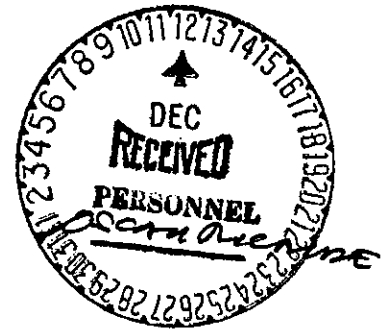




OFFICE OF THE PUBLIC AUDITOR

December 12, 2008



**Attorney for Appellant: J&G Construction**

John Thos. Brown, Esq.  
General Counsel  
545 Chalan Machaute  
Maite, Guam 96932

**Appellee - Guam Memorial Hospital Authority**

Mr. Peter John Camacho  
Administrator  
Guam Memorial Hospital Authority  
850 Governor Carlos Camacho Rd.  
Tamuning, Guam 96913

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Aaron R. Jackson, Esq.  
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Hagatna, Guam 96910

Transmitted herewith is a copy of the Decision and Findings and Recommendations on appeal OPA-PA-07-005 in the appeal of Jones and Guerrero Co. Inc., dba J&G Construction regarding Guam Memorial Hospital Authority's Invitation for Bid No. GMHA 005-2007, Warehouse Extension Project.

A complete copy of the Decision and Findings will be posted on our website within the next few days and be available for public view at [www.guamopa.org](http://www.guamopa.org).

Senseramente,

*bn* Doris Flores Brooks, CPA, CGFM  
Public Auditor



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545 Chalan Machaute  
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**MAIR, MAIR, SPADE  
& THOMPSON**

**DEC 12 2008**

TIME: 3:43  
REC'D BY: [Signature]

**Appellee - Guam Memorial Hospital Authority**

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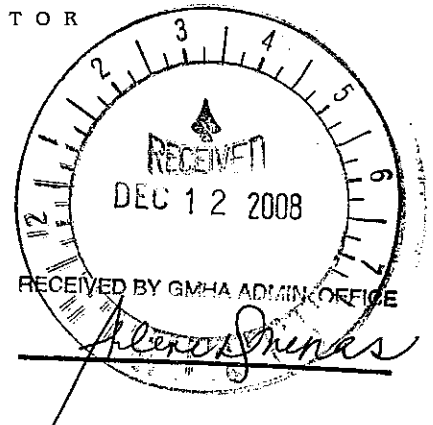


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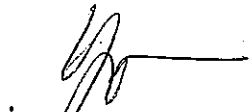
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Senseramente,

  
for Doris Flores Brooks, CPA, CGFM  
Public Auditor



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF,  
JONES AND GUERRERO CO., INC., dba  
J&G CONSTRUCTION,

Appellant

APPEAL NO: OPA-PA-07-005

DECISION

I. INTRODUCTION

This is the Public Auditor's Decision on an appeal filed on June 21, 2007, by Jones and Guerrero Co. Inc., dba J&G Construction (Hereafter "J&G") regarding the Guam Memorial Hospital Authority's (Hereafter "GMHA") denial of J&G's bid protest concerning an Invitation for Bid for a warehouse extension project. John Thos. Brown, Esq. J&G general counsel represented J&G in this matter and Aaron R. Jackson Esq., of Mair, Mair, Spade & Thompson, P.C., represented GMHA.

The Public Auditor holds, under the applicable Guam procurement laws and regulations, that GMHA improperly rejected J&G's bid on the basis of responsiveness. The information omitted by J&G properly pertained to the issue of responsibility. The case is remanded to GMHA for a determination of either responsibility or non-responsibility and further appropriate agency disposition.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the Findings of the Hearing Officer, Charles D. Stake, Esq., issued on December 12, 2008. In

Decision- 1

1 addition, this Decision is based on the Procurement Record, all documents submitted by the  
2 parties in the appeal, as well as all testimony and arguments presented at the January 16 and  
3 February 25, 2008, Pre-Hearings in this matter. The parties waived a formal Hearing and  
4 requested a decision on the record at the February 25, 2008, Pre-Hearing.  
5

