

**CABOT
MANTANONA, LLP**
Edge Building, Second Floor
929 South Marine Corps Drive
Tamuning, Guam 96913
Telephone (671) 646-2001
Facsimile (671) 646-0777

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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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Attorneys for Harbor Center Guam

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

IN THE MATTER OF THE APPEAL OF) APPEAL NO.: OPA-PA-010-004
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HARBOR CENTER GUAM CO. LTD.,
And HARBOUR CENTRE PORT
TERMINAL, INC.

HEARING BRIEF

JURISDICTION

Appellant Harbor Center Guam’s Motion for Public Auditor to Recuse herself is dispositive regarding whether or not the Office of Public Accountability (hereinafter “OPA”) has jurisdiction to hear this appeal. If the Motion for Public Auditor to Recuse herself is denied, then the OPA has jurisdiction to hear this appeal. If the Motion is granted then OPA lacks jurisdiction and this appeal must be transferred to the Superior Court of Guam in Accordance with 5 G.C.A. §§ 5480(a) and (c), 5481(a) and (c), 5707(a), and 7 G.C.A. § 3105. See *In the Appeal of TeleGuam Holdings LLC*, Appeal No. OPA-PA-10-002 Decision and Order Re: Purchasing Agency’s Motion for the Public Auditor to Recuse Self; *TeleGuam Holdings LLC v. General Services Agency*, SP 0050-10 Decision and Order by

Judge Barrett-Anderson, April 29, 2010 (citing *Pacific Rock Corp. v. Dept. of Educ.*, 2000 Guam 19. ¶23 (Guam Supreme Court 2000)).

If Appellant's Motion for Public Auditor to Recuse Herself is denied, then OPA has jurisdiction to hear this appeal based on 5 G.C.A. § 5703, which states that the Public Auditor's jurisdiction "**shall** be utilized to promote the integrity of the procurement process and the purpose of 5 G.C.A. Chapter 5." Emphasis added.

STANDARD OF REVIEW

The standard of review for the Public Auditor to review this protest action is de novo. 5 G.C.A. §§ 5703 and 5425(g)(3); *In the Appeal of Guam Education Financing Foundation*, OPA-PA-09-007, Decision p. 6-7.); and *In the Appeal of Guam Community Improvement Foundation*, OPA-PA-09-005, Decision p. 12.

ARGUMENTS

There are several issues that will require evidence and arguments at the hearing in this case:

1. Involvement of General Services Agency's (hereinafter "GSA") Chief Procurement Officer in RFP process:

12 G.C.A. § 10401 states that the:

General Services Agency Chief Procurement Officer **shall** be an observer throughout the RFP, MSB, or IFB process as specified in this Section, **shall** receive copies of all documents involved and **shall** be invited to any meetings regarding the public-private partnership process specified in this Section." Emphasis added. Appellant's Exhibit 1.

In this case, GSA's Chief Procurement Officer, Claudia Acfalle, did not observe the entire RFP process and therefore 12 G.C.A. § 10401 was violated. There are several

examples of how this statute was violated. First, Claudia Acfalle will testify (if she is located and subpoenaed before the hearing) that neither she nor any member of her staff was provided the opportunity to observe the entirety of the procurement process. See Declaration of Rawlen Mantanona filed September, 27, 2010. Claudia Acfalle will also testify that neither she nor her staff were able to observe the evaluation or the scoring portions of the RFP process because the evaluation committee members took the bid packets home for evaluation. Id. Claudia Acfalle will also testify that she believed that allowing evaluators to take home the bid packets to independently evaluate them was a breach of the integrity of the procurement process. Id.

Second, nobody from GSA attended the June 1, 2010 meeting where the evaluation committee members and the PAG Procurement Officials decided to evaluate proposals at home and sign Non-Disclosure Agreements. Appellant's Exhibit 4, Bate Stamp Number 000160; and Appellee's Exhibit K.

Third, the evidence will also show that on July 7, 2010, Claudia Acfalle told PAG's Chief Procurement Officer, Alma Javier, that allowing evaluators to take the bid packets home violated procurement law, and that Alma Javier ignored Claudia Acfalle's advice and proceeded with the procurement process anyway. Appellant's Exhibit 2, Bate Stamp Number 000005.

Fourth, Claudia Acfalle sent a GSA representative, Pete San Nicolas to observe the evaluation process at the July 14, 2010 meeting, but he was unable to observe the evaluation process because the evaluations were previously completed by the evaluation committee members at home, unsupervised, contrary to Claudia Acfalle's original advice.

Appellant's Exhibit 2, Bate Stamp Number 000005; Appellant's Exhibit 4, Bate Stamp Numbers 00158-00159; and Declaration of Rawlen Mantanona filed September, 27, 2010.

