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PROCUREMENT APPEALS

**PROCUREMENT APPEAL**

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In the Appeal of )  
)  
HARBOR CENTRE GUAM CO. LTD. )  
And HARBOUR CENTRE PORT )  
TERMINAL, INC. )  
)  
Appellant. )  
\_\_\_\_\_ )

**COMMENTS ON AGENCY REPORT**

The Harbor Centre Guam Co. Ltd. and Harbour Centre Port Terminal, Inc. (hereinafter collectively referred to as "Harbor"), the Appellant in the matter referenced above, hereby submits its Comments to the Agency Report submitted by the Jose D. Leon Guerrero Commercial Port (hereafter referred to as the "Port").

**INTRODUCTION**

The Port argues that the bid protest was untimely, and even it was timely, the Port did not violate any procurement law in administering and awarding the RFP No. PAG-010-003.

Harbor Centre will show that the bid protest that led to this protest was timely, as it was launched five days after Harbor Centre discovered the underlying facts supporting the protest. Harbor Centre will also show that the Port violated 12 GCA § 10401 when it allowed the evaluators to evaluate bid proposals out of the supervision and observation of the Chief Procurement Officer (the "CPO") of the General Services Administration. Additionally, the Port violated 2 GAR § 3114(h) when it opened bid proposals and did not allow procurement officers to observe the evaluation process and the scoring of the proposals. Lastly, the Port did not follow the procurement laws concerning the evaluation committee where no Government of Guam official was

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appointed as part of the evaluation committee. For these reasons, the Port should be ordered to rebid RFP No. PAG-010-003.

I. **The Bid Protest Was Timely and the Underlying Facts as Basis for the Protest Derived From a Lawful Source**

Section 5425(a) of Title 5 of the Guam Code sets forth the time frame for launching a bid protest:

Authority to resolve protests of solicitations and awards.

(a) Right to Protest. Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved knows or should know of the facts giving rise thereto.

5 GCA § 5425. The fourteen day clock starts when the party knows or should know of the facts giving rise to the grounds for appeal.

In the present case, it was not until after the bid was awarded that counsel for Harbor Centre learned of the dispositive facts, which shall be discussed in detail below. On July 28, 2010, upon receiving the notice of non-award, counsel for Harbor Centre contacted the CPO to ask if the CPO received any irregularities in the bid process. What ensued was a discussion as to whether the Agency followed the relevant procurement laws in the administration and review of the bid proposals. See Declaration of Rawlen Mantanona, attached hereto and referred herein as Exhibit "A". The CPO acknowledged that the Agency did not perform the bid process pursuant to statute, namely that procurement procedures were violated when the Port evaluation committee members removed bid proposals to conduct evaluations off-site and out of

the observation both Port Procurement Officers but more importantly, the CPO. See Ex. A.

The information came from a lawful source which is the CPO of GSA only after Notices of non-award had been issued. Further, since the information was leading to this appeal was derived from a lawful source there is no violation of 5 G.C.A. Chapter 5 Article 11.

Harbor Centre filed its protest on August 2, 2010, within five days of discovering the violations. Thus, the bid protest was timely.

II. **The Port Violation 12 GCA § 10401 When It Allowed Evaluators to Evaluate the Bid Proposals Off-Site and Outside of the Observation of the CPO.**

Title 12 GCA § 10401 was enacted in 2007 for the purposes of allowing the Port to enter into public-private management contracts for the management, maintenance, and operation of the Port. The Legislature designated the CPO as the administrator and supervisor of the Port's bid process:

The General Services Agency Chief Procurement Officer shall serve as an observer throughout the RFP, MSB, or IFB process as specified in this section, shall receive copies of all documents involved and shall be invited to any meetings regarding the public-private partnership process specified in this section.

12 GCA § 10401 (emphasis added).

In 2009, the Legislature, finding significant disparities in the procurement process, amended 5 GCA § 5150 giving the Attorney General oversight in the procurement processes of the General Service Agency (the "GSA"). The purposes of

such safeguards were articulated in the Legislative findings to the underlying Bill 220-30, which called for amendments to 5 GCA § 5150:

[The Legislature] finds that there exists a need for greater scrutiny in the preparation of bid documents and in the awarding of bids for major purchases and contracts for services.

