Auditor direct GPA to cease consideration of TRC for award of the RFP and proceed with the procurement in accordance with 5 GCA §5451, which provides:

**§5451. Remedies Prior to Award.**

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

Dated this 17<sup>th</sup> day of July 2007.



Therese M. Terlaje  
Hearing Officer  
Procurement Appeals  
Office of the Public Auditor



OFFICE OF THE PUBLIC AUDITOR

**PROCUREMENT APPEALS**

**In the Appeal of**

**Appeal No.: OPA-PA-07-002**

**Emission Technologies, Inc.**

**DECISION**

**Appellant**

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**I. INTRODUCTON**

This is a Decision by the Public Auditor on an appeal filed on April 20, 2007, and an Amended Appeal (hereafter "Amended Appeal") filed on May 1, 2007, by Emission Technologies, Inc. (hereafter "Appellant" or "ETI") regarding Guam Power Authority's (hereafter "GPA") letter of April 12, 2007 to ETI, denying ETI's protest of April 6, 2007 concerning GPA-RFP-07-002 (Continuous Emission Monitoring Systems) (hereafter RFP).

The Public Auditor determines that in the absence of a Guam Business License, GPA's consideration of TRC for award is not consistent with Guam law and the RFP; and the Public Auditor further directs GPA to cease consideration of TRC for award of the RFP and proceed with the procurement in accordance with 5 GCA § 5451.

**II. FINDINGS OF FACTS**

The Public Auditor in reaching this Decision has considered and incorporates herein the Findings of the Hearing Officer, issued on July 17, 2007, except where inconsistent herewith. In addition, this Decision is based on the Procurement Record and all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the July 6, 2007, hearing on this matter.

1. GPA first published the GPA-RFP-07-002 (RFP) on or about October 17, 2006.<sup>1</sup> It included two amendments and a Special Reminder.

2. Amendment I dated October 23, 2006,<sup>2</sup> changed the closing date to November 3, 2006; and Amendment II dated October 26, 2006,<sup>3</sup> changed the closing date to November 17, 2006 plus announced the pre-bid conference to be held on November 8, 2006 with a site walk-thru. Except for those addressed by the two amendments, there were no written questions submitted to GPA by potential offerors regarding the RFP and no official responses by GPA.

3. The following provisions of the RFP are relevant to this appeal:

**(a) Section 2.4 Awards or Rejection of Proposals<sup>4</sup>**

... It is the policy of the Guam Power Authority to award proposals to offerors duly authorized and licensed to conduct business in Guam.

**(b) Section 2.16 LICENSING<sup>5</sup>**

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. Specific information on licenses may be obtained from the Director of Revenue and Taxation.

**(c) GPA Special Reminder to Prospective Individuals/  
Firms<sup>6</sup>**

[X] OTHERS: Business License (applicable to RFP) and additional requirements must be submitted at the time of RFP Closing.

4. GPA sent a letter dated January 22, 2007 to ETI informing ETI of TRC's selection as the "best offeror to provide the Annual Emission Testing for GPA Power Generating Units."<sup>7</sup>

5. ETI sent a protest letter dated January 30, 2007<sup>8</sup> to GPA protesting the selection of TRC as the best offeror. As the basis of its protest, ETI listed the evaluation criteria and how ETI's

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<sup>1</sup> See Procurement Record, Front Section for the complete RFP; also see ETI 1<sup>st</sup> Protest Section, Memo from Melissa J.S. Cruz (Buyer II) to Pacific Daily News Classified, Attn: Eve. The RFP was introduced at hearing by Guam Power Authority as Exhibit A.

<sup>2</sup> See Procurement Record, front section.

<sup>3</sup> Id.

<sup>4</sup> Id. at RFP, Page 7 of 42, Section 2.4.

<sup>5</sup> See Procurement Record, RFP, Page 11 of 42, Section 2.16 Licensing.

<sup>6</sup> See Procurement Record, RFP, Page 1 of 42.

<sup>7</sup> See Procurement Record, ETI 1<sup>st</sup> Protest Section; also see Appellee Guam Power Authority's Exhibit List as Exhibit B.

expertise fit that criteria, and suggested that the evaluation results were biased and should be re-done.

