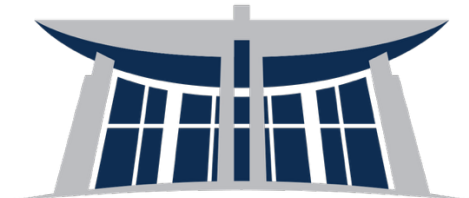


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**Proposed Policies and Procedures for the Competitive Solicitation,
Selection & Award of Concession Agreements
at the**

**A.B. WON PAT INTERNATIONAL
AIRPORT GUAM**



ATURIDAT PUETTON BATKON AIREN
GUAHAN ENTENASIONAT

November 7, 2025

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CONCESSION REGULATIONS**

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NOTE: These Concession Policies and Procedures are authorized by 12 GCA § 1203.1.

- § 1101. Purpose.
- § 1102. Policy.
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- § 1105. Requirement of Good Faith.
- § 1106. Definitions.
- § 1107. Savings Clause.

§ 1101. Purpose. The Government of Guam, through the Antonio B. Won Pat International Airport Authority, Guam (“GIAA” or “Authority”), owns and operates the Antonio B. Won Pat International Airport, Guam. These Concession Policies and Procedures (sometimes referred to herein as “Policies and Procedures”) do not and shall not constitute a part of any Concession Agreement. The purpose of these Concession Policies and Procedures is to provide standard policies and procedures governing the solicitation, selection, award and operation of non-airline Concessions on Airport Property, as required by the mandates of 12 GCA § 1203.1, as may be amended from time to time, and in conformity with industry practices and procedures.

§ 1102. Policy. It is the policy of GIAA to promote efficiency and achieve the needs and best interests of GIAA in the award of Concession Agreements by:

- (a) continuously developing sound policies and practices to achieve GIAA’s self-sustaining mandate;
- (b) providing for increased public confidence in the procedures followed in the award of Concession Agreements;
- (c) exercising fair and equitable treatment of all persons who compete for Concession Agreements and Concessionaires;
- (d) fostering effective broad-based competition within the free enterprise system; and
- (e) providing safeguards for the maintenance of a solicitation procedures of quality and integrity.

§ 1103. Objectives. The primary objectives of GIAA in entering into Concession Agreements, is to:

- (a) Maximize revenue generation to GIAA without creating an undue financial burden on those contracting with GIAA.
- (b) Minimize the costs and expenses incurred by GIAA in operating and maintaining the Airport.
- (c) Maintain a fee and rental structure that will make GIAA as self-sustaining as possible.
- (d) Provide the highest quality and broadest range of services to Airport users.
- (e) Enhance the growth and development of the Airport as a regional aviation center.

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- (f) Preserve investments in the Airport and the level of service provided by GIAA and its Concessionaires.
- (g) Facilitate orderly development of the Airport.
- (h) Ensure provisions of consistent quality of services provided at the Airport.
- (i) Ensure compliance with applicable laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application and acceptance of federal funds.
- (j) Enable conformity with the approved Airport Master Plan.
- (k) Make the Airport available for public use on reasonable terms without undue discrimination.

§ 1104. Planned Solicitation. All Solicitations for Concession Agreements shall, where possible, be made sufficiently in advance of need for performance to promote maximum competition and good management of resources. Publication of Requests for Proposals shall not be manipulated so as to place potential Proposers at an unnecessary competitive disadvantage. The Executive Manager shall make a written determination of need for the Concession prior to initiating a Solicitation.

§ 1105. Requirement of Good Faith. These Concession Policies and Procedures require all parties involved in the negotiation, performance, or administration of Concession Agreements to act in good faith.

§ 1106. Definitions. Terms used in these Concession Policies and Procedures have the following meaning ascribed to them unless the context in which they are used requires a different meaning, or unless a different definition is prescribed for a particular chapter in these Policies and Procedures.