Accordingly, there were at least four violations of 12 G.C.A. § 10401. 12 G.C.A. § 10401 state the "General Services Agency Chief Procurement Officer *shall* be an observer throughout the RFP..." GSA's Chief Procurement Officer or her representatives were not allowed to observe the entire RFP process, specifically the evaluation and scoring portions of the RFP process, because PAG allowed the evaluation committee members to take home the bid packets and score them unsupervised. The evaluation and scoring portion of the RFP process is arguably the most important part of the process and clearly 12 G.C.A. § 10401 was violated. Additionally, when GSA's Chief Procurement Officer did observe parts of the RFP process, she found violations of the procurement process and communicated her concerns to Alma Javier. Alma Javier ignored Claudia Acfalle's concerns. Therefore, the RFP process in this case was not observed by GSA throughout the procurement process and GSA did not approve of the way PAG handled the RFP process, in violation of 12 G.C.A. § 10401.

2. Handling of Proposals

Allowing evaluation committee members to take home bid packets to independently evaluate and score the proposals is a violation of 2 G.A.R. Div. 4 § 3114(h), and 5 G.C.A. § 5001(b). The underlying purposes and policies of Guam Procurement Law are to provide increased public confidence in the procedures followed in public procurement, and to provide safeguards for the maintenance of a procurement system of quality and integrity. 5 G.C.A. §5001(b)(3) and (7).

2 G.A.R. Div. 4 § 3114(h) mandates that proposals are to be kept secured and they must be opened in the presence of two procurement officials. Appellant argues that the Public Auditor read broadly and in conjunction with 2 G.A.R. Div. 4 § 3114 in its entirety, as well as 2 G.A.R. §§ 3109(l)(2) and (3). When the government agency solicits an RFP (as opposed to an IFB), the agency may not turn over any proposals or information about a proposal until after an award is issued. Even after an award is issued, the non-awarded proposals do not need to be turned over. 2 G.A.R. §§ 3114(h) and (i). Alternatively, when the solicitation is an IFB (not an RFB), once the bids are opened, "the opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential." 2 G.A.R. §§ 3109(l)(2) and (3). A reading of these rules together imply that all bid packets or proposals in RFPs are to be kept secure and confidential at all times throughout the procurement process, until an award is issued.

In order to ensure compliance with Guam Procurement law, specifically that the bids were kept secured, confidential, and that no information was leaked, it is essential to observe the evaluation and scoring process. Expert witness, GSA's Administrative Counsel, Robert Kono, will testify that the industry standard on Guam for evaluating proposals, is to have all of the evaluators meet at the same time at the same place, independently evaluate the proposals, while being supervised by procurement officials. Affidavit of Robert Kono. Mr. Kono will also testify that the reason Guam agencies supervise evaluators is to ensure compliance with the law. *Id.* Mr. Kono will testify that based on his information and personal knowledge of the procurement laws and agency standards, that it is not possible to ensure compliance with Guam Procurement law or its

underlying purposes or policies when evaluators are allowed to take home proposals and evaluate them. Id. Mr. Kono will also testify that based on his information and personal knowledge of procurement laws and agency standards, until this case, no Guam agency has ever allowed individual evaluation committee members to take home proposals and independently evaluate them.

Therefore, by allowing the evaluation committee members to take bids home to evaluate and score them, unsupervised, PAG violated both 2 G.A.R. Div. 4 § 3114(h) and 5 G.C.A. § 5001(b).

3. Use of Non-Disclosure Affidavits

Similarly, PAG violated 2 G.A.R. Div. 4 § 3114(h) and 5 G.C.A. § 5001(b) when they allowed members of the evaluation committee to sign Non-Disclosure Affidavits in lieu of being observed throughout the evaluation and scoring process. Appellant reiterates the same arguments in section #2 (supra) and maintains that requiring evaluation committee members to sign a Non-Disclosure Affidavit is not a valid substitute for being observed throughout the evaluation and scoring process. Guam Procurement Law already mandates that no disclosure take place. 2 G.A.R. Div. 4 § 3114(i). The only way to ensure compliance is by actual human observation throughout the evaluation process.

4. The Evaluation Committee:

A. The composition of the evaluation committee:

The RFP in this case requires that the evaluation committee be comprised of "PAG personnel and members of the Board of Directors, and/or Government of Guam personnel selected by the PAG's General Manager." RFP at Volume V, Item 2, Page V-1; emphasis

added. This language means that non-PAG Government of Guam personnel must be part of the evaluation committee. As Appellee admitted on page 2 of its Rebuttal to Appellant's Comments on Agency Report, all of the committee members were Port Personnel and Port Board Members. None of them were non-PAG Government of Guam employees. Therefore, PAG violated the terms of its own contract.

