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 10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**  
 11 **HAGÁTÑA, GUAM**

12 **IN THE APPEAL OF K CLEANING ) OPA-PA-13-004**  
 13 **SERVICES )**  
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 15 )  
 16 **APPELLANT )**  
 17 )  
 18 ) **INDEX**  
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23 **COMES NOW** the Guam International Airport Authority, by and through Counsel Fisher &  
 24 Associates, and submits an agency report. This record is submitted pursuant to 2 Guam Admin.  
 25 R. & Regs. 12105.

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I.

A Copy of the Protest

*Please see Agency Procurement Record filed 15 May 2013 at Tab I*

II.

A Copy of the Bid or Offer, a Copy of the Bid or Offer that is being Considered for Award, a copy of all Other Bids

*See Supplemental Agency Procurement Record filed 23 May 2013 for all bids*

III.

A Copy of the Solicitation

*Please see Agency Procurement Record filed 15 May 2013 at Tab F*

IV.

A Copy of the Abstract of Bids or Offers

*Please see Agency Procurement Record filed 15 May 2013 at Tab G*

V.

Any Other Documents which are Relevant to the Protest

*Please see Agency Procurement Record filed 15 May 2013. Please see Supplemental Agency Procurement Record filed 23 May 2013.*



VI.

The Decision from which the Appeal is Taken

*Please see Agency Procurement Record filed 15 May 2013 at Tab J*

VII.

A Statement Answering the Allegation of the Appeal

*Attached Herewith*

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
HAGÁTÑA, GUAM

IN THE APPEAL OF K CLEANING	)	OPA-PA-13-004
SERVICES	)	
	)	
	)	<b>AGENCY</b>
APPELLANT	)	<b>STATEMENT</b>
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**COMES NOW** the Guam International Airport Authority, by and through Counsel Fisher & Associates, and submits an Agency Statement in response to Appellant K Cleaning Service’s appeal filed 08 May 2013. In this matter Appellant submitted a bid out of time and, pursuant to the solicitation, the Agency rejected it. This Statement is submitted pursuant to 2 Guam Admin. R. & Regs. 12105(g).

**STATEMENT OF FACT**

On 25 January 2013 the Guam International Airport Authority (GIAA) issued an invitation for interested parties to submit bids for a custodial services contract. *See Agency Procurement Record at Tab F.* Appellant received the solicitation on 28 January 2013. At the

1 noticed time for submission of bids<sup>1</sup>, Appellant brought his bid to the GIAA conference room,  
2 not the Executive Manager's office, and as a result his submission was late.

3 In accordance with the solicitation, bids submitted out of time were not accepted. In  
4 total, nine entities submitted or attempted to submit bids; seven submitted properly to the  
5 Executive Manager's office and two (including Appellant) did not.

6 By this appeal, Appellant complains of the "Method, Solicitation or Award" and claims  
7 the instructions as to place of submission were confusing and ambiguous. These are the  
8 instructions or statements in the solicitation complained of;

9  
10 1. "The invitation for Bid, stated in pertinent part, 'Deadline for submission is 2:00 p.m.  
11 Friday, February 15, 2013 at which time and place all bids will be publicly opened and  
12 read aloud at the GIAA Conference Room.'" *Appeal at Attachment 1.*

13 2. "The information for bid General Information also included language regarding the  
14 time and place for receiving the bids. It stated '[a]s described in the bid documents until  
15 2:00 p.m., Friday February 15, 2013, at GIAA, at which time and place, all bids will be  
16 publicly opened and read aloud at the GIAA conference room.'" *Id.*

17 3. "In the instructions to Bidders section of the Invitation for Bid it stated, 'Sealed bids  
18 in triplicate will be received at the Office of the GIAA Executive Manager as indicated in  
19 the INVITATION FOR BID at which time and place all bids will be publicly opened and  
20 read aloud'" *Id.*

21  
22 The language complained of was present in the solicitation as originally published and known to  
23 Appellant since January 2013.

24  
25 <sup>1</sup> The bid receipt and opening date was moved by addendum to 29 March 2013 at 2:00 p.m.  
*See Addendum D to Solicitation at Tab F.*

1 On 4 April 2013 K Cleaning Services filed a complaint with GIAA. Although not styled  
2 as such, the Agency treated the complaint as a protest and rendered a decision on 18 April 2013.  
3 Thereafter, and no later than 02 May 2013, GIAA awarded the contracts to the successful  
4 bidders. This appeal was filed in the Office of the Public Auditor on 08 May 2013.

### 5 MEMORANDUM OF POINTS AND AUTHORITY

6 Appellant complains that language in the solicitation was ambiguous and caused him to  
7 miss a deadline for submission of bids. In truth, no such ambiguity exists. Of Appellant's three  
8 cited phrases, only one addresses the place of submission; "[s]ealed bids in triplicate will be  
9 received at the Office of the GIAA Executive Manager." *See supra*. The other two merely state  
10 how and where the bids will be opened, i.e. as "described in the bid documents . . . at GIAA, at  
11 which time and place, all bids will be publicly opened and read aloud at the GIAA Conference  
12 room", *id*, and again, "all bids will be publicly opened and read aloud at the GIAA Conference  
13 Room." *Id*. There is no statement, and Appellant cites to none, which contradicts the clear  
14 instruction that bids will be "received at the Office of the GIAA Executive Manager."  
15

#### 16 *1. Appellant's argument is untimely.*

17 By motion, the Agency has asked that this appeal be dismissed as untimely. *See Motion*  
18 *to Dismiss an Appeal, filed 15 May 2013, OPA-PA-13-004*<sup>2</sup>. In that motion, the Agency noted  
19 that the Appellant did not appeal an agency decision within the mandatory fifteen (15) day  
20 timeframe. The Agency also noted that the Appellant did not file a protest with the Agency in a  
21 timely manner. *Id*.