- (a) *Air Transportation* shall mean the carriage for hire of persons, baggage, property, cargo, and mail by aircraft.
- (b) *Airport* shall mean the Antonio B. Won Pat International Airport.
- (c) *Airport Layout Plan* or *ALP* shall mean a plan that shows boundaries and proposed additions to all areas owned or controlled by GIAA for airport purposes, approved by the FAA and made a part hereof, as the same may be amended from time to time.
- (d) *Airport Property* shall mean all real property of GIAA as shown in the Airport Layout Plan.
- (e) *Award* shall mean the execution of the Concession Agreement(s) with one or more Proposers determined in writing by the Executive Manager to be best qualified based on evaluation factors set forth in the RFP. and.
- (f) *Blind Trust* shall mean an independently managed trust in which the Government Employee beneficiary has no management rights and in which the Government Employee beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.
- (g) *Board of Directors* shall mean the duly appointed Board of Directors of GIAA acting

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collectively in the manner prescribed by law.

- (h) *Confidential Information* shall mean any information which is available to a GIAA employee only because of the employee's status as an employee of GIAA and is not a matter of public knowledge or available to the public on request.
- (i) *Conspicuously* shall mean written in such special or distinctive format, print or manner that a reasonable person against whom it is to operate ought to have noticed it.
- (j) *Contract Modification* shall mean any written alteration, modification, amendment, or restatement of any provisions of a Concession Agreement accomplished by mutual action of the parties to the contract.
- (k) *Concession(s) and Concession Privileges* shall mean the right given to a Person by GIAA to use a specific portion of Airport Property for the purpose of selling certain goods or providing certain services to users of the Airport to generate revenues, other than operating an Air Transportation business.
- (l) *Concession Agreement* shall mean the written contract between GIAA and a Concessionaire specifying the terms and conditions under which a Concessionaire may use, occupy, and access certain Airport Property and manage and operate a Concession.
- (m) *Concession Fee* in the context of an RFP shall mean the fees and/or rent proposed by a Proposer, and in the context of a Concession Agreement shall mean the fees and/or rent paid by a Concessionaire. In all cases the Concession Fee is in consideration for the Concession Privileges granted by GIAA. Concession Fee includes, but is not limited to, minimum annual guaranteed (MAG) rent and/or percentage rent.
- (n) *Concessionaire* shall mean the operator and/or manager of a Concession, or its permitted successors or assigns.
- (o) *Data* shall mean recorded information, regardless of form or characteristic.
- (p) *Designee* shall mean a duly authorized representative of a person holding a superior position.
- (q) *Direct or Indirect Participation* shall mean involvement through decision, approval, disapproval, recommendation, preparation of any part of a Solicitation, influencing the content of any terms or conditions of a Solicitation or Concession Agreement, rendering of advice, investigation, auditing or in any other advisory capacity.
- (r) *Discussions*, as used in the Solicitation process, means an exchange of information during which GIAA may seek to determine in greater detail a Proposer's qualifications and explore with the Proposer the scope and nature of a concession opportunity, the proposer's method of management and operation of the concession and the relative utility of alternative methods of approach.. Discussions may be conducted in connection with Request for Proposals.
- (s) *Executive Manager* shall mean the duly appointed Executive Manager of GIAA or his designee.
- (t) *FAA* shall mean the Federal Aviation Administration, U.S. Department of Transportation, or any federal agencies succeeding to its jurisdiction.
- (u) *FAR* shall mean the Federal Aviation Regulations as published by the FAA.

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- (v) *Financial Interest* shall mean:
- (1) ownership of any interest or involvement in any relationship from which, or as a result of which, a Person within the past year has received, or is presently or in the future entitled to receive, more than Two Thousand Five Hundred Dollars (\$2,500) per year, or its equivalent;
 - (2) ownership or an interest in any property or any business; or
 - (3) a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- (w) *GAR* shall mean the Guam Administrative Rules and Regulations, as may be amended from time to time.
- (x) *GIAA* shall mean the Antonio B. Won Pat International Airport Authority, Guam, a public corporation and autonomous instrumentality of the Government of Guam.
- (y) *Government Employee* means:
- (1) Any person elected to public office;
 - (2) a non-elected person, whether appointed or selected through a personnel selection procedure, receiving a salary, wages, or other compensation from the government of Guam; a non-compensated or minimally compensated individual who is performing personal services for the government of Guam.
- The term *Government Employee* does not include a Person who, as an independent contractor, performs professional, scientific, technical, or advisory service for a government of Guam agency and who receives a fee, honorarium, or similar consideration for the services performed.
- (z) *Gratuity* shall mean a payment, loan, subscription, advance, deposit of money, services, or anything of more than Nominal Value, present or promised, unless consideration of substantially equal or greater value is received. Gratuity may include any tangible and intangible benefit in the nature of gifts, favors, entertainment, discounts, passes, transportation, accommodation, hospitality, or offers of employment more than Nominal Value.
- (aa) *Immediate Family* shall mean spouse, fiancé, children, parents, brothers and sisters, grandparents and grandchildren, mothers-in-law and fathers-in-law, brothers-in-law and sisters-in-law, daughters-in-law and sons-in-law. Stepsiblings, stepchildren and stepparents shall also be regarded as immediate family.
- (bb) *Interested Party* means an actual or prospective Proposer or Concessionaire that may be aggrieved by a Solicitation or award of a Concession Agreement and who files a protest.
- (cc) *Main Terminal Building* shall mean that portion of Airport Property identified as such in the ALP.
- (dd) *May* denotes the permissive.
- (ee) *Nominal Value* means actual worth or actual cost, whichever is greater, which does not exceed \$25 individually or cumulatively.
- (ff) *Official Responsibility* shall mean direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through

