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8 **ATTORNEY FOR APPELLEE**
9 The Guam Power Authority

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PROCUREMENT & CONTRACTS

MAY 4 2007
TIME: 4:15 pm
BY: [Signature]
FILE No. OPA-PA 07-002

10 **OFFICE OF THE PUBLIC AUDITOR**
11 **GUAM**

12 IN THE APPEAL OF)
13 EMISSION TECHNOLOGIES, INC.,) Appeal No. OPA-PA-07-002
14) **APPELLEE GUAM POWER**
15) **AUTHORITY'S AGENCY REPORT**
16)
17 Appellant.)

18 **COMES NOW**, Appellee GUAM POWER AUTHORITY (GPA), by and through its
19 counsel of record, ANTHONY R. CAMACHO, ESQ., and, pursuant to 2 GAR, Div. 4, Chap. 12,
20 §12104(c)(3), and 2 GAR, Div. 4, Chap. 12, §12105, does hereby submit its answer to the above
21 stated appeal in the following Agency Report:

- 22 1. Copy of the Protest: A copy Appellant EMISSION TECHNOLOGIES, INC.'s (ETI)
23 April 6, 2007 Letter of Protest to GPA-RFP-07-002 is attached hereto as Exhibit A and
24 incorporated herein as if fully set forth.
- 25 2. Copies of the offer submitted by Appellant and a copy of the offer that is being
26 considered for award: Copies of said proposals do not have to be included in the agency report if
27 they have been submitted to the Office of the Public Auditor as part of procurement record. 2
28 GAR, Division 4, Chapter 12, §12105. Here, the Appellant in this matter is ETI and the offer
being considered for award by GPA in GPA-RFP-07-002 was submitted by TRC Environmental
Corporation. Copies of ETI 's and the offer submitted by TRC's offers were included in the
copy of the procurement file for GPA-RFP-07-002 (Continuous Emission Monitoring Systems)
that GPA filed with the Office of the Public Auditor on April 27, 2007. Further, said offers were

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COPY
EXHIBIT " 7 "

4 submitted as part of the Confidential part of said procurement file that is not subject to public
5 disclosure pursuant to 2 G.A.R. Div. 4, Chap. 3, §3114(h) and (i)(2).

6 The copies of said offers are not included herein because they are not public records.
7 Generally, procurement records are public records. 5 GCA §5249 and §5251. However, a
8 purchasing agency must not disclose any information contained in the Offeror's proposals, and
9 the proposals of the offerors are not subject to public inspection until after award of the contract
10 is made, and only the proposal of the offeror who is awarded the contract is subject to public
11 inspection. 2 GAR, Division 4, Chapter 3, §3114(h) and (i)(2). Here, GPA has not made an
12 award in GPA-RFP-07-002 and none of the proposals, to include the ETI's and TRC's proposals
13 can be publically disclosed at this time.

14 3. A copy of the solicitation, including the specifications or portions thereof relevant to
15 the protest: A copy of GPA-RFP-07-002 (Continuous Emission Monitoring System) is attached
16 hereto as Exhibit B and incorporated by reference herein as if fully set forth.

17 4. A copy of the Abstract of Bids: . Copies of the Abstract of Bids/Register of Proposals
18 do not have to be included in the agency report if they have been submitted to the Office of the
19 Public Auditor as part of procurement record. 2 GAR, Division 4, Chapter 12, §12105. Here, a
20 copy of the Abstract of Bids/Register of Proposals was included in the copy of the procurement
21 file for GPA-RFP-07-002 (Continuous Emission Monitoring Systems) that GPA filed with the
22 Office of the Public Auditor on April 27, 2007. Further, said Abstract of Bids/Register of
23 Proposals was submitted as part of the Confidential part of said procurement file that is not
24 subject to public disclosure pursuant to 2 G.A.R. Div. 4, Chap. 3, §3114(h)(1), which states that
25 the Registrar of Proposals shall be opened to public inspection only after award of the contract.
26 Here, no contract has been awarded and the Abstract of Bid/Register of Proposals is not open to
27 public inspection

28 5. Any other documents which are relevant to the protest: The following relevant

4 documents are attached hereto as the Exhibits they are listed as and said documents are
5 incorporated by reference herein as if fully set forth:

6 a. ETI's January 30, 2007 Letter of Protest is attached herein as Exhibit C.