6. GPA on January 31, 2007 executed a "Stay of Procurement" on the RFP as a result of the protest letter "until such concerns are resolved."<sup>9</sup>

7. GPA denied the January 30 protest in a letter to ETI dated March 26, 2007:

(a) GPA found ETI's protest allegation that the evaluation review committee's results were biased in favor of TRC Environmental (TRC) had no merit; that GPA did not reject ETI's Proposal due to deficiency; and that the solicitation complied with Guam Procurement Law and Regulations, specifically 5 G.C.A. § 5216(e) and 2 G.A.R., Div. 4, Chap. 3, § 3114(f)(2), because the Evaluation Review Committee correctly evaluated and graded the content of the proposals, to include ETI's proposal, based on all of the evaluation criteria set forth in the RFP.

(b) GPA granted ETI's request to inspect the Evaluation Review Committee's Evaluations pursuant to 5 GCA § 5249 and § 5251 because it is a record of a meeting concerning this procurement action, ...

(c) GPA denied ETI's request to review TRC's Proposal because a purchasing agency must not disclose any information contained in the Offeror's proposals until after award of the contract is made, 2 GAR, Division 4, Chapter 3 § 3114(h) and (i)(2).

(d) The letter informed ETI that it had the right 'to administrative or judicial review' of this decision.

8. GPA faxed a letter on March 28, 2007 to other offerors (TRC, Otte, and Co-Tech) and an informational copy to the OPA to advise all that the Stay of Procurement had been lifted for ETI's protest letter of January 30, 2007.

9. ETI responded to GPA's denial of its protest with a letter dated April 6, 2007,<sup>10</sup> officially requesting for an "administrative review of this award." Specifically, ETI raised alleged bias against ETI in the evaluation process, acknowledged not being able to review TRC's proposal due to procurement laws; and requested the following:

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<sup>8</sup> Id.

<sup>9</sup> See Procurement Record, 1<sup>st</sup> Stay Section.

<sup>10</sup> See Procurement Record, ETI 2<sup>nd</sup> Protest Section; also see, Appellee Guam Power Authority's Exhibit List, Exhibit E.

...we do request a written confirmation stating TRC has complied with all Government of Guam laws regarding business and contractor licenses. ETI has continuously maintained these licenses as required from the time we started providing these services to you. Please note it can take several months to legally acquire a CEMS contractor's license.<sup>11</sup>

10. GPA hand delivered an informational copy of ETI's April 6 letter to the OPA on April 11, 2007.

11. On April 10, 2007 GPA wrote to ETI advising that it had executed a stay of procurement as a result of ETI's April 6 letter, and until such time as the concerns were resolved, that they were reviewing the Request for Proposals submitted and would formally advise of the outcome.<sup>12</sup>

12. GPA's Reply to the April 6 letter was dated April 12, 2007,<sup>13</sup> and faxed to ETI on April 13, 2007.<sup>14</sup> GPA stated, in pertinent part, that

1. GPA does not have the jurisdiction to decide a procurement protest appeal and such appeal must be filed with Guam's Public Auditor in accordance with the requirements and procedures set forth in 2 G.A.R., Div. 4, Chap. 12, § 12101 *et seq.*

2. ETI's allegations that the evaluation process was biased in favor of TRC Environmental, which is the same allegation it made in its first protest, and its new allegation that GPA appears to be using the Procurement Process to improperly end their existing contract, are both hereby denied because such allegations are now untimely, further ETI's new allegation has no merit.

3. ETI's request for a written confirmation stating that TRC Environmental has complied with all Government of Guam laws regarding business and contractor licenses is hereby denied because GPA is not required to provide such documents, and if GPA had them, such documents would be part of TRC Environmental's proposal which GPA must not publicly disclose, pursuant to 2 G.A.R. Div. 4, Chap. 3,

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<sup>11</sup> Id.

<sup>12</sup> See Procurement Record, 2<sup>nd</sup> Stay Section.

<sup>13</sup> See Procurement Record, 2<sup>nd</sup> Protest Reply GPA to ETI; also see Appellee Guam Power Authority's Exhibit List, Exhibit G.

<sup>14</sup> See Procurement Record, 2<sup>nd</sup> Protest Reply GPA to ETI; also see Appellee Guam Power Authority's Exhibit List, Exhibit H.

§ 3114(h) and (i)(2), unless it awards the contract to TRC Environmental.<sup>15</sup>

13. GPA by letter dated April 13, 2007<sup>16</sup> to interested parties (TRC, Otte, and CoTech) informed all that the Stay of Procurement in response to ETI protest letter of April 6 had been lifted.

14. On April 18, 2007, Rose Cruz wrote in her Purchase Order Summary Log for Vendor TRC:

PO cost @ \$169,850.00. PO for Jess review prior to budget.<sup>17</sup>

Testimony at trial evidenced that GPA had obtained TRC's best and final offer, and the draft PO was based on that offer.

