

1 **LUJAN AGUIGUI & PEREZ LLP**
Attorneys at Law
2 DNA Building, Suite 300
238 Archbishop Flores Street
3 Hagåtña, Guam 96910
Telephone: (671) 477-8064/5
4 Facsimile: (671) 477-5297

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

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO. OPA-PA: 10-004

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8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **PROCUREMENT APPEAL**

11 IN THE MATTER OF APPEAL of
12
13 HARBOR CENTRE GUAM CO. LTD.
14 And HARBOUR CENTRE PORT
15 TERMINAL, INC.
16
Appellant.

APPEAL NO: OPA-PA-010-004

**SUBMISSION OF
AGENCY REPORT**

17
18 The Jose D. Leon Guerrero Commercial Port, also known as the Port Authority of Guam,
19 the purchasing agency in the matter referenced above, hereby submits the following exhibits as
20 the Agency Report pursuant to 2 GAR §12105:

- 21 1. A copy of the protest:
22 *A copy of Appellant's protest was previously filed with the Office of Public*
23 *Accountability ("OPA") on September 8, 2010 as Exhibit 15 of the Procurement*
24 *Record.*
25 2. A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer
26 that is being considered for award or whose bid or offer is being protested, if any had
27 been submitted prior to the protest:
28

COPY

1 *A copy of the proposal submitted by the Appellant was previously filed with the OPA*
2 *as Exhibit 10 of the Procurement Record. A copy of the proposal that is being*
3 *considered for award was filed as Exhibit 11 of the Procurement Record.*

- 4 3. A copy of the solicitation, including the specifications or portions thereof relevant to
5 the protest:

6 *The RFP and Addenda 1-4 were previously filed with the OPA as Exhibit 9 of the*
7 *Procurement Record.*

- 8 4. A copy of the abstract of bids or offers or portions thereof relevant to the protest:

9 *The abstract of bids or offers was previously filed with the OPA as part of Exhibit 14*
10 *of the Procurement Record, at Bates Stamp No. LAP1489.*

- 11 5. Any other documents which are relevant to the protest, including the contract, if one
12 has been awarded, pertinent amendments, and plans and drawings:

13 *Other documents relevant to the protest are included as exhibits to the Agency*
14 *Statement filed concurrently herewith.*

- 15 6. The decision from which the Appeal is taken, if different than the decision submitted
16 by Appellant:

17 *The Agency decision from which the Appeal is taken was previously filed with the*
18 *OPA as Exhibit 16 of the Procurement Record.*

- 19 7. A statement answering the allegation of the Appeal and setting forth findings, actions,
20 and recommendations in the matter together with any additional evidence or
21 information deemed necessary in determining the validity of the Appeal. The
22 statement shall be fully responsive to the allegations of the Appeal:

23 *The Agency Statement is filed concurrently herewith at TAB A.*

- 24 8. If the award was made after receipt of the protest, the report will include the
25 determination required under 2 GAR §9101(e): and

26 *Not applicable.*

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9. A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding.

A Declaration regarding Court Action is filed concurrently herewith at TAB B.

Dated this 15th day of September, 2010.

Respectfully submitted,

LUJAN AGUIGUI & PEREZ LLP

By: 
for **REBECCA PEREZ SANTO TOMAS, ESQ.**
Attorneys for
Jose D. Leon Guerrero Commercial Port

TAB A

1 **LUJAN AGUIGUI & PEREZ LLP**

2 Attorneys at Law
3 DNA Building, Suite 300
4 238 Archbishop Flores Street
5 Hagåtña, Guam 96910
6 Telephone: (671) 477-8064/5
7 Facsimile: (671) 477-5297

8 *Attorneys for*
9 *Jose D. Leon Guerrero Commercial Port*

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.

