

**CABOT
MANTANONA LLP**
Edge Building, Second Floor
929 South Marine Corps Drive
Tamuning, Guam 96913
Telephone: (671) 646-2001
Facsimile: (671) 646-0777

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

JUL 09 2010
TIME: 3:40 PM BY: AC
FILE NO. OPA-PA: 10-003

Attorney for Appellee, Guam Community College

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

In the Matter of Appeal of)	Docket Number: OPA-PA-10-003
EONS ENTERPRISES CORP.,)	
)	
Appellant)	
)	AGENCY REBUTTAL TO
)	APPELLANT'S COMMENTS ON
)	AGENCY REPORT
)	

INTRODUCTION

Appellee Guam Community College, (hereinafter "GCC"), by and through its attorney, Sarah A. Strock, of Cabot Mantanona LLP, respectfully submits this Agency Rebuttal pursuant to 2 G.A.R.R. Division 4, § 12104(c)(4) in response to the Comments On Agency Report filed by Appellant Eons Enterprises Corp. (hereinafter "Eons") on July 2, 2010. Appellant Eons substantively comments only on sections (a), (f), (g), and (h) of Appellant's Agency Report. Accordingly, this Rebuttal will only address those specific sections.

REBUTTAL ON APPELLANT'S COMMENTS

I. Section (a) of the Agency Report: Eons did not file a protest with GCC.

In the Comments to Agency Report, Eons asserts that their May 3, 2010 letter (attached as Exhibit "A") requesting a "re-evaluation of the bid awards" from GCC was a sufficient protest for six different reasons:

1. The letter "clearly rejects" the award,
2. The letter identifies Eons as the protestor,
3. The letter refers to the relevant bid,
4. The letter asks for reevaluation of bids,
5. The letter was authored by a non-lawyer who did not know the formal requirements of a protest, and
6. There is no "form of formal protest document" available online.

First, the letter does not clearly reject the reward. The letter was only three sentences long and only asked for a "reevaluation" of the bids since Eons submitted the lowest bid. See Exhibit "A". Asking for a "reevaluation" is not a clear rejection, nor is it a formal protest. See discussion *infra*.

Second, the letter did not identify Eons *as a protestor* because the letter did not contain any protest language (such as "protest," "protestor," "protesting," "protestant," etc.) that would alert GCC to recognize that the letter was intended as a formal protest, as required by 2 G.A.R. § 9101(c)(3). The letter only identified Eons as the party requesting a "reevaluation," as opposed to the required "protestor."

Third, the letter did identify the relevant bid. However, most business letters identify the subject matter of a letter, and the mere reference to the bid in the May 3 letter did not put GCC on notice that Eons intended the letter to be considered a formal protest and thereby trigger the relevant timelines and procurement rules.

Fourth, requesting a "reevaluation" is not a sufficient formal protest. The minimum requirements for a protest are found in 2 G.A.R. § 9101(c):

(c) Filing of Protest.

(1) When Filed. **Protests shall be made in writing** to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, **and shall be filed in duplicate within 14 days after the protestor knows or should have known of the facts giving rise thereto.** A protest is considered filed when received by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Protests filed after the 14 day period shall not be considered.

(2) Subject of Protest. Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

(3) Form. To expedite handling of protests, the envelope should be **labeled "Protest."** The **written protest** shall include as a minimum the following:

(a) **the name and address of the protestor;**

(b) **appropriate identification of the procurement, and, if a contract has been awarded, its number;**

(c) a statement of **reasons for the protest;** and

(d) **supporting Exhibits, evidence, or documents** to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

(4) Notification of the Attorney General. The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall submit a copy of the protest to the Attorney General within three days of the receipt of the written protest. (Emphasis added)

Eons' May 3, 2010 letter was not a sufficient protest. The letter did not use the word "protest," it did not contain the contract award number, it did not contain a statement of reasons, it did not have supporting evidence, it did not request reasons why Eons' bid was rejected, and was not filed in duplicate within 14 days after Eons knew of the award. It was three sentences long and merely requested a reevaluation of the bids, which does not comply with the minimum legal requirements established by 2 G.A.R. § 9101(c).

