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7 *Attorneys for Far East Equipment Company, LLC*

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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

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FILE No. OPA-PA -08-002

OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEAL

8 IN THE APPEAL OF
9 FAR EAST EQUIPMENT CO., LLC
10 Appellant.

Docket No. OPA-PA-08-002

**FAR EAST EQUIPMENT COMPANY,
LLC'S REPLY TO MOTION TO DISMISS
PROCUREMENT APPEAL**

11
12
13 Far East Equipment Co., LLC (hereinafter referred to as "Far East") opposes the Jose D.
14 Leon Guerrero Commercial Port's (hereinafter referred to as "Port") motion¹ to dismiss the
15 appeal of Far East as the Office of the Public Auditor does have jurisdiction to adjudicate the
16 appeal of the unsolicited proposal for three used gantry cranes accepted by the Port in complete
17 disregard of the Guam Procurement laws.

18 **FACTS**

19 On June 30, 2006 the Port Authority of Guam (hereinafter referred to as "PAG") issued
20 Bid Invitation No. PAG-06-017 for the procurement of used gantry crane. Far East submitted a
21 bid. On August 7, 2006 PAG rejected the Far East bid and simultaneously cancelled the IFB.
22 Previously, in 2005 PAG had issued PAG 05-020 a request for proposal for privatization of
23 cargo operations at the Port which required offerors to lease, operate and maintain all existing
24

25 ¹ In the discussion which follows Port and Port Authority of Guam (PAG) will be used interchangeably.

1 PAG equipment and required offerors to supply, operate, and maintain additional equipment
2 including gantry cranes and other container off-loading equipment. PAG-05-020 was also
3 cancelled by the Port.

4 Two shipping companies, Matson Navigation Company, Inc. and Horizon Lines, Inc.
5 (hereinafter referred to as "Matson & Horizon") currently providing ocean carrier services to
6 Guam, offered in 2007 to purchase, refurbish, transport and erect three used gantry cranes at the
7 Port at a cost of \$12-15 million dollars to be borne by them. PAG would then enter into an
8 enforceable agreement with Matson & Horizon for the operation and repair of the cranes by Port
9 employees for an undisclosed consideration and for a reduction or abatement of its Tariffs for
10 Stevedoring services to reflect the fact that Matson & Horizon were providing their own gantry
11 cranes for cargo operations. All of these terms were embodied in a Letter of Intent (Exhibit 1
12 hereto) and a License Agreement (Exhibit 2 hereto).

13 On December 14, 2007, the PAG Board of Directors passed Resolution No. 07-07
14 (Exhibit 3) granting Matson & Horizon a non-exclusive license for a term of five years to use the
15 Rails and other related property at the Port and to land, install, maintain and operate the cranes.
16 The resolution also approved the execution of the Letter of Intent described above. Far East
17 protested the PAG's acceptance of the unsolicited proposal of Matson & Horizon on December
18 18, 2007 (Exhibit 4) contending that the acceptance of the proposal was in violation of 5 GCA §
19 5219 and the unsolicited offer as then presented could not be evaluated as the financial terms of
20 the transaction had yet to be negotiated.

21 ARGUMENT

22 The Matson & Horizon proposal squarely fits the definition of an unsolicited offer
23 defined in 5 GCA § 5219 (a) as being "any offer other than one submitted in response to a
24 solicitation". PAG or Port attempts to circumvent the procurement law by claiming that it may
25 license the use of its real property under 12 GCA § 10105 (i). However, the real property

1 licensing power is only applicable to the use of the gantry rails and real property at the Port. It
2 does not extend to obtaining and/or renting gantry cranes.

3 This proposal to furnish three used gantry cranes is clearly an unsolicited proposal. Port
4 argues in a footnote that the Port is a self-sustaining enterprise and is not subsidized by
5 appropriations from the General Fund (see footnote 1 of Port's motion). This argument is totally
6 irrelevant to this discussion. The Port is required to follow Guam Procurement laws by the
7 Port's enabling statute. 12 GCA § 10105 (b).

8 Next, the Port contends in another footnote that no decision exists under 5 GCA § 5425
9 (c) to appeal to the Public Auditor. This argument is a mere "red herring" designed to draw
10 away attention from the fact that the Port, while maintaining its position that this was not a
11 procurement, did send a letter dated January 8, 2008 to Far East which in effect denied Far East's
12 appeal (Exhibit 5). Had the GSA or Port issued a procurement denial letter they would have
13 grievously damaged their assertion that this is not a procurement. Therefore, it is very
14 disingenuous for the Port to send a letter on behalf of the Port and GSA denying our protest
15 because they say this is not a procurement and then to argue later that there can be no appeal
16 because there is no procurement decision from which to appeal.