6 1. GMHA issued Invitation for Bid No. GMHA 005-2007 for competitive sealed bids for  
7 construction services for the GMHA Warehouse Extension Project on February 1, 2007. J&G  
8 responded and submitted a timely bid for the project. All the sealed bids were opened by GMHA  
9 on March 21, 2007. J&G was the low bidder.  
10

11 2. The General Terms and Conditions of the Sealed Bid Solicitation and Award item  
12 number 11 provided a bid bond requirement in pertinent part as follows:

13 BID BOND REQUIREMENT: Bidder is required to submit a Bid Guarantee  
14 Bond or standby irrevocable Letter of Credit or Certified Check or Cashiers  
15 Check in the same bid envelope to be held by the Government pending award.  
16

17 The timely submitted J&G bid included a cashiers check dated March 21, 2007, number 3808454  
18 drawn on Bank of Hawaii issued by their Hagatna branch providing "pay to the order of Guam  
19 Memorial Hospital Authority \$126,424.00." There was a notation on the bottom left front of the  
20 check stating warehouse extension project: No: GMHA 005-2007. There was a notation on the  
21 bottom left front of the check stating "warehouse extension project: No: GMHA 005-2007".  
22

23 3. The GMHA bid package, which was provided to all prospective bidders for the  
24 warehouse project, contained a warning document entitled Special Reminder to Prospective  
25 Bidders which all bidders had to read and sign. The Special Reminder listed a series of seven  
26 essential items as "requirements of the bid" which must be completed and "submitted in the bid  
27 envelope at the date and time for bid opening", and that "failure to comply with the requirements  
28

1 will mean disqualification and rejection of the bid.” One of those listed seven essential items was  
2 the Bidders Qualification Statement.

3  
4 4. In a Bid Status Notice dated May 1, 2007, GMHA informed J&G that its bid had been  
5 rejected on the basis that it was “non-responsive”. J&G responded to GMHA on May 4, 2007,  
6 with a notice of protest and request for explanation. On May 7, 2007, the Supply Management  
7 Administrator for GMHA informed J&G that the protest letter had been received and that  
8 GMHA will make no award of the contract until the protest has been settled.

9  
10 5. In a June 11, 2007, letter the GMHA Administrator responded to the J&G protest letter  
11 and rejected the protest explaining that the J&G bid was rejected for failing to “complete  
12 portions of the [Bidders Qualification] Statement and also failed to submit a detailed listing of  
13 availability of personnel and technical equipment to perform the required services,” while all  
14 other prospective bidders met the requirements. In more detail, a May 9, 2007, memorandum  
15 (Hereafter GMHA Memo) from the GMHA Hospital Facilities Maintenance Manager to the  
16 GMHA Supply Management Administrator stated that the “failure by the Contractor to complete  
17 the required Bidders Qualification Statement is considered significant in determining the most  
18 responsive and responsible bidding practices. And in this case the prospective contractor failed to  
19 display his/ her company as a responsive and responsible bidder.” The GMHA Memo included  
20 an attachment listing what it considered critical areas omitted in the Bidders Qualification  
21 Statement. The following objections were cited: secretary and treasurers names were left blank;  
22 the list of equipment included forklift and dump truck only and “failed to attach a detailed listing  
23 of equipment available to execute the project/work.”; the response to request for resume of  
24 organization’s supervisory personnel and their areas of performance was considered incomplete  
25 and “not a resume”; the list of jurisdictions in which organization’s partnership or trade name is  
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1 filed was left blank; categories of work that the organization normally performs with its own  
2 forces was left blank; name of bonding company and address of agent were left blank. The  
3 GMHA Memo also cited a bid package attachment entitled, "Evaluation Factors for  
4 Determination of Qualified Bidders" citing two standards GMHA felt J&G failed to meet in its  
5 bid. The two standards were labeled Item 1 and Item 4.  
6

7           **Item 1.** The bidder has sufficient experience and he is fully prepared with  
8 necessary capital, machinery and skilled workmen and supervision staff to carry  
9 out the contract satisfactorily.  
10

