

In the Appeal of)
)
 FAR EAST EQUIPMENT) **NOTICE OF APPEAL**
 COMPANY, LLC)
)
) Docket No. OPA-PA - 06 - 002
)
 Appellant.)
)
 _____)

APPELLANT INFORMATION

Name: Far East Equipment Company, LLC
 Mailing Address: P.O. Box 10838
 Tamuning, Guam 96931
 Business Address 173311 Corsair Road
 Tiyan, Barrigada, Guam 96913
 Daytime Contact No.: (671) 473-4374

APPEAL INFORMATION

- (A) Purchasing Agency: Port Authority of Guam.
- (B) Identification/Number of Procurement, Solicitation, or Contact: Multi-Step Sealed Bid No. PAG 06-001 for the Fabrication and Installation of One (1) or Two (2) New Dockside Container Handling Gantry Crane.
- (C) The bid protest was denied by the Head of the Purchasing Agency on November 13, 2006.
- (D) The Appeal is made from a decision on protest of method, solicitation or award.
- (E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

Mid-Pac Far East
 Airport Industrial Park
 825 Tiyan Parkway
 Barrigada, Guam 96913

JRN Air Conditioning & Refrigeration
 P.O. Box 27070
 GMF, Guam 96921

Themes (Guam)
 178 Cabras Highway
 Piti, Guam 96915

Ambyth Shipping
 1026 Cabras Highway, Suite 205
 Piti, Guam 96915

United General Consultants
 142 Seaton Boulevard
 Hagatna, Guam 96910

OFFICE OF THE PUBLIC AUDITOR
 GOVERNMENT OF GUAM
 SUITE 401, PACIFIC DAILY NEWS BLDG.
 238 ARCHBISHOP FLORES STREET
 HAGATNA, GUAM 96910

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DATE: 24 NOV 06 3.00 PM

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FORM AND FILING

1. **A Concise, Logically Arranged, And Direct Statement Of The Grounds For Appeal.**

A. **Chronology of Facts.**

On September 21, 2006, FarEast picked up the bid documents from PAG. A pre-bid conference was held on October 6, 2006 at which PAG requested that all questions from bidders be submitted in writing no later than October 16, 2006. On October 13, 2006 - three days early - FarEast submitted its technical questions to be answered by PAG. The next day, FarEast submitted one additional technical question.

The Phase 1 bid opening was to be conducted on October 27, 2006. On October 23, 2006, FarEast had still not received answers to its technical questions. Therefore, on that date, FarEast inquired in writing about the status of the answers to its questions, and also requested if there would be an extension to the Phase 1 bid opening date. On October 26, 2006, PAG notified FarEast that the Phase 1 bid opening would be extended from October 27, 2006 to November 3, 2006.

On October 26, 2006, FarEast acknowledged receipt of the extension of the bid opening, but expressed concern that it had still not received responses from PAG to its technical questions. FarEast also requested on this date that the Phase 1 bid opening date be extended thirty (30) days after PAG responds to bidders questions. PAG did not respond to this request for extension until November 1, 2006. Finally, on October 30, 2006, only four days before the Phase 1 bid opening was scheduled to occur, PAG responded to FarEast's technical questions. However, in addition to responding to the technical questions of FarEast, PAG also added an additional section to the bid, made several changes to the specifications, acknowledged several inconsistencies with different sections of the specifications, and requested that FarEast respond to certain questions.

On October 30, 2006, FarEast asked in writing that it be provided with questions submitted by any other bidders, and that it also be provided with responses from PAG to any such questions. PAG never responded to this inquiry.

On November 1, 2006, PAG advised FarEast that the bid submission date would remain November 3, 2006. The next day, on November 2, 2006, FarEast advised PAG in writing that the November 3, 2006, submission date was not practical because FarEast had not received answers to its questions until October 30, 2006; PAG had added additional sections to the bid; and, PAG has required on October 30, 2006, that FarEast answer certain technical questions.

On November 3, 2006, FarEast notified PAG in writing that its responses to the questions from FarEast contained incomplete documentation and, again, requested that PAG continue the Phase 1 bid opening scheduled to be conducted that day. PAG responded by denying the request for an extension of time sighting concerns from other bidders. FarEast then requested again that it be provided with the missing attachment referred to in PAG's responses to FarEast's questions, but no such information was ever provided.