17 The heart of the matter here is that the procedure for considering and evaluating an
18 unsolicited offer stated in 5 GCA § 5219 (c) and (d) is not being followed. By using the
19 licensing agreement, the Port is attempting to circumvent the Guam Procurement Laws which it
20 statutorily cannot do and must not be allowed to do.

21 Port next argues that because there is no expenditure of public funds the Matson &
22 Horizon proposal is not a procurement. The problem is that there will be such an expenditure.
23 PAG employees will be operating and repairing the gantry cranes. And, there is a yet to be
24 determined discounting and/or forgiveness of Port user fees to be given to Matson & Horizon.

25

1 The Port also argues that its License Agreement does not involve any one of the acts
2 defined as procurement in 5 GCA § 5030 (a). In support of its argument, Port cites the definition
3 of procurement in that section. However, Port's citation is misleading because it is purposely
4 incomplete. Besides the Port's cited language, 5 GCA § 5030(o) goes on to state that
5 procurement:

6 ... also includes all functions that pertain to the obtaining of any supply, service
7 or construction, including description of requirements, selection and solicitation
8 of sources, preparation and award of contract, and all phases of contract
administration.

9 (Emphasis added.) The Port's entire actions in this matter are certainly covered by the definition
10 of procurement.

11 With respect to the Port's letters to Far East's counsel that there are no issues of
12 procurement, Far East's counsel's response was succinct and is incorporated herein in full by
13 reference. (Exhibit 6)

14 CONCLUSION

15 The proposal from Matson & Horizon for used gantry cranes is clearly an unsolicited
16 proposal. As it is a procurement, the Office of the Public Auditor has jurisdiction to hear Far
17 East's appeal. Thus, Port's Motion to Dismiss should be denied.

18 Dated this 4th day of February 2008.

19
20 **The Law Offices of John S. Unpingco &
21 Associates, LLC**

22
23 By: 

24 John S. Unpingco, Esq.
25

12/14/07

December __, 2007

The Port Authority of Guam
1028 Cabras Highway Suite 201
Piti, Guam

Re: Letter of Intent - License for Three Cranes

Dear Sir/Madam:

Matson Navigation Company, Inc. ("Matson") and Horizon Lines, LLC ("Horizon") are currently providing ocean carrier services to the Territory of Guam and have identified an urgent need for additional container cranes to be used to load and unload their cargo and equipment at the Jose D. Leon Guerrero Commercial Port in Piti (the "Commercial Port"). Matson and Horizon have identified an opportunity to purchase three container gantry cranes currently owned by the Port of Los Angeles for their own use. If Matson and Horizon are successful in their bid, then they intend to refurbish and modify the cranes and transport them to Guam to be used to load and off-load cargo and equipment from Matson and Horizon ships calling on the Commercial Port. (The cranes are further referred to as the "POLA Cranes".) When executed by all parties, this letter will confirm the mutual intention and understanding of the parties concerning the POLA Cranes.

1. Grant of License

In order to allow Matson and Horizon to make use of the POLA Cranes in connection with their transportation of goods to and from Guam, the Port is willing to grant Matson and Horizon a non-exclusive license to use the gantry rails and other related property in the Commercial Port for a five (5) year term and to allow Matson and Horizon to use the POLA Cranes to load and unload their cargo and equipment at the Commercial Port from their vessels.

2. Stevedoring Services

The Port's tariff charges for stevedoring services include consideration for the provision of Port-owned equipment such as cranes. Because Matson and Horizon will be providing their own cranes, the Port is willing and fully intends to enter into an enforceable agreement with Matson and Horizon for the operation of the cranes by Port employees and for a reduction or abatement of its Tariffs for Stevedoring Services, or to establish a new Tariff for carriers providing their own gantry cranes, and/or to make other arrangements to reflect the fact that Matson and Horizon are providing their own gantry cranes for cargo operations, all subject to applicable requirements of law.

3. Cooperation and Timing

Subject to paragraph 4, the parties will in good faith use reasonable commercial efforts to agree upon the terms and conditions of appropriate agreements within ninety (90) days of the date that Matson and Horizon acquire the POLA cranes or within ninety (90) days of the date of this letter, whichever is later.

4. Non-binding Agreement; Survival

It is understood that this letter is intended solely as a basis for further discussion and merely expresses the parties' good faith and mutual intentions to reach agreements with respect for the POLA Cranes and Stevedoring Services involving the POLA Cranes. This letter does not constitute a binding or enforceable agreement. Nothing contained in this letter shall require or be construed as requiring any party to perform any act or function contrary to law. After the

execution and delivery of any subsequent written agreements, the legal rights and obligations of the parties shall only be those which are set forth in those agreements.