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- subordinates, to approve, disapprove, or otherwise direct government action.
- (gg) *Person* shall mean an individual, corporation, limited liability company, partnership sole proprietorship, joint venture, union, committee, club, other organization or group of individuals acting as an entity. Person includes a trustee, receiver, assignee or similar representative.
 - (hh) *Proposer* means a Person who has actually submitted a proposal in response to a RFP, unless the context indicates otherwise.
 - (ii) *Protestor* means an Interested Party who files a protest under Article 4 of these Policies and Procedures.
 - (jj) *Prospective proposer* shall mean a Person who will actually submit a proposal in response to a RFP.
 - (kk) *Request for Proposals* or *RFP* shall mean all documents, whether attached or incorporated by reference, utilized for soliciting competitive proposals.
 - (ll) *Responsible Proposer* shall mean a Person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
 - (mm) *Shall* denotes the imperative.
 - (nn) *Signatory Airline* shall mean a certificated air carrier providing Air Transportation to and from the Airport that have executed substantially similar agreements with GIAA covering the use and occupancy of facilities at the Airport.
 - (oo) *Solicitation* means a Request for Proposals issued by GIAA for the purpose of soliciting competitive proposals for a Concession opportunity on Airport Property.

§ 1107. Savings Clause. If any provision, section or subsection of these Policies and Procedures, or portion thereof, shall be held by any court or other tribunal of competent jurisdiction to be illegal, void, or unenforceable, the remainder of such provision, section or subsection shall not be thereby affected and shall be given full effect, without regard to the invalid portion.

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§ 2101. Compliance with Federal Requirements. All Solicitations shall comply with all federal law and regulations that are applicable to GIAA, and to the extent that such federal laws or regulations conflict with these Concession Regulations, the mandates of such federal laws or regulations shall prevail.

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- § 3101. General Provisions.
- § 3102. Unsolicited Offers.
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- § 3104. Methods of Solicitation.
- § 3105. Reserved.
- § 3106. Request for Proposals.
- § 3107. Cancellation of Solicitation.
- § 3108. Responsibility of Offeror and Proposer.
- § 3109. Concession Agreements.
- § 3110. Multiple Awards.
- § 3111. Audits and Records.
- § 3112. Finality of Determinations.
- § 3113. Reporting of Anticompetitive Practices.
- § 3114. Solicitation Record.

§ 3101. General Provisions.

- (a) **Extension of Time for Proposal Acceptance.** After opening proposals, the Executive Manager may request Proposers to extend the time during which GIAA may accept their proposals. The reasons for requesting such extension shall be documented in the solicitation record.
- (b) **Only One Tender or Proposal Received.** If only one proposal is received in response to a Request for Proposals, the Executive Manager may, as the Executive Manager deems appropriate, either make an award in accordance with the procedures set forth in § 3106 (Request for Proposals) of this Article or, if time permits, resolicit.
- (c) **Multiple Or Alternate Proposals.** Unless multiple or alternate proposals are specifically provided for, the Solicitation shall state that such proposals shall not be accepted. When prohibited, multiple or alternate proposals shall be rejected. The provisions of this Section shall be set forth in the Solicitation, and if multiple or alternate proposals are allowed, it shall specify their treatment.
- (d) **Proposal Security and Faithful Performance Guaranty.** Proposal security and a faithful performance guaranty shall be required in such form and amounts as the Executive Manager deems advisable to protect the interests of GIAA. Any such requirements must be set forth in the Solicitation. Proposal security and the faithful performance guaranty should not be used as a substitute for a determination of Proposer responsibility.
 - (1) **Proposal Security.** A proposal security shall be required to be submitted with a proposal. The proposal security may be in such form as determined by the Executive

