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 PROCUREMENT APPEALS

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BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:

**GUAM COMMUNITY IMPROVEMENT
 FOUNDATION, INC.**

Appellant.

) DOCKET NO. OPA-PA 09-005
)
)
) **OPPOSITION OF INTERESTED**
) **PARTY INTERNATIONAL**
) **BRIDGE CORPORATION TO**
) **APPELLANT'S MOTION TO**
) **RECONSIDER PROTECTIVE**
) **ORDER**
)

On October 22, 2009, Appellant, Guam Community Improvement Foundation, Inc. ("GCIF"), filed a motion to reconsider the Public Auditor's Decision Re Purchasing Agencies Motion for a Protective Order filed on October 21, 2009 ("OPA D&O"). International Bridge Corporation, an interested party, submits this Memorandum in opposition to the Motion for Reconsideration.

In requesting the Public Auditor to reconsider the Decision and Order granting the Purchasing Agent's Motion Re Purchasing Agency's Protective Order, filed on October 21, 2009, Guam Community Improvement Foundation, Inc., changes course from its initial opposition to the protective order, which focused on the existence of an award, see GCIF Response to Motion For A Protective Order By Purchasing Agency, filed September 23, 2009,

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and argues now that there are simply no procurement regulations that ensure the confidentiality of proposals in this procurement undertaken, as statutorily mandated, as a request for proposals.

In Public Law 29-114, the Legislature authorized the solicitation of Requests for Proposals. Title 5 GCA § 58A105, added by Public Law 29-114, §2, directed, *inter alia*, that “[s]ubject to the approval of *I Liheslaturan Guåhan*, the government of Guam or an Education Agency may solicit Requests for Proposals (‘RFP’) through the Department of Public Works, in compliance with the Guam Procurement Law, for the financing, design and construction of the Education Facility, together with maintenance of the Education Facility over the Lease-Back Period, according to the needs of the Education Agency and consistent with this Chapter.” This section also provided that “[t]he RFP *shall* be issued within thirty (30) days of enactment of this Act for replacement of the John F. Kennedy High School Facility on the existing site. . . .” *Ibid.*

At the time Public Law 29-144 was enacted in October of 2009, the Guam Procurement Law did not generally authorize procurement via the competitive sealed proposal process, the original statutory authorization having been repealed in 1985 which also had the effect of repealing the regulations covering competitive sealed proposals. As described by the Guam Supreme Court in *Fleet Services, Inc. v. Department of Administration, Government of Guam*, 2006 Guam 6:

The competitive sealed bid process is set out in statute at 5 GCA § 5211, and in regulation at 2 GAR Div. 4 § 3109 (1997). Although 5 GCA § 5210(a) states a preference for sealed bidding, in many cases, sealed bidding is the only procedure permitted by law. The exceptions, as indicated above, are limited, and Guam law no longer provides for an alternative to sealed bidding except as provided above. Prior to 1985, government contracts could be awarded using the competitive sealed proposal process previously set forth in 5 GCA § 5212. The Guam Legislature, however, repealed section 5212 when it passed section 8 of Guam Public Law 18-8, which was effective retroactive to April 1, 1985.

Guam Pub.L. 18-8:8 (July 8, 1985); Compiler's Note, 5 GCA § 5210.^{FN3} The repeal of the statute repealed the corresponding regulation, 2 GAR Div. 4 § 3110, relating to competitive sealed proposals.^{FN4} *Georgia v. Heckler*, 768 F.2d 1293, 1299 (11th Cir.1985) (citing *United States v. Larienoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977) (stating that an agency regulation which conflicts with a statute is without any legal effect)); *see also* 2 GAR Div. 4 § 3108, note (1997) (stating that the “[o]riginal subsection (a) repealed “to reflect repeal of competitive sealed proposals and to add reference to exemptions for non-profit organizations.1/1/1999”). Therefore, competitive bidding must be used unless the procurement falls within certain statutory exceptions.^{FN5}

FN3. Specifically, section 8 of Guam Public Law 18-8 repealed Government Code § 6959.2, which is the source of 5 GCA § 5212, governing competitive sealed proposals. The public law stated: “Section 6959.2 of the Government Code is repealed. This Section 8 shall take effect retroactively as of April 1, 1985.”

