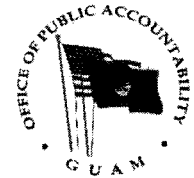


Suite 401 DNA Building  
 238 Archbishop Flores St.  
 Hagåtña, Guam 96910



# FAX

<b>To:</b>	<b>Mr. Ray S. Topasna</b> <b>Director</b> Guam Housing and Urban Renewal Authority 117 Bien Venida Avenue Sinajana, Guam 96910 Fax: (671) 300-7565	<b>From:</b>	<b>Benjamin J.F. Cruz</b> <b>Guam Public Auditor</b> Office of Public Accountability
		<b>Pages:</b>	11 (including cover page)
<b>CC:</b>	<b>Mr. Eddie J. Reyes</b> <b>President</b> <b>Flame Tree Freedom Center, Inc.</b> 206 B Chalan Kanton Tasi Chalan Pago, Guam Eddy.reyes@ftfcinc.com	<b>Date:</b>	May 31, 2019
		<b>Phone:</b> <b>Fax:</b>	(671) 475-0390 x. 208 (671) 472-7951

**Re:** OPA-PA-19-006 Notice of Appeal

For Review

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Thank you,  
 Jerrick Hernandez, Auditor  
[jhernandez@guamopa.com](mailto:jhernandez@guamopa.com)



## OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910  
Phone: (671) 475-0390 / FAX: (671) 472-7951

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May 31, 2019

Mr. Ray S. Topasna  
Executive Director  
Guam Housing and Urban Renewal Authority  
117 Bien Venida Avenue  
Sinajana, Guam 96910

**VIA FACSIMILE: (671) 300-7565**

Re: Notice of Receipt of Appeal – OPA-PA-19-006

Dear Mr. Topasna,

Please be advised that Flame Tree Freedom Center Inc. (hereinafter referred to as “Flame Tree”) filed an appeal with the Office of Public Accountability (OPA) on May 30, 2019, regarding the Guam Housing and Urban Renewal Authority’s (GHURA) denial of Flame Tree’s protest related to the procurement for ground maintenance services at GHURA properties (IFB# GHURA-COCC-019-001). OPA has assigned this appeal case number OPA-PA-19-006.

Immediate action is required of GHURA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at [www.opaguam.org](http://www.opaguam.org). The first eight pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeal. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

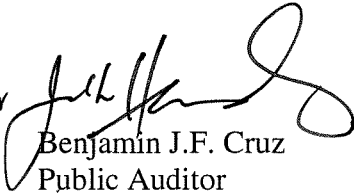
Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Friday, June 7, 2019**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Division 4, Chapter 12, §12105, by **Friday, June 14, 2019**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Flame Tree. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that you

provide one original and two copies of the said record, which will be distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or [jhernandez@guamopa.com](mailto:jhernandez@guamopa.com) should you have any questions regarding this notice.

Sincerely,

For   
Benjamin J.F. Cruz  
Public Auditor

Enclosure: First Eight Pages of the Notice of Appeal – OPA-PA-19-06

Cc: Eddy Reyes, President of FlameTree



RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: MAY 30, 2019

**Appendix A: Notice of Appeal Form**

PROCUREMENT APPEAL TIME: 1:57  AM  PM BY: FDJ

FILE NO OPA-PA: 19-006

**PART I- To be completed by OPA**

In the Appeal of \_\_\_\_\_ )  
 )  
 )  
FLAME TREE FREEDOM CENTER, INC )  
(Name of Company), APPELLANT )  
 )  
 )  
\_\_\_\_\_ )

**NOTICE OF APPEAL**

Docket No. OPA-PA 19-006

**PART II- Appellant Information**

Name: EDDY J REYES  
Mailing Address: HC 1 BOX 17378  
INARAJAN GU 96915  
Business Address: 206 B CHALAN KANTON TASI  
CHALAN PAGO GU  
Email Address: eddy.reyes@ftfcinc.com  
Daytime Contact No: 671-777-1144  
Fax No.: \_\_\_\_\_