Fifth, it does not matter that the May 3, 2010 letter was drafted by a non-lawyer, who did not know the formal legal requirements of a protest. Ignorance of the law is not

an excuse. See May v. People of Guam, 2005 Guam 17 at ¶ 28. If ignorance of the law was an acceptable excuse, undoubtedly, agencies and courts would see it used regularly as a defense, and there would be little use for lawyers. There is no statutory or common law exception for compliance with 2 G.A.R. § 9101(c) for non-lawyers. In this case, the May 3, 2010 letter did not meet the minimum legal requirements of a protest, so it is irrelevant that a non-lawyer from Eons who did not know the legal requirements of 2 G.A.R. § 9101(c) drafted the May 3, 2010 letter.

Sixth, the law does not require that a government agency, legislature, or entity provide a "form of formal protest document" online. The lack of an online template for a formal protest does not justify deviating from the minimum legal requirements in 2 G.A.R. § 9101(c). If Eons wanted its May 3, 2010 letter to serve as a formal protest, then Eons could have asked its legal counsel to prepare the letter on their behalf or review it before sending it to GCC.

Therefore, the Agency Report is correct that no protest was made. The May 3, 2010 letter was not a formal protest. It was a mere request. The May 3, 2010 letter did not comply with the minimum legal requirements as explained above and there is no legal justification for deviating from the statutory requirements in this case.

II. Section (f) of the Agency Report: GCC did not issue a formal decision.

In the Comments to Agency Report, Eons admits that "technically" GCC did not issue a formal decision. The letter dated May 10, 2010 and received by Eons on May 24, 2010 (Attached Exhibit "B") was not a formal decision to a protest. Instead, it was a polite response to Eons' May 3, 2010 letter. Therefore, the May 10, 2010 letter should not be viewed as a decision on Eons' protest.

Since GCC did not issue a formal decision, the Public Auditor does not have jurisdiction to hear this appeal. Eons states that they are reserving comments on this issue for their Opposition to Appellee's Motion to Dismiss. GCC will accordingly reserve their reply to this topic until after Eons' Opposition is received.

III. Section (g) of the Agency Report: Eons was not the lowest most responsive, responsible bidder and GCC has the authority to conduct their own construction procurement.

The parties agree that Eons was the lowest bidder. However, Eons was not the most responsive bidder or a responsible bidder in their bid. First, Eons was not a responsive bidder because their bid did not conform in all material respects to the IFB since it did not contain a copy of their business license or specialty contractor license for typhoon shutters. In the General Terms and Conditions of the IFB (section 2 of the Procurement Record, and attached as Exhibit "C") cautioned bidders that the GCC "will not consider for award any offer submitted by a bidder who has not complied with the Guam Licensing Law." Additionally, in the IFB's Special Reminder to Bidders (section 2 of the Procurement Record and attached as Exhibit "D"), GCC reminded bidders to submit a copy of their business license and contracting license in the bid envelope.

A "responsive bidder" is one who submits a bid that conforms in all material respects to the IFB. 5 G.C.A. § 5201(g) (emphasis added). Responsiveness is determined "only on the basis of information submitted with the bid, on the facts available at the time of the bid opening." In the Appeal of J&G Construction, OPA-PA-07-005 at 6 (emphasis added), 5 G.C.A. 5201(g) and 2 G.A.R. DIV 4 Chap. 2 § 3109(n)(1). A bid that fails to meet the acceptability requirements shall be rejected as nonresponsive. 2 G.A.R. § 3109(n)(3). In this case, the IFB clearly stated that the

bidder needed to submit a business license in the bid envelope. See Exhibit "D." The IFB also said that bidders needed to be in compliance with all licensing requirements or they would not be considered for an award. See Exhibit "C." According to J&G Construction, GCC may determine whether or not a bid is responsive, only on the basis of information submitted in the bid envelope at the time of the bid opening. Therefore, GCC may determine Eons' bid as nonresponsive because Eons did not submit their business license or typhoon shutter installation license in the bid envelope.