7 b. GPA's March 26, 2007 Procurement Protest Decision is attached herein as
8 Exhibit D.

9
10 6. The decision from which the Appeal is taken: A copy of GPA's April 12, 2007
11 Procurement Protest Decision is attached hereto as Exhibit E and incorporated by reference
12 herein as if fully set forth.

13 7. Statement answering the allegations of the Appeal: GPA's statement answering the
14 allegation of the appeal is as follows:

15 **BACKGROUND**

16 GPA operates the Tenjo Power Plant and the Tenjo Generating Stations which
17 collectively have six (6) 4.8 Megawatt electric power generation units. The U.S. Environmental
18 Protection Agency (USEPA) and Guam Environmental Protection Agency (GEPA) mandate that
19 GPA comply with its existing environmental regulatory permits by operating and maintaining
20 continuous emission monitoring systems (CEMS) at said power plants. In 2002, ETI, pursuant
21 to GPA-RFP-02-005, was awarded the CEMS contract which had a maximum four (4) year term
22 that expired in 2006. GPA issued GPA-RFP-07-002 (CEMS) to seek a vender for the CEMS
23 contract. ETI and TRC both submitted proposals for in response to the aforementioned RFP.

24 On January 22, 2007, GPA notified ETI that GPA had selected TRC Environmental as
25 the best offeror for GPA-RFP-07-002. On January 30, 2007, ETI filed a Letter of Protest with
26 GPA alleging that GPA's Evaluation Review Committee was biased in favor of TRC, and ETI
27 requested to review GPA's selection committee evaluations and TRC's proposal. See Exhibit C.
28 On March 26, 2007, GPA issued its decision denying ETI's January 30, 2007 protest because

4 there was no merit to ETI's allegation that the Evaluation Review Committee was biased in favor
5 of TRC. GPA also granted ETI's request to inspect the Evaluation Review Committee's
6 Evaluations. GPA also denied ETI's request to inspect TRC's proposal. On March 28, 2007,
7 GPA provided ETI a copy of GPA's aforementioned March 26, 2007 protest decision.

8 On April 6, 2007, ETI filed a second Letter of Protest with GPA requesting for an
9 administrative review of GPA's March 26, 2007 Decision, and ETI repeated its allegation that
10 the Evaluation Review Committee was biased in favor of TRC, and ETI requested for a written
11 confirmation stating that TRC had complied with all Government of Guam laws regarding
12 business and contractor licenses. See Exhibit A. On April 12, 2007 GPA issued its decision
13 denying ETI's April 6, 2007 protest because GPA does not have the jurisdiction to decide
14 procurement protest appeals, ETI's protest allegations objecting to GPA's selection of TRC as
15 the most qualified offeror were no longer timely, and GPA denied TRC's request to written
16 confirmation stating that TRC had complied with all Guam's laws regarding business and
17 contractor licenses. See Exhibit E. On April 13, 2007, GPA provided ETI with a copy of GPA's
18 aforementioned April 12, 2007 protest decision.

19 On April 20, 2007, ETI filed a procurement protest appeal with the Office of the Public
20 Auditor. On April 27, 2007, GPA filed a copy of the procurement record for GPA-RFP-07-002
21 with the Office of the Public Auditor. On May 1, 2007, the law firm of Dooley Roberts &
22 Fowler filed its Entry of Appearance and an Amended Notice of Appeal containing new
23 allegations that TRC failed to comply with Guam's Business Licensing Laws that were not
24 originally part of ETI's April 20, 2007 Appeal.

