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In the Appeal of Graphic Center, Inc.; OPA-PA-21-012

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Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Fri, May 30, 2025 at 4:00 PM

Good afternoon Mr. Hernandez:

Please see the attached document to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Sosanbra Salas Reyes

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEAL OF

GRAPHIC CENTER, INC.

Appellant.

Case No. OPA-PA-21-012

HEARING BRIEF

I. INTRODUCTION

Graphic Center, Inc. ("Graphic Center" or "Appellant") is before the Office of Public Accountability's ("OPA") pursuant to the Superior Court of Guam's Decision and Order remanding this matter back to the OPA for further agency investigation and record development to determine the materiality of the information missing from the procurement record. Graphic Center continues to assert that the GPA award to offeror Infosend, Inc. ("Infosend") was improper and contrary to law. This Hearing Brief is submitted in conformance with OPA's Scheduling Order of May 2, 2025.

II. RELEVANT FACTUAL AND PROCEDURAL HISTORY

The Guam Power Authority ("GPA") issued Request for Proposal GPA-RFP-

21-002 ("RFP") on May 13, 2021. The RFP was seeking offerors to provide GPA Professional Printing, Mailing and Processing Services Relating to Utility Customer Billing. GPA issued Amendment No. 1 to the RFP on May 28, 2021. That Amendment contained approximately seventy (70) questions to which offerors were to respond. PR, 505.

Infosend did not respond with either the Amendment or the answers to the questions propounded in the Amendment. GPA did **not** disqualify Infosend. On August 11, 2021, GPA disqualified Moonlight BPO as an offeror for failing to provide another required, albeit less material, form: the Affidavit of Disclosure of Major Shareholders. PR, 294. The procurement record contains no information regarding why GPA ignored Infosend's non-responsiveness, but disqualified Moonlight BPO.

On August 11, 2021, GPA selected Infosend for Award of the RFP. PR, 282. On August 30, 2021, Graphic Center submitted its agency level protest. PR, 236. GPA denied Graphic Center's protest on October 7, 2021. PR, 179. Graphic Center appealed to the OPA on October 22, 2021. PR, 82. The OPA Denied the Graphic Center appeal on March 25, 2022, and Graphic Center timely appealed the OPA's Decision ("decision") on April 5, 2022.

On October 29, 2024, the Superior Court of Guam remanded the matter back to the OPA, and concluded that "the procurement record contains no explanation as to why Infosend's offer was allowed to continue while missing key documents, but Moonlights's offer was rejected for that reason." Decision and Order, 6. While not confirming that the procurement record was flawed to the point of requiring abandonment of the bid altogether, the Superior Court did order more "agency investigation and record Development." Decision and Order, 6. The Court explained that "the Court remands this matter to the OPA for further agency investigation and record development to determine the

materiality of the information missing from the procurement record." Decision and Order, 6

III. THE AWARD TO INFOSEND IS NOT SUPPORTED BY THE PROCUREMENT RECORD

A. The Procurement Record shows that Infosend was materially non-responsive

The OPA's prior determination that Infosend submitted a responsive bid that was properly evaluated by GPA is not supported by law. "Responsive bidder means a person who has submitted a bid with conforms in all material aspects to the Invitation for Bids." 5 G.C.A. § 5210(g). Adherence to the plain language of the RFP is essential for bidders and the integrity of the procurement system. *Baldrige v. Government Printing Office*, 513 Fed. Appx. 965, 967 (Fed. Cir. 2013) ("If the plain language of the RFP unambiguously called for decluttered laminate film, that language controls."); *Professional Bldg. Concepts, Inc. v. City of Cent. Falls Housing Authority*. 783 F Supp. 1558, 1563 (U.S. Dist. Rl. 1992). ("Unless ambiguous, it is the language of the RFP which controls the form that a bid guarantee must take.")

Here, there is no dispute that GPA's RFP § 2.12 plainly required that offerors' respond to provide all required forms identified in the RFP. There is no factual dispute that Graphic Center submitted all required forms with its response, including Amendment 1 and the attached questions. Infosend did not. As such, only Graphic Center remained as the one responsive offeror to the bid.

B. The Procurement Record contains no explanation for this variance that allowed Infosend to nonetheless remain eligible for award.

