

The Law Offices of John S. Unpingco & Associates, LLC

777 Route 4

Suite 12B

Sinajana, Guam 96910

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www.ualawguam.com

TRANSMITTAL LETTER

January 14, 2008

Office of the Public Auditor
238 Archbishop Flores St.
Hagåtña, Guam 96910

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

JAN 14 2008

Re: Procurement Appeal 

TIME: 4:31 PM
BY: J. Unpingco
FILE No. OPA-PA-08-001

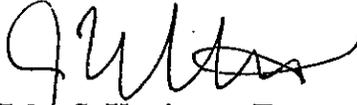
Gentlemen:

Enclosed is our appeal for the solicitation entitled "GSA/PAG 07-007" for the procurement of One New Dockside Container Handling Gantry Crane.

Please note that we do request a hearing.

Please do not hesitate to call me if you should have any questions.

Sincerely,
THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC


John S. Unpingco, Esq.

ORIGINAL
BINDER 1 OF 2

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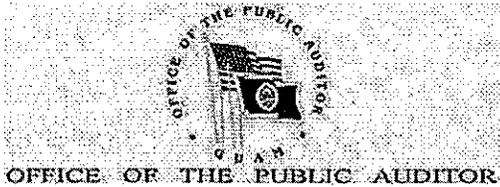
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THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC


John S. Unpingco, Esq.

ORIGINAL
BINDER 2 OF 2



OFFICE OF THE PUBLIC AUDITOR

**Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL**

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

JAN 14 2008

TIME: 4:31 PM
BY: T. Gumatian
FILE No. OPA-PA 08-001

PART I- To be completed by OPA

In the Appeal of)	NOTICE OF APPEAL
)	
<u>FAR EAST EQUIPMENT CO., LLC</u>)	
(Name of Company), APPELLANT)	Docket No. OPA-PA <u>08-001</u>
)	
)	

PART II- Appellant Information

Name: FAR EAST EQUIPMENT COMPANY, LLC

Mailing Address: PO BOX 10838
Tamuning, Guam 96931

Business Address: _____

Daytime Contact No: 473-4375; 888-6270

PART III- Appeal Information

- A) Purchasing Agency: Port Authority of Guam
- B) Identification/Number of Procurement, Solicitation, or Contract: IFB GSA/PAG 07-007
(New Dockside Container Handling Gantry Crane)
- C) Decision being appealed was made on 12/28/07 (date) by:
 Chief Procurement Officer Director of Public Works Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
- Decision on Protest of Method, Solicitation or Award
- Decision on Debarment or Suspension
- Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
- Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

N/A

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

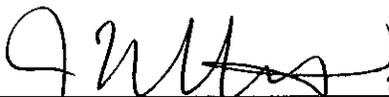
Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

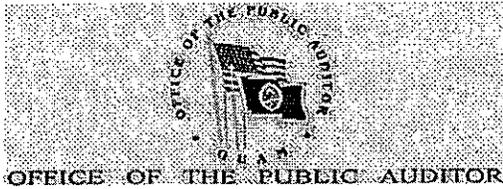
Submitted this 14th day of Jan, 2008.

By: _____
APPELLANT

or

By:  JOHN S. UNPINGCO

Appellant's Duly Authorized Representative
(Address) **THE LAW OFFICES OF JOHN S. UNPINGCO & ASSOCIATES, LLC**
(Phone No.) **777 ROUTE 4, SUITE 12B SINAJANA, GUAM 96910**
475-8545; Fax 475-8550



Appendix C: Notice of Hearing Form
PROCUREMENT APPEAL

In the Appeal of)	
)	
FAR EAST EQUIPMENT CO., LLC)	NOTICE OF HEARING
APPELLANT)	Docket No. OPA-PA _____
)	
_____)	

You are hereby notified that a hearing will be held before the Public Auditor or the Hearings Officer for Procurement Appeals at the Office of the Public Auditor on the _____ day of _____, 20__, at the hour of _____, relative to the above referenced Procurement Appeal. You may be present at the hearing; may be, but need not be, represented by counsel; may present any relevant evidence; and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Hearings Officer for Procurement Appeals, Office of the Public Auditor.

