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In the Appeal of Guahan Ventures Inc. dba Turfco; OPA-PA-21-003

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Dear Mr. Hernandez:

Please see the attached [*Proposed*] *Findings of Facts and Conclusions of Law* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

Sincerely yours,

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**1.10.22 (Proposed) Findings of Fact and Conclusions of Law.pdf**

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Guahan Ventures Inc. dba Turfco,

Appellant.

DOCKET NO. OPA-PA-21-003

[PROPOSED]

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

I. INTRODUCTION

1. This matter came before the Office of Public Accountability (“OPA”), through the Public Auditor, on an appeal filed by Appellant Guahan Ventures Inc. (“Turfco” or “Appellant”) regarding the notice of award in Request for Quotation (REQ) Q210280170 and RFQ 21002179 seeking golf carts (the “RFQ”) to Monster Auto Corp. dba Guam Autospot (“Autospot”).

2. The OPA conducted an evidentiary hearing on December 16, 2021. The hearing was conducted with restrictions on the amount of individuals that could be physically present because of the COVID-19 pandemic. In addition to counsel for the parties, institutional representatives were physically present at the hearing for GSA and Turfco. Autospot, while receiving notice of the Protest and Appeal, took no role in the proceedings. Physically present at the hearing for Turfco was its corporate representative Mr. Juan Carlos Pangelinan. Mr. Robert Kono was the representative for procuring agency GSA.

3. The OPA has considered the evidence, including the testimony of witnesses and exhibits admitted into evidence, the procurement record maintained by GSA and the submissions placed into the record by the parties. The OPA has further considered the written arguments and proposed Findings of Fact and Conclusions of Law submitted by counsel for the parties.

4. The OPA hereby enters the following Findings of Fact and Conclusions of Law. To the extent that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent that matters expressed as Conclusions of Law may be considered Findings of Fact, they shall also be deemed Findings of Fact

II. FINDINGS OF FACT

5. Appellant Guahan Ventures Inc. (“Turfco” or “Appellant”) protested the procurement conducted by the General Services Agency (“GSA”) in the issuance of Request for Quotation (REQ) Q210280170 and RFQ 21002179 seeking golf carts (the “RFQ”).

6. Turfco asserted that the eventual award to Autospot violated the law, since, Autospot was selected for award based upon a specification change only it could meet that was added after working hours the day before the quote was due. Appellant’s Exhibit Binder, (“AEB”).

7. Turfco asserted that the GSA’s rote reliance upon an “emergency” caused by the COVID-19 pandemic to avoid normal planned procurement processes is unsupported by either law or fact.

8. The GSA issued a Request for Quote for Requisition No. Q210280170 on June 14, 2021, seeking golf carts. Q210280170 stated that a quote was required no later than June 17, 2021, before close of business at 5pm.

9. GSA personnel testified that this procurement originated in the Department of Homeland Security (“DHS”) to meet a need of that agency.

10. DHS personnel testified that the procurement for the golf carts did not aim to meet a DHS need, but rather a need conveyed to DHS by the Department of Public health and Social services (“DPHSS”). No records appear in the procurement records demonstrating or documenting this DPHSS need.

11. There was no delivery date originally indicated in the Request for quotation beyond a preference for delivery to occur in 30 days.

12. On June 14, 2021, GSA informed bidders that the “preferred ETA is 30 days from the date of purchase order award.” Appellant’s Exhibit 11.

13. Other offerors prepared their bids later that day, and the next day Turfco prepared its quote for golf carts with a delivery date of 30 days out from a firm order. Turfco’s Juan Carlo Pangilinan testified that he did not submit his bid until the date it was due.

14. On June 16, 2021, at 5:43pm — after working hours and a day before the deadline for submission of quotes — GSA sent an email to offerors stating “See attached Request for Quote.... Please note that this is an ‘Emergency Procurement’ and Delivery Require is ‘IMMEDIATE’” Which was entered on the last page of the RFQ Request. Thank you for your attention please acknowledge receipt of this email.” (internal quotations and ellipses in original). The RFQ was also changed to RFQ21002179. Appellant’s Exhibit 9.

