

**LAW OFFICES
CUNLIFFE & COOK**
Suite 200
210 Archbishop Flores Street
Hagåtña, GU 96910
Telephone: (671) 472-1824
Telecopier: (671) 472-2422

Attorneys for: Appellant

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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 9-19-2013

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FILE NO OPA-PA: 13-004

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGATNA, GUAM**

IN THE APPEAL OF K CLEANING) OPA-PA-13-004
SERVICES,)
)
APPELLANT.) **APPELLANT'S SECOND AMENDED**
) **HEARING BRIEF**
)
_____)

Pursuant to the Order After Hearing/Scheduling Order dated August 27, 2013, Appellant K Cleaning Services ("K Cleaning") files this Second Amended Hearing Brief. K Cleaning incorporates Appellant's Amended Hearing Brief filed July 17, 2013, Appellant's Hearing Brief filed June 14, 2013, and its Statement of Grounds for Appeal filed with its Notice of Appeal on May 8, 2013. K Cleaning incorporates all of the points and arguments raised in these previously filed documents in this Second Amended Hearing Brief as if set forth herein. K Cleaning also incorporates its designation of anticipated witnesses and proposed exhibits set forth in Appellant's Hearing Brief filed June 14, 2013. Appellant's Statement of Grounds for Appeal, Appellant's Hearing Brief and Appellant's Amended Hearing Brief are attached hereto for the Office of Accountability's reference.

Respectfully submitted this 19th day of September, 2013.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant

By 

JEFFREY A. COOK, ESQ.

MAY 09 2013

TIME:

11:00 AM

REC'D BY:

[Handwritten signature]



OFFICE OF THE PUBLIC AUDITOR

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PROCUREMENT APPEALS

DATE: 05/08/13

TIME: 4:17 AM PM BY: C. Roque

Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

FILE NO OPA-PA: 13-004

PART I- To be completed by OPA

In the Appeal of)	
)	NOTICE OF APPEAL
K Cleaning Services)	
(Name of Company), APPELLANT)	Docket No. OPA-PA: _____
)	

PART II- Appellant Information

Name: K Cleaning Services

Mailing Address: c/o Law Offices Cunliffe & Cook
Suite 200, 210 Archbishop Flores St., Hagatna, Guam 96910

Business Address: Post Office Box 7271
Tamuning, Guam 96931

Daytime Contact No: (671) 472-1824 Jeffrey A. Cook, Esq.

PART III- Appeal Information

- A) Purchasing Agency: Antonio B. Wonpat International Airport Authority (GIAA)
- B) Identification/Number of Procurement, Solicitation, or Contract: IFB No. GIAA-001-FY13
- C) Decision being appealed was made on April 18, 2013 (date) by:
 Chief Procurement Officer Director of Public Works Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
 (Please select one and attach a copy of the Decision to this form)
- Decision on Protest of Method, Solicitation or Award
 - Decision on Debarment or Suspension
 - Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 - Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

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 Date: 5/8/13
 Time: 4:40 p.m. By: *[Signature]*

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

GCM	Service Masters
Able Industries	USG
PWS	
MTO	
JJ	

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

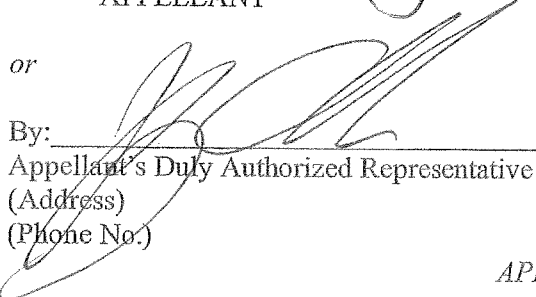
Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 8 day of May, 2013.

By: 
APPELLANT

or

By: 
Appellant's Duly Authorized Representative
(Address)
(Phone No.)

APPENDIX A

ATTACHMENT

On March 29, 2013, GIAA received bids for custodial services as contained in Invitation for Bid IFB No. GIAA-001-FY13. On information and belief there were nine (9) bidders whose bids were accepted by GIAA and there were two (2) bidders whose bids were not accepted by GIAA because they were determined to be late by GIAA. One of those bidders is Appellant.