FN4. For some unknown reason, 2 GAR Div. 4 § 3110, governing competitive sealed proposals, was still included in the 1997 publication of the GAR. However, according to the GAR now available on the Compiler of Laws website, 2 GAR Div.4 § 3110 now relates to procurement from nonprofit organizations. *See* <http://www.guamcourts.org/CompilerofLaws>.

FN5. The relevant inquiry in this case, however, relates to the statutory exception for professional services, found at 5 GCA § 5121 and 2 GAR Div. 4 § 3110. Notably, the exception for professional services is specifically stated again in 5 GCA § 5210(a).

2006 Guam 6, ¶ 15.

As stated in *Fleet Services*, after the repeal of Section 5212 and its corresponding regulations, there was and is no general statutory or regulatory procedure in the Guam Procurement Law for solicitation by way of competitive sealed proposals except the method set forth in 2 GCA § 3114. Consequently, when, with respect to this procurement, the Guam Legislature authorized solicitation by means of the request for proposals process “in compliance with Guam Procurement Law,” 5 GCA § 58A105, the reference to “Guam Procurement Law” was ineluctably to the only remaining procedure for requests for proposals,

namely that under 5 GCA § 5121 and 5 GCA § 5216, pertaining to the procurement of certain services. This reference would also include the regulations promulgated under these Sections which are found at 2 GAR § 3114.¹

As discussed in the Motion for Protective Order and in the Reply to GCIF's opposition to the motion, the procedure set forth in 2 GAR § 3114, including the necessary mandate regarding the confidentiality of proposals and the procurement record until an award is made found in 2 GAR 3114(h), is consistent with procedures for procurement by way of competitive sealed proposals in other jurisdictions and ensures the fair consideration of proposals. The confidentiality requirement is inherent in any competitive evaluation of requests for proposals. As the Public Auditor found in the Decision and Order "not disclosing the proposals at this time is necessary to preserve the integrity of the RFP process because, if the Purchasing Agency and Interested Party IBC are unable to agree on contract terms, then the Purchasing Agency will have to begin negotiations with the next best qualified offeror 2 G.A.R. Div. 4, Chap. 3, § 3114(i)(4)(B)." OPA D&O at 4-5.

GCIF's argument, followed to its logical conclusion, would result in the disclosure of proposals virtually at the time they were submitted completely undermining, if not precluding, the competitive consideration of proposals provided for in Public Law 29-114.

¹ The Legislature in providing for procurement through the request for proposals process recognized that this was far more than a construction contract, and that the ability of the offeror to obtain financing that would allow the government to pay for the project over time was of paramount importance, a criterion mirrored in the RFP. As such, the Legislature would view the procurement as entailing in principle part the selection of a party that demonstrated an ability to obtain this necessary financing which, under the two-part balancing test in *Fleet Services*, that is, the status of the service provider and the service or act provided, *see Fleet Services*, 2006 Guam 6, at ¶¶ 25-27, weighed in favor of treating this procurement as one for services under 5 GCA § 5121 and 2 GAR § 3114. In any event, the Legislature clearly intended the existing provisions of the Guam Procurement Law governing requests for proposals to apply to the JFK procurement, so it is unnecessary to examine whether, if there had not been the authorization in Public Law 29-144 for request for proposals, the procurement would have fallen under 5 GCA § 5121 and 2 GAR § 3114. International Bridge Corporation submits that, viewing the procurement as a whole, it would have come within these sections even in the absence of the statutory authorization.

GCIF's suggestion that the Legislature intended that the government diverge from the existing procurement law and promulgate regulations for this procurement, *see* GCIF Motion for Reconsideration, apparently referring to but not citing 5 GCA § 58A112, added by Public Law 29-114, §2, is inconsistent with the procurement law and with common sense since the solicitation had to be issued within 30 days of the effective date of Public Law 29-114. Because the procurement procedure to be applied as specified in Public Law 29-114, 5 GCA § 58A105, was and is the "Guam Procurement Law," the authority to issue regulations, if needed, in 5 GCA § 58A112, obviously pertains to other aspects of the administration of the leases, the school, and the project after award. The procedure set forth in 2 GAR § 3114 is necessary and sufficient for this procurement.

For the foregoing reasons, GCIF's Motion for Reconsideration should be denied.

Respectfully submitted this 27 day of October, 2009.

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