15. Turfco representative Juan Carlo Pangilinan testified that he did not see the after-hours email, as he was attending to his family and had no reason to be reviewing his email regarding this procurement on the evening a delivery date was specified.

16. Turfco received no notice about the status of its bid. Because he had not heard from GSA about the status of his bid, Mr. Pangilinan was compelled to request information as to the award of RFQ21002179 on June 22, 2021. Appellant’s Exhibit 4.

17. The record shows that the Bid Abstract for the requisition was sent to Turfco on June 24, 2021, and that the abstract showed that Turfco was the lowest responsive bidder. Appellant's Exhibit 12.

18. By then, and without equal notice to all offerors, GSA had already issued a Purchase Order to the winning offeror on June 19, 2021, and the Government of Guam accepted delivery of the golf carts on June 23, 2021. Appellant's Exhibit 17.

19. Juan Carlo Pangilinan testified about how the late notice provided to him prevented him from bringing a pre-award bid protest, and materially prejudiced his rights.

20. While the abstract was requested before cart delivery, the abstract was only sent after Autospot was able to deliver the carts. On June 24, 2021 — five days after issuing a purchase order to Autospot — GSA informed Turfco that they were not selected because Autospot could deliver the golf carts "immediate delivery." Appellant's Exhibit 5.

21. After learning from GSA that Turfco was not selected because Autospot could deliver the golf carts "immediately" — a specification change that was added the day before the quote was due — Turfco initiated a protest on June 24, 2021.

22. Turfco protested GSA's award to Autospot based upon the improper late addition of the "immediate delivery" specification that was not contained in the original bid requirements, only added after hours in the waning moments of the bid submission window, and inserted after all offerors had already prepared their bids for submission on the following day.

23. GSA denied the protest on June 25, 2021. Appellant's Exhibit 5.

24. A Notice of Appeal to the OPA followed.

25. Trial was held in person before the OPA on December 16, 2021.

III. CONCLUSIONS OF LAW: THE AWARD TO AUTOSPOT VIOLATED GUAM LAW

A. GSA'S CHANGE TO REQUIRE IMMEDIATE DELIVERY VIOLATED GUAM LAW.

26. RFQ210280170's change to RFQ21002179 requiring "immediate delivery" is a violation of Guam law, as the change was based upon no recorded need, and the change conveyed after hours effectively limited competition to one offeror.

27. Adherence to the plain language of the IFB is essential for bidders and the integrity of the procurement system. *Baldrige v. Government Printing Office*, 513 Fed.Appx. 965, 967 (Fed. Cir. 2013) ("If the plain language of the IFB unambiguously called for delustered laminate film, that language controls."); *Professional Bldg. Concepts, Inc. v. City of Cent. Falls Housing Authority*, 783 F.Supp. 1558, 1563 (U.S. Dist. R.I. 1992), *aff'd Professional Bldg. Concepts, Inc. v. City of Cent Falls*, 974 F.2d 1 (1st Cir. 1992). ("Unless ambiguous, it is the language of the IFB which controls the form that a bid guarantee must take.")

28. It is fundamental that "The drafting of specifications to reflect the needs of the government and the determination as to whether those needs can be met by a given product are primarily with the jurisdiction of the procuring agency." *To the Sec'y of the Army*, 39 Comp. Gen. 570, 572 (Feb. 10, 1960) (internal citations omitted).

29. More, "full and free competition required cannot be obtained unless the invitation and the specifications are sufficiently definite to permit the preparation and evaluation of bids on a common basis. There can be no legal competition unless bidders are competing on a common basis." *To the Sec'y of the Army*, 39 Comp. Gen. 570, 572 (Feb. 10, 1960) (internal citations omitted).

30. This procurement constituted a violation of law when GSA changed the required specification for delivery of the golf carts in the evening hours a day before the bid was due, and made that change without a record justifying the need for immediate delivery and without allowing sufficient time for action by other bidders.

