

1 VANESSA L. WILLIAMS, ESQ.
2 LAW OFFICE OF VANESSA L. WILLIAMS, P.C.
3 414 WEST SOLEDAD AVENUE
4 GCIC BLDG., SUITE 500
5 HAGÁTÑA, GUAM 96910
6 TELEPHONE: 477-1389
7 EMAIL: VLW@VLWILLIAMSLAW.COM

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PROCUREMENT APPEALS

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8 *Attorney for Appellant JJ Global Services*

9 **BEFORE THE PUBLIC AUDITOR**

10 **PROCUREMENT APPEALS**

11 IN THE APPEAL OF:

DOCKET NO. OPA-PA-19-001

12 JJ GLOBAL SERVICES,

13 Appellant,

14 and

**APPELLANT JJ GLOBAL SERVICES'
AMENDED BRIEF RE: REMEDIES**

15 GUAM VISITORS BUREAU,

16 Purchasing Agency.

17 **I. INTRODUCTION**

18 On January 2, 2019, JJ Global Services (“JJ Global”) submitted this appeal to the Public
19 Auditor. On February 4, 2019, the Public Auditor recuses himself and appointed and designated
20 the Hearing Officer to preside over this appeal. The hearing on the merits was initially scheduled
21 for March 13, 2019, and the deadline for the briefs on the issues of remedies was set no later than
22 March 18, 2019. JJ Global filed a Brief on the Remedies on March 18, 2019. However, the
23 hearing on the merits was subsequently rescheduled and heard on March 27th and 28th, 2019.
24 Therefore, the Hearing Officer subsequently ordered the parties submit any briefs or amended
25 briefs on the issue of remedies no later than April 2, 2019. JJ Global now submits this amended
26 hearing brief.

1 **II. STATEMENT OF REMEDIES**

2 GVB abused its discretion in determining that JJ Global was non-responsible. The Non-
3 Responsibility determination by GVB was an abuse of discretion because it was arbitrary,
4 capricious and in violation of law. GVB's procurement record is materially incomplete because
5 it is missing the statutorily required communications log, and there is no substantive evidence in
6 the procurement record that JJ Global had a history of unsatisfactory contract performance with
7 GPA, GWA, GIAA or DPR. Accordingly, the proper remedy is to void GVB's determination of
8 non-responsibility, terminate GVB's consequent contract with LMS, award JJ Global GVB IFB
9 No. 18-001 as the lowest responsible and responsive bidder, and award JJ Global its reasonable
10 costs incurred in connection with the solicitation, protest and appeal.

11
12 **A. THE NON-RESPONSIBILITY DETERMINATION SHOULD BE VOIDED.**

13 The Hearing Officer should find the non-responsibility determination to be null and void
14 because it is clearly erroneous, arbitrary, capricious, and contrary to law. *See* 2 G.A.R. § 3125
15 (A determination of non-responsibility is final and conclusive unless it is clearly erroneous,
16 arbitrary, capricious, or contrary to law); *see also* 5 G.C.A. § 5245. GVB's determination of non-
17 responsibility was clearly erroneous, arbitrary and capricious. There is no information in the
18 procurement record to support GVB's conclusions that JJ Global is nonresponsible. *See* 2 G.A.R.
19 § 3116.

20 Further, the non-responsibility determination is in violation of law. Any alleged
21 communication or information upon which GVB purportedly relied upon were not included in
22 the procurement record as required by 5 G.C.A. § 5249. These omitted communications from the
23 procurement record are material because without them we cannot know what information, if any,
24 GVB based their determination of non-responsibility. Because the materially incomplete
25 procurement record thwarted review by the Office of Public Accountability, the determination of
26 non-responsibility must be found clearly erroneous, arbitrary, capricious and contrary to law, and
27 therefore void.

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B. GVB’S CONTRACT WITH LMS SHOULD BE TERMINATED.

