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FILE NO. OPA-PA: 10-004

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10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

11 **PROCUREMENT APPEAL**

12 IN THE MATTER OF APPEAL of

APPEAL NO: OPA-PA-010-004

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

Appellant.

**OPPOSITION TO APPELLANT'S  
MOTION TO CONTINUE HEARING  
DATE AND OPPOSITION TO  
APPELLANT'S MOTION FOR  
DISCOVERY**

16 Comes Now the Jose D. Leon Guerrero Commercial Port (the "Port"), the Purchasing Agency  
17 in this appeal, and opposes Appellant's Motion to Continue the Hearing Date currently scheduled  
18 in this matter and Appellant's Motion for Discovery.

19 I. Continuance of Hearing Date

20 In its Motion to Continue Hearing Date, Appellant requests a continuance of the hearing date  
21 for two reasons - first; because of the unavailability of Claudia Acfalle, the government's Chief  
22 Procurement Officer; second, because Appellant intends to depose Ms. Acfalle and several other  
23 witnesses.

24 Appellant's reasons do not justify a continuance of the hearing. With regard to Ms. Acfalle's  
25 unavailability, Appellant has provided information that Ms. Acfalle is currently off-island and her  
26  
27  
28

1 return date is not known. In an email attached as Exhibit "A" to Appellant's Motion, Ms. Acfalle  
2 states:

3 "At this time, I do not have a telephone number to give you. The cell phone I  
4 have does not have service where my daughter lives. As I mentioned to you  
5 earlier I do not know when I will be returning at this time. All I can do is try to get  
6 to a phone and call you. I normally go to the nearest gas station down the street to  
use the phone. Sorry!"

7 As evidenced by her email, even Ms. Acfalle does not know when she will be returning to  
8 Guam. There is no indication that she will be any more available in one month than she will be  
9 next week when the hearing is scheduled to begin. Appellant's request to continue the hearing for  
10 a month is therefore without justification as Appellant offers no proof that they will be more  
11 prepared to present their case in chief at that time.

12 Additionally, the Hearing Officer has indicated that testimony by telephone is an option for  
13 obtaining the participation of a witness during the hearing. Ms. Acfalle states in her email that  
14 she can "try to get to a phone and call." Appellant should be required to exhaust this option  
15 before putting the entire appeal process on hold.

17 Appellant also argues that it is "unable to proceed with this appeal without [Ms. Acfalle's]  
18 testimony." Appellant has access to the procurement record that was filed by the Port in this case.  
19 The procurement record contains a log of communications by Port staff relating to the protested  
20 RFP including communications with Ms. Acfalle (See Exhibit 19 of the Procurement Record). If  
21 Appellant intends to present a record of lack of communication by the Port to the CPO, the  
22 communications log is available. Appellant has also named Port managers as potential witnesses  
23 at the hearing. These other witnesses are available for Appellant to use in its case in chief. If  
24 Appellant intends to use Ms. Acfalle to comment on whether communications or lack thereof  
25 were unlawful, surely Appellant can use means other than the testimony of a single person to do  
26

27 P-0045-35/778-35/RPST:emt

In the Matter of Appeal of Harbor Centre Guam Co. LTD. and Harbour Centre Port Terminal, Inc.

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1 so, for example, reference to an actual law or regulation. Placing the success of an entire appeal  
2 on the testimony of a single person is the choice of Appellant, and Appellant must now endure the  
3 consequences of whether that person is willing or able to testify. Appellant's Motion to Continue  
4 the hearing should therefore be denied and Appellant should be required to proceed with the  
5 hearing in this matter as it is currently scheduled .  
6

7 Appellant's request to continue the hearing date in order to depose several material witnesses  
8 is discussed in both Appellant's Motion for a Continuance and in its Motion for Discovery. Each  
9 of these requests is addressed in a single opposition below.

## 10 II. Request for Depositions

11  
12 Appellant alleges that "this appeal is complicated and requires the depositions" of no less than  
13 twelve individuals. (Appellant's Memorandum of Points and Authorities in support of Motion for  
14 Discovery.) Appellant also states that "[t]he depositions and testimony of Claudia Acfalle, Alma  
15 Javier and the ten members of the evaluation committee are essential to Appellant's appeal.  
16 Appellant needs additional time to depose the witnesses, conduct additional discovery, and to  
17 subpoena the witnesses for the hearing." (Appellant's Memorandum of Points and Authorities in  
18 support of Motion to Continue Hearing Date.)  
19

20 Appellant's arguments in support of allowing depositions and the time in which to  
21 conduct them do not justify the delay of what is meant to be an expedited administrative  
22 proceeding. Appellant's motions seek to change the nature of this proceeding from an  
23 administrative hearing to protracted civil litigation. The Hearing Officer has scheduled five days  
24 for the hearing of this case, allowing ample time for the taking of testimony from relevant  
25 witnesses. Additionally, as the parties have named the same witnesses, depositions would serve  
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1 no purpose other than to elicit the testimony of the same individuals twice. More importantly,  
2 any information to be obtained during depositions can be elicited during the hearing itself, where  
3 the hearing officer would have the ability to observe and weigh the testimony of the witness,  
4 which is what is intended by the regulations governing the appeal process (2 GAR §12108(d),  
5 “The weight to be attached to evidence presented in any particular form will be within the  
6 discretion of the Hearing Officer.”)

8 Appellant’s request to conduct depositions, and for additional time to do so, serve no  
9 purpose other than unnecessarily delaying the outcome of the appeal. Appellant’s Motion for  
10 Discovery and its Motion to Continue the Hearing Date should be denied.

11  
12 **CONCLUSION**

13 For the reasons discussed above, the Port requests that the Appellant’s Motion to Continue  
14 Hearing Date and Motion for Discovery be denied and that the hearing date as put forth in the  
15 Hearing Officer’s Scheduling Order of September 30, 2010 remain in effect.

16  
17 Dated this 13<sup>th</sup> day of October, 2010.

18 Respectfully submitted,

19 **LÚJAN AGUIGUI & PEREZ LLP**

20  
21 By: 

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

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