31. This change was also in violation of law, as it came just two days after GSA confirmed to bidders that the “preferred ETA is 30 days from the date of purchase order award.” AEB 11-001.

32. The record shows that when Autospot’s bid had been submitted, the bids of all parties were already prepared in anticipation of submission on June 17, 2021. *See*, Turfco Submission, Procurement Record (“PR”), Tab 4.

33. GSA personnel confirmed that Autospot’s bid was submitted early, and that the bid was in possession of GSA at the time GSA altered the specifications to call for immediate delivery. GSA’s buyer also confirmed that Autospot’s bid contained an immediate delivery offer that preceded the GSA specification for immediate delivery.

34. Significantly, the late change in specifications benefitted a single offeror: Autospot, who had informed the GSA earlier that it could provide immediate delivery of its carts.

35. The procurement record shows a June 1, 2021, unaddressed letter from Autospot that comes before the procurement and describing its golf carts and advertising them for sale. Appellant’s exhibit 16.

36. The June 1, 2021, was not explained by GHS, DHS, or DPHSS. If the letter was some form of unsolicited offer, then GSA violated the law by not following the requirements of 5 GCA § 5219(e), which requires “All unsolicited offers considered as being desirable shall be subjected to the Competitive Sealed Bidding process under § 5211.” This would prevent the use of an alternative method, such as emergency procurement, which is not allowed under § 5211.

37. This rendered the procurement a *de facto* sole source procurement.

38. Guam procurement law exists to, *inter alia*, “provide for increased public confidence in the procedures followed in public procurement” as well as to “ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory” 5 G.C.A. § 5001.

39. This is in keeping with the command of 5 G.C.A. § 5625 that “Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the territorial procurement organization.”

40. Altering bid specifications just hours before the end of the bid invitation period, and after confirming a preferred 30-day delivery period, and after the parties all prepared their bids, calls into serious question the fairness and propriety of the procurement conducted by GSA here.

41. More, altering bid delivery specifications after confirming another bid delivery specification calls into question the integrity of this procurement, and suggests improper conduct designed to drive this solicitation to one particular offeror.

42. Such inequitable conduct by the procuring agency results in a decrease in public confidence in the procurement procedures of the Territory.

B. GSA’S USE OF AN EMERGENCY PROCUREMENT IN JUNE 2021 TO DEAL WITH AN EMERGENCY FIRST DECLARED IN MARCH 2020 IS UNSUPPORTED BY LAW.

43. Patrick Leon Guerrero of the Department of Homeland Security provided testimony regarding the DHS role procuring the golf carts from Autospot. In conformance with Executive Order 2020-03, DHS was the central agency dealing with procurements related to COVID-19.

44. Mr. Leon Guerrero testified about his role and awareness of the needs surrounding covid-19 response since at least December 2020 as he operated as “boots on the ground” about the claimed need for golf carts to assist in Covid-19 vaccination response.

45. Mr. Leon Guerrero testified that the need for golf carts was created in part by the decision of the Government of Guam to redirect golf carts from Covid-19 response back to other duties.

46. Mr. Leon Guerrero could not recall or offer testimony on how the needs of DPHSS were communicated to DHS, or how the specifications for the golf carts were created or otherwise relayed to DHS or GSA.

47. Michelle Galang, DHS buyer and assistant, testified that the specifications for the golf carts contained in Appellant’s Exhibit 16 were provided to her by Patrick Leon Guerrero.

48. Michelle Galang testified that the specifications for the golf carts were provided via email to her, though that email appears nowhere in the procurement record. This was not standard operating procedure, she testified, as the standard procedure is for the specifications to come from the requesting Agency and the “DLAN system.”

49. GSA buyer Krystel Tahinik confirmed that the due date for bids was June 17, 2021, and that on the evening before bids were due an additional specification for immediate delivery of the golf carts was implemented by her supervisor.

50. GSA buyer Krystel Tahinik acknowledged that no log of phone calls was kept with regard to this procurement.

51. No GSA personnel could point to a particular record beyond the general declaration of the March 2020 emergency, and the declarations continuing that emergency declaration, justifying the emergency purchase of the golf carts.