11 Here GMHA found, "Contractor failed to identify machinery other than a dump truck and  
12 forklift and further failed to identify skilled workmen and supervision staff to carry out the  
13 contract satisfactorily."  
14

15           **Item 4.** The bidder submitted resumes for the local office representative, the  
16 proposed project manager, as well as the field superintendent and the resumes  
17 reflect sufficient experience in projects of this nature and/or other projects of  
18 similar complexity.  
19

20 Here GMHA found, "Contractor failed to submit resumes for local office representatives, the  
21 proposed project manager as well as the field superintendent reflecting sufficient experience in  
22 projects of this nature and/or other projects of similar complexity. Instead, the contractor  
23 submitted a one-page document with a J&G Construction letterhead addressed 'To whom it may  
24 concern' from Samuel Cunanan referencing 'Request for additional information for my updated  
25 listing of employment, name of employers, addresses, period of employment, and occupation for  
26 each employer.' This is not a resume and the document does not detail projects of similar  
27 complexity."  
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### III. ANALYSIS

The OPA is presented with an issue of first impression before this forum: responsiveness versus responsibility. In order to arrive at a resolution of this issue we refer to legal scholars, procurement law texts authored by law professors, general procurement law principles, and Guam procurement law and regulations.

Appellant J&G asserts that the appropriate issue before OPA involves responsibility; that the subject matter of the information which it omitted in its bid pertained to responsibility not responsiveness; and that GMHA was required to make a responsibility or non-responsibility determination rather than rejecting its bid on the basis of responsiveness. GMHA contends that J&G's failure to provide certain information was an issue of responsiveness and was correctly decided on that basis. GMHA notes that the instructions contained in the IFB required the omitted information be submitted with the bid, so it would be unfair to the other bidders to allow J&G to submit the information after the bid opening date.

It is well settled that under basic procurement law principles, case law, the Guam Procurement Law and the Guam Administrative Regulations implementing Guam's Procurement Law that the lowest responsive and responsible bidder must be awarded the contract. 5 G.C.A. 5211[g]; 2 G.A.R. DIV 4 Chap. 3 Section 3109[n]; GMHA Procurement Rules and Regulations Section 3-202.14.1. GMHA rejected the low bidder J&G's bid as "non-responsive" basing their decision on appellant's failure to submit a fully completed Bidders Qualification Statement with its bid on March 21, 2007, the sealed bid due date. GMHA contends the omitted information properly resulted in a non-responsive determination and cites the Special Reminder warning statement that failure to submit all required items in the bid envelope at the date and time of bid opening will result in disqualification and bid rejection. Appellant asserts the content of the



1 omitted information dealt only with responsibility and therefore the omission could not result in  
2 bid rejection based on non-responsiveness. J&G argues the IFB warning statement could not  
3 convert responsiveness material to responsibility material. Therefore GMHA was required to  
4 make a determination of responsibility or non-responsibility based on the criteria set out in Guam  
5 procurement law and regulations.  
6

7         The instant case hinges on the appropriate definition and interpretation of responsive and  
8 responsible and the legal distinction between these two terms of art. It is essential to ascertain  
9 whether a nonconforming bid involves the responsiveness of the bid or the responsibility of the  
10 bidder. Law professors Cibinic and Nash treat the key issue in the instant case in pertinent detail  
11 in Formation of Government Contracts, Third Edition, Responsiveness versus Responsibility, at  
12 pages 545-546 as follows:  
13

14                 It is critical to determine whether a nonconformity deals with the responsiveness  
15 of a bid or the responsibility of a bidder. Responsiveness, an area in which the  
16 contracting officer has limited discretion, deals with the question of whether the  
17 contractor has promised to do exactly what the Government has requested.  
18 Responsibility, however, involves the question of whether the contractor can or  
19 will perform as it has promised, and the contracting officer is accorded a great  
20 deal of discretion. Questions of responsiveness are determined only on the basis  
21 of information submitted with the bid on the facts available at the time of bid  
22 opening. Conversely, responsibility determinations are made on the basis of all  
23 information that may be submitted or available up to the time of award. These  
24 concepts are often confused, particularly when the IFB contains specific  
25 requirements concerning bidders' responsibility characteristics such as the  
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1 requirement for submission of information relating to responsibility. As a general  
2 rule, matters that deal with bidder responsibility cannot be converted into matters  
3 of responsiveness merely by inserting a provision in into the IFB requiring  
4 rejection of bids that do not comply.  
5