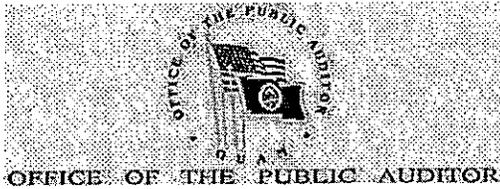
Please acknowledge receipt of this Notice and return to the Office of the Public Auditor immediately.

Acknowledged receipt:

Receiver's Signature

Print Name

Date



Appendix B: Declaration Form
PROCUREMENT APPEAL

In the Appeal of)
)
)
 FAR EAST EQUIPMENT CO., LLC)
) **APPELLANT**) Docket No. OPA-PA _____
)
)
 _____)

DECLARATION RE COURT ACTION
(To be signed by the Government Purchasing Agency.)

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this __ day of _____, 20__.

By: _____
DECLARANT

Print Declarant's Name

GROUNDS FOR APPEAL

I. GSA/PAG IFB 07-007 IS A SOLICITATION FOR A CONSTRUCTION PROJECT USING MULTI-STEP SEALED BIDDING WHICH RIGHTFULLY SHOULD PROCEED TO NEGOTIATIONS AND THEN CONTRACT AWARD.

This IFB is PAG's proverbial "second bite at the apple". Prior to this IFB, PAG had issued Multi-Step Bid No. PAG-07-001 (hereinafter referred to as PAG07-001) Rebid for the Fabrication and Installation of One or Two New Dockside Container Handling Gantry Crane. (Exhibit 1). In PAG 07-001, Appellant was the sole bidder and the IFB was cancelled (Exhibit 2). The current IFB, GSA/PAG 07-007 (Exhibit 3), except for minor changes, is identical to PAG 07-001. In the current IFB, Appellant is again the sole bidder and its bid has been rejected without discussions or negotiations.

Even though the PAG consulting structural engineer Tor Gudmundsen expressed his recommendation and concern in an email to PAG dated October 30, 2007 (Exhibit 4) his concern was ignored. In the email, Mr. Gudmundsen stated:

Please note that it is essential that we discuss the ZPMC (Appellant's) bid comments with their engineers before PAG either rejects their bid or awards their contract. It is impractical to resolve the technical issues without dialog with the bidder. If PAG rejects this round and asks for a rebid without providing an opportunity to discuss the issues, we believe the next submittal would have no additional information.

Emphasis added.

a. IFB 07-007 is a solicitation for a construction project.

5 G.C.A § 5030 (g) defines construction as:

.... the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property....

Emphasis added.

A gantry crane does fit within the definition of "other public improvements of any kind to any public real property". Nowhere in the Guam procurement laws and regulations is this phrase more specifically defined. Thus, a plain reading of the phrase does include the manufacture, delivery and erection of a gantry crane irrespective of whether the crane is viewed as personal or real property.

Moreover, the usual attributes of a construction project are present in this IFB. There are the required payment and performance bonds, the Department of Labor wage determination, detailed construction specifications, progress payments, contract submittals, design drawings, written procedures for fabrication, engineering designs, structural specifications, etc. While some of these characteristics, such as performance and payment bonds may be applicable to the procurement of supplies, not all of these characteristics are applicable to supplies.

Revealingly, the IFB, § VII, "Intent" specifically states that:

It is the intent of the Agreement, including the Specification and contract Plans, form a part hereof, to provide for the construction of one (1) New Dockside Container, Handling, Gantry Crane of modern design....

Emphasis added.

Finally, the Specification requires the submission of Submittals of various items at different times, for PAG review, such as but not limited to, the following from the Technical Provisions Specifications:

- 1) Section 1.6, General Requirements, page 6, submittals;
- 2) Section 1.6.17, General Requirements, page 8, Schedule of Submittals;
- 3) Section 3.2, Mechanical Specifications, page 36, mechanical design submittals;
- 4) Section 4.2.10, Structural Specifications, page 71, calculations for structural design;
- 5) Section 5.2.2, Electrical Specifications, page 94, concepts and details regarding electrical diagrams for power, control, distribution, conduit, cable tray and wireway details, etc.;
- 6) Section 7.5.1, Manufacturing and Erection, page 155, mechanical fabrication drawings;
- 7) Section 7.5.2, Machining, page 155, machining drawings;
- 8) Section 7.9.6.3, Manufacturing and Erection, page 160, detailed paint procedure;
- 9) Section 8.7, Installation, Manuals, Documentation and Training, page 172, submission of As-Built Drawings;

10) Section 10/5, Seismic Design, page 183, concept designs and calculations showing compliance with seismic criteria.