AGENCY STATEMENT

16 Appellant.

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18 Pursuant to 2 GAR §12105(g) the Jose D. Leon Guerrero Commercial Port (the "Port" or
19 "PAG"), the Purchasing Agency in the appeal referenced above, hereby submits its statement in
20 answer to the appeal filed by Harbor Centre Guam Co. Ltd and Harbour Centre Port Terminal,
21 Inc, (collectively referred to as "Harbour Centre" or "Appellant").

22 Earlier this year and pursuant to the authority granted it by 12 GCA §10401, the Port
23 developed and issued Request For Proposal ("RFP") No. PAG-010-003 soliciting proposals for a
24 Performance Management Contract for the Management of Cargo Terminal Operations and
25 Maintenance of Cargo Handling Equipment (referred to herein as the "PMC RFP"). A total of
26 seven companies ("offerors") submitted responses to the RFP. The Port conducted its evaluation
27
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1 of the proposals and on July 19, 2010 issued letters to the offerors informing each that it was the
2 Highest Ranked Offeror (“HRO”) or that it was not.

3 On August 2, 2010 Appellant filed with the Port a protest alleging several improprieties in
4 the RFP process and in the Port’s failure to select Harbour Centre as the Highest Ranked Offeror.
5 The Port issued its response on August 27, 2010, denying the protest in its entirety. Appellant
6 thereafter filed this appeal.
7

8 As discussed below, Appellant’s allegations are completely without merit, and worse,
9 appear to have been filed frivolously, without sufficient information to support the allegations,
10 and solely in an attempt to disrupt the RFP process. For each of the reasons outlined below, the
11 Port urges the Hearing Officer and the Public Auditor to find that Appellant’s allegations are
12 unfounded, that the appeal should be dismissed in its entirety, and that Appellant should be made
13 to pay the Port’s costs and attorney’s fees.
14

15 **I. Involvement of the Chief Procurement Officer in the RFP process.**

16 Appellant makes two claims regarding the involvement, or lack thereof, of the Chief
17 Procurement Officer (“CPO”) in the PMC RFP process. In its Procurement Appeal Grounds at
18 paragraph (b), Appellant alleges that the Port violated Public Law 30-90 “when it did not allow
19 for the observation by the General Services Agency’s Chief Procurement Officer of the entire
20 procurement process.” At paragraph (f), Appellant alleges that “PAG’s actions and violations
21 resulted in the General Services Agency’s Chief Procurement Officer or designee from not
22 observing the procurement evaluation process as required by law in accordance with 5 GCA
23 §10401.”
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1 The involvement of the CPO in the PMC RFP process was discussed initially in Public
2 Law 29-23 and again in Public Law 30-90. Both laws were codified at 12 GCA §10401, which
3 states:

4 The General Services Agency Chief Procurement Officer shall be an observer
5 throughout the RFP, MSB or IFB process as specified in this Section, shall receive
6 copies of all documents involved and shall be invited to any meetings regarding
7 the public-private partnership process specified in this Section.

8 As can be seen from the log of communications made by the Port with regard to the PMC
9 RFP, the Port complied with the mandate of 12 GCA §10401 by constantly advising the CPO or
10 her office of the developments in the RFP process, inviting her to meetings, and providing her
11 with documents involving the RFP. The log of communications and meetings for the PMC RFP,
12 filed as Exhibit 19 of the Port Procurement Record, clearly shows that the CPO was copied on
13 emails and received transmittals of documents relating to the RFP. The CPO's designee attended
14 the meeting of the evaluation committee on July 14, 2010, during which time the committee
15 finalized their rankings of the proposals. In fact, the CPO requested that the meeting be
16 rescheduled from July 9th to July 14th in order to accommodate her schedule (see email of July 8,
17 2010 from the CPO to the Port Procurement and Supply Manager, filed as Exhibit 6 of the
18 Procurement Record and attached herewith as Exhibit A). Additionally, the CPO visited the Port
19 on June 11, 2010 and reviewed the procurement file for the PMC RFP (see Summary Report of
20 Marie Benavente dated June 14, 2010 and attached herewith as Exhibit B. Because the
21 information in this report may reveal the substance of certain proposals and such information is
22 not available to the public at this time pursuant to 2 GAR 3114(h), this Exhibit will not be
23 provided to the Appellant and is marked as sealed on this filed copy). During the July 14th
24 meeting of the evaluation committee, the CPO's designee was present and lodged no objections to
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Agency Statement

