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 PROCUREMENT APPEALS

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**BEFORE THE PUBLIC AUDITOR
 PROCUREMENT APPEAL**

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-0005
)	
)	TRIAL BRIEF
GUAM COMMUNITY IMPROVEMENT)	
FOUNDATION, INC.)	
)	
Appellant.)	
_____)	

The requested proposal issued for the John F. Kennedy High Finance, Demolition, Design, Build, Maintain and Leaseback was issued on November 18, 2008. It indicated that the intent of the project was to obtain a high school facility to a municipal leaseback program ... on the best possible financial terms at the trier level of service. The terms should also include (a) all interest charges, fees and expenses; . . . (g) the ability of lessor to allow lessee to cancel the lease obligation without penalty, at the end of the current fiscal year in which appropriations were last budgeted or otherwise made legally available, in the even budgetary funds become unavailable for appropriation and future use (event of non-appropriation); (h) ability of lessor to provide one hundred percent (100%) financing for the facility It is the understanding of the Appellant that they were the only ones who indicated in their proposal that the ability of lessor to allow the lessee to cancel the lease obligations without penalty was not

possible. It is also the understanding that this was a major condition in the rating of the proposals. Subsequently, based upon the information provided for the Certificates of Participation, IBC, who had apparently said they would allow the cancellation of the lease without penalty, had modified that condition to now say that this could not occur. Under this situation, there is a question whether who was the most viable proposer has been modified.

Appellant also understands that the proposal for the financing of the project by IBC was for AAA Bonds. At the time of the proposals, IBC did not have AAA bonds available for the project so that they could not include the interest charge fees and expenses that would be required by the Request for Proposal. Indeed, Appellant believes that IBC did not have the ability to provide one hundred percent (100%) financing at the time the proposal was put in place, via AAA Bonds. They sought alternative forms of financing from AAA Bonds that they had proposed and ultimately, have tried to settle or the Certification of Participation B Rating proposal some 5 months after being selected to negotiate with the Government. Therefore, IBC did not meet the requirement of the request for proposal to provide 100% financing at the time the proposal was submitted.

Under Section VIII, 5.1 of the RFP, the proposal provides that the contract will be awarded to the most responsible and responsive proposers whose proposals meet the needs of the Government of Guam to the best degree. Since the IBC proposal proposed to allow the lease to be cancelled, which they ultimately have not been able to provide, and proposed AAA Bonds which are not available, they obviously are not the most responsive and responsible bidders.

Section VIII, 5.6 of the RFP, provides that no proposer shall assign his proposal or any rights, or obligation hereunder without the written consent of the Government of Guam The certificate of participation information submitted to potential buyers in August of 2009, indicates that the lessee is to be CaPFA, and not IBC the proposer. Appellant believes that there is no written consent by the Government of Guam to permit this change.

Finally, Section IX of the RFP provides that if the proposer is a partnership or corporation, it has to be formed legally and is duly authorized to do business in Guam. Appellant is unaware of any documentation which indicates that CaPFA and IBC have formed a partnership, yet they permit documents to be prepared which indicate that CAPFA is to be the lessee, on a lease that has already been signed as of August 1, 2009. This would be in violation of the request for proposal. CaPFA's Business License is not issued for the purpose of rental of property.

The amount of money which is proposed to be obtained through the Certificates of Participation, for the construction of the high school is more than fifty percent (50%) higher than the amount included in the proposal. As Appellant understands this matter, the issue of finances, was almost non-existent in the interviews of the proposers, and the concern of the evaluators was that the tree not be removed and the building be built in a certain configuration, and not the matters set forth in the Request for Proposal. Appellant believes that the evaluators did not follow the criteria as set forth in the Request for Proposal in determining who was the most responsible bidder.

Appellant believes that the tapes and/or transcripts of the proposal meetings will adequately establish that the Rating Committee did not follow the requirements of the Request for Proposal and the Procurement was in violation of the law.

Respectfully submitted this 16 day of October, 2009.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant
**Guam Community Improvement
Foundation, Inc.**

By 

F. RANDALL CUNLIFFE, ESQ.