**PART III- Appeal Information**

A) Purchasing Agency: GHURA

B) Identification/Number of Procurement, Solicitation, or Contract: IFB#GHURA-COCC-019-001

C) Decision being appealed was made on 17 MAY 2019 (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:

GET L.L.C.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**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 Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

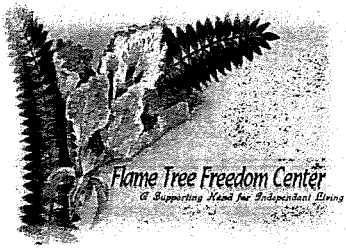
The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court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

Submitted this 30<sup>th</sup> day of MAY, 20 19.

By: FLAME TREE FREEDOM CENTER, INC.  
APPELLANT

or  
By: EDDY J REYES, PRESIDENT, FLAME TREE FREEDOM CENTER, INC.

Appellant's Duly Authorized Representative  
(Address) HC 1 BOX 17378 INARAJAN GU 96915  
(Phone No.) 671-777-1144



# FLAME TREE Freedom Center

*A Supporting Hand for Independent Living*

HC1 Box 17378, Inarajan, Guam 96915

To: Benjamin J.F. Cruz  
Public Auditor  
Office of Public Accountability

Re: Part IV Form and Filing: Notice of Appeal on IFB# GHURA-COCC-019-001

Dear Mr. Cruz,

1. The following information is PART V – Form and Filing for the subject Notice of Appeal for IFB# GHURA-COCC-019-001, which follows filing requirements in accordance with 2 GAR § 12104.
  - a. **The name, mailing and business address of the Appellant:**
    - i. EDDY J REYES, HC 1 BOX 17378 INARAJAN, GU 96915;
    - ii. President, FLAME TREE Freedom Center, Inc (FTFC)
  - b. **Appropriate identification of:**
    - i. **Procurement or Solicitation:** IFB# GHURA-COCC-019-001
    - ii. **Procuring Agency:** Guam Housing & Urban Renewal Authority
    - iii. **Award to:** GET L.L.C.
  - c. **Concise, logically arranged, and direct statement of the grounds for Appeal:**

**The following is a concise and logically arranged chronological list of events regarding IFB# GHURA-COCC-019-001:**

- i. On 18 March 2019, FLAME TREE Freedom Center (FTFC) sent an email and a letter to the GHURA Executive Director expressing its formal interest in IFB# GHURA-COCC-019-001, citing 5 GCA § 5001 and 5 GCA § 5217, and informed him that FTFC had been providing ground maintenance services to GHURA for the past two years (Atch 1).
- ii. On 27 March 2019, after receiving no response from GHURA, FTFC requested GHURA's disposition on Atch 1. (Atch 2).
- iii. On 28 March 2019, GHURA informed FTFC via email that "this project is fair and openly competitive as required by local (5 GCA) and federal law (2 CFR Part 200). (Atch 3).