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1 the conduct of the meeting (see Summary of Evaluation Meeting, July 14, 2010 filed as Exhibit 8
2 of the procurement record and attached herewith as Exhibit C). Nor has the CPO since July 14th
3 advised the Port of any objection to the RFP process. All of these actions, along with the
4 additional communications with the CPO described in the Port's procurement record, are proof
5 that the Port has complied with the requirements laid out in P.L. 30-90 and 12 GCA §10401.
6

7 Appellant appears to be speaking on behalf of the CPO by alleging, incorrectly, that the
8 CPO was somehow left out of the RFP process. Appellant has not indicated how or when it
9 discovered information regarding the Port's communications with the CPO. Assuming the
10 Appellant actually had information about the CPO's involvement in the RFP to justify the filing
11 of its protest and this appeal, at least two troubling issues arise: first, how the Appellant came
12 into possession of non-public information about the Port and CPO's communications (or lack
13 thereof) relating to this RFP, and second, when such information became available to Appellant.
14 If the Appellant obtained this information from a government employee, Appellant necessarily
15 engaged in improper communications about an ongoing RFP. The second issue that arises is
16 when Appellant came into possession of this information. The evaluation committee meeting
17 occurred on July 14, 2010. The CPO's designee was present at that meeting and communications
18 with the CPO regarding the RFP occurred on numerous instances before that date. Yet Appellant
19 did not file its protest until August 2, 2010, more than fourteen days after the evaluation
20 committee's last meeting. If Appellant had this information prior to the fourteen day deadline
21 described in 5 GCA §5425(a), the protest was untimely and the appeal relating to this issue
22 should be dismissed. In the event the Appellant did not and does not have any information to
23 justify its allegations about the CPO's involvement, this appeal should be dismissed on the basis
24 that Appellant's claims are completely without grounds, frivolous, and made solely to disrupt the
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1 procurement process. Finally, Appellant makes no connection whatsoever between the CPO's
2 alleged lack of involvement and any prejudice it might have suffered in the evaluation process.
3 The lack of such connection is further proof that Appellant has no grounds for its protest and
4 appeal on the basis of the CPO's involvement in the RFP.
5

6 **II. Handling and control of proposals.**

7 Appellant makes two claims about the Port's handling of the proposals submitted in
8 response to the RFP. At paragraph (d) of its grounds for appeal, Appellant states, "PAG violated
9 the Guam Procurement Laws ... by not maintaining the mandated security and control of Bid
10 offers ... [b]ecause of the integrity and security of the aforementioned, Bids were compromised."
11 Appellant further alleges at paragraph (e) that the Port "comprised [sic] and invalidated the Bid
12 process by permitting Evaluation Committee Members to take off the premises Bid offers from
13 Offerors in violation of 2 GAR §3114(h)(1)."
14

15 Appellant's reliance on 2 GAR §3114(h) in support of its claims appears to be misplaced.
16 §3114(h) states:
17

18 (h) Receipt and Handling of Proposals. (1) Registration. Proposals and
19 modifications shall be time-stamped upon receipt and held in a secure place until
20 the established due date. Proposals shall not be opened publicly nor disclosed to
21 unauthorized persons, but shall be opened in the presence of two or more
22 procurement officials. A Register of Proposals shall be established which shall
23 include for all proposals, the name of each offeror, the number of modifications
24 received, if any, and a description sufficient to identify the services offered. The
register of Proposals shall be opened to public inspection only after award of the
contract. Proposals of offerors who are not awarded the contract shall not be
opened to public inspection.