B. Qualifications of Evaluation Committee:

Similar to argument #4A (*supra*), the evaluation committee was insufficient because it also lacked the qualification, education and experience to properly evaluate the proposals in this case. In *L.G. Ganacias v. GIAA*, the Court held that the person charged with evaluating bid offerings "should be an individual with some knowledge of the product which is the subject of the bid." CV 1787-00, Decision and Order, November 13, 2000, page 23. In that case, the court admonished one of the evaluation committee members, who did not bother to examine sample pagers submitted with the bid because she didn't know much about pagers.

Similarly in this case, the only thing that is known about the qualifications of the evaluation committee members are their titles:

1. John B. Santos, Operations Manager
2. Ernie Candoleta, Maintenance Manager
3. Joaquin Pangelinan, Equipment Support Services Manager
4. Ray B. Santos, Transportation Superintendent
5. Francine T. Rocio, Personnel Services Administrator
6. Sooja L. Suk, Systems Manager

7. Glenn B. Nelson, Commercial Manager
8. Jovyna Lujan, Board Member
9. Bill Berry, Board Member;
10. Dora Jean Perez, Planner IV, Alternate Evaluator

As of October 13, 2010, the Public Auditor has not granted Appellant's Motion for Discovery. At this time there is insufficient information to determine whether or not the evaluation members were knowledgeable and qualified to evaluate this multi-million dollar Port Management Contract. Expert witness, Robert Kono, will testify that based on his information and personal knowledge of the procurement laws and agency standards, that it Guam agencies select individual evaluators based on their experience that is relevant to the specific type of bid or proposal. See Affidavit of Robert Kono. For example, in construction contracts, Guam agencies normally select evaluators that are engineers, architects, contract management supervisors or directors and are qualified to evaluate a construction contract, and Guam agencies do not select evaluators who lack the education, experience and expertise in the relevant areas to evaluate bids or proposals. *Id.*

Without additional discovery, there is not enough information to determine whether or not the "Equipment Support Services Manager" or the "Maintenance Manager" have the financial, economic, and business experience and education to properly evaluate the bid in this case and comply with Guam Procurement Law and *L.G. Ganacias v. GIAA*.

5. Methods of how the Evaluation Committee evaluated and scored the Proposals:

Without additional discovery, there is not enough information to determine whether or not there is an additional procurement violation here. Since the evaluation committee members evaluated and scored the evaluations at home, unsupervised, until they are each deposed or they give testimony at the hearing, there is insufficient information to determine whether more violations occurred. Since the committee members were unsupervised, and possibly unqualified, it is possible more violations occurred. Appellant renews its request for additional discovery in order to explore these avenues.

6. Legality of the methods of evaluating the proposals

Without additional discovery, there is not enough information to determine whether or not there is an additional procurement violation here. Since the evaluation committee members evaluated and scored the evaluations at home, unsupervised, until they are each deposed or they give testimony at the hearing, there is insufficient information to determine whether more violations occurred. Since the committee members were unsupervised, and possibly unqualified, it is possible more violations occurred. Appellant renews its request for additional discovery in order to explore these avenues.

7. Communication between GSA's Chief Procurement Officer and Pete San Nicolas and the Port's Chief Procurement Officer, evaluation committee and staff

Appellant sent out a FOIA request on Monday, October 11, 2010 to obtain additional discovery that was not part of the procurement record or Appellant's other two FOIA requests, regarding whether or not the relevant laws were followed in this RFP. The

documents are due on Friday, October 15, 2010. Without additional discovery, there is not enough information to determine whether or not there is an additional procurement violation here. Since the evaluation committee members evaluated and scored the evaluations at home, unsupervised, until they are each deposed or they give testimony at the hearing, there is insufficient information to determine whether more violations occurred.

Since the committee members were unsupervised, and possibly unqualified, it is possible more violations occurred. Appellant renews its request for additional discovery in order to explore these avenues.

Appellant acknowledges that some of these issues were not raised in the protest. Appellant urges the Public Auditor to extend her jurisdiction to any matter properly submitted in connection to this protest and appeal, including new issues that have come up after additional documents were handed over, and witnesses were interviewed. The Public Auditor's jurisdiction "shall be utilized to promote the integrity of the procurement process and the purpose of 5 G.C.A. Chapter 5." Emphasis added.

CONCLUSION

There were several violations of procurement law in this RFP process and the Public Auditor should order PAG to re-bid RFP No. PAG-010-003 as soon as possible.

Respectfully submitted this 13 day of October, 2010.

CABOT MANTANONA LLP
Attorneys for Harbor Center Guam

By: 

SARAH STROCK