If this letter correctly sets forth the parties' good faith intentions and is otherwise acceptable, then please so indicate by causing this letter to be executed by an authorized representative(s) in the spaces provided below.

ACKNOWLEDGED and AGREED:

Matson Navigation Company, Inc.

By: _____
Typed Name: G. J. North
Title: Senior Vice President
Date: _____

Horizon Lines, LLC

By: _____
Typed Name: M. Labrador
Title: Vice President, Hawaii, Guam & Micronesia
Date: _____

Port Authority of Guam

By: _____
Typed Name: _____
Title: _____
Date: _____

4/14/07

LICENSE AGREEMENT

This License Agreement ("License") is made between the Jose D. Leon Guerrero Commercial Port (Port Authority of Guam) (the "Port") whose address is 1026 Cabras Highway, Suite 201, Piti, Guam 96915, the Matson Navigation Company Inc. ("Matson"), whose address is 1026 Cabras Highway, Suite 115, Piti, Guam 96915 and Horizon Lines, LLC whose address is 1010 Cabras Highway, Piti, Guam 96915 ("Horizon") (Matson and Horizon are sometimes referred to collectively as the "Crane Owners".)

RECITALS:

I. The Port of Los Angeles has offered for sale three 50-foot container gantry cranes (the "Cranes"). Matson and Horizon intend to purchase the Cranes, substantially renovate and improve them, ship them to Guam, and install them on the existing gantry crane rails (the "Rails") at the commercial pier area of the Jose D. Leon Guerrero Commercial Port of Guam (the "Commercial Port") and then use the Cranes for loading and off-loading cargo from their ships calling on the Commercial Port. Matson and Horizon estimate that the cost for purchasing, renovating, transporting and installing the Cranes will be from \$12,000,000 to \$15,000,000.

II. On December 13, 2007, the Board of Directors of the Port agreed to allow Matson and Horizon to use the Rails and other related property within the Commercial Port to land, install, maintain and use the Cranes and therefore has agreed to give Matson and Horizon this non-exclusive license to use the property more particularly identified below.

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III. The Port acknowledges that Matson and Horizon will not acquire and bring the Cranes to Guam unless the parties enter into this License.

IV. The Port Board of Directors ("Board") has the authority to make, negotiate, and issue a five (5) year license for the use of its real property and other related facilities pursuant to 12 Guam Code Annotated ("GCA") § 10105(i). Furthermore, the Board has jurisdiction, control, and management over all government of Guam lands within the areas of the Commercial Port pursuant to 12 GCA § 10104(f). Therefore the parties agree as follows:

WITNESSETH:

1. Grant of License:

Provided that the Crane Owners successfully acquire the Cranes, the Port hereby grants to the Crane Owners the non-exclusive right to use the Rails and those portions of the Commercial Port as are identified on Exhibit A for the exclusive use of and for landing, installing, using, and maintaining the Cranes. The Port further grants to the Crane Owners, their respective officers, contractors, employees and agents, the right of access over and across any and all property within the Commercial Port necessary to land, install, use, and maintain the Cranes. In the exercise of any privilege granted by this License, the Crane Owners shall comply with all applicable laws. Except as may be otherwise provided herein, the Crane Owners shall not cause any property of the Port or of the government of Guam to be destroyed, displaced, or

G.M. X
PROVIDE
EXHIBIT
A

damaged in the exercise of the privilege granted by this License without the prior written consent of the Port. The Crane Owners shall confine activities on the property strictly to those necessary for the enjoyment of the privilege hereby licensed, and shall refrain from marring or impairing the appearance of said property, obstructing access thereto, interfering with the transaction of the Port's or the government of Guam's business and the convenience of the public, or jeopardizing the safety of persons or property, except as may be otherwise provided for herein.

In order to protect public safety, the Crane Owners may use any and all reasonably appropriate means of restricting public access to the Cranes, subject, however, to Section 2 below.