25 Nowhere in §3114(h)(1) is there a prohibition against the taking of bids or proposals off the
26 premises of the purchasing agency after the requirements outlined in the section for the opening
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1 of the proposals have been met. There is no question that the Port complied with the
2 requirements of §3114(h)(1): the proposals were held by the Port until the date and time on which
3 they were due; the proposals were then opened in the presence of two Port procurement officials
4 (see the Abstract filed with Exhibit 14 of the procurement record at Bates Stamp No. LAP1489.)
5

6 Appellant also relies on the Port's use of a Non-Disclosure Agreement executed by
7 members of the evaluation committee as proof that the Port "admitted its knowing violation of the
8 security of the Bids and integrity of the process" (Appellant's Appeal Grounds, paragraph (e).
9 Copies of the Non-Disclosure Agreement are filed as Exhibits 17 and 18 of the Agency Report).
10 It is unclear why Appellant construes the use of a Non-Disclosure agreement as a violation of the
11 security of the Bids. If anything, the Port's requirement of written assurance that the evaluation
12 committee members would not inappropriately disclose information related to the RFP is an
13 indication of the Port's extra measures to maintain the security of the proposals.
14

15 Appellant offers no justification for its claims that the Port mishandled the proposals
16 received in response to the RFP. For this reason, the appeal as it relates to this issue should be
17 dismissed.

18 **III. Makeup of the Evaluation Committee**

19 At paragraph (g) of its grounds for appeal, Appellant alleges that the evaluation committee
20 "was required to be constituted by a PAG Personnel, Members of the Board of Directors and the
21 Government of Guam personnel appointed by the PAG Manager." Appellant goes on to state
22 "[i]t is believed that there was no independent Government of Guam personnel participating in
23 the Evaluation Committee pursuant to appointment from the General Manager of the PAG." The
24 composition of the evaluation committee is referenced in the RFP at Volume V, Item 2, Page V-1,
25 which provides that the committee will be comprised of "PAG personnel and members of the
26
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Appeal No. OPA-PA-010-004

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1 Board of Directors, and/or Government of Guam personnel selected by the PAG's General
2 Manager." The list of evaluation committee members approved by the Port's General Manager
3 is filed under Exhibit 4 of the procurement record. In compliance with the RFP, the evaluation
4 committee was made up of Port Personnel and Port Board members. Appellant's contention that
5 the makeup of the committee was somehow in violation of the RFP requirements is baseless.
6

7 **IV. General claims that the Port violated applicable procurement law.**

8 The remainder of Appellant's grounds for appeal consists of general claims that the Port
9 violated applicable procurement law but does not contain any reference to a specific act or
10 omission by the Port that would qualify as a violation of law or regulation. For example,
11 paragraph (a) of the grounds for appeal simply states the Port "did not perform the RFP process as
12 mandated and in compliance with Public Law 30-90." And paragraph (c) states the Port "failed to
13 perform the evaluation process in determining and designation of the 'Highest Rated Offeror' in
14 compliance with the Guam Procurement Law." Because these allegations are of such a broad and
15 general nature, the only response that can be made is the similarly broad and general answer that
16 the Port did comply with applicable law in its administration and evaluation process. Such
17 allegations, without reference to specific acts or omissions by the Port, fail to state an actual claim
18 against the Port and therefore should be found without merit and dismissed.
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22 **V. The Port's costs and attorneys' fees.**

23 5 GCA §5425(h)(2) grants the Public Auditor "the power to assess reasonable costs
24 including reasonable attorney fees incurred by the government, including its autonomous
25 agencies and public corporations, against a protestant upon its finding that the protest was made
26 fraudulently, frivolously or solely to disrupt the procurement process." The present appeal and its

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Appeal No. OPA-PA-010-004

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1 underlying protest fit this description; for this reason the Port asks the Hearing Officer and Public
2 Auditor to find that Appellant should be made to pay the Port's costs and attorneys' fees incurred
3 in defense of this matter.

