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OPA-PA-25-002: In the Appeal of Glimpses of Guam, Inc.

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Wed, May 14, 2025 at 3:00 PM

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Cc: djberman@pacificlawyers.law, Charles McDonald <charles@mcdonald.law>, guam@mcdonald.law

Hafa Adai Mr. Hernandez,

Please see attached *Appellant Glimpses of Guam, Inc.'s Reply in Support of Motion for Summary Judgment* for filing in the above matter.

Please confirm your receipt of this email and its attachments. Thank you.

Regards,

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Appellant Glimpses of Guam Inc's Reply in Support of Motion for Summary Judgment.pdf

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7 *GLIMPSES OF GUAM, INC.*

8 **BEFORE THE PUBLIC AUDITOR**
9 **PROCUREMENT APPEALS**
10 **TERRITORY OF GUAM**

11 IN THE APPEAL OF

Appeal No.: OPA-PA-25-002

12 GLIMPSES OF GUAM, INC.,

**APPELLANT GLIMPSES OF GUAM, INC.'S
REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

13 Appellant.

14 COMES NOW Appellant GLIMPSES OF GUAM, INC. (hereinafter "Glimpses"),
15 by and through counsel undersigned, and hereby respectfully replies to the Purchasing
16 Agency's Response to Motion for Summary Judgment filed by the Guam Visitors
17 Bureau ("GVB").

18 **I. INTRODUCTION**

19 Glimpses submitted a bid on a Request for Proposal ("RFP") from the GVB for a
20 contract to perform marketing and advertising services for GVB. Another bidder named
21 "The Manhita Team" comprised of different individual entities named SKIFT, Big Fish
22 Creative Inc. ("Big Fish") and Ruder Integrated Marketing Strategies ("RIMS") was
23 evaluated as the number 1 bidder. RIMS—who was not a responsible or responsive
24 bidder—was unlawfully awarded the contract from GVB. The evaluations refer to The
25 Manhita Team. The Manhita Team repeatedly promotes only the Team as the bidder.
26 The Manhita Team bid omitted documents such as an affidavit of non-collusion from
27 SKIFT. The Manhita Team bid was legally deficient. GVB's attempt to award to RIMS, a
28

non-bidder, violated procurement law. Summary Judgment in Glimpses' favor is warranted here.

II. BACKGROUND

Glimpses incorporates by reference the statements of undisputed material facts in its Memorandum Brief in Support of Summary Judgment filed on May 7, 2025 and Opposition to GVB's Motion to Dismiss filed on May 12, 2025.

III. POINTS AND AUTHORITIES

Summary judgment in Glimpses' favor and ordering a rebid is the correct resolution at this point. In opposing summary judgment, GVB makes several flawed arguments. As shown below, those arguments fail and Glimpses is entitled to summary judgment as a matter of procurement law in its favor.

a. The OPA has jurisdiction over this appeal

GVB argues "RIMS [sic] did not obtain an agency decision prior to filing this appeal; RIMS [sic] did not exhaust administrative remedies, leaving the OPA without jurisdiction to decide this motion"; "RIMS [sic] did not timely seek the Public Auditor's confirmation of GVB's determination of need re the substantial interests of Guam; RIMS [sic] did not exhaust administrative remedies, leaving the OPA without jurisdiction to decide this motion." GVB's Opposition to MSJ at 1. Presumably these arguments are meant to be directed at Glimpses, not RIMS—the non-bidder that GVB incorrectly claims is one and the same as The Manhita Team.

