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FILE NO OPA-PA: 13-007

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÁTÑA, GUAM

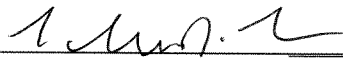
IN THE APPEAL OF ABLE) OPA-PA-13-007
INDUSTRIES OF THE)
PACIFIC)
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APPELLANT

GUAM INTERNATIONAL AIRPORT AUTHORITY

AGENCY REPORT

FISHER & ASSOCIATES



Thomas J. Fisher, Esq.
For Guam International Airport
Authority

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8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
 9 **HAGÁTÑA, GUAM**

10 IN THE APPEAL OF ABLE) OPA-PA-13-007
 11 INDUSTRIES OF THE PACIFIC)
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26 **COMES NOW** the Guam International Airport Authority, by and through Counsel Fisher &
 27 Associates, and submits an agency report. This record is submitted pursuant to 2 Guam Admin.
 28 R. & Regs. 12105.

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I.

A Copy of the Protest

The Agency Denies the Existence of a Protest but Provides Correspondence, Appellant and Agency. See Agency Procurement Record filed 21 June 2013, at Tab I.

II.

A Copy of the Bid or Offer, a Copy of the Bid or Offer that is being Considered for Award, a copy of all Other Bids

See Agency Procurement Record filed 21 June 2013 at Vols. I and II

III.

A Copy of the Solicitation

Please see Agency Procurement Record filed 21 June 2013 at Vol. I, Tab F.

IV.

A Copy of the Abstract of Bids or Offers

Please see Agency Procurement Record filed 21 June 2013 at Vol. I, Tab G.

V.

Any Other Documents which are Relevant to the Protest

Please see Agency Procurement Record filed 21 June 2013.

VI.

The Decision from which the Appeal is Taken

The Agency Denies the Existence of a Protest but Provides Correspondence, Appellant and Agency. See Agency Procurement Record filed 21 June 2013, at Vol. I, Tab I.

VII.

A Statement Answering the Allegation of the Appeal

Attached herewith

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÁTÑA, GUAM

IN THE APPEAL OF ABLE)	OPA-PA-13-007
INDUSTRIES OF THE)	
PACIFIC)	
)	AGENCY STATEMENT
APPELLANT)	
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COMES NOW the Guam International Airport Authority, by and through Counsel Fisher & Associates, and submits an Agency Statement in response to Appellant Able Pacific Industries' Appeal filed 10 June 2013. In this matter Appellant submitted a non-responsive bid and, pursuant to the solicitation, the Agency rejected it. Appellant does not appeal on this theory though, rather it asserts it should have been awarded a contract without competitive bidding. This Statement is submitted pursuant to 2 Guam Admin. R. & Regs. §12105(g).

***** STATEMENT OF FACT *****

Appellant believes the award of the contracts in this matter violated 5 Guam Code Ann. §5001(d). *See Appeal at page 1.* Appellant asserts the following facts to be true. Appellant met with the Agency on 18 March 2013 and asked that he be awarded the contract pursuant to 5 Guam Code Ann. §3001.1. *Id.* On 29 March 2013 Appellant was sent a letter from the Agency informing it that the Agency would continue with competitive sealed bidding. *Id at 2.* In fact, the Agency received and opened bids in this matter on 29 March 2013.

1 Despite Appellant's desire that competitive sealed bidding be avoided, he submitted a bid
2 but did not include a required bid bond. Based on this omission, pursuant to the language of the
3 solicitation, the bid was rejected. *See Id at attachment C.* Appellant was notified of this on 03
4 May 2013. *Id.*

5 On 23 May 2013, perhaps 53 days (and more than 14) after Appellant learned the
6 Agency would proceed by competitive sealed bidding, Appellant wrote a letter to the Agency
7 requesting clarification. *Id at p. 2.* This letter was not labeled a protest, was not a protest, and
8 was not sent within 14 days of learning the agency would proceed by competitive sealed bidding.
9 *See Id at attachment D.* Also on 23 May 2013, Appellant sent a letter to the Agency requesting
10 assistance in appealing the award. This letter was not labeled a protest, was not a protest, and
11 was sent perhaps 53 days (and more than 14) days of learning the agency would proceed by
12 competitive sealed bidding.

13 *** MEMORANDUM***

14 Appellant asserts it was entitled to a contract because it is a non-profit employing the
15 disabled. In support of this proposition it cites 2 Guam Admin. R. & Reg. §3110.1. The section
16 states in relevant part;

17 A contract may be awarded for a supply or service without going through the
18 competitive sealed bid procedure when the contractor is a non-profit corporation
employing sheltered or disabled workers.

