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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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TIME: 3:00  AM  PM BY: [Signature]  
FILE NO OPA-PA: 13-004

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
HAGÁTÑA, GUAM

IN THE APPEAL OF K CLEANING ) OPA-PA-13-004  
SERVICES )  
)  
)  
APPELLANT ) **AGENCY REPLY**  
) **TO APPELLANT'S COMMENTS**  
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**COMES NOW** the Guam International Airport Authority, by and through Counsel Fisher & Associates, and submits a Reply to Appellant's Comments on an Agency Report.

**\*\*\* REPLY\*\*\***

As has been said many times throughout this appeal, the Guam International Airport Authority (GIAA) issued an Invitation for Bids which states the time and place for receiving bids was at the office of the Executive Manager. The solicitation never states that bids will be received at the Airport conference room. K Cleaning failed to carefully read the solicitation, made a mistake, and as a result submitted a bid out of time.

Importantly, K Cleaning actually knew that the appropriate place to submit bids was at the office of the Executive Manager. On 07 February 2013, K Cleaning, represented by Mr. Dubidato Conlu, attended a mandatory pre-bid conference. This pre-bid conference was held in GIAA conference room #3, the same room in which bids would eventually be opened. See

1 *Agency Procurement Record at Tab A.* At that conference, Mr. Frank Taitano of the GIAA  
2 stated,

3 “[p]lace of submission of your proposals would be our admin office, 3<sup>rd</sup> floor, the  
4 same location where packages were picked up.”, and

5 “It’s important that you get your bids up there before 2”

6 *See Id at Tab C (recording located at Office of Public Accountability) at 01:50 et seq., and*  
7 *Declaration, Frank Taitano, attached hereto.* K Cleaning was told, and had actual  
8 knowledge, that the place of submission was the office of the Executive Manager<sup>1</sup>; it was  
9 never told that the place of submission was at a conference room, and giving K Cleaning the  
10 greatest benefit of doubt, it was told at a minimum that the place to submit bids was not the  
11 place where it eventually brought its bid to be opened (“get your bids *up there* before 2”).

12 The language of the solicitation instructed bidders to submit bids “as described in the  
13 bid documents” (*Agency Procurement Record, Tab F, General Information*) which document  
14 said “[s]ealed bids in triplicate will be received at the office of the GIAA Executive Manager .  
15 . . .” *Id at Instruction to Bidders.* K Cleaning asserts that the Invitation is unclear because “[i]t  
16 directs the bidder to submit its bids as indicated in the IFB” and that “[t]he only thing the IFB  
17 mentions regarding the Office of the Executive Manager is the location to pick up the bid  
18 package.” *Comments at p.5.* This of course is untrue. The IFB’s instructions specifically  
19 state bids will be received at the office of the Executive Manager. *See Id.* K Cleaning merely  
20 attempts to restructure the Invitation for Bids to exclude the instructions to bidders.<sup>2</sup>

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23 <sup>1</sup> The Executive Manager’s office is an office within the administrative suite.

24 <sup>2</sup> In the normal course of things, one would suppose a section entitled “Instruction to Bidders”  
25 invites the closest attention. K Cleaning apparently declined that “invitation” and made a  
mistake.

1 Appellant's comments to the Agency Report reveal (for them) a dilemma. If they rely  
2 too heavily on the assertion of an ambiguity, they risk running upon the shoals of waiver; if  
3 they disclaim an ambiguity, they must acknowledge they made a mistake. K Cleaning threads  
4 the needle in this fashion;

5 But these instructions read along with the invitation for bid and the general  
6 information **clearly create an ambiguity** in the whole bidding process that took place  
7 on March 29, 2013.

8 At that time and place the bids were to be submitted and opened, K Cleaning did not  
9 believe there was any ambiguity and that the process was to take place at the  
10 conference room. **If K Cleaning had believed the instructions were unclear**, it  
11 would have raised the issue prior to the date the bids were to be submitted and opened.

12 *Appellant's Comments at p. 2*

13 Two points can be drawn from these comments; K Cleaning believes there is a clear  
14 ambiguity in the solicitation ("clearly create an ambiguity") and K Cleaning failed to  
15 recognize it ("If K Cleaning had believed the instructions were unclear, . . ."). In other  
16 words, K Cleaning failed to notice what it says is a clear ambiguity. This is a problem for it.

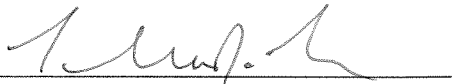
17 Accepting, *arguendo*, K Cleaning's assertion of clear ambiguity as true, then it was  
18 required to seek clarification prior to bid opening. As the Court of Federal Claims states, "If  
19 the ambiguity is patent, a government contractor has a duty to seek clarification from the  
20 government, and its failure to do so precludes acceptance of its interpretation. In other words,  
21 a party who has the opportunity to object to the terms of a government solicitation containing  
22 a patent error and fails to do so prior to the close of the bidding process waives its ability to  
23 raise the same objection subsequently in a bid protest." *J.C.N. Const., Inc. v. U.S.*, 107  
24 *Fed.Cl. 503, 512 (Fed.Cl., 2012)*. Here, K Cleaning states that the ambiguity is "clear". It  
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1 was required therefore to seek clarification prior to bid opening. Having failed to do so, it has  
2 waived the argument.

3 K Cleaning asks that its mistake be forgiven and, in a broad appeal to equity, that it be  
4 awarded the contract. "Equity" in such a result is only dimly reflected. Like all others, K  
5 Cleaning received and was given a chance to review the solicitation. K Cleaning, like all  
6 others, **was told** at a pre-bid conference where its bids were to be submitted. Where is the  
7 equity in depriving a bidder who followed the rules of a fairly won contract in order to  
8 assuage K Cleaning's disappointment and relieve it of the consequence of mistake?

9 **WHEREFORE** GIAA asks that this Office find for the Agency in this appeal.

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11 **FISHER & ASSOCIATES**

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15 For Guam International Airport  
16 Authority  
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