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10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

11 **PROCUREMENT APPEAL**

12 IN THE MATTER OF APPEAL of

APPEAL NO: OPA-PA-010-004

13 HARBOR CENTRE GUAM CO. LTD.
14 And HARBOUR CENTRE PORT
15 TERMINAL, INC.

HEARING BRIEF

Appellant.

16 Comes Now the Jose D. Leon Guerrero Commercial Port (the "Port), the Purchasing
17 Agency in this Appeal, and submits its Hearing Brief as follows:

18 The arguments concerning contested issues in this Appeal are:

19 I. Handling and Control of Proposals.

20 Appellant had made allegations that the Port violated applicable law by not maintaining the
21 mandated security and control of bid offers and by permitting Evaluation Committee members to
22 take the proposals received in response to the RFP off Port premises (See paragraphs (d) and (e)
23 of Appellant's Grounds for Appeal). In support of its claims, Appellant specifically cites only
24 one law or regulation, that is, 2 GAR §3114(h). The Port has answered this allegation
25 consistently, pointing out that §3114(h) does not prohibit the taking of bids or proposals off the
26 premises of the purchasing agency after the requirements of that section for the opening of
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1 proposals have been met. The Port complied with the requirements of §3114(h) and no violation
2 of that regulation has occurred.

3 Other than its citation of §3114(h), of which there was no violation, Appellant relies only on
4 vague and general allegations that the Port “did not perform the RFP process as mandated and in
5 compliance with Public Law 30-90” and that the Port “failed to perform the evaluation process in
6 determining and designation of the ‘Highest Rated Offeror’ in compliance with the Guam
7 Procurement Law” (Paragraphs (a) and (c) of Appellant’s Grounds for Appeal). The Port
8 maintains that these vague and general allegations, without reference to specific acts or omissions
9 by the Port, or to specific law, regulation, or policy that may have been violated, amount to a
10 failure by Appellant to state any actual claim against the Port. In fact, Appellant has no
11 meritorious claim.
12

13 II. Composition of Evaluation Committee

14 Appellant claims that composition of the evaluation committee for the RFP did not conform
15 to the requirements in the RFP. (According to Paragraph (g) of Appellant’s Grounds for Appeal,
16 the evaluation committee “was required to be constituted by PAG Personnel, Members of the
17 Board of Directors and the Government of Guam personnel appointed by the PAG Manager.”).
18 The Port maintains that Appellant has incorrectly interpreted the language in the RFP governing
19 the makeup of the evaluation committee, specifically, RFP Volume V, Item 2, Page V-1 which
20 provides that the committee will be comprised of “PAG personnel and members of the Board of
21 Directors, and/or Government of Guam personnel selected by the PAG’s General Manager.” In
22 compliance with the language in the RFP, the evaluation committee was made up of Port
23 Personnel and Port Board members. Appellant’s claims on this issue are incorrect and simply
24 without merit.
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1 III. Use of Non-Disclosure Affidavits

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3 Appellant contends that the execution of Non-Disclosure Agreements by the members of the
4 evaluation committee is proof the Port “admitted it’s knowing violation of the security of the Bids
5 and integrity of the Process.” (Appellant’s Grounds for Appeal, Paragraph (e)). However,
6 Appellant offers no support for its contention that the use of such agreements is a violation of
7 applicable law. If anything, the Port’s requirement of written assurance that the evaluation
8 committee members would not inappropriately disclose information related to the RFP is an
9 indication of the Port’s extra measures to maintain the security of the proposals. Appellant’s
10 allegations regarding this issue are baseless.
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12 IV. Involvement of the Chief Procurement Officer in the RFP Process

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14 Appellant has made two claims regarding the involvement, or lack thereof, of the Chief
15 Procurement Officer (CPO) in the RFP process. First, Appellant claims that the Port violated
16 Public Law 30-90 “when it did not allow for the observation by the [CPO] of the entire
17 procurement process.” (Appellant’s Grounds for Appeal, Paragraph (b)). Second, Appellant
18 asserts that the Port’s “actions and violation resulted in the [CPO] or designee from not observing
19 the procurement evaluation process as required by law in accordance with 5 GAC §10401.”
20 (Appellant’s Grounds for Appeal, Paragraph (f)). Appellant’s allegations regarding the lack of
21 involvement by the CPO in the RFP process are without merit. The Procurement Record,
22 specifically the communications log filed at Exhibit 19 of the Procurement Record, provides
23 numerous examples of the Port’s efforts to keep the CPO apprised of and involved in the RFP
24 process. The Procurement Record also contains several examples of the CPO’s involvement in
25 the RFP process, including the rescheduling of an evaluation committee at her request, the

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1 presence of her designee during a meeting of the evaluation committee, and a visit by the CPO
2 herself to the Port to review the RFP file. These examples of communications to or by the CPO
3 regarding the RFP demonstrate the incorrect and baseless nature of Appellant's allegations.
4

5 V. Communication by Appellant's Counsel with the Chief Procurement Officer

6 Appellant's counsel filed a declaration indicating that on or about July 28, 2010 he engaged in
7 a conversation with the CPO concerning the RFP process. Communications by a representative
8 of an Offeror about an ongoing RFP with the CPO were improper. By its counsel's conversation
9 with the CPO, Appellant violated the provisions of the RFP which prohibit the contact by
10 Offerors with any person participating in the selection process. (See excerpt from the RFP at
11 Exhibit 9 of the Procurement Record, RFP PAG-010-003, at Bates Stamp Nos. LAP 0051 and
12 LAP0055). The conversation between Appellant's Counsel and the CPO also violated the
13 fairness of the procurement process by allowing one Offeror access to information that was not
14 made available to all Offerors. However, despite the improper actions of Appellant and the CPO,
15 the communications between them appear to have taken place after the evaluation of the
16 proposals submitted in response to the RFP, and the communications should not serve to disrupt
17 the procurement process that was appropriately administered by the Port.
18
19

20 VI. Qualifications of Evaluation Committee; Methods of how the Evaluation Committee
21 Evaluated and Scored the Proposals; Legality of the Methods of Evaluating the Proposals; and
22 Communication between GSA's Chief Procurement Officer and Pete San Nicolas and the
23 Port's Chief Procurement Officer, Evaluation Committee and Staff

24 The subjects referenced immediately above were contained in the List of Issues filed by
25 Appellant on October 8, 2010. However, these subjects were not contained in the Appellant's
26 Appeal Grounds or in its Comments on Agency Report and therefore should be stricken and not
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1 considered in this matter. In any event, because Appellant has not raised these specific matters
2 until now the Port is unable to respond to these matters at this time, but reserves the right to do so
3 upon presentation by the Appellant of its arguments on these matters.
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5 Dated this 13th day of October, 2010.

6 Respectfully submitted,

7 **LUJAN AGUIGUI & PEREZ LLP**

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9 By: 

10 **REBECCA PEREZ SANTO TOMAS, ESQ.**

11 *Attorneys for Jose D. Leon Guerrero Commercial Port*
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