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September 2, 2008

Senator Ben C. Pangelinan
Twenty-Ninth Guam Legislature
324 W. Soledad Avenue, Suite 101
Hagatna, Guam 96910

Re: *Guma Trankilidat*

Dear Senator Pangelinan:

I am responding to your letter of July 31, 2008 in which you stated that you found discrepancies in the proposal submitted by Ironwood Village Guam LLC ("Ironwood") in response to the Guam Housing and Urban Renewal Authority's ("GHURA") *Guma Trankilidat* project. You believe the discrepancies invalidate Ironwood's proposal and require the solicitation to be cancelled and re-issued.

You have also stated that, although you have pointed out the discrepancies to GHURA, it does not view the solicitation as problematic and has continued on with the solicitation. Therefore, you are now asking our office to review the procurement.

In conducting our review, we have looked at only the documents you forwarded to us, *to wit*, (i) GHURA's RFP#-GHURA-Guma Trankilidat-008-005 (hereinafter "RFP") issued on or about May 2, 2008; (ii) Ironwood's proposal in response to the solicitation; and (iii) your letter of July 25, 2008 to GHURA's Executive Director. We are assuming that you have provided us with a complete copy of the RFP and of Ironwood's proposal.

Our review will look at the four questions raised in your letter dated July 25, 2008 to GHURA, and analyze their impact on the solicitation.

1. Did the Georgia notary public improperly notarize the signature of Ironwood's president on several form affidavits when she failed to change the venue from "Territory of Guam, ss, Hagatna, Guam" to the place of notarization in Georgia, and failed to remove or change the words "in and for the Territory of Guam" below her signature line?

GHURA attached several form affidavits to the RFP for use by offerors, all such affidavits indicating venues in Guam with the assumption that they would be executed on Guam. The venue was stated as "Territory of Guam, ss, Hagatna, Guam." The form

affidavits also contained the words "in and for the Territory of Guam" and "my commission expires _____" below the notary's signature line under the jurat.

The purpose of a venue in an affidavit is to indicate the place where the act was done. Therefore, generally, when these form affidavits with Guam venues are executed and notarized in a jurisdiction other than Guam, the notary of the other jurisdiction makes corrections to the venue to reflect the jurisdiction in which the affidavit is signed and notarized. Usually, the words "Territory of Guam" and "Hagatna, Guam" are simply crossed out and the correct city or county and state are hand-written or typed on the Guam form.

Ironwood executed the affidavits in Georgia. The Georgia notary signed the jurats, sealed the affidavits with her inked stamp, and then hand-wrote her commission's expiration date under her signature line. She did not, however, change the venue from Hagatna, Guam to Georgia, nor did she change the words "in and for the Territory of Guam" which appeared below her signature line.

Although there is some indication to the contrary, many states do not view an affidavit as being null and void or fatally defective for lacking a statement of the venue so long as there is other evidence that the oath was duly administered by a proper officer within the jurisdiction. See, *e. g.*, *Wood v. Blythe*, 1 N.W. 341 (Wis. 1879); *Merriam v. Coffee*, 20 N.W. 389 (Neb. 1884); *Englehart-Davidson Mercantile Co. v. Burrell*, 66 Mo. App. 117 (1896); *In re McCarthy*, 196 N.Y.S. 265 (1922); *Barthelmues v. Ives*, 85 N.Y.S.2d 35 (1948). Evidence which satisfies the venue statement may be the notary's stamped impression if it includes the name of the county and state. See, *e. g.*, *Cox v. Stern*, 48 N.E. 906, Ill. 1897); *Hambel v. Lowry*, 174 S.W. 405 (Mo. 1915); *Milligan v. Zeller*, 196 N.W. 793 (Iowa 1924).

In the instant case, a venue is not lacking altogether, but stated incorrectly as Guam. Yet, the affidavits were obviously notarized in Georgia by a Georgia notary as shown by the Georgia notary's embossed stamp. The stamp clearly reads "COBB COUNTY, GA" along with her name, the words "notary public" and her commission expiration date. Thus, while there is a contradiction regarding venues, the information on the embossed seal imprint matches the name of the notary on the signature line, and would override any information to the contrary printed on the form affidavit.

Therefore, we feel that for purposes of responding to a solicitation by the government of Guam, the Georgia notary's embossed seal imprint corrected the venue from Guam to Georgia, and we may presume the execution and notarial act took place in Cobb County, Georgia.

Turning next to the issue of the words below the Georgia notary's signature on the form affidavits, we reviewed Georgia's notary law and found that a Georgia notary must authenticate all official acts with a seal of the office, which may be either an inked stamp or an embosser. Whether an inked stamp or embosser is chosen as the official seal, the

seal must state the (1) name of the notary; (2) the words "Notary Public"; (3) the word "Georgia" or "GA"; and (4) the county of the notary's residence. O.C.G.A. 45-17-6. Georgia law does not require the expiration date of the notary's commission to appear on the seal, nor is the expiration date required to authenticate documents.

