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**Filing: In the Appeal of Graphic Center: OPA-PA-21-012**

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To: Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

Cc: "Joshua D. Walsh" &lt;jdwalsh@rwtguam.com&gt;

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,

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**Pldg - Proposed Findings of Fact and Conclusions of Law.pdf**

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

IN THE APPEAL OF

GRAPHIC CENTER, INC.

Appellant.

Case No. OPA-PA-21-012

**[PROPOSED] FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**I. INTRODUCTION**

This matter came before the Office of Public Accountability (“OPA”), through the Public Auditor, pursuant to the Superior Court of Guam’s October 29, 2024, Decision and Order remanding this matter back to the OPA. The Superior Court concluded that “the procurement record contains no explanation as to why Infosend’s offer was allowed to continue while missing key documents, but Moonlight’s offer was rejected for that reason.” Decision and Order, 6. The Superior Court directed that further agency investigation and record development was needed to determine the materiality of the information missing from the procurement record.

The OPA conducted a limited evidentiary hearing on June 6, 2025. In addition to counsel for the parties, institutional representatives were physically present at the hearing. Physically present at the hearing for Graphic Center was its corporate representative Mr. Christopher Biolchino. GPA's Chief Financial Officer John Kim was the representative for procuring agency GPA. Interested Party Infosend was also present.

The OPA has considered the evidence, including the testimony of prior witnesses and exhibits admitted into evidence when this matter was first before the OPA, the procurement record ("PR") maintained and prepared by GPA, and the submissions placed into the record by the parties. The OPA has further considered the written arguments and proposed Findings of Fact and Conclusions of Law submitted by counsel for the parties.

The OPA hereby enters the following Findings of Fact and Conclusions of Law. To the extent that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent that matters expressed as Conclusions of Law may be considered Findings of Fact, they shall also be deemed Findings of Fact

## **II. FINDINGS OF FACT**

1. 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. Glidepath is the incumbent customer billing contractor.

2. 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.

3. GPA's RFP § 2.12 required that offerors' respond to provide all required forms identified in the RFP.

4. GPA's RFP does not contemplate bid submissions where offerors provide answers to the questions presented in Amendment 1 in an alternative narrative form. To the contrary, offerors were reminded that they must submit Amendment 1.

5. Infosend did not respond directly with either the Amendment or the answers to the questions propounded in the Amendment, though GPA maintains that the information requested in that Amendment was provided elsewhere in Infosend's bid response.

6. GPA did not disqualify Infosend.

7. On August 11, 2021, GPA disqualified Moonlight BPO as an offeror for failing to provide another required, albeit less material and easily correctable form: the Affidavit of Disclosure of Major Shareholders. PR, 294.

8. While GPA offered testimony from bid evaluator John Kim that they were satisfied with Infosend's submission and the information they claimed they could glean from it in lieu of a submission of Amendment 1, the procurement record contains no information regarding an explicit decision by GPA reflecting the bid evaluation method implemented by Mr. Kim.

9. The Procurement Record does not record the decision to ignore Infosend's lack of submission of the Amendment 1 form, or to proceed forward with a narrative review while simultaneously disqualifying Moonlight for failing to submit a required form.

10. On August 11, 2021, GPA selected Infosend for Award of the RFP. PR, 282.

11. 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.

12. This matter was subsequently remanded back to the OPA for further record proceedings to determine the materiality of the information missing from the procurement record" regarding the decision to proceed with an award to Infosend. Decision and Order, 6

13. In addition to standing upon the testimony previously provided to the OPA, GPA buyer Dawn Fejeran and RFP Evaluator John Kim provided further testimony during the remanded proceedings.

14. In order to determine bid responsiveness, testimony was elicited about how GPA uses an agency checklist form for its procurement personnel to use.

15. If, after an offeror's bid is submitted and an initial review by GPA personnel finds that the offer's bid is missing some item from the agency

checklist, that bid is immediately rejected and does not proceed to further evaluation.

16. GPA rejected Moonlight BPO's bid because the agency checklist form revealed that Moonlight BPO had not submitted an Affidavit disclosing major shareholders.

17. GPA did not reject Infosend's bid because Infosend complied with the agency checklist.

18. However, testimony provided at the remanded hearing by Dawn Fejeran revealed a fundamental flaw in the agency's use of their responsiveness checklist. GPA's buyer testified that while GPA may, as it did with issuing Amendment 1, require further items from offers as part of a responsive bid package, the agency itself never updates its bid responsiveness checklist. This means that GPA procurement personnel, upon receipt of bid packages, are making responsiveness determinations that do not comport with the actual responsiveness requirements of a particular amended RFP.