The basis for GIAA not accepting Appellant's and others bid package was that GIAA stated the Invitation for Bid required that the bid package be received at the office of the GIAA Executive Manager. However, the Invitation for Bid did not state this requirement. The Invitation for Bid, stated in pertinent part, "Deadline for submission is 2:00 p.m. Friday, February 15, 2013 at which time and place all bids will be publicly opened and read aloud at the GIAA Conference Room. All bids received after deadline of submission specified above, will not be considered." A copy of which is attached as Exhibit "A". The February 15, 2013 date had been continued to the March 29, 2013 date. On March 29, 2013 at 1:30 p.m. a representative of Appellant, K Cleaning Services, along with representatives of at least one other bidder were at the GIAA Conference Room to submit their bid packets for opening as directed in the Invitation for Bid. A little after 2:00 p.m. a GIAA representative came to the GIAA Conference Room and informed Appellant's representative that Appellant's bid was late and would not be accepted. Later, while the rest of the bidders bid proposals were being read, GIAA decided to accept the bid package from Appellant but did not publicly open it.

The Information for bid General Information also included language regarding the time and place for receiving the bids. It stated, "As described in the bid documents until 2:00 p.m., Friday, February 15, 2013, at GIAA, at which time and place, all bids will be publicly opened and read aloud at the GIAA Conference Room. Bids received after indicated time and date, will not be considered." A copy of the General Information page containing this information is attached as Exhibit "B".

In the Instruction to Bidders section of the Invitation for Bid it stated, "Sealed bids in triplicate will be received at the office of the GIAA Executive Manager as indicated in the INVITATION FOR BID at which time and place, all bids will be publicly opened and read aloud." (Emphasis in original). A copy of the Instruction to Bidders is attached as Exhibit "C".

Based on this confusing language in the Invitation for Bid, Appellant's representative was at the GIAA Conference Room as noted in the Invitation for Bid to have the bids opened and read aloud. On April 4, 2013, Appellant filed a protest with GIAA pointing out the ambiguity of the Invitation for Bid as the explanation for why their representative was at the Conference Room and not at the Executive Office. A copy of the Protest letter of April 4, 2013 is attached as Exhibit "D". On April 22, 2013, Appellant received a rejection letter from GIAA dated April 18, 2013 stating that the bid was not ambiguous and therefore the protest was rejected. A copy of the rejection letter is attached as Exhibit "E".

Based on this rejection, Appellant files this appeal with the OPA.

Appellant notes that the April 18, 2013 rejection letter, which is GIAA's decision as required by 5 GCA §5425(c) states the reasons for the action taken by GIAA, but fails to inform the Appellant of its right to administrative and judicial review. Based on this insufficiency in the April 18, 2013 decision letter, GIAA has not yet complied with the statutory requirements for a decision and therefore the time for Appellant to file its appeal continues to be open. Appellant cites the Decision and Order of Judge Michael J. Bordallo in *Sumitomo Construction vs. Government of Guam, Department of Public Works, SP0274-98*, in which the Court states, "This Court finds that the DPW's August 27th letter denying Sumitomo's protest failed to comport with the statute mandating the DPW to inform a protestant that it has a "right to administrative and judicial review." 5 GCA §5425(c)(2). The Court finds that in such cases, where the Respondent is remiss in its obligations, a Petitioner should be allowed a reasonable amount of time to file a

protest. The 9th Circuit has upheld that the time for an appeal does not begin to run until the judgment is actually docketed, even where the appeal is filed several years after judgment was rendered but not docketed. Likewise, time in the instant case does not begin to run until the DPW complies with the statutory requirements. Therefore, under the facts of this case, the Court finds that the Petitioner's filing of its protest on September 28 was reasonable and that Sumitomo filed its Petition in a prompt and timely manner."

Upon reviewing the Invitation for Bid sections cited in this appeal OPA will agree that the Invitation for Bid is ambiguous and confusing. The section GIAA relies on to state that the bids were supposed to be received at the GIAA Executive Manager's office is ambiguous in and of itself as it states, "As indicated in the INVITATION FOR BID" since the Invitation for Bid and the General Information both state that the bids will be opened at the GIAA Conference Room and state nothing about submitting the bids to the GIAA Executive office.

Therefore, Appellant respectfully requests that the OPA review this matter and determine that GIAA improperly conducted this procurement and violated Appellant's rights, as well as other bidders, by refusing to accept their bids at the date, time and place the Invitation for Bid instructed they do so. Based on this determination by OPA, GIAA should be ordered to open all bids that were timely presented at the GIAA Conference Room including Appellant's bid and award the contract based on the lowest bid of all bidder's submissions.

Dated this 8th day of May, 2013.

