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*****Proposed Findings of Fact*****

1. On 25 November 2015 the Guam Visitors Bureau (GVB) issued a Request for Proposals (RFP) from parties interested in receiving a contract to provide tourism destination marketing representation in the Republic of Korea (GVB RFP 2016-006).

2. Appellant TLK Marketing Co. (TLK) was among those who expressed interest and obtained a copy of the RFP. Also an interested proposer was the eventual awardee, Happy Idea Company (HIC).

3. Among the provisions of the RFP, GVB called for a qualified professional tourism destination marketing agency with a minimum of 5 years extensive and consistent experience working with the Republic of Korea travel trade, close relationship with the Korean government and the US Embassy, to act as GVB's tourism destination marketing representative in the Republic of Korea . . ." *See RFP 2016-006 at ¶1.1.*

4. Potential offerors were also informed that "selection of the best qualified offeror [would] be based on the qualifications, experience, and commitment of

1 the Offeror's lead and support individuals proposed for this RFP" See *RFP*
2 *2016-006 at ¶2.0.*

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5 5. Offers were due no later than 08 February 2016. *RFP 2016-006 at p.2*

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7 6. By 08 February 2016, four offers had been received, among them offers
8 from TLK and HIC. See *Agency Procurement Record, OPA-PA 16-005, Vol. I*
9 *at Tab G.*

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12 7. These received offers were evaluated by four offerors on 16 February
13 2016. See *Agency Procurement Record, OPA-PA 16-005, Vol. I at Tab L.* The
14 gross result of the evaluation was not revealed to the evaluators.
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18 8. On 19 February 2016, the top three proposers were invited to make oral
19 presentations. Among them were TLK and HIC. See *Agency Procurement*
20 *Record, OPA-PA 16-005, Vol. I at Tab M.*

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23 9. On 25 February 2016 oral presentations were made. See *Agency*
24 *Procurement Record, OPA-PA 16-005, Vol. I at Tab G.*

1 10. HIC made an oral presentation assisted by Mr. Karl Pangelinan. *See*
2 *Agency Procurement Record, OPA-PA 16-005, Vol. I at Tab O.* Mr. Pangelinan
3 had formerly served as General Manager for GVB but had left that position on
4 31 January 2015.
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7 11. Mr. Pangelinan was a non-compensated representative of HIC at the time
8 of the oral presentation, in a contractual relationship with HIC since 02 February
9 2016, but was not entitled to pay for his assistance in the presentation.
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12 12. A required document to be submitted with all proposals was an Affidavit
13 Disclosing Ownership and Commissions. *See Agency Procurement Record,*
14 *OPA-PA 16-005, Vol. I at Tab B.*
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17 13. HIC did submit the required affidavit with their proposal. That affidavit
18 was dated 01 February 2016 and did not disclose any relationship between HIC
19 and Mr. Pangelinan. *See Agency Procurement Record, OPA-PA 16-005, Vol. II*
20 *at Tab C.*
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1 14. In its proposal, HIC noted its corporate history; that it had founded SD
2 Pharm in 2006 and had signed various marketing contracts in 2006, 2007, 2008
3 and 2012. *See Agency Procurement Record, OPA-PA 16-005, Vol. II at Tab C.*
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6 15. In its proposal, HIC provided brief biographies of its principal officers.
7 Those biographies state that at least 7 of the principals have at least five years'
8 experience in marketing and related activity with three having more than 10
9 years' experience. *See Agency Procurement Record, OPA-PA 16-005, Vol. II at*
10 *Tab C.*
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14 16. Pursuant to the RFP, all proposals were ranked and HIC prevailed. On 25
15 February 2016, at a regular meeting of the Board of the GVB, a motion was
16 made to "recommend Board approval to authorize GVB General Manager as
17 Chief Procurement Officer to enter into negotiation and contract with the highest
18 rate (sic) and most qualified offeror for GVB RFP 2016-006." *See TLK*
19 *Marketing's Exhibits at 7.*
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23 17. According to the General Manager, this was GVB's usual practice in
24 regard to contracts resulting from procurements.
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1 18. On 04 March 2016 an employee of the GVB informed HIC that they
2 were the highest rated and most qualified offeror and simultaneously made
3 offered terms on the contract. *See Agency Procurement Record, OPA-PA 16-*
4 *005, Vol. I at Tab X.*

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8 19. On 09 March 2016 that same employee contacted HIC and, among other
9 things, asked HIC not to mention publicly that it had been selected until
10 negotiations were finalized and a contract signed and that “we do not want any
11 protest from the other offerors.” *See TLK Marketing’s Exhibits at 12.*

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14 20. According to that employee, on or about 09 March she had heard from
15 another offeror that Korean news media was reporting that HIC had received the
16 GVB contract.