22 Here the Appellant complains of language within the invitation. Thus, Appellant  
23 challenges the solicitation. If he perceived an ambiguity, he was required to protest within  
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25 <sup>2</sup> Arguments and statements of fact made in that motion are incorporated by reference herein.

1 fourteen days of the time he knew, or should have known, of the facts giving rise to the protest.  
2 *5 Guam Code Ann. §5425(a)*. Appellant was in possession of that language for two months prior  
3 to the submission of bids and had ample time to seek clarification or to protest but waited until  
4 after submission to complain. This is plainly too late. Much more than fourteen days elapsed  
5 between the time Appellant knew, or should have known, of the perceived ambiguity and the  
6 time of protest.

7 *2. Appellant has waived an argument of ambiguity*

8 As has been said, Appellant protests the solicitation. As the Federal Circuit holds, “a  
9 party who has the opportunity to object to the terms of a government solicitation containing a  
10 patent error and fails to do so prior to the close of the bidding process waives its ability to  
11 raise the same objection subsequently in a bid protest action in the Court of Federal Claims.”  
12 *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). See also  
13 *Infrastructure Defense Technologies, LLC v. U.S.*, 81 Fed.Cl. 375, 388 (Fed.Cl.,2008), “The  
14 failure to challenge the terms of the solicitation prior to the close of the bidding process is a  
15 waiver of that same objection in a subsequent bid protest in the Court of Federal Claims.”  
16 The facts of this case show that Appellant knew, or should have known, of an ambiguity but  
17 did nothing until after the bids were open. If he believes there is an ambiguity in the  
18 solicitation, he should have acted upon it. If he now states that he was unaware of the  
19 ambiguity until his bid was rejected, he is admitting he made a mistake.<sup>3</sup>  
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23 <sup>3</sup> The Agency notes that 7 of 9 interested bidders understood the solicitation and submitted  
24 correctly. Government invitations and requests are often complicated, this does not mean  
25 they are ambiguous though, merely that they require a careful read.

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3. *There is no ambiguity.*

The language complained of is difficult but it is not ambiguous. There is one uncontradicted statement that reads “Sealed bids in triplicate will be received at the Office of the GIAA Executive Manager as indicated in the INVITATION FOR BID . . .” Because Appellant conflated this instruction with the place of opening, he failed to timely submit a bid. This is no more than his mistake (7 other bidders did not make this error). Appellant’s misunderstanding does not create an ambiguity and his Office should decline Appellant’s invitation to find it. *See U. S. v. Culbert, 435 U.S. 371, 379 (1978)* “[W]e decline to manufacture ambiguity where none exists.”

4. *Appellant’s proposed remedy is unavailable.*

By way of remedy, Appellant asks that the GIAA ought to be “ordered to open all bids that were timely presented at the GIAA conference room including [his] bid and award the contract based on the lowest bid of all bidder’s submissions.” *Appeal at Attachment 1.* This remedy is unavailable. Pre-award and post-award remedies available to a successful appellant are described by law. 5 Guam Code Ann. §5452 provides

(a) If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) if the person awarded the contract has not acted fraudulently or in bad faith:

- (A) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or
- (B) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

(2) if the person awarded the contract has acted fraudulently or in bad faith:

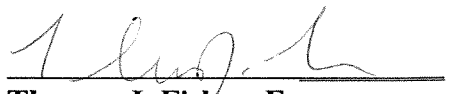
- (A) the contract may be declared null and void; or
- (B) the contract may be ratified and affirmed if such action is in the best interests of the Territory, without prejudice to the Territory’s rights to such damages as may be appropriate.

*Id.*

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Here, an award has been made. *See Supplemental Agency Procurement Record, Volume II, at Tab I.* If we assume that the agency solicitation was improper and because there is no allegation of bidder bad faith or fraud, the remedy available is a termination of contract unless the GIAA decides to ratify and affirm. *2 Guam Admin. R. & Regs. 9106(b).* There is no provision in the law to allow a re-opening of bids and redetermination of award at this point.

**FISHER & ASSOCIATES**



**Thomas J. Fisher, Esq.**  
**For Guam International Airport Authority**



VIII.

A Determination Required under 2 GAR §9101(e)

*Not applicable*



IX.

A Statement Indicating whether the Matter is the Subject of a Court Proceeding

*Attached herewith*

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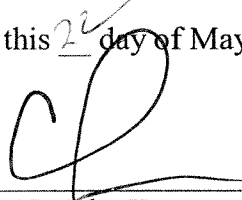
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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
HAGÁTÑA, GUAM

IN THE APPEAL OF K CLEANING	)	OPA-PA-13-004
SERVICES	)	
	)	
	)	
APPELLANT	)	<b>DECLARATION RE</b>
	)	<b>COURT ACTION</b>
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**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 22 day of May, 2013.

By:   
\_\_\_\_\_  
Charles H. Ada, II  
Executive Manager