6 Guam procurement law statutes and administrative regulations also follow the above indicated  
7 distinctions between responsiveness and responsibility. These distinctions occur as to; [1] the  
8 definition of the two terms of art; [2] the time frame for making a responsibility determination as  
9 opposed to a responsiveness decision; and [3] the different subject matter which properly  
10 comprises a responsibility decision as opposed to the appropriate subject matter of a  
11 responsiveness determination. In essence, responsiveness goes to whether a potential contractor  
12 promises to perform the contract and is determined at bid opening from the information provided  
13 in the bid documents alone. However, responsibility goes to whether a potential contractor is  
14 able to perform and is determined before award from information accessed prior to award. A  
15 finding of non-responsibility requires a written determination stating the reasons for the decision  
16 which must be promptly provided to the bidder.  
17  
18

19 **A. Definitions Distinguishing Responsiveness and Responsibility.**  
20

21 The Guam Code at 5 G.C.A. 5201[f] defines responsible bidder as, "a person who has the  
22 capability in all respects to perform fully the contract requirements, and the integrity and  
23 reliability which will assure good faith performance." In contrast a responsive bidder is defined  
24 at 5 G.C.A. 5201 [g] as, "a person who has submitted a bid which conforms in all material  
25 respects to the Invitation for Bids." Guam Administrative Regulations simply parallel the Guam  
26 Code and provide similar distinctions. 2 G.A.R. DIV 4 Chap. 1 Sections 1106.27 and 1106.28;  
27 GMHA Procurement Rules and Regulations 3-202.14.2.  
28

1 **B. Distinction Between Time Frames Applicable to Responsiveness and Responsibility**  
2 **Determinations.**

3 **1. Responsiveness Is Determined at Bid Opening**

4  
5 The responsiveness issue is determined only on the basis of information submitted with  
6 the bid and facts available at the time of bid opening and is determined at the bid opening date. 5  
7 G.C.A. 5201[g]; 2 G.A.R. DIV 4 Chap. 2 Section 3109[n][1] provides, "The Invitation for Bids  
8 shall set forth the requirements and criteria which will be used to determine the lowest  
9 responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed  
10 in the Invitation for Bids." Thus, the agency decision to be made at the bid opening date deadline  
11 is straightforward: the bid submitted is either conforming or non-conforming. The information  
12 submitted by a bidder/offeror as its response to the Invitation for Bid is the exclusive basis for  
13 ascertaining responsiveness and the responsiveness determination occurs at the time of bid  
14 opening allowing for little discretion to be exercised by the contracting officer.  
15

16  
17 **2. Responsibility Is Determined Before Award**

18 Unlike responsiveness decisions, responsibility determinations are based on the  
19 information supplied or available up to the time of award. After an inquiry by the contracting  
20 officer, the bidder must supply the requested responsibility information in a timely manner.  
21 Unreasonable failure by the bidder to reply to the inquiry constitutes grounds for a non-  
22 responsibility determination. A bidder/offeror must, "promptly supply information in connection  
23 with an inquiry with respect to responsibility." If a bidder fails to supply the information  
24 requested by the contracting officer, the procurement official may base the responsibility  
25 decision on any available information or find the prospective contractor non-responsible based  
26 on its unreasonable failure to promptly comply with the request. All non-  
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1 responsibility determinations must be in writing and a copy provided to the bidder. 2 G.A.R. DIV  
2 4 Sections 3116 [a], 3116[b][2][B], and 3116[b][3]. "*Before awarding a contract the*  
3 Procurement Officer must be satisfied that the prospective contractor is responsible." [emphasis  
4 supplied] 2 G.A.R. DIV 4 Section 3116 [b][4].