Glimpses has properly pursued its protest and appeal. The Public Auditor has jurisdiction "to review and determine *de novo* any matter properly submitted to her or him." 5 GCA § 5703(a) (2005); *see also* 2 GAR Div. 4 § 12103(a). Jurisdiction exists here. GVB appears to suggest that Glimpses was required to file multiple protests and appeals. This is illogical, inefficient, and not what procurement law requires. While

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2 exhaustion is required as to each and every claim under the procurement code,¹ GVB
3 cannot arbitrarily determine what should be a separate claim.² Procurement law
4 requires that Glimpses timely file a protest and timely file an appeal. Glimpses did both
5 before expiration of relevant deadlines. Glimpses has submitted with document support
6 that no state of emergency exists since the outset of this appeal. That decision is pending
7 before the OPA. In addition, Glimpses has filed a second appeal. Logically, as Glimpses
8 previously requested and advocated, and for judicial economy, the two appeals would
9 and should be consolidated by a court, but GVB resisted in order to gain a procedural
10 edge. Additional appeals or separate exhaustion of remedies are not required and
11 would simply add redundancy and inefficiency.

12 GVB failed to provide statutorily required proper notice of the right to appeal in
13 the substantial interests determination ("SID") notice. Therefore, jurisdiction exists over
14 Glimpses' appeal relating to the SID, and that issue is before the OPA now. Moreover,
15 other than the disputed SID two-day deadline, Glimpses satisfied all procurement code
16 deadlines for a protest and appeal.

17 Jurisdiction by reviewing tribunals and courts to review an urgent and
18 compelling determination like the SID here is broad. For example, the U.S. Court of
19 Appeals for the Federal Circuit has held that the U.S. Court of Federal Claims has
20 jurisdiction to review an agency's decision to override a pre-award automatic stay
21 based on an "urgent and compelling" finding under the applicable federal procurement
22 statute. *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286 (Fed. Cir. 1999). In
23 *RAMCOR*, the Federal Circuit explained that because a pre-award override decision
24

25 ¹ As the Supreme of Guam has explained "an aggrieved bidder must raise known defects in the
26 solicitation process **during the administrative review phase before pursuing such claims in Superior Court.**" *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, ¶74 (emphasis added). Glimpses
27 has done just that here. OPA has jurisdiction over each issue or claim in the case.

28 ² See, e.g., *Senegal v. United States*, 2023 U.S. App. LEXIS 27060, *15 (Fed. Cir. Oct. 12, 2023) ("We see no reason to consider the two actions separately; cancellation and resolicitation were two components of a single agency decision announced in one breath.").

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2 allowed the agency to continue with procurement and contract performance, it was "in
3 connection with" a procurement, establishing jurisdiction in the court under the
4 applicable statute. *Id. See also PGBA, LLC v. United States*, 57 Fed. Cl. 655, 659–60 (2003)
5 (extending the reasoning to a "best interests" determination to prevent agencies from
6 avoiding review by always issuing override decisions).

7
8 **b. Enforcing a two-day time bar without providing notice is**
9 **arbitrary, capricious, and contrary to Constitutional Procedural**
10 **Due Process**

11 "If a procurement decision is not supported by a rational or reasonable basis,
12 Guam's procurement law appears to allow an aggrieved bidder to have that decision set
13 aside as arbitrary or capricious, or as an abuse of discretion." *DFS Guam L.P.*, 2020
14 Guam 20, ¶45 n.12 (citations omitted). In *DFS Guam L.P.*, the Supreme Court declined to
15 address whether a claim that a procuring agency's decision to deny a protest may be
16 subject to a claim of arbitrariness or capriciousness. *Id.* The Court noted that whether an
17 emergency declaration needed to award a procurement is reviewable for arbitrariness.
18 *See id.* (citing *Pac. Data Sys., Inc. v. Superior Court of Guam*, Civ. No. 90-00029, 1990 WL
320357, at *2 (D. Guam App. Div. Oct. 24, 1990)).

19 Once a party brings a timely protest, an automatic stay of procurement until final
20 resolution of that protest is required. 5 GCA § 5425(g). That is the fundamental black
21 letter rule of procurement law. However, an exception is allowed: the statute further
22 provides conditions allowing the purchasing agency to continue with an appealed
23 award if "necessary to protect substantial interests of the Territory. . . ." 5 GCA
24 § 5425(g)(1).