19. The result of this discrepancy means that an offeror like Moonlight BPO with a missing document can be rejected out of hand, but another offeror like Infosend with a missing document can be moved along to bid evaluations, all because initial procurement review personnel are using flawed checklists that fail to capture all final requirements of a bid submission.

20. GPA's failure to correctly capture on its responsiveness checklist all aspects of a RFP and its amendments means that any award would be arbitrary and

capricious due to the lack of meaningful comparative review of offerors.

21. GPA's procurement record fails to address any of these issues regarding the flawed responsiveness checklist, and provides no justification for making an award to a bidder who could have been rejected prior to bid evaluations had GPA procurement staff updated its checklist as the requirements of the RFP itself were updated.

22. There is no dispute that the information sought from Amendment 1 was material to the procurement.

23. The questions from GPA contained in Amendment 1 sought information on communication, security, bill formatting software, archiving, disaster preparation, and other material questions regarding the production of bills.

24. 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.

### III. CONCLUSIONS OF LAW

25. The OPA is unable to determine that Infosend submitted a responsive bid that was properly evaluated by GPA in accordance with law.

26. A "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. Ct. 1992). ("Unless ambiguous, it is the language of the RFP which controls the form that a bid guarantee must take.")

27. 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. However, there is also no dispute that GPA added, in the form of Amendment 1, further requirements to the forms required to be submitted offerors but never provided its procurement review staff with an updated checklist reflecting that addition.

28. There is no factual dispute that Graphic Center submitted all required forms with its response, including Amendment 1 and the attached questions.

29. Infosend did not submit the Amendment 1 form.

30. Infosend would have been rejected had GPA's procurement staff kept an updated responsiveness checklist. GPA's oversight allowed a bid that would have been rejected upon initial review to move forward for further consideration.

31. Such a disparate application of responsiveness review prevents an award to Infosend in this RFP under law.

32. Even though Infosend was not initially rejected, GPA could not effectively recreate Amendment 1 by having its bid evaluators scour the other aspects of Infosend's bid submission, and the procurement record contains no information on



how such a decision was made.

33. While GPA offered testimony from bid evaluators that they were satisfied with Infosend's submission and the information they claimed they could glean from it, the fact that procurement record contains no information regarding an explicit decision by GPA regarding making this determination in the absence of an Amendment 1 submission prevents the issuance of an award.

34. GPA provided prior testimony that each bidder was required to submit the Amendment in its bid package response.

35. 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.

36. GPA turned a blind eye to this non-responsiveness, and claims it did so because its evaluators were able to obtain the information they sought through other means. However, there is no record, public or otherwise, of GPA granting such an exemption to Infosend or making an explicit decision to proceed in such a manner. This procurement record error violates the law, and prevents an award.

37. Guam law mandates that "each procurement officer shall maintain a complete record of each procurement." 5 G.C.A. § 5249.

38. 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.

39. 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.

40. Evidence taken during the hearing on remand reveals that GPA made no such decision, and only proceeded to evaluate the Infosend bid because its initial bid review personnel failed to update their responsiveness review checklists.

41. 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.

42. 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.

43. The law does not allow an award under these conditions.

44. 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).

45. GPA personnel testified that the procurement record has not been updated since November 2021. Even though a stay of procurement is in place, GPA's failure to capture or otherwise log all communications "in any way related" to this procurement further demonstrates the ineffective procurement record process implemented by GPA.

46. GPA personnel testified that they have undertaken no further efforts to assure themselves of Infosend's current ability to perform as a contractor in 2025, and are intending to proceed with an award based upon a responsibility determination made in 2021. Such a stale determination cannot support an award.

47. The record here is defective as it contains no record of the communications that resulted in the waiving of Infosend's failure to submit Amendment 1, or tasking its evaluators to push forward with a review.

48. The lapse in the procurement record is material. The missing 70 answers to GPA questions prevented GPA from comparing Infosend to other bidders utilizing the same format for review, and therefore thwarted effective evaluation of the Infosend submission.

49. 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.”)

50. 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.

51. As the only offeror to submit a fully responsive bid Graphic Center remained as the one responsive offeror to the RFP.

#### 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. This deviation was allowed to occur only because GPA' internal procurement method to determine responsiveness — the use of a checklist —is fundamentally flawed in failing to account for amendments made to an 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 10<sup>th</sup> day of July 2025 at Hagåtña, Guam.

**RAZZANO WALSH & TORRES, P.C.**

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