- iv. Based on GHURA's 28 March 2019 response (Atch 3), FTFC submitted a bid proposal to GHURA on the bid opening date of 28 March 2019. The results were:
  1. Bid Packet #1: FTFC second lowest bid.
  2. Bid Packet #2: FTFC second lowest bid.
  3. Bid Packet # 3: FTFC lowest bid.
- v. On 9 April 2019 (Atch 4), FTFC sent a letter to GHURA Executive Director and:
  1. explained how GHURA had treated FTFC in the recent years, where GHURA handled FTFC separately from the IFB process.
  2. Since GHURA had made reference to the Code of Federal Regulations in Atch 3, requested that GHURA also take into consideration 41 USC Chapter 85, which stipulates the same provisions as 5 GCA § 5001.
  3. Emphasized that FTFC trains and employs individuals with disabilities to perform ground maintenance services.
  4. Provided information regarding FTFC's justification for a "responsible bidder", which was a requirement for the IFB.
  5. Since GHURA did not find FTFC non-responsive to the IFB when FTFC did not submit the bonding requirement, requested GHURA to apply 5 GCA § 5217 in its entirety (i.e. non-competitive basis).
  6. Informed GHURA that FTFC employs Section 8 recipients.
  7. Stated that FTFC is willing to submit an updated price proposal for Bid Packets #1 and #2.
- vi. On 6 May 2019, GHURA sent FTFC and email and attachment re: Notice of all unsuccessful bidders (Atch 5), which was acknowledged by FTFC on 7 May 2019 (Atch 6).
- vii. On 7 May 2019, FTFC submitted a Letter of Protest to GHURA (Atch 7).
- viii. On 09 May 2019, GHURA requested a meeting with FTFC on 10 May 2019 (Atch 8).
- ix. On 10 May 2019, GHURA and FTFC met to discuss the situation with no conclusion or agreement.
- x. On 13 May 2019, FTFC requested to review the procurement file (Atch 9).
- xi. On 14 May 2019, FTFC reviewed the procurement file at GHURA. FTFC was able to review a memorandum from the GHURA Executive Director to the Board of Commissioners, which recommended the award of Bid Packet #1 to GET LLC; Bid Packet #2 – no award; and Bid Packet #3 to FTFC. The record of decision by the Board of Commissioners was not file. GHURA informed FTFC that the Board of Commissioner will approve the minutes of the previous meeting at its next meeting at the end of May 2019.
- xii. On 15 May 2019, FTFC submitted a letter to the GHURA Executive Director with a revised price proposal and requested GHURA reconsider its award decision. In addition, FTFC indicated that the tapes of the Board meeting were unavailable to

review, so FTFC was not in a position to provide an update to its Letter of Protest (Atch 10).

xiii. On 17 May 2019, GHURA informed FTFC that the protest was denied (Atch 11).

**Statement on Grounds of Appeal:**

i. In reference to GHURA's 17 May 2019 letter pertaining to IFB # GHURA-COCC-019-001, GHURA denied FLAME TREE Freedom Center's protest on the award to Bid Packet #1 based on the grounds of offering the services at a higher price than the lowest bidder and for failing to comply with 5 GCA § 5217. FTFC contends that procurement process was flawed from the beginning, when FTFC was placed in a competitive situation, contrary to 5 GCA § 5001(d), 5 GCA § 5217 and 5 GCA § 5210. FTFC is of the opinion that it should have never been placed in a competitive situation based on the Government of Guam policy established for non-profit organizations. The following rationale is provided to justify FTFC's grounds for an appeal.

**1. 5 GCA § 5001(d):**

a. *(d) Policy Concerning Sheltered Workers or Persons with Disabilities. If any entity of the government of Guam or any entity expending governmental funds intends to procure any supply or service which is offered by a nonprofit corporation employing sheltered workers or persons with disabilities, or a government of Guam entity employing sheltered workers or persons with disabilities, then that entity shall procure such supply or service from that nonprofit corporation or government entity if the supply or service is available within the period.*

b. There are two operative words in 5 GCA § 5001(d): *policy* and *shall* that must be taken into consideration. According to Black's Law Dictionary, the word *policy* is defined as "The general principles by which a government is guided in its management of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the POLICY." According to the Cambridge English dictionary, the word *shall*, means certainly will. In this case, only FTFC, a non-profit organization that employs individuals with disabilities, expressed formal interest and submitted a proposal to GHURA, citing 5 GCA § 5001 and 5 GCA § 5217. There was no other non-profit organization that participated; therefore, GHURA should have dealt with FTFC on a non-competitive basis but chose to do otherwise.