The Public Auditor declared that a bid is not responsive where the IFB required a valid contracting license, including a C41 (reinforcing steel classification) license and resumes of key personnel, but the bidder failed to provide the specialty C41 license and resumes of key personnel in the bid envelope. In the Appeal of Dick Pacific, OPA-PA 07-007. The Public Auditor found that the specialty license and resumes of key personnel were material requirements of the IFB based on the clear language of the bid saying that the omission of these requirements would result in the disqualification and rejection of the bid. Id. at 8. Similarly, in this case, a business license and a contracting license to install typhoon shutters were material requirements of GCC's IFB. The requirement of submitting a business license and contracting license to perform the work in the IFB specifically stated that the omission of these requirements would result in rejection of the bid. See Exhibit "C." Since Eons failed to provide these documents in the bid envelope, according to the reasoning in Dick Pacific, GCC may determine that Eons' bid failed to conform in all material elements to the IFB, and find that Eons' bid was nonresponsive.

Eons points out that GCC can waive minor irregularities in the bids received. (Emphasis added.) GCC opted not to waive Eons' irregularities in this bid. See Exhibit "E."

In addition to being non-responsive, Eons was not a responsible bidder. "Unlike responsiveness decisions, responsibility determinations are based on the information supplied or available up to the time of award." In the Appeal of J&G Construction. 2 G.A.R. § 3116 (b)(4) states that: "[b]efore awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible."

2 G.A.R. § 3116 (b)(2) states the standards of responsibility:

Standards of Responsibility.

(A) Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

(i) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

(ii) a satisfactory record of performance;

(iii) a satisfactory record of integrity;

(iv) qualified legally to contract with the territory; and

(v) supplied all necessary information in connection with the inquiry concerning responsibility. 2 G.A.R. § 3116 (b)(2) (emphasis added.)

GCC was not satisfied that Eons was a responsible bidder because Eons did not submit a business license or a contractor's license to install typhoon shutters. By failing to provide their business license and contractor's license to install typhoon shutters, GCC determined that Eons was not able to legally contract with the territory to install the typhoon shutters because it did not supply all of the relevant information concerning its ability to install the typhoon shutters.

On April 7, 2010, GCC evaluated all of the bids and made a written determination that Eons was not a responsible bidder and therefore disqualified from receiving the reward. See Exhibit "E." On April 26, 2010, GCC's procurement officer, Joleen Evangelista confirmed with the Contractor License Board that Eons did not have a contracting license to install typhoon shutters at that time. See Exhibit "E." In fact, Eons did not obtain their C68 (shutter installation) license until June 29, 2010. See Exhibit "F." To date, Eons has still not submitted a copy of their business license. After confirming that Eons did not in fact have a license to install typhoon shutters with the Contractor License Board, GCC awarded the contract to Alliance Metal Specialties on April 26, 2010. Therefore Eons was not a responsible bidder and is disqualified from being awarded the contract.

Eons further insists that GCC is not authorized to procure its own construction contracts, and relies on In the Appeal of the Z4 OPA Opinion filed on May 5, 2010. OPA-PA-09-012. Eons' reliance on this opinion is misplaced for two reasons. First, the IFB in this case is not a construction contract. The IFB is to *install* typhoon shutters, not to construct them. Second, even if this is a construction contract, GCC does have the authority for procuring its own construction, services, and supplies contracts.

Eons argues that Z4 held that neither DOE nor GSA had the construction expertise to handle construction procurement. Eons does not cite a page number in this opinion to support this claim. In Z4, the Public Auditor did not hold that DOE lacked the authority to procure its own construction contracts. On the contrary, DOE itself decided that they lacked the qualified personnel to determine whether the

submitted bids complied with the technical specifications. In the Appeal of the Z4 at 3, and FN 8. The sole purpose that DOE decided to outsource the IFB review in Z4 was because DOE themselves determined that they lacked the qualified personnel. In the Appeal of the Z4 at 3-6. Contrary to what Eons argues, the Public Auditor held that DOE does in fact have the authority to handle procurement for supplies, services, **and construction** contracts. In the Appeal of the Z4 at 11 (emphasis added). The Public Auditor also held that DOE may delegate this authority to another agency, however DOE could not delegate the procurement of construction contracts to GSA, but could delegate the procurement of construction contracts to DPW. In the Appeal of the Z4 at 11-12. The Public Auditor did **not** hold that DPW is the **only** agency that can handle the procurement of **all** government construction contracts on Guam.