[...]

[The Legislature] further finds that Guam stands to lose considerable amounts of federal funding due to questionable procurement practices. It is the intent of [the Legislature] therefore, to ensure the fair and equitable treatment of all who are involved in the procurement process and to preserve the integrity of the procurement system.

Bill No. 220-30 Legislative Findings.

In 2010, 12 GCA § 10401 was further amended to acknowledge and accommodate the involvement of the Attorney General in the Port's procurement process. Notwithstanding the inclusion of Attorney General's oversight, the Legislature still found that the CPO played an integral role of the procurement process:

Senator Ada: What is GSA's role in this process?

Phil Tydingco: Current law states that GSA shall be an observer throughout the process, given all documents, and must be invited to all meetings regarding this process.

Committee Report Digest to Bill 300-30 (the underlying Bill amending Section 10401).

Contrary to the Port's allegations, the Procurement Officer of GSA and or her designate was not present at all stages of the procurement and were unable to observe the entire procurement as required by 12 GCA § 10401. The Port argues that it was "constantly advising the CPO or her office of the developments in the RFP process, inviting her to meetings, and providing her with documents involving the RFP."

But advising the CPO on the developments and inviting her to meetings was not nearly enough to satisfy the mandate of the law. The CPO was required to be an observer throughout the entire process. As will be demonstrated, neither the CPO nor her designee were present when the evaluators evaluated and scored the bid proposals.

Harbor Centre's counsel had a conversation with the CPO on July 28, 2010 after receiving the notice of non-selection. Counsel called the CPO to see whether she believed the Port had complied with the requirements of 12 G.C.A. §10401. Counsel was advised by the CPO that neither she or her designee was able to perform their duties pursuant to the requirements of 12 G.C.A. § 10401. The CPO stated that she believed the Port violated procurement procedures when Port evaluation committee members removed from the Port's premises the bid proposals for evaluation. The CPO further indicated that due to the removal of the bid proposals, neither she nor her agents were able to observe the bid evaluation process.

Clearly, the evaluation of the bid proposals is an integral part of the procurement process. The failure of the Port to allow the CPO to observe the entirety of such proceeding is in direct violation of 12 GCA § 10401. Moreover, the removal of the bid proposals from the observation of the CPO was plainly a breach of the integrity of the procurement and raises definite concerns regarding the "transparency" of the whole bid process altogether:

Transparency and fairness are essential preconditions for containing corruption in public procurement. Transparency renders abuse difficult and increases the likelihood of detection. Also, as bidders must trust in the fairness of the process to participate in a tender, the perception of

transparency is crucial in attracting the largest possible number of tenderers and increasing competition. Ample participation also protects against bribery, favoritism, nepotism, and collusion-forms of corruption that become difficult to sustain when many actors have stakes in the process.

Public Procurement Asia/Pacific, Part 1.2.

The removal of the bid proposals from the premises allowed a period of non-transparency in this procurement. It allowed an opportunity for evaluators to gather, caucus or lobby amongst themselves during the evaluation. It jeopardized the confidentiality of contents of the bid proposals, allowing for potential third-party distribution of the information contained therein. Finally, it put at risk the loss, destruction or dissemination of highly sensitive bid information.

Moreover, subsequent investigation revealed that the bid proposals were not just evaluated, but scored outside of the observation of the CPO. Based upon the representations by the CPO, counsel filed a Protest on behalf of Harbor Centre for the above entitled procurement.

According to representations made by Pete San Nicolas, a GSA procurement officer, to undersigned counsel, the evaluation portion of the procurement was never observed. See Ex. A. Mr. San Nicolas stated that he was surprised when there was really no evaluation conducted by the committee and all that was really done was a "ranking" of the bids. Apparently all the evaluations had been completed and neither he nor anyone from the GSA witnessed any of the evaluations or scoring done by the separate evaluation committee members.<sup>1</sup> Mr. San Nicolas stated that "evaluation

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<sup>1</sup> The Port provided documents indicating that members had pre-scored the bids and only ratified their prior scores.

process” is a very important process in the RFP process and it is crucial that it be observed by procurement officers to make sure the evaluators are evaluating without any form of coercion or influence.