25 DISCUSSION

26 ETI's April 20, 2007 Appeal

27 ETI's is improperly attempting to appeal GPA's March 26, 2007 denial of ETI's January
28 30, 2007 Protest. The scope of the Public Auditor's Administrative Review must be limited to

4 GPA's April 12, 2007 decision denying ETI's April 6, 2007 protest. The Public Auditor must
5 sustain GPA's April 12, 2007 decision denying ETI's April 6, 2007 protest because ETI's
6 opposition to the selection of TRC as the best qualified offeror is untimely and because ETI's
7 argument that its untimely protest should be considered now because ETI requested an
8 administrative review in its April 6, 2007 protest has no merit. Procurement protests must be
9 made within fourteen (14) days after the protestor knows or should have known of the facts
10 giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1). Also,
11 protest appeals must be filed with the Public Auditor within fifteen (15) days after receipt by a
12 protestor of the protest decision. 2 G.A.R., Div. 4, Chap. 12, §12201(a) and §12104(a). Here,
13 ETI's allegations in its April 6, 2007 protest that TRC's selection as the most qualified offeror
14 was improper were made well beyond fourteen (14) days because ETI knew that TRC was
15 selected as the best qualified offeror on January 22, 2007. Further, ETI's improper and illegal
16 request for an administrative review in its April 6, 2007 protest does not remove the untimeliness
17 of its allegations because such reviews are conducted by the Office of the Public Auditor and the
18 request for such review in a protest is not a protest appeal.

19 The scope of the Public Auditor's Administrative Review must be limited to GPA's April
20 12, 2007 decision denying ETI's April 6, 2007 protest. ETI cites GPA's April 12, 2007 Protest
21 Decision as the Decision that ETI is appealing. See Notice of Appeal filed on April 20, 2007.
22 GPA's March 26, 2007 protest decision is now a final decision and its findings that the
23 Evaluation Review Committee was not biased in favor of TRC is now *Res Judicata* and is no
24 longer subject to challenge or appeal. An agency's selection of a best qualified offeror is a final
25 and conclusive unless it is clearly erroneous, arbitrary, capricious, or contrary to law. 5 G.C.A.
26 §5480(d), §5245, and §5216(e). A protest decision finding that an agency's selection of a best
27 qualified offeror was not clearly erroneous, arbitrary, capricious, or contrary to law becomes final
28 after the period of time for a protestor to exhaust his administrative remedies and file an action in

4 the Superior Court of Guam has expired. 2 G.A.R., Div. 4, Chap. 9, §9101. Administrative
5 finality, the administrative version of res judicata, bars challenges to administrative decisions
6 after time for making challenge has expired. *UOP v. U.S.*, 99 F.3d 344 (C.A. 9, 1996). Here, the
7 fifteen (15) day time period for appealing GPA's March 26, 2007 protest expired on April 12,
8 2007 and ETI has filed no appeal concerning said protest to present. Thus, GPA's March 26,
9 2007 protest decision is a final decision and its findings that the Evaluation Review Committee
10 was not biased in favor of TRC is *Res Judicata*.

11 The sole issue for the Public Auditor to decide in this matter is whether GPA was correct
12 in denying ETI's April 6, 2007 protest because its allegations concerning the selection of TRC as
13 the best qualified offeror were untimely. As stated above, ETI's allegations that the Evaluation
14 Review Committee was biased are now barred because of GPA's March 26, 2007 protest
15 decision finding no merit in those allegations which is now *Res Judicata* in this proceedings.
16 Generally, procurement protests shall be made in writing to the head of a Purchasing Agency,
17 and shall be filed in duplicate within 14 days after the protestor knows or should have known of
18 the facts giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1).
19 Here, GPA notified ETI that GPA had selected TRC Environmental as the best offeror for the
20 RFP on or about January 22, 2007. The time to file a protest concerning such action expired
21 fourteen (14) days later on or about February 5, 2007. ETI knew of its allegation that the
22 Evaluation Review Committee was biased prior to February 5, 2007 because said allegation was
23 the basis of its January 30, 2007 protest which was denied by GPA's March 26, 2007 decision.
24 Also, ETI's allegation that GPA was somehow attempting to use the procurement process to end
25 the contract ETI was awarded in GPA-02-005, was an allegation the ETI knew or should have
26 known as early as October 13, 2006, when GPA first published its Notice of GPA-RFP-07-002,
27 which was for the same services that ETI had been performing for GPA pursuant to the four (4)
28 year CEMS contract ETI was awarded in GPA-RFP-02-005. Thus, ETI's allegation that the