4 **VI. Conclusion**

5 For the reasons discussed above, the Port respectfully requests that the Hearing Officer
6 and Public Auditor deny this appeal, and furthermore find this appeal to be frivolous and without
7 merit and that an award of reasonable costs and fees be made for the Port.
8

9 Dated this 15th day of September, 2010.
10

11 Respectfully submitted,

12 **LUJAN AGUIGUI & PEREZ LLP**

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14
15 By: 
16 **REBECCA PEREZ SANTO TOMAS, ESQ.**

17 *Attorneys for*

18 *Jose D. Leon Guerrero Commercial Port*
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EXHIBIT A

Alma B Javier

From: Alma B Javier [abjavier@portguam.com]
Sent: Friday, July 09, 2010 8:53 AM
To: 'Jovyna Lujan'; 'Bill Beery'; 'John Santos'; Joaquin P. Pangelinan; 'rbsantos@portguam.com'; 'glenn'; 'Dora C Perez'; 'Sooja L. Suk'; Francine T. Rocio
Cc: 'Rebecca Perez Santo Tomas'; 'John Weisenberger'; 'Vivian Leon'; 'Rick J. Agustin'
Subject: FW: FW: Evaluation Committee Meeting, PMC

To all:

Please be advised that the evaluation committee meeting is re-scheduled for Wednesday, July 14, 2010, 1000 a.m. Thank you for your support.

Alma

From: Claudia Acfalle [mailto:claudia.acfalle@gsa.guam.gov]
Sent: Thursday, July 08, 2010 11:15 PM
To: Alma B Javier
Subject: Re: FW: Evaluation Committee Meeting, PMC

Hi Alma:

Tomorrow I have a scheduled meeting with senator B.J. Cruz at 10:00 a.m. Can you pls. reschedule for next week Wednesday at 10:00 a.m.? Pls. advise!

Claudia

On Thu, Jul 8, 2010 at 2:21 PM, Alma B Javier <abjavier@portguam.com> wrote:

Hi Chief:

As per our discussion last night and per your recommendation, please see attached memorandum advising the committee of the scheduled meeting, tomorrow, June 9, 10:00 am at the Board Room.

See you there!

Alma Javier

From: Alma B Javier [mailto:abjavier@portguam.com]

Sent: Thursday, July 08, 2010 2:20 PM

To: 'John Santos'; 'rbsantos@portguam.com'; 'glenn'; 'Sooja L. Suk'; 'Ernest G Candoleta'; 'Jovyna Lujan'; 'Bill Beery'; Francine T. Rocio; Joaquin P. Pangelinan
Cc: 'Vivian Leon'; 'Rick J. Agustin'
Subject: Evaluation Committee Meeting, PMC

To all:

Please see attached memorandum. Your attendance is extremely appreciated.

Alma B. Javier

Procurement & Supply Manager

Port Authority of Guam

(671) 477-5931 ext. 369

**SEALED
EXHIBIT B**

EXHIBIT C

PORT AUTHORITY OF GUAM

SUMMARY OF MEETING

Date of Meeting: July 14, 2010, 10:00 a.m. at the Port's Board Conference Room
Type of Meeting: Evaluation Committee Meeting
Ref: RFP 10-003, PMC for the Management of Cargo Terminal Operations and Maintenance of Cargo Handling Equipment

In attendance are the following:

1. John B. Santos, Committee Member
2. Ernie Candoleta, Committee Member
3. Joaquin Pangelinan, Committee Member
4. Ray B. Santos, Committee Member
5. Francine T. Rocio, Committee Member
6. Sooja L. Suk, Committee Member
7. William Beery, Committee Member
8. Dora Jean Perez, Committee Member
9. Glenn Nelson, Committee Member
10. Jovyna Lujan, Committee Member
11. Alma Javier, Procurement Official
12. Peter San Nicolas, Procurement Official (GSA)