Based on the foregoing, this project requires constant, detailed supervision as the project progresses. This is a defining characteristic of construction projects. Supply contracts do not require such detailed, ongoing supervision.

As the current IFB is actually for a construction project, negotiations between GSA/PAG and Appellant are permissible. 2 GAR § 2108 (a) allows the head of a purchasing agency to delegate the authority to negotiate on adjustment of the bid price for a construction project.

b. PAG 07-007 was written as a Multi-Step Sealed Bidding.

The Sealed Bid Solicitation Instructions to the Invitation for Bids (IFB) (Exhibit 5) on page 23 of the IFB clearly states in paragraph 13 that the IFB is a Multi-Step Sealed Bidding. Paragraph 13(b) provides that:

In addition to the requirements set forth in the General Terms and Conditions and the Special provisions, the following applies:

1) Only unpriced technical offers are requested in the first phase;

2) Priced bids will be considered only in the second phase and only from bidders whose unpriced technical offers are found acceptable in the first phase;

3) The criteria to be used in the evaluation are those specified in the Special Provisions and the General Terms and Conditions ...

c) Receipt and Handling of Unpriced Technical Offers. Unpriced technical offers shall not be opened publicly, but shall be opened in front of two or more procurement officials...

d) Evaluation of Unpriced Technical Offers. The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

- 1) acceptable;
- 2) potentially acceptable, that is, reasonably susceptible of being made acceptable; or,

3) unacceptable...

e) Upon completion of Phase One, the Procurement Officer shall invite each acceptable bidder to submit a price bid...

This procedure is the multi-step bidding described in 2 GAR § 3109(r) and is the procedure for multi-step sealed bidding delineated in 2 GAR § 3109 (t) and (v).

In addition, there are other indications in the current IFB (Exhibit 3) that the IFB is a multi-step sealed bidding and not a one-step sealed bidding. First, on page 3b, Section IV, Bid Instructions, it is provided that:

This section describes the minimum requirements of items and information to be submitted in response to the Bid. The Bidder may however include any additional information necessary to better explain his or her offer, but any information submitted by the Bidder must be current, accurate, and complete.

Emphasis added.

Second, on page 3h, paragraph 7, "Contract Provisions", the third subparagraph provides that:

By submitting a Bid, the Bidder specifically understands and agrees that it has a duty to explain and clarify and (sic) all conditions imposed or included in its responses and questions in this Bid. The Bidder further understands that it has an affirmative duty to inquire about and clarify any section of the Bid that the Bidder does not understand or that the Bidder believes may be susceptible to more than one interpretation.

Emphasis added.

These two provisions are an invitation to discussions or negotiations made by the General Services Administration/Port Authority of Guam (GSA/PAG). Appellant is being asked not only to submit additional information but an affirmative duty is being imposed on the Appellant to explain and clarify its bid. This requested submission of information and/or clarification not only shows that discussions/negotiations were intended but that the specifications of the IFB were not specific enough or clear enough for an evaluation and award to be based solely on the price submitted. Negotiations/discussions were called for by GSA/PAG.

Third, Section VIII, "Intent", page 3k, subparagraph 3 explains that:

Owner is purchasing the expertise of the Contractor. The Contractor is invited to point out elements of the specification that are inconsistent with good design and selection of materials, quality and schedule control, operating practice and other contractual considerations. Owner desires to work with the Contractor to gain the benefit of its expertise.

Emphasis added. This invitation to discussions/negotiations is even more direct than the preceding ones. It should be noted that these calls for discussions do not specify whether they are to occur prior to or after contract award. As the IFB was solely authored by GSA/PAG, any ambiguity should be construed against the drafter. This is a general principle of contract law codified in 18 GCA § 87120. *See also Government of Guam vs. Pacificare Health Insurance Co., of Micronesia Inc., 2004 Guam 17, ¶ 73 n. 18.* And, 5 GCA § 5002 allows supplementary general principles of contract law to be applied.