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19 21. Also on 09 March 2016, HIC was sent a notice of award and on 10 March
20 all other offerors were sent notices of non-selection. *See Agency Procurement*
21 *Record, OPA-PA 16-005, Vol. I at Tabs Q through T.*

- 1 22. On 14 March 2016 a contract was executed by and between GVB and
2 HIC to obtain and perform the solicited services. *See Agency Procurement*
3 *Record, OPA-PA 16-005, Vol. I at Tab V.*
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- 5
- 6 23. On 24 March 2016 and 21 April 2016 TLK protested the award. Those
7 protests were denied and the instant appeal ensued.
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- 9
- 10 24. TLK asserts the following on appeal;
- 11 a. That GVB is wrong in its assertion that HIC “has sufficient
12 experience” and “meets qualifications” of the RFP. *See Appeal I at*
13 *p. 5.*
- 14
- 15 b. That GVB has violated the automatic stay requirements mandated
16 by 5 GCA §5425(g). *See Appeal I at p. 7*
- 17
- 18 c. That TLK will be irreparably harmed if GVB were allowed to usurp
19 the OPA’s authority and circumvent the Guam Procurement laws.
20 *See Appeal I at p. 7*
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- 22 d. That GVB colluded with HIC, Inc. to violate the RFP and Guam
23 Procurement law by withholding information regarding the ranking
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and award of the contract to deprive the offerors of their rights under the Guam Procurement law. *See Appeal II at p. 4.*

- e. That GVB violated §3.10 of the RFP when it failed to obtain the required board approvals. *See Appeal II at p. 6.*
- f. That HIC failed to disclose in the affidavit disclosing ownership and commission Karl Pangelinan’s involvement in this RFP. *See Appeal II at p. 8.*
- g. That HIC misrepresented its experience by relying on SD Pharm’s experience to meet the 5 year experience requirement. *See Appeal II at p.9.*
- h. TLK will be irreparably harmed if GVB is allowed to usurp the OPA’s authority and circumvent the Guam Procurement laws. *See Appeal II at p. 11.*

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*****Conclusions of Law *****

A. Whether an agency determination that HIC “has sufficient experience” and “meets qualifications” is mistaken and whether HIC misrepresented its experience by relying on SD Pharm’s experience to meet the 5 year experience requirement.

TLK states that HIC misrepresented its corporate experience by relying on the history of SD Pharm. TLK states that this “misrepresentation” lead to HIC’s selection as best qualified. Reduced to its essence, this aspect of the Appeal concerns an alleged lack of qualification for HIC. But TLK fails to acknowledge that absent reference to SD Pharm, HIC still prevails. According to evidence received, evaluators acknowledged that key personnel for HIC had more than 5 years’ experience. In other words, TLK fails to provide evidence that absent the inclusion of SD Pharm in its offer, HIC would not have prevailed. The agency, also according to evidence, has determined the successful offeror has the necessary experience. According to HIC’s proposal it has the following experience;

- As SD Pharm it entered marketing contracts with various entities as far back as 2006
- Happy Idea Company’s founding member has close to 15 years of experience in the field of public relations and is a successful public relations and marketing professional.

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

8 *See Agency Procurement Record, OPA-PA 16-005, Vol. II at Tab C.*

9 Together and separately, these qualifications were determined by the

10 agency to sufficiently support evaluation criteria to allow award and it cannot be

11 said that this determination is beyond agency discretion. Additionally the RFP

12 states that "GVB seeks to retain a qualified professional tourism destination

13 marketing agency ("Agency") with a minimum of 5 years extensive and

14 consistent experience working with the Republic of Korea travel trade, close

15 relationship with the Korean government and the US Embassy to act as GVB's

16 tourism destination marketing representative in the Republic of Korea . . ."