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Manager, including, but not limited to, bond, letter of credit, or cashier's check. Such proposal security shall be submitted with the understanding that it will guarantee that the Proposer will not withdraw its proposal for the time period stated in the RFP and is subject to forfeiture if the successful Proposer fails to enter into a Concession Agreement within the prescribed time. The proposal security shall be in such amount as is determined by the Executive Manager in accordance with his/her best judgment. Such amount shall be adequate to protect GIAA from loss in the event the purported successful Proposer withdraws its proposal prior to the expiration of the time period stated in the RFP or the purported successful Proposer fails to enter into a Concession Agreement within the time prescribed in the RFP.

- (2) **Faithful Performance Guaranty.** A faithful performance guaranty shall be required from the successful Proposer guaranteeing full performance by the Concessionaire of all of the terms, covenants and conditions contained in the Concession Agreement, including, but not limited to, payment of the Concession Fee.
- (i) **Amount required.** The faithful performance guarantee shall be in such amount as is determined by the Executive Manager in his/her best judgment that is adequate to protect GIAA in the event of breach by the Concessionaire.
- (ii) **Form.** The faithful performance guaranty may be in such form as determined by the Executive Manager, including, but not limited to, bond, letter of credit, or cashier's check. Bonds as may be required in this Section shall be issued by a surety licensed to do business in Guam and shall be issued on Government standard performance bond forms. Letter of Credit or Certified Check or Cashier's Check shall be issued by any banks or bonding agencies duly licensed to do business in Guam.
- (e) **Conditioning Proposals Upon Other Awards Not Acceptable.** Any proposal which is conditioned upon receiving award of both the particular contract being solicited and another territorial contract shall be deemed nonresponsive and shall be rejected.
- (f) **Reserved.**
- (g) **Incorporation by Reference.** A RFP may incorporate documents by reference provided that the RFP specifies where such documents can be obtained.
- (h) **Acknowledgment of Amendments.** The RFP shall require the acknowledgment of the receipt of all amendments issued.
- (i) **Disclosure of Ownership, Financial, and Conflicts of Interest.**

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- (1) Purpose. The disclosures required by this Section are intended to reveal information bearing on the responsibility of a Proposer, and can be obtained by an inquiry regarding responsibility prior to award.
- (2) Public Disclosure of Ownership.
 - (i) The ownership interests to be disclosed under this Section include the interests of a Person who owns all or any part of a Proposer whether as a sole proprietor, a partner, limited or otherwise, a shareholder of any class, in which case the percentage ownership interest test shall be based on each class, a member of an association or company, limited or otherwise, and any Person owning a beneficial legal interest in any trust, and any other Person having the power to control the performance of the Concession or the prospective Concessionaire.
 - (ii) Prior to award, every Person who is a Proposer shall submit a Disclosure Statement, executed as an affidavit under oath, disclosing the name of each Person who currently or has owned an ownership interest in the Proposer greater than ten percent (10%) at any time during the twelve (12) month period immediately preceding the date of the Solicitation (the “relevant disclosure period”).
 - (A) If a Proposer is an artificial person, the Disclosure Statement shall disclose the name of each Person who has owned an ownership interest in such artificial person (a “second tier owner”) greater than twenty-five percent (25%) at any time during the relevant disclosure period.
 - (B) If any such second tier owner is also an artificial person, the Disclosure Statement shall disclose the name of each Person who has owned an ownership interest in such second tier owner (a “third tier owner”) of forty-nine percent (49%) or more during the relevant disclosure period.
 - (C) If the name of no natural person has been identified as an owner, or a second or third tier owner of the Proposer, the Disclosure Statement shall identify the name, position, address, and contact information of the natural person having the authority and responsibility for the performance of the prospective Concession Agreement, and the name of any natural person who has the authority and power to remove and replace the designated responsible person or otherwise control the performance of the prospective Concession Agreement.
 - (iii) Disclosure of Financial Interest. Every Person who is a Proposer shall execute an affidavit disclosing the name of any Person who has received or is entitled to receive a commission, gratuity, contingent fee or other compensation to solicit, secure, or assist in obtaining business related to the Solicitation by means of a Disclosure Statement, executed as an affidavit under oath, disclosing such interest

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and shall also contain the amounts of any such commission, gratuity, contingent fee or other compensation.