Pursuant to Section 5452 of the Guam Procurement Code, termination of GVB’s contract with LMS is a proper remedy. Guam procurement law allows post-award procurements to be terminated if the solicitation or award of a contract is in violation of law. *See* 5 G.C.A. § 5452. The award of GVB IFB No. 2018-001 was in violation of 5 G.C.A. § 5249 and § 5250 because it was based on a materially incomplete procurement record. Since the procurement records is materially incomplete, the Hearing Officer has the statutory authority to cancel the award. *See, Teleguam Holdings, LLC v. Guam*, 2018 Guam 5 ¶¶ 40- 41.

The *Teleguam Holdings* case arose from a procurement dispute over a ten-part Invitation for Bid by GSA. *Id.* at ¶ 3. The IFB states that each the ten parts (A-J) was to be treated separately for bid submission. *Id.* The Superior Court had found deficiencies in the procurement record and found the proper remedy in the pre-award stage was either revision or cancellation. *Id.* at ¶ 9. Because the procurement record was incurably incomplete, the court found revision impossible and cancelled all ten-parts of the IFB. *Id.*

The Supreme Court reversed the decisions with respect to 9 of the 10 parts because it found that the Superior Court lacked jurisdiction over Parts A-D and Parts F-J because its jurisdiction was not invoked within fourteen days of the Public Auditor’s decision. *Id.* at ¶ 21. However, the Supreme Court upheld the trial court’s finding with respect to Part E. *Id.* at ¶¶ 40-41. With respect to the Part E, the Supreme Court found that since the appellant GTA demonstrated that the required procurement record was materially incomplete, the trial court cancellation of Part E was consistent with statutorily prescribed remedies and affirmed the portion of the trial court’s Judgment cancelling Part E of the IFB. *Id.* The Supreme Court also noted that cancellation and termination of post-award procurements is a proper post-award remedy under 5 G.C.A § 5452. *Id.* at ¶ 41.

The Superior Court has applied the *Teleguam Holdings* to terminate a contract as the appropriate post-award remedy in *DFS Guam L.P. v. The A.B. Won Pat International Airport Authority, et. al.*, Superior Court of Guam Civil Case No. CV0943-14, Decision and Order (Feb. 2, 2018). This case arose from a procurement dispute between DFS and the A.B. Won Pat International Airport Authority (AIAA). In 2012, AIAA issued an RFP to operate a specialty

1 retail concession at the airport. *Id.* at p. 3. Both DFS and Lotte Duty Free Guam, LLC ("Lotte")
2 submitted timely bids to AIAA. *Id.* On April 12, 2013, AIAA announced Lotte as the most
3 qualified proposer. *Id.* DFS protested the award of the contract to Lotte, which the AIAA denied,
4 and DFS appealed to the OPA. In 2015, DFS also sued AIAA and Lotte for the wrongful award.
5 DFS sought summary judgment under several theories, but most pertinently to the present case,
6 on whether the AIAA violated the Procurement Code by not maintaining a complete procurement
7 record. *Id.* at pp. 4, 28.

8 The Superior Court found that Section 5249(b) created an affirmative duty on the agency
9 to create "a log of all communications between government employees and any member of the
10 public, potential bidder, vendor or manufacturer which is in-any way related to the procurement."
11 5 GCA § 5249(b). There were undisputed facts providing by attorney billing records that showed
12 there were meetings and telephone calls that took place related to the procurement, and a
13 procurement record missing those telephone calls would be an incomplete procurement record.
14 *Id.* at pp. 30-31. Therefore, the Superior Court found that AIAA failed in its affirmative duty to
15 maintain a complete procurement record and violated the Procurement Code pursuant to 5 GCA
16 §§ 5245 and 5247. In addressing the remedies, the Court found that the AIAA exceeded its
17 statutory authority by entering the contract with Lotte and therefore set aside the contract. *Id.* at
18 pp. 36-37. Because GVB has also failed to maintain a complete procurement record and
19 exceeded its authority by entering the contract with LMS, it likewise appropriate that the contract
20 should be set aside.