52. DPHSS was the agency that wanted to procure golf carts, and DHS personnel testified that DHS and DPHSS personnel desired golf carts to assist in responding to the Covid-19 Pandemic since the inception of the public health emergency in March of 2020. No record of the DPHSS need exists in the record.

53. DPHSS sent in its request for golf carts to Homeland on June 12, 2021

54. The justification for the golf carts was the COVID-19 public health emergency as declared by the governor and to help with transportation of individuals with disabilities and senior citizens at vaccination sites, public outreach sites, and rapid engagement sites.

55. By June of 2021, the Government of Guam had multiple months to plan for transportation needs, including the need to acquire golf carts.

56. COVID-19 vaccines arrived on Guam on or around December of 2020. The government knew vaccinations and testing sites were part of the COVID-19 emergency response since at least December of 2020.

57. Senior citizens, and others with mobility issues that would benefit from golf cart transportation, were part of the first phase of vaccinations in December 2020

58. Patrick T. Leon Guerrero, Acting Administrator at the time of the procurement, was present at vaccination sites and recognized a need for golf carts as early as December of 2020.

59. During the COVID-19 pandemic, various government agencies and private parties lent DPHSS and Homeland Security golf carts to use for the emergency response.

60. At some point, well before June of 2021, various government agencies and private parties began to recall the golf carts they lent to DPHSS and Homeland.

61. This recall was gradual and not immediate.

62. Homeland knew well in advance of June of 2021 that they needed to procure golf carts for the government's response to the COVID-19 pandemic.

63. The government knew ahead of time that they would eventually need golf carts.

64. Claudia Acfalle of the General Services Agency testified that no determination of need was contained in the procurement record since, in her mind, informal procurement did not need such determinations and that the purported emergency status of this procurement for golf carts placed it in an informal category. She could point to no law that supported her views.

65. Claudia Acfalle testified that it is her understanding that all emergency procurements must specify an immediate delivery and be completed within 30 days. This is why, in her view, the procurement for golf carts could be altered to establish an immediate delivery specification. She could point to no law that supported her views.

66. Claudia Acfalle testified that she did not realize that the alteration in the RFQ specifying an immediate delivery was sent after working hours the day before the bids were due. She acknowledged that this was inappropriate and should not have been done.

67. While the OPA recognizes that an emergency exists and the golf carts may be necessary to address the COVID-19 emergency, the government should have procured them via ordinary channels because the need was not immediate.

68. Claudia Acfalle testified that GSA was seeking "best delivery" of the golf carts, but acknowledged that the original RFQ did not contain a delivery specification and instead expressed a preference for delivery in 30 days.

69. GSA testified that Turfco's bid and original delivery timeline was compliant with the original RFQ, and that Turfco's bid was the lowest responsive price under those original delivery requirements.

70. Juan Carlo Pangelinan of Turfco testified that since delivery specifications constitute a portion of bid price, that he could have submitted a bid responsive to a particular delivery date had GSA specified one.

71. The need was known well in advance of June of 2021, and the government should have procured the golf carts in anticipation of losing the golf carts.

72. Homeland failed to do so, and this was a violation of procurement law.

73. DPHSS personnel testified regarding the existence of the public health emergency, and confirmed that transportation help in response to the emergency has been needed since the inception of the emergency. They also testified that specific transportation help for vaccination efforts were needed since at least December 2020.

74. GSA's preferred defense of its conduct by declaring that the purchase was "based on Executive Order 2021-12" is without support under the law. Agency Report, Tab 1.

75. That order has no bearing on the procurement of golf carts. That order, like much of the litany of other COVID-19 edicts from the Governor before it, is simply an order continuing the Governor's continuance of the public health emergency first declared in Executive Order No. 2020-03.

