

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Mr. John M. Benavente, P.E. General Manager Guam Power Authority P.O. Box 2977 Hagåtña, Guam 96932 Fax: (671) 648-3165	From:	Benjamin J.F. Cruz Guam Public Auditor Office of Public Accountability
	Mr. D. Graham Botha, Esq General Counsel Guam Power Authority 688 Route 15, Suite 302 Mangilao, Guam, 96913 Phone: (671) 648-3203/3002 Fax: (671) 648-3290	Pages:	9 (including cover page)
CC:	Mr. Matthews Pothen President Appellant Guam Industrial Services, Inc. DBA Guam Shipyard 272 East Harmon Industrial Park Rd., Ste. 101 Tamuning, Guam 96913 Phone: (671) 646-5261 Fax: (671) 646-5258 Email: MPothen@guamshipyard.net	Date:	December 9, 2020
	Mr. Arthur B. Clark, Esq. Law Offices of Arthur Clark, P.C. Attorneys for Appellant Guam Industrial Services, Inc. DBA Guam Shipyard 196 Sirena Ln. Tamuning, Guam 96913 Phone: (671) 687-1389 Email: arthurclark.atty@gmail.com	Phone:	(671) 475-0390 x. 208
		Fax:	(671) 472-7951

Re: OPA-PA-20-009 Notice of Receipt of Appeal

For Review
 Please Comment
 Please Reply
 Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
 Jerrick Hernandez, Auditor
jhernandez@guamopa.com

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910
Phone: (671) 475-0390 / FAX: (671) 472-7951

December 9, 2020

John M. Benavente, P.E.
General Manager
Guam Power Authority
P.O. Box 2977
Hagåtña, Guam 96932

VIA FACSIMILE: (671)648-3165

Re: Notice of Receipt of Appeal – OPA-PA-20-009

Dear Mr. Benavente,

Please be advised that Guam Industrial Services, Inc. DBA Guam Shipyard (hereinafter referred to as “Guam Shipyard”) filed an appeal with the Office of Public Accountability (OPA) on December 7, 2020, regarding the Guam Power Authority’s (GPA) denial of Guam Shipyard’s protest related to the procurement of the performance management contract for GPA’s Yigo diesel contractors (Multi-Step Bid (MSB) GPA-061-20). OPA has assigned this appeal case number OPA-PA-20-009.

Immediate action is required of GPA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at www.opaguam.org. The first ten pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeal. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Wednesday, December 16, 2020**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Division 4, Chapter 12, §12105, by **Wednesday, December 23, 2020**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Guam Shipyard. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that GSA

provide one original and one electronic file of the said record, which will be distributed as follows:
Copy-1: Master File; and Copy-2: Public Auditor and/or Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or jhernandez@guamopa.com should you have any questions regarding this notice.

Sincerely,

A handwritten signature in blue ink, appearing to read "Benjamin J.F. Cruz". The signature is stylized and cursive.

Benjamin J.F. Cruz
Public Auditor

Enclosure: First Six Pages of the Notice of Appeal – OPA-PA-20-009

Cc: Arthur B. Clark, Law Offices of Arthur Clark, P.C., Attorney for Appellant Guam Shipyard



RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

DATE: Dec. 7, 2020
TIME: 3:54 AM PM BY: Cms
FILE NO OPA-PA: 20-009

PART I- To be completed by OPA

In the Appeal of)
Guam Industrial Services, Inc.) **NOTICE OF APPEAL**
DBA Guam Shipyard)
(Name of Company), APPELLANT)
Docket No. OPA-PA _____)
_____)

PART II- Appellant Information

Name: Guam Industrial Services, Inc. DBA Guam Shipyard
Mailing Address: 272 East Harmon Industrial Park Rd., Ste. 101
Tamuning, Guam 96913
Business Address: Same
Email Address: MPothen@guamshipyard.net
Daytime Contact No: (671) 646-5261
Fax No.: (671) 646-5258

PART III- Appeal Information

- A) Purchasing Agency: Guam Power Authority
- B) Identification/Number of Procurement, Solicitation, or Contract: MSB GPA-061-20
Nov. 19, 2020, rec'd
- C) Decision being appealed was made on Nov. 23, 2020 (date) by:
 Chief Procurement Officer Director of Public Works Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
 Decision on Protest of Method, Solicitation or Award
 Decision on Debarment or Suspension
 Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

<u>JBC/Orbis/Guaden JV</u>	_____
<u>Marianas Energy Co.</u>	_____
<u>Dooik Engine Co.</u>	_____
<u>Monster Auto Corp.</u>	_____
_____	_____

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 7th day of Dec., 2020.