2. Port's Control Over Use:

The Crane Owners' use of the Rails and related property, as set forth in Section 1 above, and use of the Cranes under the terms of this License, shall be at all times subject to the direction and control of the Port, through its General Manager. The Port shall have the right to determine the timing, placement and manner of use of the Rails for the purpose of ensuring the efficient, safe and proper operation of the Commercial Port:

3. Use of the Cranes:

The Crane Owners shall have the right to use and maintain the Cranes and to load and off load containers and cargo from their vessels calling upon the Commercial Port. To the maximum extent possible the Cranes shall be operated by qualified

employees of the Port, subject to the direction and control of the General Manager of the Port. The Crane Owners shall be responsible for all maintenance and repairs necessary to keep the Cranes in a good and safe working order and condition. In consultation with the General Manager, such repairs and maintenance shall be accomplished using skilled and qualified employees of the Port, to the extent reasonably available, who shall not for any purpose be considered employees of the Crane Owners. In consultation with the General Manager, the Crane Owners shall determine and control the nature, scope and finished quality of all repairs and maintenance to be completed by the Port employees. In the event the Crane Owners are dissatisfied with the work or services of a particular Port employee, then they shall so notify the General Manager in writing who shall then determine the placement of the employee subject to applicable law. In the event the Crane Owners, in consultation with the General Manager, shall reasonably determine that specific and necessary repair or maintenance work requires skills or expertise not then available through Port employees or that skilled or qualified Port employees are not immediately available to complete the required repairs, then the Crane Owners may use others, including their own employees, for such repairs or maintenance, at their own cost and expense.

The parties expressly acknowledge and agree that in no way shall this License be construed as a Public-Private Partnership Contract and Lease Agreement for terminal operations and maintenance, as described in the Port Public-Private Partnership Authorization Act of 2003 (12 Guam Code Annotated Section 10301 et seq.), or that any provisions of the Port Public-Private Partnership Authorization Act of

2003 be construed as applying to this License, except to the extent set forth in Section 10(d) below.

4. **Fee for the use of the Rails and Related Property:**

For the use of the Rails and related property within the Commercial Port under this License the Crane Owners shall pay to the Port the sum of ~~\$20,165.00~~ ^{\$23,556.01} per month commencing on the date the Cranes are landed and installation is begun at the Commercial Port. The fee shall be paid on or before the first (1st) day of each month of the term of this License. Fees for any partial month shall be prorated.

5. **Term of the Agreement:**

Matson and Horizon shall have the non-exclusive right to use the Rails and related property for the purpose of and on the terms set forth herein for a five (5) year period commencing on the date installation of the Cranes on the Rails is begun, and shall continue for a period of five (5) years, unless sooner terminated. The Crane Owners shall provide written notice to the General Manager of the date that such installation is to begin, and shall work together with the General Manager in good faith to ensure that such date is acceptable to Port and does not otherwise interfere with the operations of the Port.

The Crane Owners' right to use the Rails and related property shall not be revocable or terminated by the Port except as provided in Section 8 or 13 of this License.

6. **Insurance and Maintenance:**

(a) The Crane Owners warrant and agree that at all times that the Cranes are at the Commercial Port they shall be maintained in good condition and repair and, except while undergoing periodic repairs for reasonable time periods, fully operable for their intended purpose.

(b) The Crane Owners, either individually or jointly, shall procure and maintain property insurance covering the Cranes insuring against loss or damage caused by fire, wave and tidal action, typhoon, wind, earthquake, lightning, vandalism and all other perils customarily defined as "Extended Coverage". Such insurance may include a deductible in such an amount, as the Crane Owners shall reasonably determine, from time to time.

(c) The Crane Owners shall procure and maintain, or self-insure as permitted by applicable law, their respective obligations under applicable workers compensation laws and under the U.S. Longshoreman and Harbor Worker's Compensation Act, in the minimum amount of \$1,000,000 per accident.

(d) The Crane Owners shall procure and maintain, or self-insure as permitted by applicable law, comprehensive general liability insurance with a minimum limit of liability, bodily injury, death or property damage of \$5,000,000 for each occurrence and in the aggregate, for all claims arising from or related to the Cranes.

7. **Indemnification:**

The Crane Owners shall indemnify and save harmless the Port, its officers, directors, contractors, employees, agents, guests, invitees or customers

against any and all loss, damage, claims, or liability whatsoever, or against any fines or penalties imposed by any governmental entity or authority, in any way arising from or related to the Cranes or due to the exercise by the Crane Owners of the privilege granted by this license, except to the extent that such is caused by the wrongful or negligent acts or omissions of the Port, its officers, directors, employees, contractors, agents, guests, invitees or customers.

8. **Termination:**

The Crane Owners, on the one hand, or the Port, on the other hand may terminate this License and the Crane Owners' right to use the Rails and the property described herein, on ninety (90) days prior written notice to the other party for cause, provided that the party that is alleged to be in default fails to cure any such default within the ninety (90) day period. For purposes of this License, "cause" shall mean the non-compliance with any term or provision of this License, or non-compliance with any provision of applicable law. In the event that this License is terminated, then the Crane Owners shall, at their expense, cause the Cranes to be removed from the Commercial Port within ninety (90) days after the date of termination pursuant to this Section 8. The Crane Owners shall continue to pay the amount identified under Section 4, above, until the Cranes are removed from the Commercial Port.