FarEast was not the only bidder who requested additional time. In addition to FarEast, Themes (Guam), Mid-Pac Far East and JRN Air-Conditioning and Refrigeration also requested an extension of time. Thus, four of the six bidders requested an extension. PAG, however, refused to grant an extension of time to FarEast, Themes, Mid-Pac and JRN, and instead proceeded to the Phase 1 bid opening on November 3, 2006.

FarEast was unable to submit a bid on that date because: (a) PAG wrongfully delayed responding to the timely technical questions submitted by FarEast; (b) PAG failed to provide FarEast with questions submitted by other bidders, and the responses of PAG to such questions; (c) PAG added an additional section to the bid only four days before the Phase 1 bid was scheduled to be opened; (d) PAG required that FarEast provide additional technical information only four days before the bid opening was to occur; (e) PAG deleted, changed, and acknowledged several inconsistencies with its specifications and did not provide FarEast reasonable time to incorporate these changes into its technical proposal; (f) PAG failed to provide an attachment that was referred to in its responses to the questions from FarEast; and, (g) PAG wrongfully failed to continue the bid opening for a reasonable time so as to allow FarEast to participate and submit a bid.

Far East filed a bid protest on November 7, 2006. A supplement to the bid protest was filed on November 15, 2006. The bid protest was denied on November 13, 2006, but Far East was not advised of this fact until November 15, 2006.

B. The Guam Procurement Regulations require that Far East be given a "reasonable time" to prepare its bid.

Under 2 G.A.R. § 3109(d), the period between the date of distribution of an ITB and the date set for receipt of bids is called the "bidding time."

The minimum allowed bidding time is 15 days. Obviously for complicated bids, a 15-day bidding time is not always practical, so the Rule states that in each procurement case, the bidding time must be set to provide bidders a "reasonable time" to prepare their bids:

2 G.A.R. § 3109. Competitive Sealed Bidding.

(a) **Application.** The provisions of this Section apply to every procurement made by competitive sealed bidding, including multi-step bidding. ****

(d) **Bidding time.** Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. *In each case bidding time will be set to provide bidders a reasonable time to prepare their bids.* A minimum of 15 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the procurement officer. (Emphasis added).

C. The Guam Procurement Regulations Require an Extension of Time for Submitting a Bid Whenever Additional Sections or Amendments Are Added by the Agency.

In addition to the above, the Procurement Regulations also require that when amendments or changes are made to an ITB, the time for submitting a bid must be increased so that bidders can address the new sections. As discussed in Far East's original protest letter, on October 30, 2006, PAG added additional sections to the ITB and made changes to the specifications. PAG did this with only four days remaining for the Phase I Opening Bid deadline of November 3, 2006.

By adding the additional sections and making changes to the specifications, PAG essentially amended the ITB. It does not appear that PAG ever formalized the additional sections and changes by issuing a written "Amendment to Bid" as is required by 2 G.A.R. § 3109(I).

Under 2 G.A.R. § 3109(i)(3), when an amendment is made to an ITB, if the time and date set for receipt of bids will not permit bidders to consider the amendment in their bids, then the time to respond to the ITB must be increased to the extent possible in the amendment:

2 G.A.R. § 3109. Competitive Sealed Bids. ****

(i) Amendments to Invitations for Bids

(1) **Form.** Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendments shall reference the portions of the Invitations for Bids it amends.

(2) **Distribution.** Amendments shall be sent to all prospective bidders known to have received an Invitation for Bids.

(3) **Timeliness.** Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. *If the time and date set for receipt of bids will not permit such preparation, such time shall be increased to the extent possible in the amendment* or, if necessary, by telegram or telephone and confirmed in the amendment.

Although there is no specific Guam statute or regulation which sets out a time frame or deadline within which a GovGuam agency such as PAG must absolutely respond to a bidder's technical questions, the Procurement Regulations clearly contemplate and require that a bidder shall have a "reasonable time" to prepare its bid. This is particularly so if the agency has made amendments or changes to the bid specifications.

What constitutes a "reasonable time" to prepare a bid package depends on the nature and complexity of the particular solicitation. A Gantry Crane is a specialized and sophisticated piece of machinery that is worth millions of dollars. The particular specifications of the PAG Gantry Crane contained unique design features that exceeded normal standard specifications. Obviously, the preparation of a bid package for PAG Gantry Crane was a complex one that required more than the mere four days given by PAG from the time it responded to Far East's questions and the deadline set for submitting bids.