Many states include a form of jurat in their statutes to be used by their state's notaries, as does Guam. Therefore, we looked for a form of jurat recognized by Georgia law, but found none. Instead, we found that the jurat form generally used in Georgia is "Sworn to (or affirmed) and subscribed before me this ___ day of ____, 19___. (SIGNATURE AND SEAL OF NOTARY)." See *Notary Seal and Certificate Verification Manual* (4th ed. 1998) pg. 82 published by the National Notary Association. The accepted form shows that, after the signature line, and other than the notary seal, no additional word or information is necessary - - not even a statement of the venue or commission's expiration date.

Thus, the Georgia notary notarizing the Ironwood affidavits had no reason to write in her commission's expiration date below her signature. Whatever she wrote in was superfluous. As for the incorrect venue appearing below her signature on the form and not changed by the Georgia notary, we have already discussed this issue above and concluded that the information on the notary's seal takes precedence over conflicting information belonging to the original form.

2. Does the hand-written alteration to the otherwise typed form affidavit entitled "Good Standing Affidavit" require rejection of the affidavit or of the proposal in light of the alteration not having been dated or initialed by the author of the alteration?

An affidavit is a declaration of facts made voluntarily by the affiant under oath before a person authorized to take affirmations or give oaths, usually a notary public. An affiant who willfully makes a false statement commits perjury.

Affidavits are made for an infinite number of purposes, but frequently, a government agency will require an affidavit for a specific purpose, and will have a form available for such purpose. The affiant must be certain that the statements on the form affidavit are true for the affiant. If not, the affiant must change the statement printed on the form.

There is no uniform manner considered to be correct in handling changes on form affidavits. Generally, if an error or mis-statement appears on an affidavit and the affidavit is not going to be re-typed correctly in its entirety, then the proper means of correcting the language is for the affiant to strike through the error or mis-statement. After making the correction, the affiant should initial the strike out. Generally, however, it is not considered good form for the affiant to erase any error or mis-statement, or use opaque correction fluid. See *Notary Public Handbook* by Alfred E. Piombino, national edition, pg. 79.

Likewise, one would think that if additional words need to be added to make the statements on the form correct, then the affiant would hand-write the changes onto the form and initial them. Writing in additional language to correct any mis-statement is expected and acceptable where generalized forms are concerned, because no one wants the affiant to perjure himself, least of all the affiant himself.

Therefore, where changes have been made but not initialed, we can presume the affiant made the corrections himself. We can also assume that the changes were made prior to the affiant signing the affidavit before a notary public. These presumptions may be rebutted by evidence to the contrary, but no evidence has been offered for our review.

Regardless, if GHURA feels a need to do so, then it may, but is not required to, question both the affiant and the Georgia notary as to who made the changes and when the changes were made. If the line of questioning raises the issue of alteration of the affidavit by someone other than the affiant or after it was notarized, then depending upon the circumstances, GHURA might have cause to reconsider its direction.

Otherwise, however, there is a presumption that the affidavit was made properly, and the lack of initials or a date by the hand-written alteration is not cause for automatic rejection of the affidavit or proposal.

3. Was Ironwood required to obtain a Guam business license before submitting a proposal to GHURA's solicitation?

A fact of modern commerce is that businesses do business across state lines, and with other nations. The business of government is no different. In anticipation of out-of-state business, all fifty states have local preference laws dictating how to handle out-of-state bidders. For a comparison of these state local preference laws, please see www.window.state.tx.us/procurement//stpurch/map/index.html.

Guam also has a local preference policy found at 5 G.C.A. §5008, which provides, in pertinent part:

All procurement . . . shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam

Procurement . . . from off Guam may be made if no business . . . 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, . . . when procured from a business licensed to do business on Guam

Section 5008 authorizes an off-island business to be selected if there is no Guam business offering the desired supplies or services or if the stated price differential is met. Nothing in Section 5008 requires the off-island business to become a licensed Guam

business before submitting a bid to the government of Guam. In fact, some businesses never have to set foot on Guam to complete the business transaction with the government of Guam.¹

Whether or not a Guam business license is needed is strictly ruled by the business licensing laws of 11 G.C.A. Chapter 70. "Engaging in, transacting, conducting, continuing, doing or carrying on a business " on Guam is defined at 11 G.C.A. §70103(e). Section 70103(e) also provides, in part:

[A] person shall not be considered to be engaging in, transacting, conducting, continuing, doing or carrying on a business within the meaning of this Division solely by reason of carrying on in Guam any . . . of the following activities:

. . . .
(6) soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where those orders require acceptance outside Guam before they become binding contracts

Bidding by an off-island company on a government of Guam contract would fall under the exception of §70103(e)(6).