6 **C. Distinction Between Subject Matter Properly Applicable to Responsiveness and**  
7 **Responsibility.**

8 **1. Subject Matter Applicable to Responsiveness**

9 Appropriate subject matter for responsiveness decisions pertains to whether or not the  
10 bidder J&G, has promised to do precisely what GMHA has requested. Responsiveness is a  
11 procurement law area in which contracting officers are accorded very limited discretion. In  
12 essence the responsiveness question is simply whether the bidder J&G promised to perform the  
13 contract. Formation of Government Contracts pp 537-592. Responsiveness goes to matters of  
14 substance evident from the bid document such as conformance to the contract conditions. Such  
15 conformity must be apparent at bid opening and thus is properly determined at that time. In order  
16 to implement the competitive procurement process and avoid prejudicing other bidders all  
17 prospective contractors must be bidding to perform the same identical contract. 2 G.A.R. DIV 4  
18 Section 3109 [m].

21 **2. Subject Matter Applicable to Responsibility**

22 Responsibility subject matter concerns whether the bidder can or will perform as  
23 promised and thus, as indicated above, is properly determined before award. Formation of  
24 Government Contracts pp 245-253; 2 G.A.R. DIV 4 Section 3116 [b][2]. Standards of  
25 Responsibility describe in significant detail the appropriate subject matter to be considered in a  
26 responsibility determination. Factors to be considered are whether a prospective contractor has  
27  
28

1 the following:

- 2 i. the appropriate financial, material, equipment, facility, and personnel resources  
3 and expertise, or the ability to obtain them, necessary to indicate its capability to  
4 meet all contractual requirements;
- 5 ii. a satisfactory record of performance;
- 6 iii. a satisfactory record of integrity;
- 7 iv. qualified legally to contract with the territory; and
- 8 v. supplied all necessary information in connection with the inquiry concerning  
9 responsibility." 2 G.A.R. DIV 4 Section 3116 [b] [2] [A].

10 The regulation continues, "[T]he prospective contractor may demonstrate the availability  
11 of necessary financing, equipment, facilities, expertise, and personnel by submitting upon  
12 request: [A]evidence that such contractor possesses such necessary items; [B]acceptable plans to  
13 subcontract for such necessary items; or [C]a documented commitment from, or explicit  
14 arrangement with, a satisfactory source to provide the necessary items." 2 G.A.R. DIV 4 Section  
15 3116 [3].

16  
17 **D. Application of the Relevant Procurement Law and Facts to the J&G Protest.**

18 GMHA bases its rejection of J&G's bid as non-responsive on the bidder's failure to,  
19 "complete portions of the Contractors Qualification Statement and also failed to submit a  
20 detailed listing of availability of personnel and technical equipment to perform the services,  
21 while all other bidders met the requirements." [Fact Findings 5.] GMHA considered these  
22 omissions "significant" in deciding to issue the rejection. GMHA cited as critical ; secretary and  
23 treasurer's names left blank, list of equipment was incomplete and included only forklift and  
24 dump truck; the list of supervisory personnel was not complete and did not amount to a  
25 "resume"; jurisdictions where trade name filed was left blank; categories of work normally  
26 performed, blank name of bonding company and address of agent blank. GMHA also included in  
27  
28

1 its June 11, 2007, letter explaining the basis for its rejection of the bid that, "J&G failed to  
2 identify skilled workmen and supervisory staff to carry out the contract satisfactorily" and "J&G  
3 failed to submit resumes" for local office representatives, project manager, field superintendent  
4 showing sufficient experience in projects of this nature.[Fact Findings 5] Although J&G did not  
5 fill in the blanks for bonding company and agent, it did so because it substituted a cashiers check  
6 for a bond which was acceptable under the terms of the GMHA IFB package.[Fact Findings 2].  
7 While these omissions are cited by GMHA as non-responsive, they parallel almost verbatim the  
8 factors of responsibility set out in Guam law: appropriate financial, material, equipment, facility,  
9 personnel resources, and the expertise or ability to obtain them, needed to demonstrate ability to  
10 meet contract requirements including a satisfactory record of performance, integrity, and legal  
11 qualification. See 2 G.A.R. DIV 4 Section 3116 [b][2][A] Standards of Responsibility[i]-[v].  
12  
13