**2. 5 GCA § 5217:**

a. ***Procurement from Nonprofit Corporations.*** *A contract may be awarded for a supply or service without competition when the contractor is a nonprofit corporation employing sheltered or handicapped workers. As a condition of the award of the contract the contractor must certify that labor on the project will be performed by handicapped persons except that supervisory personnel do not have*

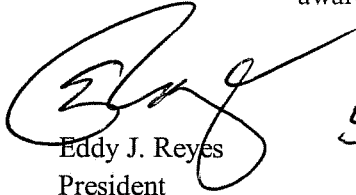


- to be handicapped. A contractor awarded a contract pursuant to this Section shall not be required to post any of the bonds required under Article 5 of this Chapter.*
- b. FTFC contends that 5 GCA § 5001(d) and 5 GCA § 5217 are interconnected to one another and do not stand alone. Since it is established that 5 GCA § 5001(d) is *policy*, FTFC contends that 5 GCA § 5217 is procedural in nature under the chapter of Source Selection and Contract Formation. With respect to the wording, *A contract may be awarded for a supply or service without competition when the contractor is a nonprofit corporation employing sheltered or handicapped workers*, in order to meet the spirit and intent of the 5 GCA § 5001(d) policy objective, where the government *shall* contract a non-profit organization, the only situation where a government entity *may* award contract *without* competition is when there is only one non-profit organization that employs individuals with disabilities is involved. If there are *multiple* non-profits organizations involved, then competition is inevitable.
  - c. With respect to the wording, *As a condition of the award of the contract the contractor must certify that labor on the project will be performed by handicapped persons except that supervisory personnel do not have to be handicapped*. In my 11 March 2019 letter to GHURA, FTFC certified that individuals with disabilities would perform this work, as we have done with GHURA and other government of Guam contracts in the past two years. Upon contract award, FTFC will provide a letter identifying and certifying the number of employees with a disability that will be performing the services. In addition, FTFC offered to help employ public housing recipients, as required by the program, to including individuals with disabilities. Those public housing recipients that may be hired as a result of this contract, could fill other positions, such as supervisory positions. For this sentence to apply, FTFC contends the application of the first sentence must exist, i.e. contract award will be on a non-competitive basis.
  - d. With respect to the last sentence, *A contractor awarded a contract pursuant to this Section shall not be required to post any of the bonds required under Article 5 of this Chapter*, FTFC did not submit a bond citing this provision and GHURA acknowledged and did not declare FTFC non-responsive. Therefore, FTFC concludes that all provisions under Article 5 apply.
3. 5 GCA § 5210:
- a. *Methods of Source Selection. (a) Unless otherwise authorized by law, all territorial contracts shall be awarded by competitive sealed bidding, pursuant to § 5211 of this Article, except for the procurement of professional services and except as provided in: (6) Section 5217 of this Article.*
  - b. GHURA failed to comply with 5 GCA § 5210: GHURA required FTFC to participate in a competitive process and participate in the bid opening (28

March 2019 email). FTFC is of the opinion that, if FTFC did not participate, GHURA would have declared FTFC as “non-responsive” and would have disqualified FTFC. Therefore, FTFC felt compelled to submit a bid packet.