Sincerely,

CUNLIFFE & COOK



JEFFREY A. COOK

VERIFICATION

Hagåtña, Guam.

I, Dubidato SM Conlu, Jr., being first duly sworn, depose and state that I have read the foregoing Notice of Appeal and know the contents thereof; that the same is true of my knowledge, except as to those matters alleged upon information and belief, and as to those matters, I believe them to be true.



DUBIDATO SM CONLU, JR.

Hagåtña, Guam.

SUBSCRIBED and SWORN to before me this 8th day of May, 2013, by Dubidato SM Conlu, Jr.

ROWENA S. JOHNSON
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: NOV. 05, 2016
210 Archbishop Flores St., Ste 200 Hagåtña, Guam 96910



NOTARY PUBLIC

ATTACHMENT "1"

LAW OFFICES
CUNLIFFE & COOK
Suite 200
210 Archbishop Flores Street
Hagåtña, GU 96910
Telephone: (671) 472-1824
Telecopier: (671) 472-2422

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DATE: 6/14/13
TIME: 305 AM PM BY: R. Field
FILE NO OPA-PA: 13-004

Attorneys for: Appellant

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGATNA, GUAM

IN THE APPEAL OF K CLEANING) OPA-PA-13-004
SERVICES,)
)
)
APPELLANT.) APPELLANT'S HEARING BRIEF
)
)
_____)

Appellant K Cleaning Services ("Appellant") through counsel, Jeffrey A. Cook, Esq., submits its hearing brief pursuant to the Scheduling Order of May 21, 2013.

PRELIMINARY ISSUE

On June 13, 2013 Appellant filed its Motion to Strike Agency Reply to Appellants or in the Alternative Order Agency to Provide Complete Record to Appellant, Allow Appellant to File Supplemental Comments to the Agency's Reply, and Extend Time for Filing Trial Brief and Advising if it Wants Hearing. Obviously due to the short time Appellant has not received a decision on its Motion. Therefore, Appellant files this Hearing Brief subject to the opportunity to supplement it once the OPA rules on the above referenced Motion.

ISSUE PRESENTED

Agency refused to accept Appellant's bid at the date and time stated in the IFB. This was the result of Agency's ambiguous documentation in the IFB. Agency now claims bidders were instructed of the time and place to submit bids at the pre-bid conference. Agency, however, as noted in the above referenced motion, has not

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provided a complete record of the procurement process, specifically the recording it is now relying on.

Appellant will present evidence that the pre-bid conference was so crowded and noisy that Appellant's representatives as well as other potential bidders did not hear any instruction about the time and place to submit bids would be different from the language in the IFB.

ANTICIPATED WITNESSES

1. Mr. Dubidato Conlu, Jr., owner of Appellant. He was present at the pre-bid conference and will testify that he did not hear any instruction given that the time and place for submitting the bids was anything other than the conference room as set out in the IFB.

2. Ms. Windy Gadia, supervisor of Appellant. She was present at the pre-bid conference and will testify that she heard no information regarding submitting the bid at the Office of the Executive Manager instead of at the conference room as stated in the IFB.

3. Mr. Ed David, company representative who submitted the bid on the date and time and place set forth in the IFB.

4. Dr. Gemma Conlu, operation manager of Appellant. She prepared the bid submittals.

5. Mr. Anthony Guerrero, a representative of AMI who also turned in its bid at the conference room on the date, time and place directed by the IFB.

6. Mr. Tony Rivera, owner of Guam Tropical Landscaping Incorporated who was present at the pre-bid conference and did not hear any instruction about turning in bids at the Office of the Executive Manager.

7. Ms. Veron Lopez, representative of JJ Global who was present at the pre-bid conference and did not hear any information that the bids were to be turned in at the Office of the Executive Manager.

PROPOSED EXHIBITS

All documents in the Agency Procurement Record maybe relied on by Appellant. As noted herein and in the Motion to Strike, Appellant continues to request that Agency be ordered to provide Appellant with a copy of the recording that it has relied on in its Reply to Appellant's Comments. As noted in the Motion, Agency is required by law to provide a copy of recordings as part of the record to Appellant in an appeal such as this.

Respectfully submitted this 14th day of June, 2013.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant

By _____

JEFFREY A. COOK, ESQ.