4 Evaluation Review Committee was biased and ETI's allegation that GPA was using the
5 procurement process to improperly end their existing contract were untimely as they failed to file
6 a protest within fourteen (14) days after they knew or should have known of such allegations.

7 ETI's argument that its untimely protest should be considered now because ETI requested
8 an administrative review in its April 6, 2007 protest has no merit. As stated above, GPA's
9 March 26, 2007 protest decision is final and has a *Res Judicata* effect on these proceedings. Said
10 decision did inform ETI that it had "the right to administrative and judicial review" of the
11 decision. See Page 2, Exhibit D. Said language was in GPA's March 26, 2007 protest decision
12 because it is required by Guam's procurement laws and regulations. If a protest is not resolved
13 mutual agreement, the head of a purchasing agency shall promptly issue a decision in writing and
14 the decision shall: (1) State the reasons for the action taken; and (2) inform the protestant of its
15 right to administrative and judicial review. 5 G.C.A. §5425(c)(1) and (2). GPA's notice of the
16 right of administrative and judicial review mirrors the language requires by the aforementioned
17 statute. Despite being advised of right to administrative review, ETI failed to file its appeal
18 within fifteen (15) days after receiving GPA's March 26, 2007 protest decision on March 28,
19 2007.

20 Instead, on April 6, 2007, ETI filed a second Protest Letter with GPA. See Exhibit A.
21 Said protest did request for an administrative review of "this award." However, there has been
22 no award of a contract in GPA-RFP-07-002, and GPA has no jurisdiction to conduct an
23 administrative review of its March 26, 2007 protest decision. Generally, a protestor may appeal
24 a procurement protest decision under 5 GCA §5425© relative to the protest of a method of
25 selection, a solicitation, an award of a contract, within fifteen (15) days of receipt by protestor of
26 the decision and the Public Auditor shall determine whether a decision on the protest of method
27 of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the
28 statutes, regulations, and the terms and conditions of the solicitation. 2 G.A.R., Div. 4, Chap. 12,

4 §12201(a). Also, Procurement Appeals shall be made in writing to the Public Auditor and shall
5 be filed in triplicate. 2 G.A.R., Div. 4, Chap. 12, §12104(a). Here, GPA's March 26, 2007
6 Procurement Protest Decision, is a procurement protest decision made pursuant to 5 G.C.A.
7 §5425(c). Thus, GPA does not have the jurisdiction to decide a procurement protest appeal and
8 such appeal must be filed with Guam's Public Auditor in accordance with the requirements and
9 procedures set forth in 2 G.A.R., Div. 4, Chap. 12, §12101 *et. seq.*

10
11 **ETI's May 1, 2007 Amended Notice of Appeal**

12
13 The Public Auditor must not consider any of the allegations in the Amended Notice of
14 Appeal for two (2) reasons. First, the Amended Notice of Appeal is not properly before the
15 Public Auditor because it is not timely filed. Second, ETI's Amended Notice of Appeal contains
16 a new allegation, TRC is not licensed to conduct business on Guam, that is not properly before
17 the Public Auditor because was not raised in ETI's April 6, 2007 Protest and said allegation was
18 not considered or decided by GPA's April 12, 2007 Protest Decision. Finally, in the alternative,
19 should the Public Auditor consider this new allegation, there is no merit to ETI's claim that
20 GPA's selection of TRC as the best qualified offeror is improper because TRC does not have a
21 Guam Business License.