Alma Javier conducted and administered the meeting. The summary of the meeting is as follows:

1. Introduction: Ms. San Nicolas was introduced to the members of the Evaluation Committee and each member was asked to introduce themselves for the record.
2. Instructions: The members were advised that the purpose of the meeting is to finalize their evaluation and ranking scores. It was noted that the initial evaluation score sheets that other members have submitted are being returned for them to finalize. They were advised that each box before them contained the same copies of proposals that was collected back by Procurement and labeled with their names. Any notes that they may have are kept in-tact and additional blank evaluation score sheets were included, should they need them.

The members were advised that a Certification of Non-Disclosure and Confidentiality Form is provided and required from the members to submit at the conclusion of their evaluations. The said certification is an assurance that the member evaluated the proposals independently and that confidentiality was kept without discussions nor disclosure of any information to anyone or anybody.

3. The members were reminded that ample time was provided to them to read, review, digest, understand and absorb all the information on each proposal. The members were advised that rather than the administrator go over page by page of the each proposal, each section of Volume II of the RFP, titled Qualifications of Offerors and Proposed PMC, may be discussed. They were informed that as we go over each offeror's proposal, they need to advise if any clarifications are needed from the offeror.
4. Review of proposals: Following the identified sections in Volume II, the members were asked the following questions (repeatedly) during review of each proposal (7 proposals in total):
 - a. Does the proposal provides enough information regarding the qualifications of the offeror in reference to their experience, background, history of organization, legal structure and ownership, the management of the organization and management's philosophy? (Section 2)
 - b. Does the proposal provides enough information with regards to their experience in marine terminal operations, the history & growth of the marine terminal operations, their existing mari

- terminal operations, their experience with marine terminal maintenance, the experience with training of personnel, experience with O&M budgeting, experience in procurement, safety management, environmental compliance management, unique innovation & technologies and experience with quality management processes? (Section 2.1)
- c. Does the proposal provides enough information that demonstrates is financial capability, the marine terminal financial performance, the ability to fund working capital, and the ability to finance PMCP capital requirements? (Section 2.2)
 - d. Does the proposal provides enough information regarding its legal structure & ownership and management of the organization and proposed PMCP? (Section 3)
5. Evaluation: After review of each proposal, the members were some given time to finalize their evaluation scores. The evaluation score sheets were collected from each member at the end of the review for each proposal. Each time the collection of the evaluation score sheets were made, the number of score sheets were verified by Mr. San Nicolas to ensure that all score sheets were collected.
 6. Upon completion of the evaluations, each member were asked to submit the Certification form and they were collected for file.
 7. The members were advised that all the scores will be compiled and tallied to determine the final ranking results. They were thanked for their participation.

Attachment: Signed Attendance Sheet

Prepared by: Alma B. Javier



TAB B

1 **LUJAN AGUIGUI & PEREZ LLP**

Attorneys at Law
2 DNA Building, Suite 300
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APPEAL NO: OPA-PA-010-004

9
10 HARBOR CENTRE GUAM CO. LTD.
11 And HARBOUR CENTRE PORT
12 TERMINAL, INC.

DECLARATION RE COURT ACTION

13 Appellant.

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

17 The undersigned party does hereby confirm that to the best of her knowledge, no case or
18 action concerning the subject of this Appeal has been commenced in court. All parties are
19 required to and the undersigned party agrees to notify the Office of the Public Auditor within 24
20 hours of being informed of the commencement of a court action regarding this Appeal or the
21 underlying procurement action.

22 Submitted this 15th day of September, 2010.

23 Respectfully submitted,

24 **LUJAN AGUIGUI & PEREZ LLP**

25
26
27 By: 

REBECCA PEREZ SANTO TOMAS, ESQ.

Attorneys for Jose D. Leon Guerrero Commercial Port