- c. Related to paragraph 3b, above, GHURA cited federal law (2 CFR Part 200) as part of its justification for a competitive bid, which FTFC is of the opinion that this relationship is associated with the use of federal funding. Irrespective of the procurement policy 5 GCA § 5001(d), FTFC concludes that GHURA was aiming to achieve the lowest price through competition. Since, GHURA made reference to federal requirements, the following 41 USC Chapter 85 should have also been taken into consideration.
  - i. **41 USC Chapter 85 § 8504. Procurement requirements for the Federal Government.** a) *An entity of the Federal Government intending to procure a product or service on the procurement list referred to in section 8503 of this title shall procure the product or service from a qualified nonprofit agency for the blind or a qualified nonprofit agency for other severely disabled in accordance with regulations of the Committee and at the price the Committee establishes if the product or service is available within the period required by the entity.* <http://uscode.house.gov/view.xhtml?path=/prelim@title41/subtitle4/chapter85&edition=prelim>
  - ii. NOTE: For federal contracts, ground maintenance services is on the list of services that are available to non-profit organizations that employ individuals with disabilities.
4. Competitive pricing. FTFC contends that it should not have been placed in a competitive situation for this bid. However, GHURA placed FTFC in a competitive situation, FTFC’s proposed price was approximately \$30K over the lowest bidder. In FTFC’s 9 April 2019 letter (Atch 4), FTFC offered to submit an updated price proposal; however, GHURA did not respond to the offer. Following the GHURA – FTFC meeting on 10 May 2019, FTFC submitted a revised reduced price for Bid Packet #1 for GHURA’s consideration.
2. Conclusion: The primary basis of FTFC’s Notice of Appeal regarding IFB#GHURA-COCC-091-001 is GHURA’s failure to apply the above-mentioned federal and local mandates pertaining to procurement handling of non-profit organizations that employ individuals with disabilities to perform this service. Furthermore, FTFC contends that the Guam procurement provisions 5 GCA § 5001(d), 5 GCA § 5217 and 5 GCA § 5210 should be considered in totality to facilitate the implementation of the policy instead of being dealt with as individual and stand-alone provisions.
3. Statement Specifying the Ruling Requested: FTFC is requesting that the OPA provide its opinion on whether GHURA followed the procurement process based on the spirit and intent on mandated Government of Guam policy, as well as the federal mandate, since it is FTFC’s understanding that this project will be federally funded. *Under the assumption the OPA finds in favor of FTFC’s protest*, the OPA is invited to:
  - a. Direct GHURA to cease contract award actions to GHURA’s selected bidder,

- b. Direct GHURA to work with FTFC and:
  - i. if FTFC's revised pricing is within GHURA's budget authority, award the contract to FTFC.
  - ii. If FTFC and GHURA are unable to reach agreement on the pricing, cancel the award of Bid Packet #1 and reissue another IFB.



Eddy J. Reyes  
President

FLAME TREE Freedom Center, Inc.

5-20-19

# Transmission Report

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## FAX

<b>To:</b>	Mr. Ray S. Topasna Director Guam Housing and Urban Renewal Authority 117 Bien Venida Avenue Sinajana, Guam 96910 Fax: (671) 300-7565	<b>From:</b>	Benjamin J.F. Cruz Guam Public Auditor Office of Public Accountability
		<b>Pages:</b>	11 (including cover page)
<b>CC:</b>	Mr. Eddie J. Reyes President Flame Tree Freedom Center, Inc. 206 B Chalan Kanton Tasi Chalan Pago, Guam Eddy.reyes@ftfcinc.com	<b>Date:</b>	May 31, 2019
		<b>Phone:</b>	(671) 475-0390 x. 208
		<b>Fax:</b>	(671) 472-7951

**Re:** OPA-PA-19-006 Notice of Appeal

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Thank you,  
 Jerrick Hernandez, Auditor  
[jhernandez@guamopa.com](mailto:jhernandez@guamopa.com)

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HR: Host receive	PR: Polled remote	RP: Report	FA: Fall	G3: Group 3
WS: Waiting send	MS: Mailbox save	FF: Fax Forward	TU: Terminated by user	EC: Error Correct



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**OPA-PA-19-006 Notice of Receipt of Appeal**

2 messages

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**Jerrick Hernandez** <jhernandez@guamopa.com>  
To: eddy.reyes@ftfcinc.com

Fri, May 31, 2019 at 2:24 PM

Hafa Adai,

See attached document. Please confirm receipt of this email and the attachment.

--

Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA  
Auditor  
Office of Public Accountability – Guam  
www.opaguam.org  
Tel. (671) 475-0390 ext. 208  
Fax (671) 472-7951

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**Eddy Reyes** <eddy.reyes@ftfcinc.com>  
To: Jerrick Hernandez <jhernandez@guamopa.com>

Fri, May 31, 2019 at 2:18 PM

Please see attached acknowledgement.  
Best Regards  
Eddy

Eddy Reyes  
President  
FLAME TREE Freedom Center, Inc.  
[Quoted text hidden]

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