15. ETI formally appealed the April 12 decision to the Public Auditor on April 20, 2007. Among other claims, ETI states the following in its April 19, 2007, letter to the Public Auditor, included in the Notice of Appeal:

ETI goes to great lengths to demonstrate compliance with all Guam Laws such as business license, contractors license, and GRT, therefore ETI appreciates GPA including Section 1.0: INSTRUCTIONS TO RESPONDENTS, SubSection 2.6 (*sic*) LICENSING, which states 'Offers are reminded that GPA will not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law.

ETI conducted field checks at Rev and Tax and determined as of April 10, 2007, or any time prior, that TRC has not maintained a Guam Business License as was required to even be determined responsive to GPA-RFP-07-002 as per Section 1, Part 2.6 (*sic*) of the mentioned RFP.<sup>18</sup>

16. GPA by letter to ETI dated April 24, 2007<sup>19</sup> informed ETI of the Stay of Procurement in effect in response to ETI's Notice of Appeal of April 20, 2007.

17. On May 1, 2007, Attorney Fowler representing ETI submitted an Amended Notice of Appeal<sup>20</sup> (hereafter "Amended Appeal") which focused on the licensure issue only, and provided:

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<sup>15</sup> See Procurement Record, 2d Protest Reply (GPA to ETI).

<sup>16</sup> See Procurement Record, 2<sup>nd</sup> Lift Section.

<sup>17</sup> See Procurement Record, ETI 1<sup>st</sup> Protest Section – Purchase Order Summary Log and Comments on Agency Report, page 6 last paragraph).

<sup>18</sup> See Notice of Appeal, April 20, 2007, Attachment - ETI letter to the Public Auditor, April 19, 2007, page 2.

<sup>19</sup> Please note that this GPA letter to ETI dated April 24, 2007 was not included in the Procurement Record but can be found in the Guam Power Authority's Confirmation of Procurement Record and Proof of Notification of Interested Parties submitted by Anthony R. Camacho, Counsel for GPA on May 15, 2007.

<sup>20</sup> See Amended Notice of Appeal dated May 1, 2007.

- (a) TRC is not licensed to conduct business on Guam. The RFP required that offerors to be licensed under Guam law and that GPA would 'not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law.' Additionally, 5 G.C.A. § 5008 requires that procurements be made from companies licensed to conduct business on Guam.
- (b) ETI requested that the Office of Public Auditor rule that GPA cannot consider TRC for award because it was not licensed to conduct business on Guam.
- (c) ETI attached to its appeal<sup>21</sup> a May 1, 2007 Dept of Rev and Tax Certification which stated, 'This is to certify that this office has no records of any entity registered under TRC Environmental Corporation.'<sup>22</sup>

18. GPA received the Amended Notice of Appeal on May 3, 2007 and GPA claimed in its Agency Report that it did not have time to answer all the new allegations before turning in the Agency Report on May 4, 2007.<sup>23</sup>

19. GPA's Agency Report neither admitted nor denied whether TRC had a Guam Business License. GPA stated that GPA-RFP-07-002 does not require offerors to obtain a Guam Business License prior to submission of its proposal.

20. ETI was a Guam-licensed foreign corporation that was qualified as a local business entitled to a preference under 5 GCA § 5008.<sup>24</sup>

21. As of the July 6 hearing, TRC had an application for a Guam Business License pending with the Department of Revenue and Taxation.<sup>25</sup>

### III. ANALYSIS

#### A. The Public Auditor has jurisdiction over this appeal pursuant to Guam Procurement Law.

The Public Auditor has *de novo* jurisdiction over appeals of decisions relative to protested solicitation or awards pursuant to § 5425 and Article 12 of the Guam Procurement Law, found in

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<sup>21</sup> See *id.*

<sup>22</sup> *Id.*, Page 4.

<sup>23</sup> See Appellee Guam Power Authority's Agency Report, page 9, lines 7 to 10.

<sup>24</sup> Testimony of Robert Wilson, President of ETI.

<sup>25</sup> Testimony of Paul Clark, Manager, Northwest Air Measurements Office, TRC.

Chapter 5 of Title 5, Guam Code Annotated. Subsection (e) of § 5425 describes jurisdiction over appeals of protest decisions relative to solicitation or awards:

(e) Appeal. A decision under Subsection (c) of this Section including a decision thereunder regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.

