

LAW OFFICES  
**CUNLIFFE & COOK**  
210 Archbishop F.C. Flores Street  
Hagåtña, Guam 96910  
Telephone: (671) 472-1824  
Telecopier: (671) 472-2422

Attorneys for: **Appellant**

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PROCUREMENT APPEALS

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FILE No. OPA-PA 09-0005

**BEFORE THE PUBLIC AUDITOR**  
**PROCUREMENT APPEAL**

IN THE APPEAL OF:	)	DOCKET NO. OPA-PA 09-0005
	)	
<b>GUAM COMMUNITY IMPROVEMENT</b>	)	<b>APPELLANT'S RESPONSE TO</b>
<b>FOUNDATION, INC.</b>	)	<b>MOTION FOR A PROTECTIVE</b>
	)	<b>ORDER BY PURCHASING</b>
	)	<b>AGENCY</b>
Appellant.	)	
_____	)	

The Department of Public Works (DPW) has filed a Motion for a Protective Order, asking the Public Auditor not to disclose to Protestor/Appellant Guam Community Improvement Foundation, Inc. (GCIF) the proposals of the Proposers for the Request for Proposal at issue herein.

The Objectors argue that there has not yet been "an award of the contract for the JFK High School Rebuild". This statement of the Objector is not supported by their actions. The information submitted to the general public with regard to the Series 2009A Certificates of Participation (John F. Kennedy High School Project) provide that a lease was entered into between the Government of Guam and CaPFA on August 1, 2009. According to news releases by Objector, DPW and GEDA, the Certificates of Participation were to be sold, but the protest filed herein caused the cancellations of those sales. Further, International Bridge Corporation (IBC) and the Government of Guam had

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proposed a joint ground breaking at the JFK site which was cancelled because the protest was filed. How can the Government still be in negotiations with IBC if all of these matters were ready to occur? While there may not be an actual contract entered into by the parties, the award of the project clearly appears to have been awarded.

Objector points to 2 GAR §3114(h)(1), but as indicated above, the award has been made, it is just that the contract has not yet been signed. It should be noted that 2 GAR §12105, specifically requires a copy of the bid or office submitted is required to be made part of the agency report. In their agency report, DPW merely put the front cover sheets of those documents. That is the reason that they are now filing for this protective order.

The decision that they cite to out of California, Michaelis, Montanari & Johnson v. Superior Court, 38 Cal.4<sup>th</sup> 1065, 44 Cal.Rptr.3d 363 (2006) is, in fact, supportive of Appellant's position. The conclusion of the Supreme Court of California was that the disclosure of the competing proposals for the city's lease project properly could await conclusion of Lawa's negotiation process. All of the cases and arguments they cited reach the same conclusion. Since DPW and IBC have concluded their negotiations, the project had been awarded, although no contract had not yet been entered, is similar to the proceedings in California wherein the matter had been awarded, but not yet approved by the board and then it was returned for the purpose of further negotiations. Had they simply submitted the matter to the Board and the board was prepared to act, under the California decision, it would have been appropriate at that point to release the documents as requested. Since the negotiations are complete, and the project has been awarded, the only thing that is now necessary is the actual execution of the contract, the proposals should be released, so that the parties can all be aware of the contents, and not permit the

Government to have a superior knowledge of what it is that is contained in the various proposals during this appeal.

If the Public Auditor were to take the position of the Government, then as a matter of policy, no appeals could ever be based upon the proposals submitted, or bid submitted because the protestors could not see that information until after the contract was actually inked which could be well over 14 days after the award had been made and the time for protesting would have expired.

The Government's argument is disingenuous since they have every intent of signing the contract, indeed have requested the Public Auditor to find that there is a substantial interest of the Government to go forward with the proposal at this time, and set aside the stay. If they do not know what the terms of their award is, then how can there be a substantial interest of the Government to go forward with the proposal?

### CONCLUSION

For the foregoing reasons, DPW's request for a protective order should be denied.

Respectfully submitted this 23 day of September, 2009.

**CUNLIFFE & COOK**  
A Professional Corporation  
Attorneys for Appellant  
**Guam Community Improvement  
Foundation, Inc.**

By   
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F. RANDALL CUNLIFFE, ESQ.