21 Reaffirmation of the contract is not an option, because it is not in the best interests of the
22 Territory. *See* 5 G.C.A. § 5452(a). Although LMS may not have acted fraudulently or in bad
23 faith, GVB's violations of procurement law are especially egregious and should not be
24 inconsequential. The Hearing Officer may take judicial notice of GVB's pattern of providing
25 grossly incomplete procurement records – including missing logs of communications as required
26 by statutes. *TLK Marketing Co. Ltd. V. Guam Visitors Bureau*, Superior Court of Guam Civil
27 Case No. CV0914-16, Decision and Order, p. 12 (Nov. 13, 2018). It is egregious that after the
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1 *TLK Marketing* decision that GVB would maintain that it was not required to maintain a log of
2 communications as part of the procurement record.

3 It is not in the best interests of the territory for an agency to continue to ignore their
4 affirmative duty to keep records and logs of communications regarding a procurement. *See*
5 5.G.C.A. § 5249(b) and 2 G.A.R., Div. 4, Chap. 3, § 3129(2). If the contract remains with a
6 bidder who won based on a materially incomplete procurement record, this would go against the
7 policies of Guam's Procurement Laws and Regulation to provide for increased public confidence
8 in the procedures following in public procurement, to provide safeguards for the maintenance of
9 a procurement system of quality and integrity, and of requiring public access and transparency to
10 all aspect of procurement. *See* 5 G.C.A § 5001(b)(3)(7) and (8), and 2 G.A.R., Div. 4, Chap 1 §
11 1102(2)(6) and (7). Further, the Hearing Officer also has the authority to immediately award the
12 contract to JJ Global as the lowest responsible and responsive bidder so that the landscaping needs
13 of GVB may continue to be met without interruption. *See infra*. Therefore, the only appropriate
14 remedy is to terminate GVB's contract with LMS.

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16 **C. JJ GLOBAL SHOULD AWARDED GVB IFB NO. 2018-001 AS THE LOWEST
RESPONSIBLE AND RESPONSIVE BIDDER.**

17 The remedy of award to JJ Global as the next lowest and responsible bidder is appropriate
18 and precedented. In *Guam Publications*, the Public Auditor terminated the improperly awarded
19 contract and awarded the remainder of the contract to the remaining offeror. *See In the Appeal*
20 *of Guam Publications, Inc.*, OPA-PA-08-007. The award to JJ Global is also in keeping with
21 both 2 G.A.R. § 9106(1)(c)(1), which allows an award to be made where there is no prejudice to
22 other bidders, and 5 G.C.A. § 5212(d), which contemplates government procurement through
23 award to the next lowest bidder in the event of contract default and termination. When the bid
24 submission was closed, JJ Global was the lowest bidder, and would have been awarded the
25 contract but for GVB's sham determination of non-responsibility. Since this determination of
26 non-responsibility is void, JJ Global is the lowest responsive and responsible bidder. Awarding
27 the remainder of the contract to JJ Global is in keeping with the policy of Guam's procurement
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1 law to save the taxpayer money and provide increased economy in territorial activities. *See* 5
2 G.C.A. § 5265.

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4 **D. AS A SUCCESSFUL APPELLANT, JJ GLOBAL IS ENTITLED TO ITS COSTS.**

5 Pursuant to 5 GCA §5425(h), "...when a protest is sustained, the protestant shall be
6 entitled to the reasonable costs incurred in connection with the solicitation and protest, including
7 bid preparation costs." The OPA can therefore properly award JJ Global its reasonable costs
8 incurred in preparing the solicitation and mounting the instant protest.

9
10 **III. CONCLUSION**

11 GVB's undisputed failure to maintain a complete procurement record conclusively
12 establishes that the GVB's non-responsibility determination is unsupported by the procurement
13 record, and that the award to LMS was based on an incomplete procurement record and in
14 violation of law. For the foregoing reasons, the Hearing Officer should find that the non-
15 responsibility determination is void, the resulting contract to LMS should be terminated, that JJ
16 Global should be awarded the remainder of GVB IFB No. 18-001 as the lowest responsible and
17 responsive bidder, and that JJ Global is entitled to its reasonable costs incurred in connection with
18 the solicitation, protest and appeal.

19 Respectfully submitted this 2nd day of April, 2019.

20 **LAW OFFICE OF VANESSA L. WILLIAMS, P.C.**
21 *Attorney for Appellant*

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25 VANESSA L. WILLIAMS, ESQ.