Similar to DOE, GCC is authorized to promulgate its own procurement regulations. 5 G.C.A. §§ 5125 and 5131. However, unlike DOE in the Z4 case, GCC did not decide that they lacked the qualified personnel to determine whether or not the bids for typhoon shutter installation complied with technical specifications. In fact, the specifications for typhoon shutter installation are relatively simple. Eons cites no authority and provides no evidence to support its claim that GCC lacks the necessary expertise to conduct procurement for the installation of typhoon shutters. GCC did not delegate any of its procurement authority to another agency. Since GCC did not delegate its procurement authority, the holding in Z4 is inapplicable. Accordingly, GCC has the authority for procurement of its own construction (and services and supplies) contracts. Therefore, GCC's IFB for typhoon shutters is valid.

IV. Section (h) of the Agency Report: Eons did not file a protest with GCC, therefore GCC is not required to make a determination as required by 2 G.A.R. § 9101(e).

The award was issued to Alliance Metal Specialties on April 26, 2010 and acknowledged on April 27, 2010. No formal protest was filed by Eons. See analysis in section I supra.

CONCLUSION

This Appeal should be dismissed because OPA lacks jurisdiction to hear this appeal since Eons never filed a formal protest and GCC never issued a final determination in response to such protest. If the Public Auditor decides she has jurisdiction over this Appeal, Eon's Appeal should be denied because Eon's was not the lowest, responsive, and responsible bidder. GCC has the authority for procurement of services, supplies, and construction contracts on public property so GCC's IFB in this case was valid. Therefore, GCC respectfully requests that the Public Auditor dismiss this Appeal and award all legal and equitable remedies that GCC may be entitled to as a result.

Respectfully submitted this 9th day of July, 2010.

By:

CABOT MANTANONA LLP
Attorney for Guam Community College


SARAH A. STROCK



EONS ENTERPRISES CORP.
121 East Liguán Avenue
Dededo, Guam 96929
Tel: (671) 637-6869
Fax: (671) 637-6871, E mail : eonscons@ite.net

Guam Community College
MATERIAL MANAGEMENT

RECEIVED

MAY 03 2010

2:35pm

Initials: *J. Evangelista*
Forwarded to: _____
Date Forwarded: _____

Date: May 3, 2010

To: Joleen M. Evangelista
Procurement & Inventory Administrator
Guam Community College
Mangilao, Guam

Subject: REQUEST FOR RE EVALUATION OF THE BID AWARDS
Re: Install Typhoon Shutters at the Student Services and Administration
Building (Building 2000)
GCC-FB-10-009

Madam,

This is connection with the bid status send to us dated April 26, 2010 as hereto attached.

We respectfully request for consideration for re evaluation of the bids of the above referenced project due to fact that we submitted the lowest bid to the project which should have been considered as it is most favorable to the government.

We greatly appreciate you consideration on this matter.

Sincerely,

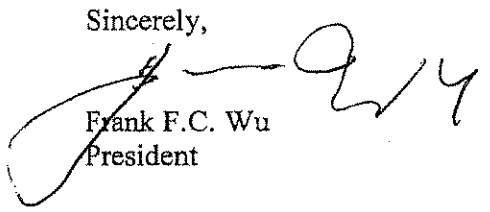

Frank F.C. Wu
President

EXHIBIT A



Kulehon Kunitiddat Guahan

Accredited by the
Western Association of
Schools and Colleges

11/10/2010
P

May 10, 2010

To: Frank F.C. Wu
President
EONS ENTERPRISES CORP.
121 East Liguan Avenue
Dededo, Guam 96929

VIA: Joleen M. Evangelista, Procurement & Inventory Administrator
Jose Quitugua, Facilities Coordinator
Carmen K. Santos, Vice President Business & Finance

Subject: Request for reevaluation of the bid awards
GCC-FB-10-009 (Install Typhoon Shutters at the Student Services and
Administration Building – Building 2000)

Dear Mr. Wu,

This letter is to advise you that the Guam Community College received your letter dated May 3, 2010 regarding the above. GCC has evaluated the bids in detail and remains firm in its decision on the award. Please note that the bids are evaluated based on the lowest, responsive and responsible bid.