76. The Government's use of an "emergency" procurement here, more than a year and a half after the onset of the emergency, directly contradicts Guam law which explains that an "Emergency means a condition posing an imminent threat to public health, welfare, or safety which could not have been foreseen through the use of reasonable and prudent management procedures, and which cannot be addressed by other procurement methods of source selection." 5 GCA § 5030(x); 2 GAR § 1106(47).

77. The Government's reliance upon a COVID-19 induced "emergency" in June of 2021 requiring the immediate purchase of golf-carts is untenable, and does nothing to further the obligations under the law that the procurement system "provide for increased public confidence in the procedures followed in public procurement," and "ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory," 5 GCA. § 5001.

78. The extended use of COVID-19 to justify emergency procurement has caused some legal commentators to note the abuse that such emergency procurement invites:

There is inconsistent application of emergency procurement procedures: Emergency procurement procedures are not consistently implemented even when existent. Sometimes, the procurement of goods or services not related to the crisis is unjustifiably processed under the less-rigorous emergency procedures.

Nikolaos Doukellis & Paul M. Bourassa, *Financial Misconduct in Times of Crisis: Applying Lessons Learned from the Private Sector to Government*, Crim. Just., Spring 2021, at 42, 42–43 (internal page number omitted).

79. The OPA has similarly recognized the abuse inherent in the overuse of emergency procurement methods during the continued COVID-19 Pandemic.

80. As the Office of Public Auditor has explained in its recent examination of emergency procurement use during the COVID-19 pandemic, "After three months of emergency procurement, GovGuam had sufficient information regarding [its procurement needs] to prepare and issue an IFB, instead of the extended use of emergency procurement." OPA Report No. 21-06, Government of Guam Procurement of Hotels Used for COVID-19 Quarantine Performance Audit March 2020 through December 2020 (July 2021), 6.

81. Similarly here, after nearly a year of vaccination availability, the Government had more than enough time to properly plan for a procurement that would have landed golf carts on Guam by the end of June, 2021.

C. GSA'S DISPARATE TREATMENT OF OFFERORS VIOLATES THE LAW.

82. GSA finds no error in its continuing conduct in entering into contracts with offerors without informing other offerors that an award determination has been made.

83. This behavior directly contradicts Guam procurement law, which requires the "fair and equitable treatment of all persons who deal with the procurement system of this Territory." 5 G.C.A. § 5001(b)(4).

84. Such behavior is also an affront to good practice under the federal procurement regime, which recognizes that unsuccessful offerors should be informed of that status and be provided debriefings so that they obtain the benefit of the stay provision. *See, e.g., Gtt Indus., Inc.*, B-220824, United States Government Accountability Office (Nov. 5, 1985); *see also Strategica, Inc.*, B-227921 United States Government Accountability Office (Oct. 27, 1987) (noting the failure of a contracting officer to give unsuccessful offerors in small business set-aside procurements pre-award notice of the name and location of the apparent successful offeror).

85. Worse, this conduct is part of a pattern of Government procurement behavior undertaken in an attempt to limit the protesting period and avoid the automatic stay. *See, In the Appeal of TLK Marketing Co., Ltd.*, OPA-PA-16-003, (Decision and Order, June 15, 2016, Page 3).

86. GSA should not be allowed to provide clandestine notices to some offerors and withhold information from others in order to neuter the protest rights of offerors it does not favor.

87. Guam law mandates that “each procurement officer shall maintain a complete record of each procurement.” 5 GCA § 5249; *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 22 .The law does not provide an exhaustive list of what a complete record contains, but instead provides a non-exhaustive list of items that “the record shall include.” 5 GCA § 5249.

88. The Superior Court of Guam canceled a procurement in which the Government Agency kept an incomplete procurement record. See *Teleguam Holdings LLC v. Government of Guam and Pacific Data Systems*. The Court in *Teleguam Holdings* held that where the "procurement record upon which IFB GSA 064-11 and the proposed awards were based is incomplete, [a] revision of the consequent proposed awards cannot render the preceding procurement record complete and it would remain in violation of the Procurement Law ... " The court ordered the IFB and the proposed awards canceled, noting specifically that "[i]f another invitation for bids regarding this matter is issued, the agencies involved shall maintain a complete procurement record in compliance with the Procurement Law."