9. **Assignment:**

The Crane Owners, either separately or jointly, may assign this License to a joint venture, partnership, corporation or limited liability company which is wholly owned by

Matson and/or Horizon, or any of its subsidiaries or affiliates, subject to the written consent of the Port, such consent not to be unreasonably withheld. Other than as stated in the preceding sentence, Matson and Horizon shall have no right to assign this License or any of their rights or obligations hereunder, except with the express written consent of the Port. A change in control of Matson and/or Horizon shall not be considered an assignment for purposes of this provision.

10. **Miscellaneous:**

(a) **Notice:** Any notice or other communication required or related to this License or the Cranes shall be given in writing to the other parties to this License by being personally delivered to the addresses set forth in the preamble of this License and by being simultaneously delivered by facsimile and deposited in the U.S. Mail to the following addresses:

Port Authority of Guam Attention: General Manager 1026 Cabras Highway Suite 201 Piti, Guam 96915 Facsimile: (671) 477-4445	Matson Navigation Company Attention: Gary J. North, Senior Vice President of Pacific P.O. Box 899 Honolulu, Hawaii 96808 Facsimile: (808) 242-6048
Horizon Lines LLC Attention: Mar Labrador Pier 51-A Sand Island Honolulu, HI 96819 Facsimile: (808)	

(b) **Severability:** If any term, provision, covenant or condition of this License is held by a court of competent jurisdiction to be invalid, void or unenforceable, then the rest of this License shall remain in full force and effect.

(c) **Entire Agreement:** This instrument contains the entire agreement of the parties concerning its subject matter. It is final and integrated. All prior understandings are merged herein. This License may only be modified or amended in a written instrument signed by all of the parties.

(d) **Binding Effect.** This License shall bind and inure to the benefit of the parties to this License and any of their respective permitted successors or assigns including any terminal operator designated by the Port pursuant to the Port Public-Private Partnership Authorization Act of 2003 or any other Port privatization or including any contractor designated by the Port pursuant to the "Public-Private Partnership Authorization Through a Performance Management Contract" (12 GCA sections 10401 et seq. (enacted by Public Law 29-23)), subject to any and all requirements of applicable law.

11. **Counterparts and Facsimile:**

The authorized representatives of the parties may execute this License in three or more counterparts and each counterpart shall be deemed an original instrument against any party which has signed it. This License may be delivered and the executed signature page may be transmitted by facsimile.

12. **Choice of Law/Resolution of Disputes:**

This License shall be construed, interpreted, and enforced under the laws of Guam. The exclusive forum for any court action that arises from or that is related to this License shall be the territorial or federal courts of Guam, which shall have the power to

specifically enforce this License subject to applicable law.

13. **Failure to Obtain and Install Cranes:**

This License shall be rendered void and of no effect if the Crane Owners have not obtained and installed the Cranes at the Commercial Port within one year from the date of this License.

THIS LICENSE AGREEMENT IS VALID ONLY IF SIGNED AND EXECUTED BY ALL PARTIES, AND WILL BE ENTERED INTO AS OF THE DATE THAT THE LAST REQUIRED SIGNATORY SIGNS AND EXECUTES IN THE APPROPRIATE SPACE BELOW.

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**JOSE D. LEON GUERRERO
COMMERCIAL PORT (PORT
AUTHORITY OF GUAM)**

By: _____
MONTE MESA
Chairman Board of Directors

Date: _____

By: _____
General Manager

Date: _____

MATSON NAVIGATION COMPANY, INC. HORIZON LINES, LLC

By: _____
GARY J. NORTH, Its senior vice
President

Date: _____

By: _____
MAR LABRADOR,
Its _____

Date: _____

By: _____
MEREDITH N. ENDSLEY, Its assistant
Secretary

Date: _____

BOARD OF DIRECTORS

Chairman:
Monte Mesa
Vice Chairperson:
Jovyna Lujan
Secretary:
Rosita Adkins
Members:
Joseph Camacho
Arsonio R. Pellacani