We thank you for your participation in this bid and encourage you to participate again in the future.

Sincerely,

Mary A. Y. Okada
President

EXHIBIT B.

GENERAL TERMS AND CONDITIONS
SEALED BID SOLICITATION AND AWARD
Only items marked "X" are applicable to this bid.

(X)1. AUTHORITY:

This solicitation is issued subject to all the provisions of Title VII-A of Government Code (Guam Procurement Act) and the Guam Procurement Regulations (copies of both are available at the Office of the Compiler of Laws, Department of Law, copies available for inspection at the Guam Community College). It requires all parties involved in the preparation, negotiation, performance, or administration of contracts to act in good faith.

(X)2. GENERAL INTENTION:

It is the declared and acknowledged intention and meaning of these General Terms and Conditions for the bidder to provide Guam Community College with specified services or with materials, supplies or equipment completely assembled and ready for use.

(X)3. TAXES:

Bidders are cautioned that they are subject to Guam Income Taxes as well as other taxes on Guam Transactions. Specified information on taxes may be obtained from the Director of Revenue and Taxation.

(X)4. LICENSING:

Bidders are cautioned that the College will not consider for award any offer submitted by a bidder who has not complied with the Guam Licensing Law. Specific information on licenses may be obtained from the Director of Revenue and Taxation.

(X)5. LOCAL PROCUREMENT PREFERENCE:

All procurement of supplies and services where possible, will be made from among businesses licensed to do business on Guam in accordance with Section 6950-7 of Title VII-A of the Government Code and Section 1-104 of the Guam Procurement Regulations.

(X)6. COMPLIANCE WITH SPECIFICATIONS AND OTHER SOLICITATION REQUIREMENTS:

Bidders shall comply with all specifications and other requirements of the Solicitation.

(X)7. "ALL OR NONE" BIDS:

Unless otherwise allowed under this solicitation, "all or none" bids shall be deemed to be non-responsive. If the bid is so limited, the College shall not reject part of such proposal and award on the remainder. The whole bid must be rejected.



GUAM COMMUNITY COLLEGE

Kolehon Komunitat Guahan
Accredited by the
Western Association of
Schools and Colleges

GCC Guam Community College

P.O. BOX 23069

GMF, BARRIGADA, GUAM 96921

Accountability • Impartiality • Competence • Openness • Value

INVITATION FOR BID (IFB) NO.: GCC-FB-10-009

DESCRIPTION: **Install Typhoon Shutters at the Student Services and Administration Building (Building 2000)**

SPECIAL REMINDER TO PROSPECTIVE BIDDERS

Bidders are reminded to read the Sealed Bid Solicitation and Instructions, and General Terms and Conditions attached to the IFB to ascertain that all of the following requirements checked below are submitted in the bid envelope, **in duplicate**, at the date and time for bid opening.

- BID GUARANTEE (15% OF BID AMOUNT)** - May be in the form of;
 - a. **Cashier's Check or Certified Check**
 - b. **Letter of Credit** (must not expire no earlier than ninety (90) days from the date of submittal)
 - c. **Surety Bond - Valid only if accompanied by:**
 - 1. Current Certificate of Authority issued by the Insurance Commissioner;
 - 2. Power of Attorney issued by the Surety to the Resident General Agent;
 - 3. Power of Attorney issued by two (2) major officers of the Surety to whoever is signing on their behalf.
- STATEMENT OF QUALIFICATIONS;**
- SAMPLES;**
- BROCHURES/DESCRIPTIVE LITERATURE; PLEASE TAB ALL DESCRIPTIVE LITERATURE AND NOTATE ITEM NUMBERS FOR EASE OF REFERENCE DURING EVALUATION**
- AFFIDAVIT OF DISCLOSURE OF MAJOR SHAREHOLDERS** - Must comply with the following requirements:
 - a. The affidavit must be notarized and dated on the same month as the bid opening;
 - b. date of signature of the person authorized to sign the bid and the notary date must be the same.
- LOCAL PROCUREMENT PREFERENCE APPLICATION (See attached) (Non-completion of this application form is not a basis for rejection.)**
- NON-COLLUSION AFFIDAVIT**
- OTHER REQUIREMENTS: CURRENT BUSINESS/CONTRACTORS LICENSE**

This reminder must be signed and returned in the bid envelope together with the bid. Failure to comply with the above requirements will mean a disqualification and rejection of the bid. On this ___ day of _____, 2010, _____ acknowledge receipt of this special reminder to prospective bidders with the above referenced IFB.