LAW OFFICES
CUNLIFFE & COOK
 Suite 200
 210 Archbishop Flores Street
 Hagåtña, GU 96910
 Telephone: (671) 472-1824
 Telecopier: (671) 472-2422

FISHER & ASSOCIATES
ATTORNEYS AT LAW
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 DATE: 7/17/13
 TIME: 1:45 AM PM BY: Ashley
 FILE NO OPA-PA: _____

Attorneys for: Appellant

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
 HAGATNA, GUAM**

IN THE APPEAL OF K CLEANING)	OPA-PA-13-004
SERVICES,)	
)	
)	
APPELLANT.)	APPELLANT'S AMENDED HEARING
)	BRIEF
)	
_____)	

Pursuant to the Order Consolidating Appeals and Amending Scheduling Order dated June 21, 2013, Appellant K Cleaning Services ("K Cleaning") files this Amended Hearing Brief. K Cleaning incorporates Appellant's Hearing Brief filed June 14, 2013 and incorporates its Statement of Grounds for Appeal filed with its Notice of Appeal on May 8, 2013. K Cleaning incorporates all of the points and arguments raised in these previously filed documents in this Amended Hearing Brief. K Cleaning also incorporates its designation of anticipates witnesses and proposed exhibits set forth in Appellant's Hearing Brief filed June 14, 2013.

K Cleaning believes Guam International Airport Authority ("Agency") would stipulate to the following facts:

1. There was a Pre-Bid Conference on February 7, 2013. There were thirty-eight (38) people signed in for the Pre-Bid Conference. The original date for submission and opening of bids was February 15, 2013. Agency extended the date to submit and

no client was present this

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 Time: 2:21 PM BY: RD

open bids to March 29, 2013 at 2:00 p.m. A representative of K Cleaning was at the Pre-Bid Conference.

2. A representative of K Cleaning was at Agency's conference room on March 29, 2013 before 2:00 p.m. At least one other bidder was also at the conference room.

3. Shortly after 2:00 p.m., on March 29, 2013 a GIAA representative came to the conference room and told K Cleaning's representative and the other bidder(s) that bids were to be submitted at the Executive Manger's Office.

4. Initially GIAA refused to accept K Cleaning's and other bid packages. GIAA then agreed to accept the bid packages but would not open them.

5. On April 4, 2013, K Cleaning wrote Agency a letter complaining that its bid should have been accepted, opened and considered on March 29, 2013.

6. On April 18, 2013, Agency sent K Cleaning a letter stating that it considered K Cleaning's April 4, 2013 letter, a letter of protest. Agency went on to reject K Cleaning's protest. Agency's letter failed to include statutory required notice that K Cleaning had rights of review of the Agency decision.

7. Since K Cleaning's bid was not opened and considered by Agency, K Cleaning did not receive bid status letter advising bidders that bid was recommended for and to other bidders.

ISSUE FOR HEARING

K Cleaning argues in the papers incorporated in this amended hearing brief that the Invitation for Bid was either clear in its statement that the bids were to be presented and opened at the GIAA Conference Room or that the IFB and supporting documents

were ambiguous because certain portions instructed bidders to present their bids for acceptance and opening at the conference room while another portion of the bid documents stated the bids should be delivered to the Executive Managers Office. This is primarily a legal determination for the OPA and initially K Cleaning did not believe a hearing would be necessary.

However, Agency in its reply to K Cleaning's response to the Agency's Report raised for the first time that information as to where the bids should be delivered was given at the February 7, 2013 Pre-Bid Conference. Although K Cleaning had a representative at that Pre-Bid Conference, due to the number of people in attendance and the noise related to the number of people, K Cleaning representative did not hear any instruction about where the bids should be delivered. K Cleaning will present evidence to the OPA regarding the situation at the Pre-Bid Conference.

K Cleaning would note that since the Agency apparently felt it necessary to state at the Pre-Bid Conference where the bids were supposed to be submitted, this is evidence of the fact that the IFB was unclear. If the OPA determines that K Cleaning did not receive notice of where the bids were supposed to be submitted at the Pre-Bid Conference because of the noise and number of people at the meeting, the OPA should find that the IFB was unclear and GIAA should have accepted the bids of individuals who were at the GIAA Conference Room as the IFB directed.

Upon finding that the Agency violated the IFB the award of contract should be voided and the contract should be given to the bidder whose bid was the lowest as required by Guam Procurement Law. There is no urgency or emergency to find that it is in the territory's best interest that contracts for more expensive janitorial services at the

airport should be continued when if GIAA had followed the bid process it would get those services for a lesser amount, which clearly is in the territory's best interest.

Respectfully submitted this 17th day of July, 2013.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant

By



JEFFREY A. COOK, ESQ.