It is undisputed that ETI filed a timely appeal with the Public Auditor of an April 12 decision by GPA responding to issues raised by ETI in its April 6 letter. What is disputed, however, is (1) whether issues in the April 6 letter were previously addressed in the March 28 protest decision and thus the time for their appeal expired; (2) whether issues in the April 6 letter were untimely because more than fourteen (14) days had passed since ETI knew or should have known of GPA's selection of TRC; and (3) whether ETI's subsequent Amended Appeal is allowed, having been filed three days after the deadline for filing an appeal, when ETI obtained counsel.

Crucial to this discussion is GPA's March 28 denial of ETI's first protest, wherein GPA informed ETI that it had a right to "administrative and judicial review of this decision." While GPA's decision did not mention an appeal to the Public Auditor or cite any section of the procurement law relative to appeals, its statement regarding administrative review accurately mirrored 5 GCA § 5425(c). Unrepresented by counsel, ETI requested by April 6 letter to GPA "an administrative review of this award" instead of filing an appeal with OPA.<sup>26</sup>

GPA interpreted the request for administrative review as a new protest. GPA bases its finding that the April 6 ETI letter was a new protest in the second paragraph of the letter, which begins "[t]he basis of our protest is the alleged bias . . ." and in the subject line of the letter which reads "Letter of Protest to GPA-RFP-07-002. Continuous Emissions Monitoring Systems." GPA denied ETI's request on April 12 for the following reasons:

1. It should have been filed as an appeal of the March 28 denial with the Public Auditor in accordance with 2 GAR §12101, *et seq.*
2. Allegations which arose from selection of TRC as 'best offeror' were untimely because 14 days had passed in which to bring a protest pursuant to 5 GCA § 5425(a) and at least one allegation was without merit.

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<sup>26</sup> While ignorance of the law is no excuse, it is notable that the request for administrative review technically was received by OPA on April 11, within 15 days of the March 28 protest decision. Notwithstanding its form, GPA knew of the basis of the appeal and was not prejudiced by the form of the submission. The April 6 letter was clearly intended to invoke a review of the original (March 28) protest decision and the license issue was specifically raised in that request for review. Had it been filed with OPA directly, it would have been clearly received as an appeal of the March 28 protest decision.

3. GPA was not required to provide written confirmation regarding TRC's compliance with Guam licenses laws, and TRC's proposal was not subject to public inspection.

The evidence supports that it was timely for ETI to raise the issue of licensure, even as a new protest issue, in its April 6 request for administrative review, because it could not have known without reviewing TRC's proposal whether licensing was an issue. In fact, due to GPA's non-responsiveness on the issue, certification from the Department of Revenue and Taxation was the only way for ETI to determine the fact of the matter, and that was obtained on May 1, 2007.

ETI's counsel, in its pleadings, deemed the request for administrative review as a timely request for reconsideration, under 2 GAR § 9101(h), of the March 28 decision and January protest. This is supported by the letter's first two sentences:

ETI has received your letter dated March 28, 2007, denying our protest to the CEMS RFP-07-002. This will now serve as ETI's official request for an administrative review of this award.

When read together with these two sentences, the several references cited by GPA to the term "protest" that GPA cites are reasonably interpreted as references to the underlying protest and decision for which review or reconsideration is requested based on information not previously considered.

The request for administrative review was made within 15 days of the protest decision and was thus timely as a request for reconsideration pursuant to 2 GAR § 9101(h). GPA, in agreeing to examine the procurement anew without immediately referring the parties to the Public Auditor, and in announcing a stay of the procurement pending review, gave the appearance of having accepted this request for reconsideration. In accordance with the rules relative to reconsideration, ETI posed the query as to TRC's compliance with Guam Business License requirements in its request as a detailed statement of the factual and legal grounds upon which reversal or modification was deemed warranted, and thus specified the error of law made or information not previously considered.

Regardless of whether deemed a protest or reconsideration, the license issue was first presented in the April 6 letter, and was not previously addressed in the March 28 decision, and was thus timely on appeal of the subsequent April 12 decision.

Further, GPA's decision to "deny a written confirmation that TRC has complied with all Government of Guam laws regarding business and contractor licenses" does not reasonably negate the issues brought to its attention, and does not affect the timeliness of unknown facts. Per GPA, only its denial of the information is appealable and there is no decision to appeal regarding the requirement for a license. However, GPA, in refusing to confirm the issues brought to its attention, made a decision that a Guam Business License was not required, or that TRC had complied with Guam law and the requirements of the RFP, including a Guam Business License.