- (iv) Disclosure of Conflict of Interest. Every Person who is a Proposer shall disclose the name of any Person who directly or indirectly participates in any Solicitation if such person is also an employee of the government of Guam, or of the government of the United States if federal funds are used in payment of the contract.
 - (v) Required Information. Every disclosure of an ownership or financial interest of any Person required to be identified by this Section shall name the Person required to be disclosed and the street address of their principal place of business. All information disclosed or meant to be disclosed under this Section is public and shall be kept as part of the Solicitation Record.
 - (vi) Continuing Duty of Disclosure. Notwithstanding any other provision of these Policies and Procedures, the duty to disclose the information required under this Section shall be, upon award, a continuing duty of a Concessionaire, and all such information shall become part of the Solicitation Record. Throughout the term of a Concession Agreement, the Concessionaire shall promptly make any disclosures not made previously and update changes in the identities or other required information, interests, or conflicts of the Persons required to be disclosed herein. Failure to comply with this Section shall constitute a material breach of the Concession Agreement.
- (j) **Proposer Lists.**
- (1) **Purpose.** Proposer lists may be compiled to provide GIAA with the names of Persons that may be interested in competing for Concessions. Unless otherwise provided, inclusion or exclusion of the name of a Person does not indicate whether the Person is responsible with respect to a particular solicitation or otherwise capable of successfully performing a Concession Agreement.
 - (2) **Deletion of Proposers.** Persons that fail to respond to a RFP on three (3) consecutive Solicitations of similar Concession opportunities may be removed from the applicable list after notice to the Person. Persons currently meeting the criteria for inclusion on the list may be reinstated on such lists at their request.
 - (3) **Public Availability.** Names and addresses on proposer lists shall be available for public inspection provided the lists shall not be used for private promotional, commercial, or marketing purposes.

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- (k) **Publicizing Awards.** Written notice of award shall be sent to the successful Proposer and each unsuccessful Proposer shall be notified of the Award. Notice of award shall be made available to the public and included in the Solicitation Record.
- (l) **Mistakes in Proposals Discovered After Award.** Mistakes in proposals shall not be corrected after Award of the Concession Agreement except where the Executive Manager makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

§ 3102. **Unsolicited Offers.**

- (a) **Defined.** An unsolicited offer is any offer for a Concession other than one submitted in response to a Solicitation.
- (b) **Handling of Unsolicited Offers.** The Executive Manager shall not consider any unsolicited offers and shall return such offers to the sender, at the sender's cost, or destroy such offers.

§ 3103. **Assignment, Novation or Change of Name.**

- (a) **No Assignment.** No Concession Agreement is transferable, or otherwise assignable, without the prior written consent of the Executive Manager and Board of Directors provided, however, that a Concessionaire may assign monies receivable under a Concession Agreement after due notice to GIAA.
- (b) **Recognition of a Successor in Interest; Novation.** When in the best interest of GIAA, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:
 - (1) the transferee assumes all of the transferor's obligations;
 - (2) the transferor waives all rights under the Concession Agreement as against GIAA; and
 - (3) unless the transferor guarantees performance of the Concession Agreement by the transferee, the transferee shall, if required, furnish a satisfactory performance security in the form and amount determined by the Executive Manager.
- (c) **Change of Name.** When a Concessionaire requests to change the name in which it holds a Concession Agreement with GIAA, the Executive Manager shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting Concessionaire to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the Concession Agreement are thereby changed.

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§ 3104. **Methods of Solicitation.** Concession Agreements shall be awarded pursuant to a Request for Proposals in accordance with Section 3106.