GPA provided prior testimony that each bidder was required to submit the Amendment in its bid package response. Infosend did not submit the

Amendment with its response. There is no factual dispute that Infosend failed to include the required form in its response and consequently failed to answer the questions that the Amendment propounded. GPA turned a blind eye to this non-responsiveness. There is no record, public or otherwise, of GPA granting such an exemption to Infosend. This procurement record error violates the law, and prevents an award.

Guam law mandates that “each procurement officer shall maintain a complete record of each procurement.” 5 G.C.A. § 5249. The law does not provide an exhaustive list of what a complete record contains, but instead provides a non-exhaustive list of items that “the record shall include.” 5 G.C.A. § 5249. Under the law, GPA was required by Guam’s procurement laws to maintain a procurement record during the RFP process, and to make sure that the record includes everything essential to understanding how the award was made, and why certain agency actions — such as the claimed action of providing one bidder with an exception not afforded others — were made.

Guam law categorically and independently prevents an award when the material record of the procurement was not properly maintained. Under Guam law, “a complete procurement record is required by law for an award,” *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 35 (Guam May 14, 2018), citing 5 G.C.A. § 5250. There is no factual support, or support in the record, for GPA’s determination to disqualify Moonlight BPO for failing to include a required form in its response and to not disqualify Infosend for failing to include a required form in its response. Conversely, there is no factual support, or support in the record, for GPA refusing to grant Moonlight BPO an exemption as GPA granted Infosend. Put another way, the Procurement Record contains no support or reasoning for holding one offeror to a stricter standard and another to a less strict compliance standard and then rewarding the latter with an award as the

best qualified. There is no factual basis or support in the record for the OPA affirming GPA's disparate treatment of offerors or for failing to hold GPA to the terms and conditions of its RFP. Similarly, there is no factual support, or support in the record, for the determination by GPA or by OPA that Infosend's response was responsive. The law does not allow an award under these conditions.

To protect the integrity of the bidding process, a procurement record must be kept and maintained. 5 G.C.A. § 5252 (a). That record must include "the date, time, subject matter and names of participants at any meeting, including government employees that in any way related to a particular procurement" and "a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which in any way related to the procurement." 5 G.C.A. § 5249 (a) & (b). The record here is defective as it contains no record of the communications that resulted in the waiving of Infosend's non-responsiveness.

C. Infosend's failure to respond to detailed questions about its services was a material failing.

To be sure, the lapse in the procurement record is material. The missing 70 answers to GPA questions prevented GPA from comparing Infosend to other bidders, and therefore thwarted effective evaluation of the Infosend submission. The questions from GPA sought information on communication, security, bill formatting software, archiving, disaster preparation, and other material questions regarding the production of bills. These are material matters, as they directly implicate the ability to deliver the services called for in the RFP, or evaluate a bidder's plan to meet those requirements. *Superior Optical Labs, Inc. v. United States*, 173 Fed.Cl. 243

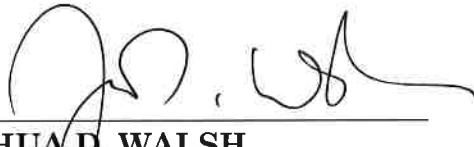
(2024)) (describing a material term in a procurement solicitation as one that is explicitly stated in the solicitation and serves a substantive purpose such as terms that are important to the government's evaluation of the offer.) *See also, Okada Trucking Co., LTD. v. Board of Water Supply*, 40 P.3d 946, 97 Haw. 544 *citing Blount, Inc. v. United States*, 22 Cl.Ct. 221 (1990) ("[A] bid which contains a material nonconformity must be rejected as nonresponsive. Material terms and conditions of a solicitation involve price, quality, quantity, and delivery.") It is evident that the procurement record is incomplete, that GPA failed to maintain a complete procurement record as required by law, and that certification of the procurement record was improper.

IV. CONCLUSION

GPA made an award to an untested off island vendor that was materially non-responsive to the issued RFP and that was evaluated using criteria that deviated from the announced criteria contained in the RFP. The record of procurement kept by GPA explains none of this, and this material failing prevents a legal award to Infosend. Because of these failings, Graphic Center respectfully requests that the OPA issue an order determining that an award to Infosend is contrary to law, and that Graphic Center, as the lowest priced remaining responsive bidder, be made the awardee of the RFP.

Respectfully submitted on this 30th day of May 2025.

RAZZANO WALSH & TORRES, P.C.

By: 
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