14 The omissions cited above by GMHA as its rational for its rejecting J&G's bid as non-  
15 responsive at bid opening are misplaced. The J&G's Bidders Qualification Statement, while  
16 substantially complete, was merely not filled to the satisfaction of GMHA. The proper subject  
17 matter category for the cited omissions is that of responsibility, not responsiveness. The missing  
18 information GMHA sought clearly goes to the potential contractor's ability to perform and falls  
19 within the scope of the Standards of Responsibility factors specifically enumerated in 2 G.A.R.  
20 DIV 4 Section 3116 [b][2][A][i]-[v] as listed above.  
21  
22

23 As properly an issue of responsibility the correct time frame for a GMHA determination  
24 regarding J&G's bid was prior to award, rather than at bid opening. If GMHA decided to reject  
25 the bid, it was required to make a written determination of non-responsibility and provide a copy  
26 of that determination to J&G.  
27

28 When the actual substance of the bid rejection is responsibility, not responsiveness, the

1 proper procedure for a responsibility determination must be followed. 2 G.A.R. DIV 4 Section  
2 3116. The Special Reminder to Prospective Bidders that, "[F]ailure to comply with the  
3 requirements [of the bid package] will mean disqualification and rejection of the bid" [See Fact  
4 Findings 3] does not act to transform GMHA's requirement to provide in the Bidders  
5 Qualification Statement information with responsibility characteristics to a responsiveness  
6 requirement. Subject matter dealing with bidder responsibility cannot be metamorphosed into  
7 an issue of responsiveness simply by inserting a provision in the IFB requiring rejection of bids  
8 that do not comply. The General Services Administration Board of Contract Appeals held in  
9 Employers Sec. Co., GSBCA 6917,85-1 BCA 17, 885 that the requirement that a bidder possess  
10 an operating license properly goes to an issue of responsibility, despite language in the  
11 solicitation stating that it affects responsiveness. The Comptroller General determined in LORS  
12 Med. Corp., Comp. Gen. Dec. B-259829, 95-1 CPD 222 that an IFB requiring submission of  
13 information relating to a company's policies and procedures pertains to responsibility despite the  
14 IFB requirement that the information be submitted with the bid. The responsibility issue could  
15 not be converted to one of responsiveness. In Science Applications, Inc., Comp. Gen. Dec. B-  
16 193479,79-1 CPD 167 despite language requiring the information be submitted with the bid, the  
17 bidder's failure to submit personnel resumes did not render the bid non-responsive.  
18  
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21

22 For the reasons set out above, GMHA's rejection of the J&G bid at bid opening as non-  
23 responsive was not in compliance with general procurement law principles and the specific  
24 requirements of Guam procurement law and regulations. It is well within the discretionary  
25 authority of GMHA to make a responsibility or a non-responsibility determination as to the J&G  
26 bid. Consequently this case is returned to GMHA for an appropriate determination of either  
27 responsibility or non-responsibility and further agency disposition consistent with their  
28

1 determination.

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4 **IV. CONCLUSION**

5 Based on the foregoing, the Public Auditor hereby determines the following:

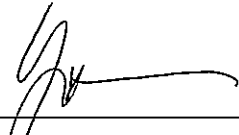
6 1. GMHA's rejection of J&G's bid at bid opening as non-responsive was not in  
7 compliance with the applicable Guam procurement law and regulations.

8 2. The case is remanded to GMHA for a determination of either responsibility or non-  
9 responsibility and further appropriate agency disposition.

10  
11 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
12 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
13 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
14 Decision. 5 G.C.A. §5481(a).

15  
16 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
17 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
18 [www.guamopa.org](http://www.guamopa.org).

19  
20 **DATED** this 12<sup>th</sup> day of December, 2008.

21  
22  
23   
24 

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DORIS FLORES BROOKS, CPA, CGFM  
25 PUBLIC AUDITOR