Resolution No. 07-07

**RESOLUTION OF THE
BOARD OF DIRECTORS OF THE
JOSE D. LEON GUERRERO COMMERCIAL PORT
(PORT AUTHORITY OF GUAM)**

WHEREAS, The Port of Los Angeles has offered for sale three 50-foot container gantry cranes (the "Cranes"). Matson Navigation Company Inc. ("Matson") and Horizon Lines, LLC ("Horizon") intend to purchase the Cranes, substantially renovate and improve them, ship them to Guam, and install them on the existing gantry crane rails (the "Rails") at the commercial pier area of the Jose D. Leon Guerrero Commercial Port of Guam (the "Commercial Port") and then use the Cranes for loading and off-loading cargo from their ships calling upon the Commercial Port; and

WHEREAS, Matson and Horizon have asked the Board of Directors ("Board") of the Jose D. Leon Guerrero Commercial Port (Port Authority of Guam) (the "Port") to give them a five (5) year license to use the rails and related property at the Commercial Port in order to land, install, maintain, and use the Cranes, and to execute a non-binding letter of intent regarding the Cranes; and

WHEREAS, at its regular meeting held on December 13, 2007, and continued on December 14, 2007, the Board agreed to give Matson and Horizon a non-exclusive license to use the Rails and other related property within the Commercial Port to land, install, maintain and use the Cranes in the form attached hereto as Exhibit 1, and to execute a letter of intent regarding the Cranes in the form attached hereto as Exhibit 2, both conditioned on the acceptance and execution by Matson and Horizon of such documents and instruments; and


WHEREAS, Board has the authority to make, negotiate, and issue a five (5) year license for the use of its real property and other related facilities pursuant to 12 Guam Code Annotated ("GCA") § 10105(i); furthermore, the Board has jurisdiction, control, and management over all government of Guam lands within the areas of the Commercial Port pursuant to 12 GCA § 10104(f).


NOW THEREFORE BE IT RESOLVED THAT:

The Board hereby gives Matson and Horizon a non-exclusive license for a term of five (5) years in the form attached hereto as Exhibit 1 (subject to the agreement of all parties as to Exhibit A referenced in Exhibit 1) and also approves the execution by Port management of a letter of intent in the form attached hereto as Exhibit 2, all subject to the acceptance and execution by Matson and Horizon of such documents and instruments. The Board hereby delegates authority to the General Manager of the Port to approve the final Exhibit A to Exhibit 1, in negotiations with Matson and Horizon.

RESOLVED BY THE BOARD OF DIRECTORS OF THE JOSE D. LEON GUERRERO COMMERCIAL PORT (PORT AUTHORITY OF GUAM) ON THE 14th DAY OF DECEMBER, 2007, IN PITI, GUAM.

**PASSED AND ADOPTED BY THE BOARD OF DIRECTORS
THIS 14th DAY OF December, 2007.**


ROSITA ADKINS
SECRETARY, BOARD OF DIRECTORS
PORT AUTHORITY OF GUAM


MONTE MESA
CHAIRMAN, BOARD OF DIRECTORS
PORT AUTHORITY OF GUAM



The Law Offices of John S. Unpingco & Associates, LLC

777 Route 4

Suite 12B

Sinajana, Guam 96910

Telephone: (671) 475-8545

Facsimile: (671) 475-8550

www.ualawguam.com

December 18, 2007

Sent via facsimile transmission

Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
Government of Guam
148 Route 1 Marine Corps Drive
Piti, Guam 96915
Via Facsimile Transmission: 472-4217

GENERAL SERVICES AGENCY
148 Route 1
Marine Drive
Piti, Guam 96925
DEC 21 2007

Kenneth T. Tagawa
General Manager,
Port Authority of Guam
1026 Cabras Highway, Suite 201
Piti, Guam 96925
Via Facsimile Transmission: 477-2689

RE: *Matson Navigation's & Horizons Lines' Unsolicited Offer of Gantry Cranes*

Dear Ms. Acfalle and Mr. Togawa,

We are the attorneys for Far East Equipment Company, LLC.

Recently, Matson Navigation and Horizon Lines jointly offered to bring in three refurbished gantry cranes and to install them (at a combined cost of \$12 - \$15 million dollars) at their expense at the Commercial Port of Guam. In return, the shipping companies seek to offset their gantry crane costs with their non-payment of some port user fees they pay to the Port Authority. The Port Authority has approved Matson & Horizon's joint Letter of Intent to buy three cranes, refurbish them and install them at the Commercial Port of Guam. The Port Authority also approved a license agreement for Horizon & Matson to use a license agreement for Horizon & Matson to use pier facilities for its cranes.