25 The Supreme Court of Guam has held

26 that in a procurement controversy under 5 GCA § 5425, the
27 automatic stay set forth in section 5425(g) remains in effect during
28 the fourteen-day period following OPA's decision and
commencement of a civil suit within the Superior Court and

continues until final resolution of the action by the Superior Court. The Government should refrain from taking action (e.g., issuing purchase orders to its chosen bidder) on a procurement award until the fourteen-day period has expired and a civil action has not been filed in the Superior Court to review the OPA's decision.

Teleguam Holdings, LLC v. Terr. of Guam, 2015 Guam 13, ¶31.

The stay is lifted if:

(1) The Chief Procurement Officer or the Director of Public Works after consultation with and written concurrence of the head of the using or purchasing agency and the Attorney General or designated Deputy Attorney General, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Territory; and

(2) Absent a **declaration of emergency** by the Governor, the protestant has been given at least two (2) days notice (exclusive of territorial holidays); and

(3) If the protest is pending before the Public Auditor or the Court, the Public Auditor or Court has confirmed such determination, or if no such protest is pending, no protest to the Public Auditor of such determination is filed prior to expiration of the two (2) day period specified in Item (2) of Subsection (g) of this Section.

5 GCA § 5425(g)(1)-(3).

The regulations discuss the "two-days notice" and the "two-day period." 2 GAR § 9101(e)(2)-(3).

The source of § 5425 is "GC '6975. MPC '9-101." Section 9-101 of the Model Procurement Code does not contain the two-day time limit.³ GVB argues it was not required to inform Glimpses of the time to protest its determination of need. Imposing this limit without providing statutory notice of the right to challenge it is a prime

³ See American Bar Assoc., Model Procurement Code (2000), § 9-101(6) (imposing the stay until "the Chief Procurement Officer, after consultation with the head of the Using Agency or the head of a Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the [State]."), PDF page 96, available at: <https://publicprocurementinternational.com/wp-content/uploads/2019/04/2000-ABA-Model-Procurement-Code.pdf>.

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2 example of arbitrary and capricious. In addition, the effort at its enforcement violates
3 the Constitutional right to Procedural Due Process rights of Glimpses, an aggrieved
4 bidder⁴ who has filed a timely protest and a timely appeal.⁵ GVB cites no authority for
5 why this short deadline passes constitutional scrutiny.

6 While the Supreme Court has assessed the legislative intent for the 14-day
7 deadline, *Teleguam Holdings, LLC*, 2015 Guam 13, ¶31, the Supreme Court does not
8 appear to have addressed the issue of whether the two-day period is a violation of
9 procedural due process when a government agency seeks to enforce it, without
10 providing notice of the right and opportunity to be heard to challenge the alleged state
11 of emergency the government invokes. Glimpses submits that enforcing the two-day
12 period without notice is unconstitutional under the circumstances here, especially to the
13 extent the timeframes set forth in the Procurement Code are jurisdictional in nature. *See*
14 *id.* ¶¶ 20-21.

15 Finally, a protest, such as Glimpses challenge to the SID, filed with an
16 administrative agency after the expiration of a jurisdictional deadline that would
17 ordinarily bar its consideration, can be accepted as filed *nunc pro tunc* where
18 extraordinary circumstances caused the delay in filing. *See Union Electric Corp. v. Board*
19 *of Property Assessment, Appeals & Review of Allegheny County*, 746 A.2d 581, 584 (Pa. 2000).
20 "The fact that the Procurement Code does not specifically address and provide for such
21 relief does not preclude allowance of a protest *nunc pro tunc*. *Nunc pro tunc* relief is an
22 equitable exception to strict deadlines that by their terms absolutely bar untimely
23 filings." *Bureau Veritas N. Am., Inc. v. DOT*, 127 A.3d 871, 879 (Pa. Cmwlth. 2015).
24 "Equitable considerations apply to Procurement Code protests and can permit a protest
25

26 ⁴ "[C]ourts have found consistently that the loss of an opportunity to compete for a contract on a level
27 playing field sufficiently establishes irreparable harm." *Rhinocorps Ltd. v. United States*, 87 Fed. Cl. 673, 679
(2009).