19 *Id (emphasis added).*

20 The language of this regulation is permissive. An Agency may award the contract
21 without using competitive sealed bidding if it wishes, but is certainly not compelled to do so.
22 This is the consequence of the regulation's language and is borne out by an opinion of the
23 Attorney General. *See Appeal at attachment F.* The permissive, discretionary nature of this
24 regulation is reflected in the procurement statutes which provide, "[a] contract may be
25 awarded for a supply or service without competition when the contractor is a nonprofit

1 corporation employing sheltered or handicapped workers.” *5 Guam Code Ann. §5127*
2 (*emphasis added*).

3 Appellant believes that section 5001(d) of the procurement law supports his position
4 that the Agency must have procured the services from it. *See Appeal at p.1*. That section
5 reads “*If any entity of the government of Guam or any entity expending governmental funds*
6 *intends to procure any supply or service which is offered by a nonprofit corporation*
7 *employing sheltered workers or persons with disabilities, or a government of Guam entity*
8 *employing sheltered workers or persons with disabilities, then that entity shall procure such*
9 *supply or service from that nonprofit corporation or government entity if the supply or service*
10 *is available within the period required by the procuring entity.” 5 Guam Code Ann. §5001(d)*
11 (*emphasis in original*). This section places a condition upon the Agency’s discretion, i.e. the
12 Agency may use its discretion to avoid competitive sealed bidding *if* it will obtain the service
13 from a nonprofit corporation employing sheltered workers or persons with disabilities and *if*
14 the service is available within the period required by the procuring entity. It does not remove
15 that discretion though. Thus it lends no support to Appellant’s position that it makes a non-
16 competitive procurement mandatory.

17 Appellant also notes that “[t]he Public Auditor shall have the power to review and
18 determine de novo any matter properly submitted to her or him.” *Appeal at p. 1*. This is
19 certainly true but the matter must be properly before the Public Auditor. Protests to an
20 Agency must be made within the statutorily allowed period. “Any actual or prospective
21 bidder, offeror, or contractor who may be aggrieved in connection with the method of
22 source selection, solicitation or award of a contract, may protest to the Chief Procurement
23 Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be
24 submitted in writing within fourteen (14) days after such aggrieved person knows or should
25 know of the facts giving rise thereto.” *5 Guam Code Ann. §5425(a)*. Here, Appellant admits

1 he knew of the Agency's intent and employment of the competitive bid process on or about
2 29 March 2013. *Appeal at p. 2*. He did nothing thereafter until 23 May 2013, or 53 days later
3 ("On May 23, 2013, I submitted a request to Charles Ada, requesting clarification on the
4 policy for awarding contracts to nonprofits." *Id*)¹. This is not a "should have known"
5 circumstance, rather Appellant had actual knowledge of its grievance but did nothing until 30
6 days past its deadline².

7 A timely Agency protest is an indispensable prerequisite to OPA jurisdiction. The
8 Office of the Public Auditor hears appeals of agency protest decisions and is not a forum of
9 first resort. Thus, without a timely agency protest, there can be no appeal. *See In the Appeal*
10 *of Townhouse Department Stores, OPA-PA-08-011, p. 6*, "The threshold issue in this matter is
11 whether IBSS' December 4th, 2007, protest was timely." Here, as is evident, and assuming
12 Appellant submitted a protest, it was not timely, the appeal cannot be properly before the OPA
13 and this appeal should be dismissed.

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15 **FISHER & ASSOCIATES**

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19 For Guam International Airport
20 Authority

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22 ¹ Agency does not concede that this amounted to a protest. It is merely the next act by
23 Appellant.

24 ² If we assume the 29 March letter was an Agency decision on an earlier protest (the 18
25 March letter), then Appellant was required to appeal to the Public Auditor by 15 April. He
did not, and this Appeal is certainly time barred under that theory.

VIII.

A Determination Required under 2 GAR §9101(e)

Not applicable

IX.

A Statement Indicating whether the Matter is the Subject of a Court Proceeding

Attached herewith

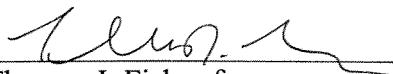
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12 IN THE APPEAL OF ABLE) OPA-PA-13-007
13 INDUSTRIES OF THE)
14 PACIFIC)
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16 APPELLANT) **DECLARATION RE**
17) **COURT ACTION**
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24 **PURSUANT TO** 5 GCA Chapter 5, unless the court requests, expects, or otherwise
25 expresses interest in a decision by the Public Auditor, the Office of the Public Auditor 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 the
Public Auditor within 24 hours if court action commences regarding this Appeal or the
underlying procurement action.

Submitted this 28TH day of June, 2013.

By: 
Thomas J. Fisher for
Charles H. Ada, II
Executive Manager