This is a protest letter. Far East Equipment Company hereby protests the Port Authority's acceptance of the aforementioned unsolicited offer of two shipping companies to bring in and install gantry cranes at the Commercial Port in exchange for an

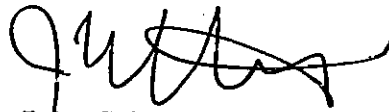
offset of some of their port user fees. In accordance with 2 GAR § 9101 (c) (3) we furnish the following information:

- 1) Name and address of Protestor:
Far East Equipment Company, LLC
PO Box 10838 Tamuning, Guam 96931
Telephone: 473-4375, Cellular: 888-6270;
- 2) Unsolicited Proposal by Matson Navigation & Horizon Lines to bring in three refurbished gantry cranes to install and operate them for five years at the Commercial Port of Guam.
- 3) The basis for our protest is that such acceptance of the unsolicited offer is clearly in violation of 5 GCA § 5219. The unsolicited offer as currently presented cannot be evaluated to determine whether it would be to Guam's and the government's advantage to procure such service as the financial terms of this transaction have yet to be negotiated. Also, the acceptance of the unsolicited offer has to be subjected to the competitive sealed bidding process under 5 GCA § 5211. And, notwithstanding any other provision of law, sole source procurement cannot be used to award a contract in any procurement arising from an unsolicited offer. This protest is also based on our right to protest under 5 GCA § 5425(a).
- 4) Supporting exhibits are attached.

Your kind attention is most appreciated.

Sincerely,

THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC



John S. Unpingco, Esq.

LUJAN AGUIGUI & PEREZ LLP

ATTORNEYS AT LAW

January 8, 2008

Via Facsimile and U.S. Mail**475-8550**

John S. Unpingco, Esq.
**THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC**
777 Route 4
Suite 12B
Sinajana, Guam 96910

Re: Your Letter Dated December 18, 2007

Dear John:

By this letter, the Jose D. Leon Guerrero Commercial Port (the "Port") responds to your letter of December 18, 2007, addressed to the General Manager of the Port and to Claudia S. Acfalle, the government's Chief Procurement Officer. Although your letter purports to "protest" the purchase by Matson Navigation and Horizon Lines (collectively "Matson/Horizon") of three (3) gantry cranes for their use, the Port does not agree that your client, Far East Equipment Company, LLC ("Far East"), may protest the transaction.

As explained more fully below, the Guam Procurement Laws (including the provisions of the GAR cited in your letter) do not apply to such a transaction.¹

Matson/Horizon are purchasing the cranes for loading and off-loading cargo from their ships. (Port Resolution No. 07-07 ("Resolution"); Letter of Intent at 1.²) The cranes

¹ Assuming that the Guam procurement laws applied to your December 18, 2007 letter – which they do not – section 9101(c)(1) of 2 GAR Div. 4 still requires that all protests be made in writing and "filed in duplicate." Furthermore, § 9101(c)(3) requires that the envelope containing the protest "should be labeled 'Protest'." As to the Port, those requirements of form were not met, consequently providing another alternative reason for the dismissal of your client's purported "protest." However, as noted above, this is not a matter involving government procurement.

² Port Resolution 07-07, which approved the form of the License Agreement to Matson/Horizon and a non-binding letter of intent among the parties, was attached to your December 18 letter. Exhibit A to the Resolution is the approved form of the License Agreement. Exhibit A was omitted from the attachments to your December 18 letter. Exhibit B to the Resolution is the approved form of the letter of intent. A copy of Exhibit B was included as an attachment to your December 18 letter.

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are not new, and Matson/Horizon intend to refurbish and modify them for their use in Guam. (Letter of Intent at 1.) The Port is not procuring or leasing the cranes, and the Port has no role in the acquisition of the cranes from the Port of Los Angeles by Matson/Horizon. Nothing in either the letter of intent or the License Agreement states that the Port intends to pay or reimburse Matson/Horizon for the cost of purchasing the cranes.³ In fact, the non-binding letter of intent states that any reduction or abatement of tariffs or other appropriate arrangements (which have yet to be implemented and/or negotiated) would be accomplished simply for the purpose of reflecting that Matson/Horizon would provide gantry cranes for their ships calling at the Port. The current Port tariffs include a component for the use of Port-owned equipment such as cranes. (Letter of Intent at 2.) If a Port user provides its own equipment, rather than using the Port's equipment, then logically some consideration should be made in order to take that circumstance into account.⁴

The subject License Agreement is a mechanism through which the Port will receive funds (and *not* expend funds⁵) in consideration for the non-exclusive licensing of portions of the Port-owned rails to Matson/Horizon for the installation of their cranes. The Port is allowed to make, negotiate, and issue licenses of terms not exceeding five years pursuant to 12 GCA § 10105(i) notwithstanding any other provision of law. Section 10105(i) was added to the Port's enabling act by section 2 of Guam Public Law 26-28. See the full text of Public Law 26-28 for a discussion of the relevant legislative history and purpose of this statute. Moreover, the provisions of Guam law regarding unsolicited offers (5 GCA § 5219) do not apply to this matter. Matson/Horizon are not offering to sell or lease the cranes to the Port. They are purchasing the cranes for their own use.