89. Here, GSA, DPHSS, and GHS personnel have testified to meetings, discussions, needs, and calls that no record exists of. Because GSA failed to maintain a complete procurement record as required under 5 GCA § 5249, the procurement Award must be set aside.

90. 5 GCA § 5249 mandates the following:

- a. Each procurement officer shall maintain a complete record of each procurement. The record shall include the following:
- b. the date, time, subject matter and names of participants at any meeting including government employees that is in any way related to a particular procurement;

- c. a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;
- d. sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;
- e. brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and
- f. (e) the requesting agency's determination of need.

91. Guam law is clear that, in order to protect the integrity of the bidding process, a procurement record must be kept and maintained. 5 G.C.A. § 5252 (a). That record must include the papers, papers including “drafts... and other papers or materials used in the development of specifications.” 5 G.C.A. § 5249 (d). The record must also be certified, in writing, as having been properly maintained and complete. 5 G.C.A. § 5249.

92. No record exists regarding the development of the golf car specifications generally or the specific need for a specification of “immediate delivery.”

93. The statutory obligations of GSA to compile, produce, and certify a complete record in procurement actions are stand-alone, independent requirements. See 5 GCA §§ 5249; 5250; *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 41 (Guam May 14, 2018) (“the law requires a complete procurement record”).

IV. CONCLUSION

94. GSA issued an RFQ for golf carts that was changed at the 11th hour to benefit a single offeror.

95. GSA has improperly relied upon COVID-19 to justify that change, and has confirmed that it withheld information from other offerors in such a manner as to remove those offeror's ability to bring a meaningful pre-award protest.

96. The Office of Public Accountability finds that the General Services Agency's (GSA) change to the Request for Quotation the evening before the bid quotations were due violates Guam Procurement Law.

97. The OPA finds that the GSA's use of an "Emergency" to justify the late changes to the procurement is unsupported by law or fact.

98. The OPA finds that GSA's change to an "Immediate Delivery" requirement amounted to a sole source Procurement in Violation of Guam Law.

99. The OPA finds that GSA's Award of a purchase order to Guam Autospot is void.

100. The OPA finds that GSA's failure to inform all offerors equally of the procurement status blatantly violates Guam law.

101. The OPA finds that, because the purchase order to Autospot was void and did not allow for a meaningful protest by the Appellant, GSA violated the Automatic Stay mandated by Guam procurement law.

102. Pursuant to 5 G.C.A. § 5452(a), the Public Auditor finds that the contract awarded to Autospot was made in violation of Guam procurement law. Therefore, under 5 G.C.A. § 5452(a)(B), the Public Auditor hereby terminates the contract between the government of Guam and Autospot.

Office of Public Accountability Orders the following:

(1) The government of Guam shall immediately return the golf carts to Autospot. Autospot shall be compensated for actual expenses incurred under the contract plus reasonable profit prior to this termination pursuant to 5 G.C.A. § 5452(a)(B).

(2) The government of Guam shall submit in writing to the OPA the expenses and reasonable profit requested by Autospot. Turfco may submit in writing a response to the expenses and reasonable profit requested by Autospot. Thereafter, the OPA will issue a Decision and Order on what the government of Guam shall pay to Autospot.

(3) The government of Guam is also hereby admonished and forbidden from using the emergency procurement procedures to circumvent its duty to adhere to planned procurement.

(4) GSA shall rescind the Notice of Award to Autospot issued in this procurement, and instead issue an Award to Turfco as the lowest priced responsible and responsive offeror under this procurement;

(5) All procuring agencies of the government of Guam shall assure “fair and equitable treatment of all persons who deal with the procurement system of this Territory,” and that fair and equitable treatment includes equitable notice about the status of the procurement and potential awards;

(6) That Turfco be awarded its fees and costs in this matter; and

(7) Such further relief as the OPA deems appropriate.

Submitted this 10th day of January 2022.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH

EDWIN J. TORRES

Attorneys for Appellant