Fourth, the Specifications themselves require the Appellant to alter the GSA/PAG specifications if they are deficient and implicitly state that negotiations for deviations and clarifications to the specifications are intended. Under the Technical Provisions Specifications, "Section 1: General Requirements", Section 1.1 "General", page 1, Section 1.1.3" mandates the following:

The specified criteria are the minimum acceptable. If, in the Contractor's opinion, any of the standards specified or requirements defined in this document are inadequate or insufficient for the intended use, it shall be the Contractor's responsibility to use the more stringent criteria...

Emphasis added.

Fifth, an almost identical request is further made in Section 1.2, "Standards", subparagraph 1.2.2 which states:

If the Contractor believes that complying with the references is impractical, the manufacturer may propose alternative standards ...

More revealing is the explicit reference to negotiations found in subparagraph, 1.1.6, page 1, which provides that:

If a conflict exists, the order of precedence shall be: (1) the law, (2) these Specifications and any list of negotiated deviations and clarifications to these specifications, ...

Emphasis added.

All of the foregoing IFB provisions clearly prove that a multi-step sealed bidding procedure was being used by the IFB and not a single step procedure. GSA/PAG's intentions, contractual provisions and specifications in the IFB, by themselves, prove that this IFB was a multi-step sealed bidding procedure. But, there is more.

In an email dated October 30, 2007, (Exhibit 4), Mr. Tor Gudmundsen, a structural engineer/consultant retained by the Port Authority to evaluate bids, wrote the following:

Please note that it is essential that we discuss the ZPMC¹ bid comments with their engineers before PAG either rejects their bid or awards them a contract. It is impractical to resolve the technical issues without a dialog with the bidder ...

Emphasis added. This was the PAG's own expert telling PAG management of the vital need to have discussions/negotiations with Appellant. Mr. Gudmundsen's comment that "it is impractical to resolve the technical issues without a dialog with the bidder" completely supports and reinforces Appellant's contention that the current IFB was written and went out to the bidders as a multi-step sealed bidding. Finally, it should be noted that Mr. Gudmundsen speaks with authority as he is a structural engineer and it is his company, TG Engineers, that co-authored the Specifications for this IFB.

c. PAG 07-007 perfectly fits the conditions for the use of Multi-Step Bidding.

A careful review of the Specifications in this IFB reveals that this is a mechanically complex acquisition. The Specifications are very technical, detailed, and complex. The fact that the PAG retained a local engineering company (TG Engineers, P.C.) and two other companies (Liftech Consultants, Inc. and McKay International Engineers) to assist the PAG in drafting the IFB specifications and in evaluating bids lends further weight to the fact this is a mechanically complex acquisition. And, even with the aforementioned experts, the IFB still requested from potential bidders additional input (the sections of the IFB requesting this help were meticulously covered in Section 1 above). Thus, there is no doubt as to the complexity of this acquisition.

Given the mechanical complexity of the acquisition, and the consistent pleas for help with its Specifications, GSA/PAG was not able to prepare at the outset a specific, definitive purchase description of the gantry crane to be purchased with this IFB which description would be good enough to permit an award based on price without any discussions with the bidder. Such a purchase description was just not practical. (The preparation of a definitive purchase description is required in a single step sealed bidding procedure). Mr. Tor Gudmundsen's October 30, 2007 e-mail clearly brings this point home when he states that: "It is impractical to resolve the technical issues without a dialog with the bidder". See Exhibit 4.

This was a multi-step sealed bidding as the conditions for use of multi-step bidding listed in 2 GAR § 3109 (r) perfectly fit the requirements and circumstances of

¹ZPMC is Appellant's subcontractor. References to ZPMC's bid are references to Appellant's bid.

this IFB. Most telling of the conditions listed in that section is subsection (r)(2)(b) which provides the following justification:

- b) to conduct discussions for the purpose of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description; ...

This was precisely what the IFB sought and needed. Unfortunately, these discussions were not allowed to occur because GSA/PAG would not allow them.

d. The rejection of Appellants' bid was erroneous.