17 Nowhere does the RFP state that failure to meet this level of experience renders

18 an offer non-responsive nor does it state that the offer will be rejected or the

19 offeror disqualified. In fact, the level of experience is part of the bundle of

20 factors used to judge the offer as a whole. Section 2.0 of the solicitation states,

21 "selection of the best qualified offeror [would] be based on the qualifications,

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1 experience, and commitment of the Offeror's lead and support individuals
2 proposed for this RFP" See RFP 2016-006 at ¶2.0.
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4 The Solicitation was validly issued for a valid purpose and, to the extent it
5 is ambiguous that the experience of individual members of the entity may be
6 attributed to the entity itself, the GVB's interpretation is entitled to deference.
7 See for example, *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*
8 *Inc.*, 467 U.S. 837, 104 S.Ct. 2778, (1984).
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11 B. Whether the Agency has violated the automatic stay requirements
12 mandated by 5 GCA §5425(g).
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14 TLK alleged that its protest triggered the automatic stay provisions of 5
15 Guam Code Ann. §5425(g). In part, that statute reads, "In the event of a timely
16 protest under Subsection (a) of this Section or under Subsection (a) of § 5480 of
17 this Chapter, the Territory shall not proceed further with the solicitation or with
18 the award of the contract prior to final resolution of such protest, and any such
19 further action is void . . . ". In this solicitation, a contract was executed no later
20 than 14 March 2016, a full 10 days prior to protest. In other words, the contract
21 was signed prior to protest and no stay arose.
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1 Additionally, this issue was raised in this appeal of an agency decision by
2 motion. The GVB responded by noting that the contract with HIC was awarded
3 prior to TLK protesting the solicitation and a stay therefore did not arise. In a
4 Decision and Order issued by the Office of Public Accountability on 15 June
5 2016, the Office agreed that the protest was made following award of a contract
6 and no stay arose. The issue is a thing decided.
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10 C. Whether TLK will be irreparably harmed if GVB were allowed to usurp
11 the OPA's authority and circumvent the Guam Procurement laws.
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13 TLK presented no evidence on this allegation. It is therefore unclear in
14 what respect TLK believes the OPA's authority is compromised. In its Appeal
15 of 22 March 2016, TLK states, "GVB and HIC's collusive acts to effectuate a
16 secret selection , negotiation and award , was a deliberate attempt to deprive
17 TLK of its rights under the Guam Procurement law." *See Appeal I at p. 7.*
18