§ 3105. **Reserved.**

§ 3106. **Request for Proposals (“RFP”).**

- (a) **General.** One of GIAA’s objectives in awarding Concession Agreements is to obtain high quality services that provide and optimize non-airline revenue to GIAA and provide optimal customer service, value and experience to the traveling public. GIAA has determined that soliciting Concession Privileges through the RFP process is good business practice and industry standard. The RFP process allows GIAA to evaluate proposals based on a variety of non-quantitative factors, including quality of customer service, management team, concepts, concession design, company experience, capital investments, brands, training, and other relevant criteria. The RFP process also encourages Proposers to propose creative and unique elements in their proposals to optimize non-airline revenue and enhance customer experience in addition to guaranteed financial offers. For these reasons, the RFP process to procure Concessions is universally accepted and utilized by airports.
- (b) **Use.** GIAA has determined that it is consistent with good business practice to award Concessions using the RFP solicitation method.
- (c) **Public Notice.** Notice of the need for a Concession shall be made by the Executive Manager at least ten (10) days before the proposals are due.
- (1) **Distribution.** Notices of a RFP shall be mailed or otherwise furnished to a sufficient number of Persons for the purpose of securing competition. Notices of a RFP shall indicate where and when the RFP may be obtained and the proposal submission deadline; generally describe the Concession opportunity; and may contain other appropriate information. Where appropriate, the Executive Manager may require payment of a fee for the supplying of a hard copy of the RFP package.
- (2) **Publication.** Every Notice of a RFP shall be publicized at least once and at least seven (7) days before the final date of submission of tenders:
- (i) in a newspaper of general circulation on Guam;
 - (ii) in industry media; or
 - (iii) in a government publication designed for giving public notices; and
 - (iv) GIAA’s website.
- (3) **Public Availability.** A copy of the RFP package shall be made available for public inspection at GIAA’s Administration Office.
- (d) **Content.** The RFP shall be in a form specified by the Executive Manager and contain at least the following information:
- (1) A description of the Concession Opportunity;

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- (2) A summary of key business terms;
 - (3) A statement of minimum qualifications, if any;
 - (4) A draft Concession Agreement;
 - (5) A schedule of events, including the proposal submission deadline;
 - (6) A statement that all potential Proposers must register with GIAA in order to receive notices regarding and amendments to the RFP;
 - (7) A statement that the proposals shall be in writing;
 - (8) A statement that Proposers may designate as confidential those portions of their proposals which contain trade secrets or other proprietary data;
 - (9) A statement of the minimum information that the proposal shall contain, which may include:
 - (i) the name of the Proposer, the location of the Proposer's principal place of business and, if different, the place of performance of the proposed contract;
 - (ii) if determined relevant by the Executive Manager, the age of the Proposer's business and average number of employees over a time period specified in the RFP;
 - (iii) the abilities, qualifications, and experience of all key personnel who would be assigned to the Concession;
 - (iv) a listing of other contracts under which services similar in scope, size, or discipline to the solicited Concession were performed or undertaken within the time period specified in the RFP;
 - (v) a plan giving as much detail as is practical explaining how the Concession will be managed and operated;
 - (vi) proposed Concession Fee; and
 - (vii) minimum investment of Proposer guaranteed as part of Proposal.
 - (10) the factors to be used in the evaluation and selection process and their importance and the basis for award.
- (e) **Evaluation.** The Executive Manager or an evaluation committee designated by the Executive Manager ("**Evaluation Committee**") shall evaluate all proposals submitted. Proposals shall be evaluated only on the basis of evaluation factors stated in the RFP. The following factors may be appropriate to use in conducting the evaluation. The relative importance of these and other factors will vary according to the Concession opportunity being solicited. The minimum factors are:
- (1) the plan for managing and operating the Concession;
 - (2) ability to successfully manage and operate the Concession as reflected by technical training and education, general experience, and specific experience in managing and operating a concession, and the qualifications and abilities of personnel proposed to be assigned to manage and operate the Concession;
 - (3) the personnel, equipment, and facilities to manage and operate the Concession that are currently available or demonstrated to be made available at the time of contracting, and
 - (4) a record of past performance of similar work.

