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 PROCUREMENT APPEALS

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Attorneys for the Department of Public Works

**BEFORE THE GUAM PUBLIC AUDITOR**  
**Procurement Appeal**

IN THE APPEAL OF:	)	DOCKET NO. OPA-PA 09-007
	)	
GUAM EDUCATION FINANCING	)	MOTION FOR PROTECTIVE ORDER;
FOUNDATION, INC.	)	SUPPORTING MEMORANDUM OF
	)	POINTS & AUTHORITIES
Appellant.	)	
	)	
	)	

**MOTION FOR PROTECTIVE ORDER**

This motion is made pursuant to direction by the Hearing Officer in the related appeal, *In the Appeal of Guam Community Improvement Foundation, Inc.*, Docket No. OPA-PA 09-005. Accordingly, the Department of Public Works, Government of Guam (“DPW”) hereby moves for a protective order precluding the disclosure of proprietary information, to include three proposals received by DPW in response to DPW RFP No. 700-5-1020-L-TAM, and documents developed in attendant negotiations with offeror International Bridge Corporation (“IBC”) occurring in this matter leading toward an award of a contract. This motion is based on Procurement Regulations, 2 GAR, §§3114(h)(1), and 3116(b) which

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 Motion for Protective Order; Supporting Memorandum  
 Of Points & Authorities  
 In the Appeal of Guam Education Financing Foundation, Inc.  
 Docket No. OPA-PA 09-007

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1 clearly prohibit disclosure of proposals and other proprietary materials until an award of a  
2 contract has been made.

3 An award of the contract has not yet been made in this procurement. Negotiations  
4 leading to an award were in-progress until an 11 August 2009 protest. Accordingly, a  
5 protective order precluding disclosure of either of the three bid proposals, and all materials  
6 developed in negotiation of a contract with one of the proposers is entirely consistent with  
7 Guam procurement law.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**  
9 **SUPPORTING MOTION FOR PROTECTIVE ORDER**

10 **A. 2 GAR § 3116(b) Prohibits Pre-Award Proposal Disclosure.**

11 Proposals filed in response to a Request for Proposal, and information developed as  
12 the result of negotiations between the purchasing agency and the highest rated proposer prior  
13 to award of a contract are not subject to disclosure *prior* to an award of the contract for the  
14 JFK High School re-build. These are proprietary materials intended to be kept confidential  
15 until a contract is awarded. In this procurement, DPW was in negotiations with IBC for the  
16 financing, construction, lease and lease back of the JFK High School at the time of the Guam  
17 Community Improvement Foundation, Inc. ("GCIF") 11 August 2009 protest. Subsequently,  
18 Guam Education Financing Foundation, Inc. ("GEFF") filed a protest and appeal. The  
19 protests, and the subsequent appeals have stayed these negotiations and the procurement  
20 process generally.

21 Essentially, at this stage in the procurement, GEFF is protesting *the selection* of IBC  
22 as the best qualified proposer; it is not protesting an actual award. Consequently, release of  
23 information prior to an actual award would be improper.

24 Guam Procurement regulation 2 GAR § 3114(h)(1) directs that:

1           Proposals and modifications shall be timed-stamped upon receipt  
2           and held in a secure place until the established due date. Proposals  
3           shall not be opened publicly nor disclosed to unauthorized persons,  
4           but shall be opened in the presence of two or more procurement  
5           officials. A Register of Proposals shall be established which shall  
6           include for all proposals. . . . The Register of Proposals shall be  
7           opened to public inspection only after award of the contract.  
8           Proposals of offerors who are not awarded the contract shall not be  
9           opened to public inspection. (emphasis added)

10           The proscription against the pre-award disclosure of proposals is further evident in 2  
11           GAR § 3116(b), which directs that “Information furnished by a bidder or offeror pursuant to  
12           this Section shall not be disclosed outside of the General Service Agency, Director of Public  
13           Works, or the head of the Purchasing Agency without prior written consent by the bidder or  
14           offeror.” It is almost universally the case that prior to an award in a solicitation based on a  
15           request for proposals, proposals will not be disclosed until some sort of final decision or  
16           award has been issued. See, generally *Michaelis, Montanari & Johnson v. Superior Court*,  
17           136 P.3d 194, 44 Cal.Rptr.3d 663 (Cal. 2006) (holding that under California’s Public  
18           Records Act there was a preponderant governmental interest in not disclosing proposals prior  
19           to the completion of negotiations, canvassing both state and federal precedent and noting the  
20           requirements of the Model Procurement Code with respect to Registrations of Proposals).