In a Bid Status letter dated November 29, 2007 (Exhibit 6) the PAG informed Appellant that its bid had been rejected due to: non-conformance with the specifications/requirements; high prices; and "vendor's recommended Commercial Deviations and Commercial Contract Terms are not in compliance with the Guam Procurement Rules and Regulations". Subsequently, in response to Appellant's protest to the rejection, the GSA also denied the protest for the same reasons (Exhibit 7). In the paragraphs which follow, we shall discuss why these reasons for rejection are invalid in the order they are presented in the GSA letter.

The PAG's technical experts were very confident that Appellant would meet the specification if discussions were to occur. In addition to Tor Gudmundsen's October 30, 2007 email previously discussed, Mr. Arun Bhamani, President and Structural Engineer of Liftech sent a letter dated November 6, 2007 (Exhibit 8) to PAG giving his comments and recommendation on Appellant's bid. Mr. Arun commented that:

The recent bid is responsive to the specifications. Although the proposed Far East crane bid generally conforms to the specification requirements they have taken many deviations and present clarifications. Many of the deviations are acceptable, but some are not. In every instance, ZPMC would likely agree to meet the specifications if negotiations were allowed...

Emphasis added. Mr. Arun went on to recommend that:

Based on the above items, strictly speaking, the bid does not comply with the specifications. However, as mentioned, we expect that all items would be resolved if communications were allowed. We recommend that PAG negotiate with Far East/ZPMC, if possible to work out the remaining issues.

Emphasis added. As the IFB was written as a multi-step sealed bidding (which we discussed above and which discussions we incorporate herein by reference) and as PAG's own experts were confident that Appellant's bid would be responsive after negotiations, the rejection of Appellant's bid for non-conformance with the IFB specifications was premature, unfair and erroneous.

Moreover, in GSA's letter dated December 28, 2007 (Exhibit 7) denying Appellant's protest, the Chief Procurement Officer listed 16 electrical technical deviations that were not acceptable, 3 mechanical technical deviations there were not acceptable, 4 electrical technical clarifications not acceptable, 2 mechanical technical clarifications not acceptable and 5 technical deviations from TMGE electrical control system that were not acceptable. Altogether, the total unacceptable items were 30. In a letter dated November 27, 2007 written by the PAG General Manager to the GSA (Exhibit 8), a total of 147 technical deviations and technical clarifications were listed. Thus, the overwhelming majority of the deviations and clarifications were acceptable to PAG and the recommendation of the PAG consultants to hold discussions to resolve the few that were unacceptable was not only reasonable but justified.

Unfortunately, Appellant's ZPMC electrical engineers are temporarily away from China so that Appellant at this time is unable to respond to the unacceptable electrical technical deviations and electrical technical clarifications. Therefore, Appellant will file a supplement to this Grounds for Appeal on January 18, 2008 pursuant to 2 GAR § 12104 (b)(5) covering only the electrical technical deviations and clarifications. With respect to the remainder, Appellant will offer its comments in the paragraphs below.

With respect to the mechanical technical deviations, PAG's experts, McKay International Engineers, Inc., provided their comments in a letter dated October 26, 2007 (Exhibit 10). As to Clause 1.7, for example, McKay suggested that there may be misunderstandings by Appellant regarding the allowable wind load and stowed wind load. McKay tried to explain that it is PAG's intent to reinforce the crane stowage location wharf grinders. Unfortunately, this vital piece of information was not shared by PAG with Appellant. This discrepancy would have easily been resolved if PAG had done so. Had this sharing of information occurred, Appellant would have removed this technical deviation and would have agreed to supply a crane with eight wheels per corner.

Similarly, as to Clause 4.4.1.1, had the information about changes in ASCE 7 wind pressure requirements been provided to Appellant, Appellant would have agreed to remove this deviation.

Likewise, with Clause 6.4.9 (the machinery house noise level), Appellant after reviewing the McKay comments, believes that there is a misunderstanding on how the noise level is being measured. Appellant indicated in this deviation that the noise measurements will not exceed 95-100 dbA and this is the best noise level of similar cranes in the world. This includes cranes built for the U.S. market that would have to comply with any OSHA requirement. Appellant is measuring the noise level in the machinery room at full operation. Generally, when personnel enter the machinery room the crane would not be in full operation thus lowering the overall noise levels below 95-100 dbA. This difference in how noise level is measured may have been cleared up if the engineers had had an opportunity to have discussions as recommended by the PAG technical consultants.