Bidder Representative's Signature

EXHIBIT D

GUAM COMMUNITY COLLEGE
FACILITY MAINTENANCE
BID EVALUATION FOR RFB: INSTALL TYPHOON
SHUTTERS AT THE STUDENT SERVICES AND ADMINISTRATION
BUILDING (BLDG. 2000)
GCC-FB-10-009
April 7, 2010

1. The following companies submitted bids in the amounts shown:
 - a. Eons Enterprise Corp. - \$58,870.00
 - b. Alliance Metal Specialties - \$60,130.15
 - c. Premier International Inc. - \$64,126.71
 - d. Equatorial Manufactory Inc. - \$66,380.00
 - e. Leading Tech Construction Co. - \$87,532.00
 - f. Loyal Pacific Corporation - \$89,764.00

2. Eons Enterprise Corp., the lowest bidder for this project, did not submit a Business License. Furthermore, per the Contractor's License included in the bid package, this bidder is not authorized to install typhoon shutters. This company is disqualified from award for these reasons.

3. The lowest responsive and responsible offerer was Alliance Metal Specialties with a bid of \$60,130.15. As a result of having met RFB requirements and being the lowest bidder for this project, I recommend that Alliance Metal Specialties be awarded the contract to perform the requested services for GCC provided that our Contracting Office review their procurement regulations and that all is found in order.

Submitted by: Joe Quitugua
Facility Maint./Planning Cdr.
Facility Maintenance
ASD, Guam Community College

(conference call w/ Joe Quitugua)
4/26/10 spoke to Ray Borja from
CLB and confirmed that
EON's does not have the
specialty license class for
shutter installation.
Jmavangelista

2011

CONTRACTOR'S LICENSE

FELIX P. CAMACHO
Governor of Guam

MICHAEL W. CRUZ
Lt. Governor of Guam

Pursuant to the provisions of Chapter VII Title XI of the Government of Guam and the Rules and Regulations of the Contractors License Board, the Executive Director of Contractors hereby issues this license to:

Frank F.C. Wu

RME For: Eons Enterprises Corporation

To engage in the business or act in the capacity of a contractor in the following classifications

**A,B,C13,C13A,C15,C18,C19,C37,C42,C55 &
C68 (Epoxy Coating/Injection, Shutter Installation)**

This license is the property of the Executive Director of Contractors, not transferable, and shall be returned to the Executive Director upon demand when suspended, revoked, or invalidated for any reason. It becomes void if not renewed on or before the expiration date.

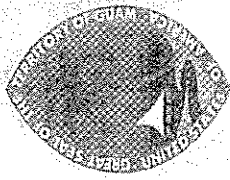
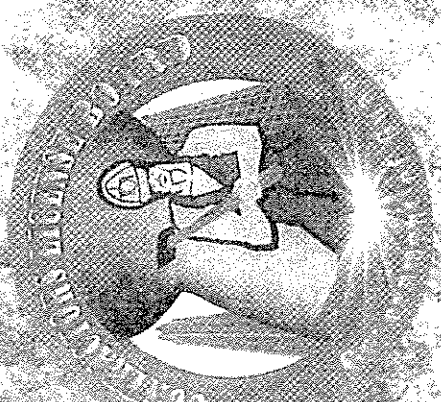
[Signature]
Signature of RME
RME # 1264

[Signature]
Signature of LICENSEE
License #

GRT # Certificate # R-0610-0988

Issued: June 29, 2010

Expires: June 30, 2011



[Signature]
THOMAS A. MORRISON
EXECUTIVE DIRECTOR

[Signature]
RICHARD QUIAMBAO
BOARD CHAIRMAN

EXHIBIT F