21           IBC’s proposal is covered by 2 GAR § 3116(b), and because IBC has not consented  
22           to the disclosure of its proposal, IBC’s Proposal cannot be disclosed until the contract is  
23           awarded. Likewise, the proposals by GEF and GCIF cannot be disclosed. Further,  
24           information and documents developed in the negotiations between IBC and DPW leading to  
25           a possible award cannot be disclosed.

**B.     2 GAR § 3114(h)(2) Prohibits the Disclosure of Trade Secrets  
          and Other Proprietary Data.**

1 Guam Procurement Regulation 2 GAR § 3114(h)(2) provides that:

2 If the offeror selected for award has requested in writing the  
3 nondisclosure of trade secrets and other proprietary data so  
4 identified, the head of the agency conducting the procurement or a  
5 designee of such office shall examine the request in the proposal to  
6 determine its validity prior to entering negotiations. If the parties  
7 do not agree as to the disclosure of data in the contract, the head of  
8 the agency conducting the procurement or a designee of such  
9 officer shall inform the offeror in writing what portion of the  
10 proposal will be disclosed and that, unless the offeror withdraws  
11 the proposals or protests under 5 GCA Chapter 5 Article 9 (Legal  
12 and Contractual Remedies) of the Guam Procurement Act, the  
13 proposal will be so disclosed.

9 IBC's proposal states on the second page of its proposal in a "Legend" as follows:

10 LEGEND: This proposal includes data that shall not be  
11 disclosed outside the Government and shall not be duplicated,  
12 used, or disclosed – in whole or in part – for any purpose other  
13 than to evaluate this proposal. If, however, a contract is awarded  
14 to this offeror as a result of – or in conjunction with – the  
15 submission of this data, the Government shall have the right to  
16 duplicate, use, or disclose the data to the extent provided in the  
17 resulting contract. This restriction does not limit the Government's  
18 right to use information contained in this data if it is obtained from  
19 another source without restriction. The data subject to this  
20 restriction are contained in sheets [ALL].

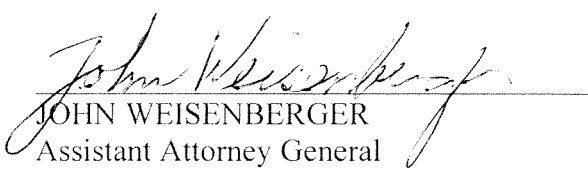
17 DPW asserts that all of the proposals are proprietary in nature and should not be  
18 disclosed. The regulations are perfectly clear: before the contract is awarded, the disclosure  
19 of any proprietary information or trade secrets contained in the proposals submitted are  
20 expressly prohibited by 2 GAR § 3114(h)(2). When the OPA requested DPW to transfer all  
21 three proposals submitted by offerors, this Office designated the proposals as proprietary by  
22 filing a "*Supplemental Procurement Record (Proprietary) Transmittal Cover Sheet (Filed*  
23 *Under Seal)*" and requested that the proposals "submitted exclusively to the Office of the  
24  
25

1 Auditor (“OPA”) under seal herewith, [be kept] strictly confidential . . .” Supplemental  
2 Procurement Record (Proprietary) Transmittal Cover Sheet filed 8 September 2009.

3 Based upon the foregoing authority DPW, hereby requests that a protective order be  
4 issued, sealing the proposals and attendant negotiations prior to contract award.

5 Dated this 2<sup>nd</sup> day of October, 2009.

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7 OFFICE OF THE ATTORNEY GENERAL  
8 **Alicia G. Limtiaco, Attorney General**

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11 JOHN WEISENBERGER  
12 Assistant Attorney General