Accordingly, GPA's April 12, 2007, decision to deny ETI's request for written confirmation regarding TRC's business license is properly before the Public Auditor, on appeal of the April 12 decision, as a decision by GPA that a Guam Business License was not required up to that point in the procurement.

The Amended Appeal reduced the issues on appeal to the sole issue of business licensure. This was consistent with the grounds in the original appeal and specifically detailed in page 2 of the April 19 letter from ETI attached to the appeal:

ETI goes to great lengths to demonstrate compliance with all Guam Laws such as business license, contractors license, and GRT, therefore ETI appreciates GPA including Section 1.0: INSTRUCTIONS TO RESPONDENTS, SubSection 2.6 (*sic*) LICENSING, which states 'Offers are reminded that GPA will not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law.

ETI conducted field checks at Rev and Tax and determined as of April 10, 2007, or any time prior, that TRC has not maintained a Guam Business License as was required to even be determined responsive to GPA-RFP-07-002 as per Section 1, Part 2.6 (*sic*) of the mentioned RFP.

As a result of the consistency between the documents, the Amended Appeal is a valid attempt after ETI obtained counsel to significantly narrow the issues on appeal, and GPA had prior notice of the licensure issue raised in the Amended Appeal. Accordingly, there was no prejudice to GPA in the narrowing of the issues it already was tasked to address and GPA had sufficient opportunity to address these issues over the course of the proceedings as evidenced by the Agency Report, the Rebuttal by GPA and the testimony and argument presented at the hearing. The Amended Appeal is therefor allowable pursuant to 2 GAR § 12104(b)(8) as a clarification of the original appeal.

In light of the narrowing of the issues by the Amended Appeal and ETI's lack of opportunity to review TRC's proposal, the timeliness of any other issues raised on appeal is not addressed.

**B. GPA could not consider TRC for award of the RFP due to TRC's lack of a Guam Business License.**

**1. The face of the RFP supports a finding that a *Guam* Business License was required prior to consideration for award, and upon submittal of the proposal.**

The RFP warned that GPA would "not consider for award any offer submitted by an offeror who has not complied with the Guam Licensing Law. Specific information on licenses may be obtained from the Director of Revenue and Taxation." See, Request for Proposal No. GPA-RFP-

07-002, General Terms and Conditions, § 2.16. The RFP also warned that “[i]t is the policy of the Guam Power Authority to award proposals to offerors duly authorized and licensed to conduct business in Guam.” See, Request for Proposal No. GPA-RFP-07-002, General Terms and Conditions, § 2.4.

The record is clear that upon submittal of its proposal and through May 1, 2007, TRC was not licensed to conduct business on Guam as attested by the Certification issued by the Department of Revenue and Taxation (hereinafter DRT) on May 1, 2007. See, attachment to ETI’s Amended Notice of Appeal. GPA submitted no evidence to counter the certification by DRT as to TRC’s lack of a Guam Business License, except for Paul Clark’s testimony that TRC had applied for a Guam Business License after being selected as best offeror.

Selection of TRC as best offeror, and negotiation with TRC to the point of obtaining TRC’s best and final offer reasonably constitute “consideration for award.” Based on the foregoing, consideration of TRC for award despite its lack of a Guam Business License was inconsistent with the terms of the RFP.

While 2 GAR § 3115(e)(b) of the Guam Procurement Law allows the agency to accept corrections to a proposal “unless the solicitation states otherwise,” the solicitation in this case does state otherwise. Specifically, the *Special Reminder to Prospective Individuals/Firms* was issued by GPA as page 1 of 42 of the RFP packet. This special reminder provided that the “Business License (applicable to RFP) and additional requirements must be submitted at the time of RFP Closing.”

Accordingly, the issue here is what type of business license was “applicable to RFP” and thus required to be “submitted at the time of RFP Closing.” GPA argued that a business license from any jurisdiction would suffice to meet this requirement, and ETI argued that only a Guam Business License would meet the requirement. Because, as discussed above, § 2.16 and § 2.4 of the RFP require a Guam Business License prior to award, a Guam Business License is at least one of the licenses applicable to the RFP, and thus its submission was required upon RFP closing in accordance with the special reminder provisions to the RFP.

Based on the above, the selection of TRC as the most qualified offeror despite the absence of a Guam Business License at time of submittal of its proposal is inconsistent with GPA’s RFP. Further, the requirements of 5 GCA § 5216(e) and 2 GAR Div. 4, Chap.3, § 3114(f)(2) that evaluation be done based on factors as listed in the RFP, do not prohibit GPA from assessing qualifications or the responsiveness of an offeror to license requirements prior to evaluation of those factors. In fact, GPA was required by 2 GAR § 3114(j) to select a best offeror only after validation of qualifications, evaluation, and discussion.