28 ⁵ The focus of procedural due process is the fairness of the procedures used by the government to deprive
one of a liberty or property interest. *Donaldson v. Clark*, 819 F.2d 1551, 1558 (11th Cir. 1987).

1 that would otherwise be untimely." *Id.* (citing *Omnicare, Inc.*, 68 A.3d at 24 (agency
2 would be estopped from enforcing Procurement Code seven-day time limit if it had
3 misrepresented the deadline for filing a protest); *Firetree, Ltd.*, 3 A.3d at 764 n.6 (altering
4 deadline date because the RFP may have misled bidders). Glimpses' protest of the SID
5 should be considered timely based on GVB's conduct and the equitable principles at
6 stake here. From the very outset of this appeal, Glimpses specifically contested the
7 supposed state of emergency GVB alleged.
8

9 **c. Awarding a "collaborative" bid to only one non-bidder among**
10 **the several individual partners on a "Team" is unlawful**

11 GVB continues, arguing that the "RIMS' Manhita submission did not violate the
12 procurement law or the terms of the RFP." This use of the label "RIMS' Manhita
13 submission" is merely a clever attempt to disguise the crucial fact that The Manhita
14 Team mentioned and emphasized repeatedly in its bid that they were not RIMS, it was
15 an alliance of three entities. *See* Exhibit "1" (referencing "The Manhita Team" advocated
16 fourteen (14) times). However, GVB has no intention to award and, according to its
17 documents, has not awarded or executed any contract with "The Manhita Team."
18 Contrary to GVB's assertion, the submission did violate procurement law.

19 The latest reports and documents from DRT show that no such "Manhita Team"
20 was incorporated, is not a filed partnership, and is not a "dba" of any actual companies
21 associated with The Manhita Team.

22 GVB asserts that RIMS is the offeror on a "collaborative" bid and can stand in the
23 place of the other entities because "The Record contains a "Partnership Agreement"
24 between RIMS and Big Fish." Opposition at 5 (*citing* GVB0662-GVB0663). RIMS
25 apparently entered into a partnership agreement with only one of the team entities; i.e.,
26 Big Fish, but SKIFT was left out of the "partnership" without explanation. The
27 "partnership agreement" only mentions Big Fish and RIMS. Also, SKIFT failed to
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2 submit any of the required individual bid materials, such as an affidavit of non-
3 collusion.

4 The partnership agreement does not correct GVB's failure to award the contract
5 to the partnership and to instead only award the contract to one "partner" – RIMS. The
6 "partnership" had no employer identification number, no business license, and no filed
7 approval or certificate of doing business as any kind of entity from the Department of
8 Revenue and Taxation. The partnership agreement does not use the fictitious name of
9 "The Manhita Team." Indeed, this partnership agreement did not assign or delegate any
10 powers to contract to RIMS or any RIMS agent or employee.

11 The actual evaluations of GVB were graded only on express finding that
12 "Manhita" or "The Manhita Group" was the bidder on the RFP. *See* Exhibit "2",
13 Evaluations at GVB0243, GVB0255, GVB0256, GVB0265, GVB0266, GVB0275 and
14 GVB0276. At no time was RIMS evaluated as a sole bidder.

15 GVB is not allowed to accept, select and award a public contract to an individual
16 party who was not evaluated and had no individual bid timely submitted in response
17 to the RFP of GVB. Guam Procurement Law provides that the award of the contract is
18 "to the lowest responsible bidder whose bid meets the requirements and criteria set
19 forth in the Invitation for Bids[.]" 5 GCA § 5211(g)(emphasis added). Under Guam law,
20 a responsible bidder means "a person who has the capability in all respects to perform
21 fully the contract requirements, and the integrity and reliability which will assure good
22 faith performance." 5 GCA § 5201(f). A responsive bidder means "a person who has
23 submitted a bid which conforms in all material respects to the invitation for Bids." 5
24 GCA § 5201(g)(emphasis added). The law does not say a responsive bidder can be
25 merely one part of a team that may have submitted a conforming bid⁶. Had the
26
27

28 ⁶ Glimpses asserts that the Manhita bid was non-conforming given the refusal and absence of each
entity's affidavit of non-collusion, that was required.