As to the 1 unacceptable technical deviation for the diesel generator and the 5 unacceptable deviations for the electrical control systems, all of these deviations were completely beyond the control of the Appellant. All of these unacceptable technical deviations were made by the respective third party suppliers designated by the PAG. Again, all of this could have easily been resolved by discussions.

With respect to the unacceptable mechanical technical clarifications, it should be pointed out that clarifications are not deviations and should not be a reason for bid rejection. As to mechanical technical clarification Clause 1.7.7, after Appellant reviewed the McKay comments, Appellant agreed with McKay's stowed wind load calculations but thought that the seismic strength requirement based on a .30 factor should be reduced to .20 so that the crane areas to be reinforced will not result in excessive weight to the crane. With respect to the Clause 3.4.25 Appellant is agreeable to using Gantrex as specified but believes that Gantrex Europe should be used instead of Gantrex U.S. because the former is the superior product.

As far as the Appellant's bid being rejected due to high price, Appellant responds as follows. First, the amount budgeted for this solicitation cannot be equated to be the Government's Cost Estimate for this procurement. Based on the documents received from a Sunshine Act Request this amount is the amount that a local bank would finance. Second, there is an engineering concept called "value engineering". In layman's terms, value engineering is where engineers discuss ways in which the project's design, materials, and construction or fabrication can be done more efficiently so that the cost of a project is reduced. On the Appellant's side alone, with Appellant and his subcontractor (ZPMC) merely looking at ZPMC providing optional equipment manufactured by ZPMC instead of the third party vendors specified by PAG, a cost reduction of \$500,000.00 would be realized on each crane provided by Appellant. If the engineers from Appellant, ZPMC, and from McKay, Tor Gudmundsen and Liftech were to have discussions, value engineering ideas reducing Appellant's bid price to the budgeted amount for this IFB would be quite attainable. For example, unnecessary extras or "bells and whistles" in the gantry crane can be eliminated that would result in additional costs or bid reductions.

The use of value engineering in the purchase, construction and fabrication of complex technological items and in construction projects is very common. Regrettably, it was not employed in this IFB. Had it been, the budgeted amount may have been the ultimate price of the Appellant for the gantry crane.

With respect to Bid Rejection issue numbers 3-5, the Commercial Contract Terms being unacceptable, again, this is a miscommunication that could have been resolved with discussions. The starting point of the Appellant's position is the IFB, Section VII, "Terms and Conditions", page 3h. Under this section, "Bidder Bids must include a statement of agreement with these terms and conditions". Appellant did submit this required statement. Appellant understood this requirement to mean that it accepted all the terms and conditions of the IFB and agreed to be bound by said terms and conditions.

The Commercial Contract Terms proposed by Appellant and Shanghai Zhenhua Port Machinery Co. Ltd. (ZMPC) is a general form document globally used by ZMPC to address terms and conditions not covered in a solicitation. Despite Appellant's submission of the statement required by Section VII of the IFB, the IFB's terms and conditions are agreed to prevail over any conflicting clauses in the ZMPC document, and, void conflicting clauses in the ZMPC document. Thus, these void provisions are not subject to negotiations.

A close reading of the Commercial Contract Terms beyond the three rejected issues does show that the remaining provisions do fill gaps in important areas that were not covered by the IFB. For example, the Commercial Contract terms cover the Buyer supervising the manufacturing or fabrication of the crane, design review procedures, etc. Thus, the Commercial Contract Terms were not meant to supplant any IFB terms and conditions, but to supplement them, provided, of course there is agreement reached for such supplementation.

II. APPELLANT SEEKS THE FAIR AND EQUITABLE TREATMENT THAT THE GUAM PROCUREMENT LAW IS MEANT TO PROVIDE AND IT IS NOT TOO LATE FOR FAIR AND EQUITABLE TREATMENT TO BE GIVEN.

Just as the PAG wishes to be treated fairly and equitably so, too, does the Appellant. PAG 07-007 is the second solicitation issued by PAG for gantry cranes and is the second time in which Appellant has been the sole bidder. Appellant's current bid has been summarily rejected by the PAG despite a blatant need for discussions. Appellant's bids require the expenditures of substantial resources. PAG has an obligation to be fair and equitable to all who deal with the procurement system of this territory.