Moreover, PAG's own documents reveal that on at least two occasions, PAG negligently failed to communicate with Far East in a timely manner. For example, the Amendment No. 1 wherein PAG extended the Phase 1 bid opening date from October 27 to November 3 is dated October 23. However, PAG did not actually notify Far East of the extension until October 26, which is a full three days later.

Further, the cover page of PAG's responses to Far East's technical questions clearly shows that PAG finalized its responses to the questions on October 26. For some reason, however, PAG did not get around to faxing the responses to Far East until October 30 (or 4 days later). Had PAG faxed its answers to Far East's technical questions on October 26 when the answers were ready, Far East would have had at least eight days to prepare its bid (rather than four days) and perhaps would have been better able to meet the November 3 bid opening deadline.

2. A Statement Specifying The Ruling Requested.

FarEast respectfully requests that the bid process relating to the gantry crane be immediately stayed until such time as this bid protest is finally resolved. In addition, FarEast requests that all the bidders be given seven (7) additional days to submit the technical bid portion of the bid. In the alternative, the current bid process should be vacated, and another bid process should be reinitiated in such a manner as to afford all responsible bidders an opportunity to participate. FarEast expressly reserves its right to recover bid preparation costs and other costs to which it is entitled under the Guam Procurement Laws and Regulations in the event that it is successful in its protest.

3. Supporting Exhibits, Evidence Or Documents To Substantiate The Appeal.

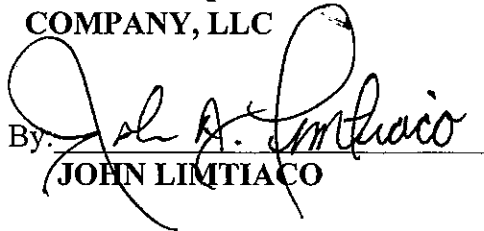
Please find attached hereto a set of documents substantiating the communications between FarEast and PAG that are referred to herein. FarEast reserves the right to supplement its exhibits as additional information may become available or as may be requested by PAG.

DECLARATION RE COURT ACTION

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 24th day of November, 2006.

**FAR EAST EQUIPMENT
COMPANY, LLC**

By: 
JOHN LIMTIACO

MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation

By: 
DAVID A. MAIR
Counsel for Appellant

ORIGINAL

PROCUREMENT APPEAL

In the Appeal of)
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FAR EAST EQUIPMENT)
COMPANY, LLC)
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Appellant.)
_____)

Docket No. OPA-PA - 06 - 002 _____

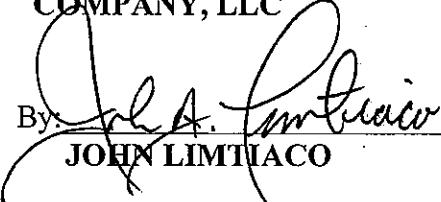
DECLARATION RE COURT ACTION
(To be signed by the Government Purchasing Agency)

Pursuant to 5 G.C.A. Chapter 5, unless the court requests, expects, or otherwise 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 24th day of November, 2006.

FAR EAST EQUIPMENT
COMPANY, LLC

By: 
JOHN LIMTIACO

MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation

By: 
DAVID A. MAIR
Counsel for Appellant

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DATE: 24 Nov 06

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HAGATNA, GUAM 96910

ORIGINAL

PROCUREMENT APPEAL

In the Appeal of)
)
FAR EAST EQUIPMENT)
COMPANY, LLC)
)
Appellant.)
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HEARING REQUEST/WAIVER

Docket No. OPA-PA -06-002

Please select one:

X Pursuant to 2 GAR § 12108(a), the undersigned party does hereby request a hearing on the appeal stated above.

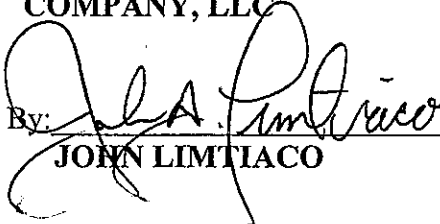
_____ Pursuant to GAR § 12108(a), the undersigned party does hereby waive his/her right to a hearing and is submitting the appeal stated above on record without a hearing.

Submitted this 24th day of November, 2006.


By: (Please select one)

- X APPELLANT
- _____ Chief Procurement Officer
- _____ Director of Public Works
- _____ Head of Purchasing Agency

FAR EAST EQUIPMENT
COMPANY, LLC

By: 
JOHN LIMTIACO

MAIR, MAIR, SPADE & THOMPSON
A Professional Corporation

By: 
DAVID A. MAIR
Counsel for Appellant

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