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- (f) **Pre-Proposal Conferences.** Pre-proposal conferences may be conducted to explain the Solicitation requirements. Conferences shall be announced to all Persons who have registered with GIAA for receipt of notices relating to the RFP. The conference shall be held long enough after the RFP has been issued to allow potential Proposers to become familiar with it, but sufficiently before the proposals submission deadline to allow consideration of the conference results in preparing their proposals. Nothing stated at the pre-proposal conference shall change the RFP unless a change is made by written amendment as provided in § 3105(g) (Amendments to Requests for Proposals) of this Article. A summary of the conference shall be supplied to all those Persons who have registered for the RFP. If a transcript is made, it shall be part of the Solicitation Record. Such a conference may be held anytime prior to the date established for submission of proposals.
- (g) **Amendments to Requests for Proposals.**
- (1) **Form.** Amendments to RFPs shall be identified as such and shall require that the Proposer acknowledge receipt of all amendments issued. The amendments shall reference the portions of the RFP it amends.
 - (2) **Distribution.** Amendments shall be sent to all Persons who have registered with GIAA to receive notices regarding the RFP.
 - (3) **Timeliness.** Amendments shall be distributed within a reasonable time to allow potential Proposers to consider them in preparing their proposals. If the time and date set for receipt of proposals will not permit such preparation, such time shall be increased to the extent possible in the amendment.
- (h) **Receipt and Handling of Proposals.**
- (1) **Registration.** Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. Proposals shall not be opened publicly nor disclosed to unauthorized persons, but shall be opened in the presence of two or more GIAA officials. A Register of Proposals shall be established for each RFP that shall include for all proposals the name of each offeror and the number of modifications received. The Register of Proposals shall be opened to public inspection only after award of the Concession Agreement. Proposals of Proposers who are not awarded the Concession Agreement shall not be opened to public inspection.
 - (2) **Requests of Nondisclosure of Data.** If the Proposer selected for award has requested in writing the nondisclosure of trade secrets and other proprietary data so identified, the Executive Manager or a designee shall examine the request in the proposal to determine its validity prior to entering negotiations. If the parties do not agree as to the disclosure of data, the Executive Manager shall inform the Proposer in writing what portion of the proposal will be disclosed and that, unless the Proposer withdraws the proposal or protests under Article 4 (Legal and Contractual Remedies), the proposal will be so disclosed.

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(i) **Discussions.**

(5) **Discussions Permissible.** The Executive Manager or Evaluation Committee may allow Proposers to give oral presentations on their proposals. The Executive Manager or Evaluation Committee may conduct Discussions with any Proposer. The purposes of such Discussions shall be to:

- (i) determine in greater detail such Proposer's qualifications, and
- (ii) explore with the Proposer the scope and nature of the Concession opportunity, the Proposer's proposed method of management and operation of the Concession, and the relative utility of alternative methods of approach.

(6) **No Disclosure of Information.** Discussions shall not disclose any information derived from proposals submitted by other Proposers, and GIAA shall not disclose any information contained in any proposals until after award of the proposed Concession Agreement has been made as provided in § 3106(h) (Receipt and Handling of Proposals). The proposal of the Proposer awarded the Concession Agreement shall be opened to public inspection except as otherwise provided in § 3106(h) (Receipt and Handling of Proposals).

(j) **Modification or Withdrawal of Proposals.** Proposals may be modified or withdrawn at any time prior to the conclusion of Discussions. All documents relating to the modification or withdrawal of a proposal shall be made a part of the Solicitation Record.

(k) **Late Tenders, Late Withdrawals, and Late Modifications.**

(1) **Definition.** Any proposal received after the time and date set for receipt of proposals is late. Any withdrawal or modification of a proposal received after the conclusion of Discussions is late.

(2) **Treatment.** No late proposal, late modification, or late withdrawal shall be considered unless received before Award, and the proposal, modification, or withdrawal would have been timely but for the action or inaction of GIAA personnel.

(3) **Notice.** Persons submitting late proposals that will not be considered for award shall be so notified in writing as soon as practicable.

(4) **Records.** All documents relating to each late proposal, late modification, or late withdrawal shall be made a part of the Solicitation Record.

(l) **Selection of the Best Qualified Proposers.** After conclusion of validation of qualifications, evaluation, and discussions, the Executive Manager shall select, in the order of their respective qualification ranking, no fewer than three acceptable Proposers (or such lesser number if less than three acceptable proposals were received) deemed to be the best qualified to provide the Concession. In the case where an Evaluation Committee is appointed by the Executive Manager, the Committee shall submit the ranking to the

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Executive Manager for the Executive Manager's consideration and approval. The Board of Directors shall review and approve the ranking of proposers.

(m) **Negotiation and Award of Concession Agreement.**

(1) **General.** The Executive Manager shall negotiate a Concession Agreement with the best qualified Proposer(s) for the solicited Concession, including, without limitation, negotiation of Concession Fee and Minimum Investment Guarantee.