Among the purposes of the Guam Procurement Law, codified in 5 GCA § 5001 (b) there are two that stand out. One is "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory" and the other is "to provide safeguards for the maintenance of a procurement system of quality and integrity". As a result of PAG not dealing with Appellant fairly and equitably, neither of these purposes are being fulfilled. In fact, the lack of fairness tarnishes the procurement system.

In addition, 5 GCA § 5003 sets forth a requirement of good faith. It provides that:

This Chapter requires all parties involved in the negotiation, performance or administration of territorial contracts to act in good faith...

Emphasis added.

Based on all that has been previously said in this Appeal, PAG has not acted in good faith. But it is not too late to remedy PAG's lack of good faith.

There are two legal avenues by which discussions can occur. The first has already been discussed above, *i.e.*, accepting this IFB as a procurement for a construction project and then holding negotiations pursuant to 2 GAR § 2108 (a). The second is under 2 GAR § 3102 (c)(1)(C) where only one bid has been received. Section 3102 (c)(1)(C) rightfully applies to this situation as it provides that:

(c) If the Chief Procurement Officer...determines in writing that the need for a supply or service continues, but that the price of one bid is not fair and reasonable and there is not time for resolicitation or resolicitation would likely be futile, the procurement may then be conducted under Section 3112 (Sole Source Procurement)...

Emphasis added. In a sole source procurement, 2 GAR § 3112 (c) requires that the "procurement officer conduct negotiations, as appropriate, as to price, delivery and terms". This procedure, if utilized will resolve this situation. Despite the PAG's well-publicized need for cranes neither of these avenues which are viable and legitimate solutions to the PAG's needs have been utilized. The conclusion is that the PAG is not dealing with Appellant in good faith despite the requirements to do so in 5 GCA § 5003.

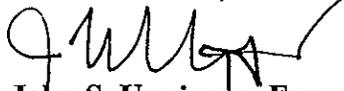
There is abundant justification for pursuing either of the above-described legal avenues. As previously mentioned there is consulting structural engineer, Tor Gudmundsen's opinion in his October 30, 2007 email that: "it is impractical to resolve the technical issues without dialog with the bidder". See Exhibit 4. There is also Liftech's, Mr. Arun Bhimani's confident opinion that: "we expect that all items would be resolved if communications were allowed". See Exhibit 8. Finally, there is the IFB which is written as a multi-step procedure and there are the IFB specifications themselves which cry out for negotiations to occur.

Appellant respectfully requests and urges the Office of the Public Auditor to give fair and equitable treatment. Appellant asks that the decision of the Chief Procurement Officer be reversed, allow discussions/negotiations to occur, and at the conclusion of said negotiations for a contract to be awarded to Appellant.

Appellant thanks the OPA for its kind and fair consideration.

Appellant does respectfully request a hearing on this appeal.

Respectfully Submitted,
THE LAW OFFICES OF JOHN S. UNPINGCO
& ASSOCIATES, LLC



John S. Unpingco, Esq.

RULING REQUESTED

It is respectfully requested that the GSA Chief Procurement Officer's Decision dated December 28, 2007 be reversed and then negotiations should be held pursuant to 2 GAR Section 2108 (a) to negotiate a price bid and after doing so, award a contract to Appellant.

In the alternative, that the Chief Procurement Officers Decision dated December 28, 2007 be reversed and that a Sole Source Procurement Contract be awarded to Appellant. Authority for the sole source to be made where there is only one bidder and resolicitation would likely be futile is 2 GAR Section 3102 (c)(1)(C).

EXHIBIT INDEX

<u>No.</u>	<u>Description</u>	<u>Tab No.</u>
1	IFB PAG-007-001	1
2	Bid Rejection Letter dated 05/16/07	2
3	IFB GSA/PAG-07-007	3
4	Tor Gudmundsen email dated 10/30/07	4
5	Sealed Bid Instructions	5
6	Bid Status letter dated 11/28/07	6
7	GSA Protest Denial Letter dated 12/28/07	7
8	Liftech letter dated 11/06/07	8
9	PAG General Manager letter dated 11/27/07	9
10	McKay International Engineers letter dated 10/26/07	10