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DATE: 10/22/09

TIME: 3:55 pm

BY: miol.

BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEAL

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-0005
)	
)	
GUAM COMMUNITY IMPROVEMENT)	APPELLANT'S MOTION TO
FOUNDATION, INC.)	RECONSIDER PROTECTIVE ORDER
)	
Appellant.)	
_____)	

MOTION

Appellant **Guam Community Improvement Foundation, Inc.**, through counsel, **CUNLIFFE & COOK**, A Professional Corporation, by F. Randall Cunliffe, Esq., will move the Public Auditor for reconsideration of its Decision granting Purchasing Agent's Motion for a Protective Order on October 21, 2009.

This Motion is based on the attached Memorandum of Law submitted herewith, the pleadings on file herein, and such other evidence, whether oral or documentary, as will be presented at the hearing on this matter.

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

By *F. Randall Cunliffe*
F. RANDALL CUNLIFFE, ESQ.

MEMORANDUM OF LAW

On October 21, 2009, the Public Auditor issued a Protective Order sealing all proposals submitted which are now part of the procurement record submitted by the Purchasing Agent. The Public Auditor relied on 2 GAR Division 4, Chapter 3, §3114(h)(1) and (i)(2) as a basis for granting the protective order.

The Public Auditor's reliance on any portion of §3114 during these proceedings is misplaced. Section 3114's application is specifically limited to the procurement of services as specified by 2 GAR Division 4, Chapter 2, §2112 which deals with the procurement of the services of accountants, lawyers, dentists and other professionals as defined in 5 GCA §5121. 5 GCA §5121 deals with the procurement of the services of the same lists of professionals as listed in 2 GAR Division 4, Chapter 2, §2112.

Services as used in 5 GCA and 2 GAR Division 4, does not include contracting for the construction of any structure. 5 GCA §5030(s) defines services as:

The furnishing of labor, time or effort by a contractor, not involving the delivery of a specific end product, other than reports which are merely incidental to the required performance.

Since the ultimate purpose of the RFP issued in this matter was for the construction of a school building, the provisions of §3114 for the procurement of services is not applicable.

In support of the Motion for a Protective Order, the Attorney General provided no legal authority, other than §3114, to support its position. The Attorney General apparently disregarded the fact the RFP was for a construction contract, not services. While the Attorney General may argue §3114(f) is the only portion of the Procurement Regulations which discusses the use of an RFP, this does not alter the fact that the specific regulation is limited in its applicability to obtaining services. DPW's failure to promulgate regulations

concerning the use of RFP's in situations other than one for procuring services, does not allow the illegal application of §3114 to the current procurement process. The sealing of a procurement record without specific statutory or regulatory authority would seem to be in violation of 5 GCA §5252 and 2 GAR Division 4 Chapter 3, §3132. When procurement records are arbitrarily sealed without any legal authority, the integrity of the bidding process is definitely called into question, as is the statutory mandate requiring public access to procurement records at the earliest possible time.

While the Legislature directed DPW to issue an RFP for this particular project, the mandate also required DPW to comply with all existing procurement laws. The Legislature also provided DPW in this legislation with the authority to adopt regulations to implement the legislative mandate. Since no specific regulations were promulgated, DPW was left with using existing regulations for the procurement of construction contracts. Under the existing regulations, 2 GAR Division 4 Chapter 3, §3109 (I)(3), a party competing for a Government of Guam contract, other than for services, must designate in writing any portion of the material they are submitting that they claim are trade secrets and/or proprietary data. This designation must be done at the time the documents were filed with the Purchasing Agency. Then the procurement officer must inform the competitor in writing of his decision regarding whether this request will be honored. If this process is not complied, then the entire submission is public at the time all submissions are opened.

The public availability of all records regarding a procurement challenge is consistent with other statutory systems enacted to ensure the public confidence in the actions taken by the Government of Guam. Under the Guam Freedom of Information Act

found at 5 GCA §10101 et seq, there is no exception protecting procurement documents from disclosure to any person who requests them.

Under the Administrative Adjudicative Law, 5 GCA §9200 et seq., a party in an administrative hearing has a right to fully cross examine the individuals about any matters related to the issue before the agency. In this matter, the Attorney General has submitted a list of witnesses and exhibits to allegedly be produced at the hearing on the merits of this appeal. Of the 30 exhibits listed, 16 are followed by the term "proprietary", which theoretically would mean they are covered by the protective order. If counsel for Appellant is prohibited from reviewing the documents, then Appellant will be denied its right to a meaningful hearing as required by the Administrative Adjudication Law.

CONCLUSION

Based upon the above arguments and authority, Appellant respectfully requests the Public Auditor reverse her prior order granting the protective order in this matter.

Respectfully submitted this 22 day of October, 2009.

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

By 
F. RANDALL CUNLIFFE, ESQ.