III. **The Port Violated 2 GAR § 3114(h) When It Allowed the Removal of the Bid Proposals from the Port’s Premises Thereby Denying the CPO the Opportunity to Observe the Process**

Next the Port raises and asserts that there was no violation of 2 GAR § 3114(h). Title 2 GAR § 3114(h) mandates that the proposals are to be kept secured and they must be opened in the presence of two procurement officers.

In this instance, the proposals were initially opened to make sure that they complied with the requirements of the Bid and resealed. The next time the bids were to be reopened was for purposes of evaluation. On July 14, 2010 Pete San Nicolas, acting as a designee of the CPO, arrived at the Port to serve as one of the two procurement officers pursuant to 2 GAR §3114(h) to observe the opening and evaluation.

As stated above, he did not witness the “evaluations” but only witnessed the “ranking” of the bid proposals, a procedure after evaluations are completed. It is obvious that the proposals were re-opened and distributed to members of the evaluation committee outside the presence of the CPO or the designee. The evaluators were then permitted to take the submittals home.

Understandably, the Port’s approach is to read literally 2 GAR § 3114(h) in hopes of avoiding a finding of violation. The Port asserts that neither 12 GCA § 10401, nor 2

GAR § 3114(h) literally prohibits the taking off premises submittals, thus no violation of the procurement law has occurred.

But a violation has occurred. The CPO was not present during the evaluations pursuant to 12 GCA § 10401. And even if the black letter of the law was not violated, the underlying key premise of procurement law shall govern in interpreting whether the mandates of the procurement laws have been followed:

The law and regulations specify certain purposes or policies of procurement law. These are not mere maxims, platitudes and ideals. They are intended to fill in the blanks and provide direction when the law or regulations have holes or are in need of clarification or direction. In procurement law, they have particular importance because the Public Auditor is charged with the broad duty to promote the 'Purposes' of the Procurement Act, not simply its black letter strictures.

*Procurement Lore or Procurement Law? A Guam Procurement Process Primer*, John Thos. Brown (July 20, 2010). "These broad policies outline the general rationale for the promulgation of this code but are in no way to be interpreted as limiting either its provisions or application" Commentary, Model Procurement Code sections 1-101. The purposes is obviously the public trust and fairness which is guaranteed by the transparency of the process.

The purposes are address in 5 GCA § 5001(b). The goal of procurement is to foster broad-based competition. To encourage such competition, competitors must have confidence in the procurement procedures that it will ensure equitable treatment and general fairness in the process. This is accomplished by protecting in the first instance the integrity of the procurement. The Government protects the integrity by maintaining transparency of the procurement from start to end. Transparency is only



accomplished by the monitoring of the entire procurement process under the watchful and dutiful eyes of procurement officers.

Finally, it should be noted that the Port's use of the non-disclosure agreements further indicates it knowingly violated of the intent and purposes of the procurement law. In an effort to try to save creditability of the procurement and mitigate their violation, they required that there evaluation committee members sign non disclosure documents. These disclosure documents are not required by the Guam Procurement Law or 2 GAR Div. 4.

IV. **The Composition of the Evaluation Committee Violated Procurement Law**

The Port denies that it violated the terms of the procurement laws by appointing members of the Board of Directors and Port employees. As set forth in the RFP, a General Manager was also supposed to appoint members of the Government of Guam outside of those employed at the Port. It was clear in the language of the RFP that Port personnel were already going to be part of the selection committee. It is clearly an attempt to add extra protection and increase transparency in this procurement. There was a specific mention for Government of Guam personnel to be included in this selection and evaluation committee which they were not. It is part of the basic simple procurement that the terms of the Bid and the offer are binding of the parties as in any other contract.

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**CONCLUSION**

For the foregoing reasons above, Harbor Centre respectfully requests that the Port be ordered to re-bid the Request for Proposals for RFP No. PAG-010-003.

Submitted this 27<sup>th</sup> day of September, 2010.

By: 

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