³ To the extent any media reports are inconsistent with this concept, the Port takes the position that such reports are inaccurate.

⁴ A simple analogy would be, for example, rates for photocopying government documents for a member of the public. Such rates presumably take into account that the government is providing, *inter alia*, paper, equipment (photocopying machines), and ink. What about if a member of the public were to provide his or her own paper and equipment (e.g., a portable photocopying machine). Would the government still charge the same rates under those circumstances?

⁵ Procurement, by definition, involves the "expenditure of public funds". 5 GCA § 5004(b). But no public funds would be expended by the Port under the Matson/Horizon license. Furthermore, procurement, by definition, involves the government "buying, purchasing, renting, leasing or otherwise *acquiring* any supplies, services or construction". 5 GCA § 5030(o) (emphasis added).

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To the extent Far East believes it has a right to administrative or judicial review of this matter, it should seek legal advice, and consult the relevant provisions of Guam law. The Port, however, takes the position that no such review is sustainable as a matter of law, and that the seeking of such review by Far East would be frivolous and unwarranted, and that Far East could be subject to appropriate sanctions and other measures appropriate to such actions. The Port does not waive any applicable immunity it may be entitled to assert under the Organic Act of Guam and/or Guam law.

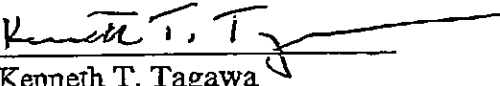
Although the Port welcomes a constructive dialogue on matters over which it has jurisdiction, it also believes that it has the responsibility to provide for the efficient operations of its facilities. A representative of Far East was present at the continued Board meeting held on December 14, 2007, and in response to questions he posed during the public comment portion of the meeting, he was informed that the Matson/Horizon crane issue was one that did not involve the Guam procurement laws. An informed review of the Board resolution and its exhibits which clearly set forth the merits of the transaction have been available at the Port since Monday, December 17, 2007. It is clear that Far East had an opportunity to review those documents as they were attached as exhibits to your December 18, 2007 letter. A review of those documents compels the conclusion that no violation of the procurement laws occurred, and that the matter is not subject to such laws. Accordingly, Far East's attempt to protest could be construed as frivolous, and consequently could also constitute grounds for procurement debarment or suspension under 5 GCA § 5426(b)(7) (debarment or suspension for "filing a frivolous or fraudulent petition, protest or appeal").

Very truly yours,

LUJAN AGUIGUI & PEREZ LLP


Ignacio C. Aguigui, Esq.

Concurred:


Kenneth T. Tagawa
General Manager

cc: Chairman, Port Board of Directors
Claudia S. Acfalle, Chief Procurement Officer

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January 14, 2008

Sent via facsimile: 477-5297

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Lujan Aguigui & Perez, LLP
DNA Building, Suite 300
230 Archbishop Flores Street
Hagatna, Guam 96910

**RE: *Jose D. Leon Guerrero Commercial Port/Matson Navigation/ Horizon Lines
Your letter dated January 8, 2008***

Dear Ike,

We have reviewed your above referenced letter and disagree with it. The fatal flaw to your position is the reduction or abatement of Port user fees. The reduction of Port- user fees to be given Matson/Horizon are lease payments or rental payments for the used cranes. If the cranes are to be eventually owned by PAG, then the reductions are progress payments. Thus, the Port will be expending funds for the cranes.

In addition, 5 G.C.A. §5030(o) defines procurement to be:

“.... buying, purchasing, renting, leasing or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.” (Emphasis added).

This is the complete text of the definition of procurement and it does cover what PAG is currently doing with respect to the cranes.

Attached is a copy of our letter to Ms. Acfalle of GSA. It is applicable to PAG as well. Kindly let us know whether PAG will be suspending negotiations with

EXHIBIT

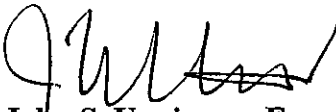
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Matson/Horizon as soon as possible as time is of the utmost essence and as it is required by the procurement laws of Guam.

Your cooperation is most appreciated.

Sincerely,

THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC



John S. Unpingco, Esq.

cc: Ms. Claudia Acfalle, Chief Procurement Officer, GSA