22 The Amended Notice of Appeal is not properly before the Public Auditor because it is not
23 timely filed. The Public Auditor shall have the power to review and determine *de novo* any
24 matter properly submitted to her. 2 G.A.R., Div. 4, Chap. 12, §12103(a). As stated above, a
25 protestor has fifteen days (15) days to file an appeal with the Office of the Public Auditor after
26 receiving a protest decision from an agency. 2 G.A.R., Div. 4, Chap. 12, §12201(a). Further, an
27 appeal is considered filed when received by the Office of the Public Auditor and Appeals filed
28 after the allowable fifteen (15) day period shall not be considered. 2 G.A.R., Div. 4, Chap. 12,

4 §12104(a). Here, on April 13, 2007 ETI was provided a copy of GPA's April 12, 2007 Protest
5 Decision and the fifteen (14) day period to file the appeal expired on April 28, 2007. ETI's
6 Amended Notice of Appeal was filed on May 1, 2007 which is beyond the said period. GPA is
7 prejudiced because its Agency Report is due on May 4, 2007 and it was not served with a copy of
8 ETI's Amended Notice of Appeal until late in the afternoon of May 3, 2007, which gives GPA
9 less than twenty-four (24) hours to answer the new allegations contained in the Amended Notice
10 of Appeal instead of the ten (10) working days that are set forth in the procurement appeal
11 regulations. Therefore, the Public Auditor should not consider ETI's Amended Notice of Appeal
12 because it is untimely and its consideration will prejudice GPA.

13 Amended Notice of Appeal contains a new allegation, TRC is not licensed to conduct
14 business on Guam, that is not properly before the Public Auditor because was not raised in ETI's
15 April 6, 2007 Protest and said allegation was not considered or decided by GPA's April 12, 2007
16 Protest Decision. ETI's April 6, 2007 Protest requested that GPA provide it written confirmation
17 that stating that TRC has complied with all Government of Guam laws regarding business and
18 contractor licenses. See Page 2, Exhibit A. GPA's April 12, 2007 Protest Decision denied this
19 request on the grounds that it is not required to provide such documents and that if GPA had
20 them, such documents would be part of TRC's proposal which GPA must not publically disclose
21 pursuant to 2 G.A.R., Div. 4, Chap. 3, §3114(h) and (i)(2). See Paragraph 3, Page 2, Exhibit E.
22 Thus, ETI has not exhausted its administrative remedies by filing a formal protest with GPA
23 concerning this matter and there is no prior GPA decision regarding this new allegation for the
24 Public Auditor to review.

25 In the alternative, should the Public Auditor consider this new allegation, there is no
26 merit to ETI's claim that GPA's selection of TRC as the best qualified offeror is improper
27 because TRC does not have a Guam Business License. GPA-RFP-07-002 does not require
28 offerors to specifically submit a Guam Business License. Here, ETI is merely alleging that this

4 requirement exists, it does not, and ETI is claiming that TRC violated this fictitious requirement.

6 **CONCLUSION**

7 Based on the foregoing, the ETI's April 20, 2007 Appeal must be denied because ETI's
8 opposition to the selection of TRC as the best qualified offeror is untimely and because ETI's
9 argument that its untimely protest should be considered now because ETI requested an
10 administrative review in its April 6, 2007 protest has no merit. Further, ETI's May 1, 2007
11 Amended Notice of Appeal must be denied because the Amended Notice of Appeal is not
12 properly before the Public Auditor because it is not timely filed and it contains a new allegation,
13 TRC is not licensed to conduct business on Guam, that is not properly before the Public Auditor
14 because was not raised in ETI's April 6, 2007 Protest and said allegation was not considered or
15 decided by GPA's April 12, 2007 Protest Decision, and, in the alternative, should the Public
16 Auditor consider this new allegation, there is no merit to ETI's claim that GPA's selection of
17 TRC as the best qualified offeror is improper because TRC does not have a Guam Business
18 License. Further, GPA hereby prays that the Public Auditor will award GPA all legal and
19 equitable remedies that GPA may be entitled to as a result of a denial of ETI's Appeals, to
20 include but not limited GPA's reasonable costs and attorney's fees if permissible.