By: _____
APPELLANT

or

By: Arthur B. Clark

Appellant's Duly Authorized Representative

(Address) Law Offices of Arthur Clark, P.C., 196 Sirena Ln., Tamuning, Guam 96913
(Phone No.) (671) 687-1389

APPENDIX A

NOTICE OF APPEAL PART IV

Summary

Appellant, Guam Industrial Services dba Guam Shipyard, was one of five bidders for MSB GPA-061-020 (the "IFB") for the performance management contract for GPA's Yigo diesel generators. Phase I of the multi-step IFB was to review and rate the technical offers. Phase II was to review the prices of the bidders whose offers were deemed acceptable during Phase I.

When utilizing the multi-step method, 2 GAR, Div. 4, § 3109(t)(4) requires that "unpriced technical offers shall be categorized as: (a) acceptable, (b) potentially acceptable,... or (c) unacceptable." Consistent with § 3109(t)(4) the IFB indicated that the offers would be separated into three categories. (See IFB at page 200 of 200, Government of Guam Sealed Bid Instructions, ¶ 13.d.); see also *Office of Public Accountability Executive Summary of Guam Procurement Law and Regulations for Procurement Solicitation, Feb. 2018, p. 4, column 2, "Evaluation of Unpriced Technical Offers."*

https://www.opaguam.org/sites/default/files/procurement_executive_summary.pdf.

Instead of complying with Guam law and following the Government Sealed Bid Instructions, GPA used a 1,050-point threshold to separate technical offers into only one of two categories, acceptable or unacceptable. Although a conflicting instruction indicating that the technical offers would be separated into only two categories was published at §1.15(e) of the IFB, at page 15 of 200, GPA should have followed Guam law and separated the technical offers into three categories, including "potentially acceptable," which was excluded. GPA's failure to comply with Guam law should have resulted in the IFB being cancelled or revised to comply with law. See 5 GCA § 5451 and 2 GAR, Div.4, § 9105. Despite these issues being brought to GPA's attention, GPA has proceeded with the IFB.

Had Guam Shipyard's bid been qualified as "potentially acceptable," it would have been allowed to participate in Phase II of the procurement. Per § 3109(t)(5):

Discussions of Unpriced Technical Offers. The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer.... Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable [which would have included "potentially acceptable" bidders] may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

Procedural History

After all bids were submitted and the technical offers were reviewed during Phase I of the IFB, Guam Shipyard was first advised by letter dated October 14, 2020, (Ex. A) that its technical offer was deemed unacceptable. However, GPA's October 14 letter did not satisfy § 1.17 of the IFB, which stated that GPA would provide all bidders whose proposals are deemed unacceptable a notice "informing them of the reason for not qualifying." (IFB, pp. 15-16). No reason was provided

for GPA's determination. Consequently, the October 14 letter is irrelevant to Guam Shipyard's protest and this appeal.

By letter dated October 19, 2020 (Ex. B), Guam Shipyard requested an explanation for its disqualification.

By letter dated October 22, 2020 (received Monday, October 26, 2020) (Ex. C), GPA informed Guam Shipyard for the first time that GPA had acted contrary to law and the Government of Guam Sealed Bid Instructions, and had utilized a two-category method to disqualify Guam Shipyard. Based on Guam law and the Government of Guam Sealed Bid Instructions, Guam Shipyard cannot reasonably be deemed to have known that GPA would have acted contrary to Guam law in evaluating its bid, which is the basis of its protest, until it received GPA's October 22 letter. Any confusion created by the conflicting provisions of the IFB should be resolved against the party who created the confusion, which is GPA, and in any event it should not be resolved in favor of disregarding the law.

Less than 14 days from Guam Shipyard's receipt of GPA's October 22 letter, by letter dated November 4, 2020, emailed after the close of business on November 3 and hand-delivered on November 4, 2020, (Ex. D) Guam Shipyard formally protested GPA's determination that Guam Shipyard was not qualified to participated in Phase II of the IFB.

By letter dated November 9, 2020, but not mailed until November 19, 2020 and received on November 23, 2020, (Ex. E) GPA denied Guam Shipyard's November 4, 2020 protest.

By letter dated November 24, 2020, (Ex. F) Guam Shipyard requested GPA reconsider its denial.