19 The problem with this assertion is that the GVB and HIC are not
20 precluded from a private negotiation of contract terms and the selection of HIC
21 arose from an appropriate evaluation process conducted among evaluators
22 deliberating separately and in private; also legal and appropriate. TLK
23 presented no evidence that would suggest, much less demonstrate, covert agency
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1 and offeror communication designed to fraudulently frustrate TLK's ambition
2 and circumvent Guam law. There is simply no evidence of wrongdoing.
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5 D. Whether GVB colluded with HIC, Inc. to violate the RFP and Guam
6 Procurement law by withholding information regarding the ranking and
7 award of the contract to deprive the offerors of their rights under the
8 Guam Procurement law.
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10 Continuing with another lurid allegation (one might suppose Sydney
11 Greenstreet was the procurement officer), TLK asserts agency and offeror
12 colluded to withhold information regarding the ranking to deprive TLK of its
13 rights under the procurement law. Distilled, the complaint is that TLK was not
14 noticed of its non-selection while HIC and GVB negotiated a contract. This
15 prevented TLK from launching a protest to stay the process. Notably, TLK does
16 not say it had a bases for protest prior to 14 March 2016, the date the contract
17 was executed by GVB. What TLK complains of then is that it had no
18 opportunity to disrupt a necessary government function while it identified its
19 ducks and got them into a row. This is not a valid exercise of the law.
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23 TLK believes its smoking gun is an email sent by a GVB employee to
24 HIC. That email states, "BTW, I was contacted by someone mentioning that
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1 HIC is communicating with the Korea media announcing that they have
2 successfully been awarded the GVB Marketing Representative contract. **Please**
3 **refrain from publicly mentioning this until we have finalized the**
4 **negotiations and signed a contract. We do not want any protest from the**
5 **other offerors . . .** “ *Appeal II at p. 5, emphasis provided by TLK.* The gun
6 though is unloaded. At the time the email was sent, HIC had not yet been
7 awarded the contract, negotiations could well have failed, GVB was under no
8 obligation to conduct its business publicly and a desire to avoid protest is
9 entirely legitimate. TLK states there was collusion to do something wrong but
10 they provide no evidence of collusive wrongdoing.
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15 E. That GVB violated §3.10 of the RFP when it failed to obtain the required
16 Board approval.
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18 Section 3.10 of the Solicitation states, “If compensation, contract
19 requirements, and contract documents can be agreed upon with the best-
20 qualified Offeror, and subject to Board approval, the contract shall be awarded
21 to the Offeror.” *See RFP at §3.10.* On 25 February 2016, at a regular meeting
22 of the Board of the GVB, a motion was made to “recommend Board approval to
23 authorize GVB General Manager as Chief Procurement Officer to enter into
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1 negotiation and contract with the highest rate (sic) and most qualified offeror for
2 GVB RFP 2016-006.” *See TLK Marketing’s Exhibits at 7.* Testimony was
3
4 received at a hearing that the usual process of GVB is to obtain Board approval
5 to allow the General Manager to negotiate and then contract with a vendor. That
6 is what occurred here and is not inconsistent with the language of the
7 solicitation. The Board specifically instructed the General Manager to negotiate
8 and enter a contract. This is also consistent with section 2.4 of the solicitation
9 which states, “GVB General Manager will nominate an Evaluation Committee.
10 Evaluation may be conducted as a group or individually, however, the same
11 evaluation form shall be used by each evaluator and the results compiled to
12 present a cumulative score with recommendations to the General Manager. The
13 General Manager shall then request the Board of Directors approval to enter into
14 negotiations with the best qualified Offeror.” *RFP at §2.4.* TLK argues that
15 there was a failure to obtain subsequent approval of the contract from the Board
16 but presents no evidence that the Board’s direction to the General Manager to
17 “contract” was invalid. In any case, it appears that TLK makes the argument as
18 a predicate to its request for an automatic stay. *See Appeal II at p. 6,* “[a]s
19 discussed in TLK’s April 21 protest, there was no award . . .” *and at p. 7*
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1 “[w]ithout the necessary board approvals, there can be no award.” As has been
2 said, this issue is decided.

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4 F. That HIC failed to disclose in the affidavit disclosing ownership and
5 commission Karl Pangelinan’s involvement in this RFP.

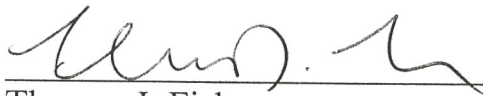
6 HIC did not disclose in its affidavit that Karl Pangelinan was involved
7 with the RFP. Undoubtedly this is because they had no obligation to do so. The
8 affidavit in question, according to uncontroverted testimony, was dated prior to
9 Mr. Pangelinan’s involvement with HIC and more importantly, he did not
10 receive compensation for his “involvement”.
11

12 The language in question reads, “Further, I say that the persons who have
13 received or are entitled to receive a commission, gratuity of other compensation
14 for procuring or assisting in obtaining business related to the bid or proposal for
15 which this affidavit is submitted are as follows . . . “ *See Agency Procurement*
16 *Record, OPA-PA 16-005, Vol. I at Tab B, p. 41.* The evidence received, which
17 TLK produced and did not rebut, is that Mr. Pangelinan’s relationship with HIC
18 began after submission of the affidavit and was not compensated nor entitled to
19 be so. There is no merit to this allegation.
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***** Conclusion *****

In this Appeal of an Agency decision, TLK carries the burden of establishing that the GVB violated in some significant respect procurement laws and regulations. Because TLK's allegations do not demonstrate a violation of the procurement law or were otherwise not supported by evidence the Appeals are denied.


Thomas J. Fisher
Legal Counsel for Appellee