Legislature intended such a result, it would have been easy to add it to the statute's plain terms.

Likewise, 5 GCA § 5216(e) limits the award to the actual offeror itself, not an individual entity that was part of a team offer or an entity that itself did not make a proposal and receive a qualification ranking.⁷

Agencies may not award a contract with the intent to transfer the contract to another entity. *See, e.g., Acepex Mgmt. Corp., B-283080 et al.*, October 4, 1999, 99-2 CPD ¶ 77. A non-bidding entity cannot simply buy a procurement award for a contract—the restriction on the transfer of bids reflects a policy of ensuring the accountability of vendors to the government and of discouraging vendors from acquiring speculative interests in government contracts for the purpose of trading in them. *See Mil-Tech Sys. Inc. v. United States*, 6 Cl. Ct. 26, 33-35 (Cl. Ct. 1984) (finding it proper to disallow the transfer of a bid in conjunction with the sale to a non-bidding entity of assets of negligible or insubstantial value for nominal consideration because an award to the bidder would subvert the integrity of the procurement process); *In re Premier Sec.*, 1997 U.S. Comp. Gen. LEXIS 238, *17 (Comp. Gen. July 14, 1997) (finding the sale of the business was tantamount to the improper sale of the bid, and prohibiting the successor in interest to receive award of the contract). There has been no merger, novation, or permissible transfer from Manhita to RIMS in this case.

Guam law provides a procedure for addressing mistakes in bidding and awarding. For example, “all decisions to permit the correction or withdrawal of bids, or

⁷ 5 GCA § 5216(e) provides that:

Award shall be made to the offeror determined in writing by the head of the purchasing agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable. If compensation cannot be agreed upon with the best qualified offeror, the negotiations will be formally terminated with the selected offeror. If proposals were submitted by one or more other offerors determined to be qualified, negotiations may be conducted with such other offeror or offerors, in the order of their respective qualification ranking, and the contract may be awarded to the offeror then ranked as best qualified if the amount of compensation is determined to be fair and reasonable. (emphasis added)

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2 to cancel awards or contracts based on bid mistakes, shall be supported by a written
3 determination made by the Chief Procurement Officer, the Director of Public Works or
4 head of a purchasing agency." 5 GCA § 5211(f). Yet, there has been no statement as to a
5 mistake over why the offeror is not the same entity that was evaluated and awarded the
6 contract nor has any proper correction of such a mistake occurred here.

7 GVB's argument that it did not need to "disclose RIMS' Manhita submission"
8 should not be accepted. GVB informed Glimpses by letter on January 21, 2025, that it
9 had "elected to pursue a contract" with RIMS. The RFP evaluations were complete at
10 that time. Glimpses sent its FOIA request to GVB on January 27, 2025. There was no
11 justification to keep The Manhita Team bid secret at that time except to conceal it and
12 inequitably keep Glimpses in the dark as to the unlawfulness of pursuing and awarding
13 the contract to RIMS—a non-bidder.

14 Glimpses does not argue that a collaborative bid is forbidden. Instead, summary
15 judgment in Glimpses' favor is merited because GVB is attempting to award the
16 contract to a non-bidding entity in violation of established procurement law principles.

17 CONCLUSION

18 Glimpses submits that summary judgment should be granted without necessity
19 of further hearings other than argument on the instant motion and is appropriate to
20 invalidate the contract awarded solely to RIMS. A re-bid of this procurement is
21 required so that a level playing field of true individual bidders, competing apple to
22 apple, so that the competition may include Glimpses, Big Fish Creative Inc., SKIFT and
23 RIMS is allowed and taken under full consideration in the GVB evaluations.

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2 DATED this 14 day of May, 2025.

3 Respectfully submitted,

4 **BERMAN LAW FIRM**
5 Attorneys for Appellant
6 *GLIMPSES OF GUAM, INC.*

7 By:


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DANIEL J. BERMAN