**2. Guam Procurement Law mandates a preference for local business in this procurement.**

This procurement is subject to 5 GCA § 5008,<sup>27</sup> which mandates that supplies and services be procured from qualified businesses licensed to do business on Guam and that maintain an office or other facility on Guam.

Purchase from an off-island vendor is inconsistent with § 5008 unless the following exception applies:

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 cost F.O.B. job site, unloaded, of procurement from off island is no greater than

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<sup>27</sup> 5 GCA § 5008 provides:

§ 5008. Policy In Favor of Local Procurement.

All procurement of supplies and services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

- (a) a licensed bonafide manufacturing business that adds at least twenty-five percent of the value of an item, not to include administrative overhead, using workers who are U. S. Citizens or lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United State[s] to work, based on their former citizenship in the Trust Territory of the Pacific Islands; or
- (b) a business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the items of supplies to be procured; or
- (c) a business that has a bonafide retail or wholesale business location that regularly carries an inventory on Guam of a value of at least one half of the value of the bid or One Hundred Fifty Thousand Dollars (\$150,000) whichever is less, of supplies and items of a similar nature to those being sought; or
- (d) a service business actually in business, doing a substantial portion of its business on Guam, and hiring at least 95% U. S. Citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

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 cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.

eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference. 5 GCA § 5008.

The evidence presented at the hearing indicates that ETI is an eligible local business pursuant to 5 GCA § 5008. The evidence also indicates that at the time of submittal of its proposal and up to the date of the hearing on this matter, TRC was not an eligible local business due to its lack of a Guam Business License.

While GPA may have sought increased competition from competitors who are not licensed on Guam, this policy conflicts with the stated GPA policy in Sections 2.4 and 2.16 in the RFP, and the policy of the Government of Guam codified in 5 GCA § 5008.

GPA submitted no evidence of the required cost analysis or determination that this procurement fit the exception contained in § 5008, which would allow it to procure from off-island. GPA contends that this protest was brought prior to the conclusion of cost negotiations with the offeror, and that until final negotiations of costs have been concluded with the offeror, it is impossible and premature for GPA and the Public Auditor to address whether this potential award fits into the exception from the local procurement preference contained in 5 GCA §5008.

However, GPA's procurement record, and testimony at the hearing indicate that a best and final offer had been obtained from TRC, and a Purchase Order drafted in the amount of \$169,850 for the remainder of fiscal year 2007 based on that best and final offer. See, April 18, 2007, entry in the Purchase Order Summary for TRC, Procurement Record, ETI 1<sup>st</sup> Protest Section. See also, testimony of Rose Cruz, Buyer II, GPA Procurement Section. Said actions indicate that an award was pending and likely would have been approved without further negotiation if not for the stay resulting from the appeal.

Award to an off-island vendor without a comparison to the price or availability of local vendors is inconsistent with 5 GCA § 5008. Without the required cost analysis, the record does not support an award to TRC.

#### IV. CONCLUSION

Based on the above, the Public Auditor determines that:

1. Offerors must have a Guam Business License to be considered for award pursuant to GPA-RFP-07-002. GPA's consideration of TRC for award is not consistent with GPA-RFP-07-002 due to TRC's lack of a (Guam) business license at time of submittal of its offer.
2. Eligible local businesses have a preference for awards pursuant to 5 GCA § 5008. TRC was not an eligible local business due to its lack of a Guam Business License.

3. Award to an off-island vendor without a comparison to the price or availability of local vendors is inconsistent with 5 GCA § 5008. Without the required cost analysis, the record does not support an award to TRC.

THE PUBLIC AUDITOR DIRECTS that GPA cease consideration of TRC for award of the RFP and proceed with the procurement in accordance with 5 GCA § 5451, which provides:

**§ 5451. Remedies Prior to Award.**

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

This is a final administrative Decision. Parties are hereby informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9 of 5 GCA Chapter 5, within fourteen days after receipt of a final administrative Decision.

A copy of this Decision shall be provided to the parties and their respective attorneys, in accordance with 5 GCA § 5702, and shall be made available for review on the OPA Website [www.guamopa.org](http://www.guamopa.org).

Dated this 1st day of August 2007.



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DORIS FLORES BROOKS, CPA, CGFM  
PUBLIC AUDITOR