For the foregoing reasons, Ironwood was not required to have a Guam business license at the time it submitted a proposal to GHURA.

However, Guam's business license laws require the license before a business begins its actual operations on Guam. Bidding on and negotiating a contract are preludes to engaging in a business. At what point in time a business begins its actual operations so as to require a business license is beyond the scope of this discussion. However, as a policy, the government of Guam has decided an off-island company awarded a contract must have its local license in place before the contract is signed.

4. May a limited liability company (LLC) that has not yet been officially registered in any state submit a proposal to GHURA's solicitation under the name of the LLC?

¹ For example, if GHURA wanted to purchase widgets, and both on-island and off-island companies bid, but the lowest bidder by a large margin even considering shipping and all other costs was a company in Georgia, then the Georgia company would win the award. The Georgia company would simply ship the widgets directly to GHURA, never having to establish a warehouse or office on Guam in order to deliver the goods. The procurement law does not expect the Georgia widget company to take out a Guam business license on Guam before delivering the widgets or when the contract is awarded, nor does it expect the company to obtain one before submitting a bid. Neither does Guam's business licensing law require the Georgia company to obtain a local license to complete the sale of widgets to GHURA.

The facts pertinent to this question are as follows in chronological order:

1. On May 23, 2008, Mr. Richard B. Inman, Jr. signed four affidavits on behalf of Ironwood (the "offeror"). On three of them, he indicated himself as the President. On May 27, 2008, Mr. Jason Ralston signed one affidavit as Vice President of Ironwood. The affidavits were a part of a proposal package to be submitted to GHURA. The proposal gave a Guam address for Ironwood with a principal contact person and telephone number on Guam. The proposal indicated that the project would be undertaken by a team put together by the offeror.

2. On May 27, 2008, all proposals were due. Apparently, the Ironwood proposal was submitted before the due date and time.

3. On May 30, 2008, Mr. John R. Hand signed Ironwood's Articles of Organization as an "organizer." Ironwood then filed the Articles with Georgia's Secretary of State, Corporations Division the same day at 3:06 P.M. The Secretary of State issued a Certificate of Organization for Ironwood on May 30, 2008, officially registered Ironwood as a limited liability company in the State of Georgia. At some point in time after the due date for all proposals, a copy of the certificate was apparently delivered to GHURA.

4. On June 19, 2008, Ironwood filed with the Department of Revenue and Taxation, Government of Guam its Certificate of Organization from the State of Georgia, along with its Articles of Organization as a limited liability company.

For all intents and purposes, the offeror was made to appear in the proposal as though it were a fully licensed or registered company in the State of Georgia. There is no evidence whatsoever in the proposal that, on the date proposals were due, May 27, 2008, Ironwood had not yet filed its Articles of Organization with the State of Georgia. The proposal only indicates that Ironwood was not yet registered on Guam.²

Therefore, on the date proposals were due, May 27, 2008, Ironwood was not licensed or registered as a business at all anywhere in the United States. Officially, Ironwood simply did not exist on May 27, 2008.

Although an off-island business need not have a Guam business license to compete for government of Guam contracts, it must at least exist as a legal business entity somewhere outside of Guam if the business is representing itself as a legal business entity in the proposal, in this case a limited liability company of Georgia. This is evident from the definition of "business" as defined in the Guam Procurement Law and the

² The "Good Standing Affidavit" shows that Ironwood was not yet registered on Guam at the time the affidavit was made, May 23, 2008, but Ironwood warranted it would be before any contract resulting from the solicitation would be executed.

meaning of "legal entity."

"Business" is defined at 5 G. C. A. §5030(a) as:

[A]ny corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

"Legal entity" is defined in Black's Law Dictionary, 5th ed. as:

Legal existence. An entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations.

On May 27, 2008, Ironwood could not function as a legal entity because it did not officially exist as one until a few more days had passed, and it finally got its Articles of organization signed and filed in Georgia. Therefore, Ironwood could not have submitted a proposal on May 27, 2008. Furthermore, the statements Mr. Inman made under oath on May 23, 2008 were untrue and may have consequences of their own.

Did the fact that Ironwood registered as a limited liability company in the State of Georgia on May 30, 2008, just a few days after the due date for proposals, cure the misleading statements in the proposal? If Ironwood had disclosed its true status in the proposal, would GHURA have been justified in accepting the proposal?

We do not believe these questions have to be answered, and that the only fact of importance was that on May 27, 2008, the due date for proposals, Ironwood did not exist as a legal entity in any jurisdiction, and therefore could not have submitted a proposal in its name on that date.

Conclusion

We are of the opinion that because Ironwood did not legally exist on May 27, 2008, it could not have submitted a proposal to GHURA on or before such date. Therefore, GHURA could not, and should not, have accepted Ironwood's proposal.


J. PATRICK MASON
Deputy Attorney General

cc: Executive Director, GHURA
Mayor, Municipality of Tamuning