Timeliness and Basis of Appeal

Title 5 GCA § 5425(a) and 2 GAR, Div. 4, § 9101(c)(1) commence the 14-day period for the filing of a protest from when the aggrieved bidder "knows or should have known of the facts giving rise thereto." GPA's October 14 letter did not explain its basis for deeming Guam Shipyard's bid as unacceptable. It failed to satisfy § 1.17 of the IFB, which stated that GPA would provide all bidders whose proposals are deemed unacceptable a notice "informing them of the reason for not qualifying." It did not contain the legally operative fact that GPA disregarded Guam law and the Government of Guam Sealed Bid Instructions. Consequently, it failed to provide any facts that could give rise to an earlier protest.

As confirmed by GPA's November 19 letter, GPA did not conform with IFB § 1.17 until its October 22 letter, which Guam Shipyard did not receive until October 26. Accordingly, Guam Shipyard's protest period did not expire until November 9, and its November 4 protest letter was timely.

In addition, GPA's October 22 letter, relaying for the first time the fact that GPA acted in violation of Guam law, would have triggered a new protest period. *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15, ¶ 28 (Guam 2004):

Upon review, and in consideration of the applicability of GMHA's own Procurement Regulations to solicitations undertaken by GMHA as stated above, we disagree with the trial court's conclusion that "[t]here can only be one event, and not a series of events, which triggers the right to protest." The plain meaning of 26 GAR 16901(c)(2), which states that "[p]rotestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer," supports an interpretation that there may be multiple events in any given solicitation that could legitimately trigger protests.

Cf. 2 GAR, Div. 4, § 9101(c)(2) ("Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.")

In any event, the Guam Supreme Court has ruled that when a solicitation fails to comply with Guam law, the legal remedies in 5 G.C.A. § 5451 (cancellation or revision to comply with law) govern *regardless* of whether a protest was timely filed.

Our holding today invalidates the procurement process used in this case, *and therefore, it is unnecessary to discuss the other arguments raised by the parties in their briefs.* We look instead to available remedies in light of our holding. The contract, which was the subject of the RFP process erroneously used here, had not yet been awarded. The appropriate remedies, therefore, are found in 5 GCA § 5451 (2005),...

We hold that using Request for Proposal DOARFP 03-001 to procure the operation, management and maintenance of the Guam Mass Transit system, violated the Guam Procurement Code.... Because the procedure was conducted in violation of Guam law, the procurement is invalidated, and the proposed award is canceled.

Fleet Servs., Inc. v. Dep't of Admin., Gov't of Guam, 2006 Guam 6, ¶¶ 36-37 (Guam 2006).

The "other arguments raised by the parties in their briefs" to which the Court referred and declared unnecessary to discuss included a dispute over whether the aggrieved bidder timely filed its protest. *See Fleet Servs., Inc.*, 2006 Guam 6, ¶ 12 ("The parties here raise several arguments..... Fleet next argues that the trial court erred in holding that its second protest letter was not timely and in dismissing the case.")

Ruling Requested

Respectfully, Guam Shipyard requests that GPA be ordered to comply with 5 GCA § 5451 and 2 GAR, Div. 4, § 9105, and that the IFB be cancelled. Although the law allows the IFB be revised to comply with law, Guam Shipyard is duly concerned at GPA's apparent lack of good faith in reviewing Guam Shipyard's protest thus far. Moreover, all bidders' technical proposals have already been scored. In addition to Guam Shipyard, one other bidder has been deemed unqualified. Guam Shipyard is concerned about the potential for mischief by allowing GPA to

revise the IFB such that it may continue to disqualify one or both bidders. Accordingly, cancellation of the IFB is requested.



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-20-009 Notice of Receipt of Appeal

Jerrick Hernandez <jhernandez@guamopa.com>

Wed, Dec 9, 2020 at 2:49 PM

To: John M Benavente <jbenavente@gpagwa.com>, Graham Botha <gbotha@gpagwa.com>

Cc: arthurclark.atty@gmail.com, mpothen@guamshipyard.net

Hafa Adai,

Please see attached Notice of Receipt of Appeal for OPA-PA-20-009. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

Notice Regarding PCOR1 Closure

The Office of Public Accountability will remain closed for the duration of Governor Lourdes Leon Guerrero's declaration of Pandemic Condition of Readiness (PCOR) 1 for Guam.


In lieu of hand-delivering documents to the office, we will allow documents to be transmitted electronically to admin@guamopa.com and my email jhernandez@guamopa.com. If a document needs to be hand-delivered, please make arrangements with me to receive them at the office. Thank you.

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Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA
Auditor
Office of Public Accountability – Guam
www.opaguam.org
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