21 8. There has been no award of GPA-RFP-07-002 and the determination required under 2
22 G.A.R., Div. 4, Chap. 9, §9101(e) is not applicable in this case.

23 9. Statement whether the matter is the subject of a court proceeding: GPA does hereby
24 confirm that to the best of its knowledge, no cause or action concerning the subject of this
25 Appeal has been commenced in court. Further, GPA acknowledges that all parties are required
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IN THE APPEAL OF EMISSIONS TECHNOLOGIES INC.
OFFICE OF THE PUBLIC AUDITOR APPEAL NO. OPA-PA-07-002
APPELLEE GUAM POWER AUTHORITY'S AGENCY REPORT

to, and GPA hereby agrees to notify the Office of the Public Auditor within twenty-four (24) hours if court action commences regarding this Appeal or the underlying procurement action.

RESPECTFULLY SUBMITTED this 4TH day of May, 2007:

By: *Anthony R. Camacho*
ANTHONY R. CAMACHO, ESQ.
Attorney for Appellee Guam Power Authority

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FILE No. OPA-PA 07-002

In the Appeal of)	Appeal No.: OPA-PA-07-002
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Emission Technologies, Inc.)	FINDINGS AND
)	RECOMMENDATIONS
Appellant)	OF HEARING OFFICER
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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, 2006.¹ It included two amendments and a Special Reminder.
2. Amendment I dated October 23, 2006,² changed the closing date to November 3, 2006; and Amendment II dated October 26, 2006,³ 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.

¹ See Procurement Record, Front Section for the complete RFP; also see ETI 1st 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.

² See Procurement Record, front section.

³ Id.

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

(a) **Section 2.4 Awards or Rejection of Proposals**⁴

... 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**⁵

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**⁶

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."⁷

5. ETI sent a protest letter dated January 30, 2007⁸ 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."⁹

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

⁴ Id. at RFP, Page 7 of 42, Section 2.4.

⁵ See Procurement Record, RFP, Page 11 of 42, Section 2.16 Licensing.

⁶ See Procurement Record, RFP, Page 1 of 42.

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

⁸ Id.

⁹ See Procurement Record, 1st 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, 2007,¹⁰officially 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 these services to you. Please note it can take several months to legally acquire a CEMS contractor's license.¹¹

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

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

¹¹ 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.¹²

12. GPA's Reply to the April 6 letter was dated April 12, 2007,¹³ and faxed to ETI on April 13, 2007¹⁴. 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.¹⁵

13. GPA by letter dated April 13, 2007¹⁶ 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.¹⁷

¹² See Procurement Record, 2nd Stay Section.

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

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

¹⁵ See Procurement Record, 2d Protest Reply (GPA to ETI).

¹⁶ See Procurement Record, 2nd Lift Section.

¹⁷ See Procurement Record, ETI 1st 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.¹⁸

16. GPA by letter to ETI dated April 24, 2007¹⁹ 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 Appeal²⁰ (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.

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

¹⁹ 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.

²⁰ See Amended Notice of Appeal dated May 1, 2007.

(c) ETI attached to its appeal²¹ 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.'²²

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, 2007.²³

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 §5008.²⁴

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

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

²¹ See *id.*

²² *Id.*, Page 4.

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

²⁴ Testimony of Robert Wilson, President of ETI.

²⁵ 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.²⁶

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:

²⁶ 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 §5008,²⁷ 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.

²⁷ 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

(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 1st 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 inform 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 17th day of July 2007.



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