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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.

**REBUTTAL TO APPELLANT'S
COMMENTS ON AGENCY REPORT**

16 Pursuant to 2 GAR §12104(c)(4) the Jose D. Leon Guerrero Commercial Port (the "Port"), the
17 Purchasing Agency in this Appeal, hereby submits its rebuttal to Appellant's Comments on the
18 Agency Report. Appellant's allegations as contained in its Comments are addressed in turn
19 below:

20 **1. Composition of the Evaluation Committee**

21 In its Comments, Appellant again alleges that the Port violated procurement law because the
22 Port was "supposed to appoint members of the Government of Guam outside of those employed
23 at the Port" and that "[t]here was a specific mention for Government of Guam Personnel to be
24 included in [the] selection and evaluation committee." (Comments on Agency Report, P. 9, Sec.
25 IV.) As stated in the Port's Agency Statement, the subject RFP at Volume V, Item 2, Page V-1
26 provides that the evaluation committee will be comprised of "PAG personnel and members of the
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1 Board of Directors, and/or Government of Guam personnel selected by the PAG's General
2 Manager." The evaluation committee was made up of Port Personnel and Port Board members.
3 The composition of the evaluation committee was therefore in compliance with the RFP.
4 Appellant offers no reference to specific law, regulation, policy, or clause in the RFP to
5 substantiate his claim that the Port acted improperly in the composition of the evaluation
6 committee. There is simply no basis for Appellant's claim on this issue.
7

8 **2. Removal of Proposals from Port Premises**

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10 Appellant continues to put forth the position that the removal of the proposals received in
11 response to the RFP from Port premises constitutes a violation of 2 GAR §3114(h). The Port
12 remains firm in its position that nowhere in §3114(h) is there a prohibition against the taking of
13 bids or proposals off the premises of the purchasing agency after the requirements in that section
14 regarding the opening of the proposals have been met. Appellant even appears to agree that the
15 Port followed the requirements of §3114(h). (See Appellant's Comments on Agency Report, P.
16 7, Sec. III, "Understandably, the Port's approach is to read literally 2 GAR §3114(h) in hopes of
17 avoiding a finding of violation. The Port asserts that neither 12 GCA §10401, nor 2 GAR
18 §3114(h) literally prohibits the taking off premises submittals, [sic] thus no violation of the
19 procurement law has occurred ... And even if the black letter of the law was not violated...")
20 Appellant has at the very least correctly summarized the Port's approach to the application of
21 §3114(h), that is, to read it literally. A literal interpretation requires only that proposals "shall be
22 opened in the presence of two or more procurement officials." The Port followed this
23 requirement (see the Abstract filed as Exhibit 14 of the Procurement Record, Bates Stamp No.
24 LAP1489), and Appellant's claims that this behavior somehow violated §3114(h) are baseless.
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1 Additionally, Appellant again offers no reference to a specific law, regulation, or policy to
2 support its contention that removal of the proposals from the Port premises by the evaluation
3 committee is prohibited. Without reference to a mandate prohibiting such action, Appellant's
4 complaint that the Port's actions were improper is baseless and should be dismissed.
5

6 **3. Observation by the Chief Procurement Officer**

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8 Appellant rests the majority of its arguments on the contention that the Chief Procurement
9 Officer ("CPO") was not given an opportunity to observe the evaluation of the proposals. The
10 Port submitted proof of its efforts to involve the CPO in the entire RFP process, as evidenced by
11 the log of communications and meetings filed at Exhibit 19 of the Procurement Record. The
12 communications log clearly indicates that not only was the CPO advised of meetings and
13 documents relating to the RFP, but that she also actively took part in observing the RFP
14 evaluation process by requesting that a meeting of the evaluation committee be rescheduled to
15 accommodate her schedule and then sending her designee to attend the meeting. (See Agency
16 Statement pp. 3- 4).
17

18 Appellant's Comments include references to the role of the Attorney General in the oversight of
19 the government's procurement process and in this specific RFP. But Appellant fails to make any
20 connection between the involvement of the Attorney General and the role of the CPO in this RFP.
21

22 Appellant includes in its Comments a declaration by Appellant's counsel regarding a
23 conversation he had with the CPO on or about July 28, 2010 concerning the subject RFP.
24 Appellant also references this declaration in its Comments by stating "[t]he CPO stated that she
25 believed the Port violated procurement procedures when Port evaluation committee members
26

1 removed from the Port's premises the bid proposals for evaluation." The declaration by
2 Appellant's counsel, though referencing comments allegedly made by the CPO, offers no actual
3 evidence that the statements therein can be directly attributed to the CPO herself. However, even
4 if the information in the declaration is taken to be an accurate representation of the CPO's
5 comments, there still is no reference to any law, regulation, or policy that prohibits the removal of
6 proposals from the premises of a Purchasing Agency by members of an evaluation committee.
7 The offering of the CPO's alleged comments adds no merit to Appellant's original argument that
8 such removal constitutes a violation of applicable law because neither Appellant nor the CPO
9 appear to be able to name what law or regulation has been violated.
10

11
12 Appellant's declaration regarding its counsel's conversations with the CPO also presents
13 issues that have yet to be addressed in this appeal. First, communications with the CPO by
14 Appellant's representative while the RFP is ongoing were improper. The subject RFP clearly
15 states "All questions or concerns regarding this RFP should be in writing and directed to Mr.
16 Enrique J.S. Agustin, General Manager Except to the above person named, direct or indirect
17 contact with COMMERCIAL PORT Management, Staff, Board members, *or any person*
18 *participating in the selection process is prohibited.*" (emphasis added, see Exhibit 9 of the
19 Procurement Record, RFP PAG-010-003, at Bates Stamp Nos. LAP0051 and LAP0055.
20 Appellant clearly violated this provision of the RFP by engaging in communications with the
21 CPO, who by Appellant's own admission, was "required to be an observer throughout the entire
22 process." (Appellant's Comments p. 5.)
23

24
25 Appellant also violated the very tenets of fairness cited in its Comments by obtaining
26 information from the CPO that was not made available to all offerors. In its Comments,
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1 Appellant states “[t]he goal of procurement is to foster broad-based competition. To encourage
2 such competition, competitors must have confidence in the procurement procedures that it will
3 ensure equitable treatment and general fairness in the process.” Had Appellant addressed this
4 question to the Port, the Port could have made Appellant’s inquiries and the Port’s responses
5 available to all parties involved in the RFP process. Instead, Appellant’s communication with the
6 CPO instead of the Purchasing Agency flew in the face of the “equitable treatment and general
7 fairness in the process” that Appellant itself now lauds as a necessary part of the procurement
8 process.
9

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11 The Port acknowledges that because the CPO is a government employee and a representative
12 of the Government of Guam, if the information in Appellant’s Counsel’s declaration is taken to
13 be true, then the CPO herself engaged in improper communications with Appellant’s
14 representative. However, as those communications appear to have taken place after the
15 evaluation of the proposals were completed on July 14, 2010 there is no effect of those
16 communications on the fairness of the evaluation process and those communications should not
17 serve to disrupt the procurement that was appropriately administered by the Port.
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19 For the reasons discussed above and in the Agency Statement filed by the Port on September
20 15, 2010, this appeal should be dismissed in its entirety.

21 Dated this 4th day of October, 2010.

22 Respectfully submitted,

23 **LUJAN AGUIGUI & PEREZ LLP**

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26 By: 

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

Attorneys for Jose D. Leon Guerrero Commercial Port

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

Appeal No. OPA-PA-010-004

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