(2) **Elements of Negotiation.** negotiations shall be directed toward:

- (i) making certain that the Proposer(s) has a clear understanding of the Concession, specifically, the essential requirements involved in managing and operating the Concession;
- (ii) determining that the Proposer(s) will make available the necessary personnel and facilities to manage and operate the Concession for the duration of the term of the Concession Agreement; and
- (iii) agreeing upon Concession Fee, minimum guaranteed investment requirements and other key business terms, taking into account the estimated value of the Concession, and the scope, complexity, and nature of managing and operating the Concession.

(n) **Successful Negotiation of Concession Agreement with the Best Qualified Proposer(s).**

If Concession Fee and all terms, conditions and obligations can be agreed upon with the best qualified Proposer(s), and such Proposer is determined by GIAA to be responsible in accordance with Section 3108, the solicited Concession shall be awarded to that Proposer(s) by execution of the Concession Agreement.

(o) **Failure to Negotiate Contract with the Best Qualified Proposer.**

(1) If Concession Fee and all terms, conditions and obligations cannot be agreed upon with the Best Qualified Proposer(s), a written record stating the reasons therefor shall be placed in the Solicitation Record and the Executive Manager or a designee shall advise such Proposer of the termination of negotiations, which shall be confirmed by written notice within three days.

(2) Upon failure to successfully negotiate a Concession Agreement with the Best Qualified Proposer(s), the Executive Manager may enter into negotiations with the next most qualified Proposer. If Concession Fee and all terms, conditions and obligations can be agreed upon, then the Concession shall be awarded to that Proposer by execution of the Concession Agreement. If negotiations again fail, negotiations shall be terminated as provided in Subsection 3106(l)(1) and commence with the next most Qualified Proposer.

(p) **Notice of Award.** Written notice of Award shall be public information and made a part of the Solicitation Record.

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- (q) **Failure to Negotiate Contract with Proposers Initially Selected as Best Qualified.** Should the Executive Manager be unable to negotiate a Concession Agreement with any of the Proposers initially selected as the best qualified Proposers, proposals may be resolicited or additional Proposers may be selected based on original, acceptable submissions in the order of their respective qualification ranking and negotiations may continue in accordance with Subsection 3106(o) (Failure to Negotiate Contract with Best Qualified Proposer) of this Section until an agreement is reached and the contract awarded.
- (r) **Memorandum of Evaluation and Negotiation.** At the conclusion of negotiations resulting in the Award of the Concession Agreement, the Executive Manager shall prepare a memorandum setting forth the basis of Award including:
- (1) how the evaluation factors stated in the RFP were applied to determine the best qualified Proposers; and
 - (2) the principal elements of the negotiations including the significant considerations relating to Concession Fee and the other terms of the contract.
- The memorandum of evaluation and negotiation shall be included in the Solicitation Record and be available for public inspection.

§ 3107. **Cancellation of Solicitation.**

- (a) **Scope of this Section.** The provisions of this Section shall govern the cancellation of any solicitation and rejection of proposals in whole or in part.
- (b) **Policy.** Solicitations should only be issued when there is a valid need for the Concession unless the Solicitation states that it is for informational purposes only. Preparing and distributing a Solicitation requires the expenditure of GIAA time and resources. Potential Proposers likewise incur expense in examining and responding to Solicitations. Therefore, although issuance of a Solicitation does not compel award of a Concession Agreement, a Solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the Solicitation is in GIAA's best interest.
- (c) **Cancellation of Solicitation - Notice.** Each Solicitation issued by GIAA shall state that the Solicitation may be cancelled as provided in these Policies and Procedures.
- (d) **Cancellation of Solicitation: Rejection of All Proposals.**
- (1) **Prior to Opening.**
 - (i) As used in this Section, *opening* means the deadline for submission of proposals in response to a RFP.
 - (ii) Prior to opening, a Solicitation may be cancelled in whole or in part when the Executive Manager determines in writing that such action is in GIAA's best interest for reasons including but not limited to:
 - (A) GIAA no longer requires the Concession; or

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- (B) proposed amendments to the Solicitation would be of such magnitude that a new Solicitation is desirable.
- (iii) When a Solicitation is cancelled prior to opening, notice of cancellation shall be sent to all Persons that registered with GIAA for the particular Solicitation. The notice of cancellation shall
- (A) identify the Solicitation;
 - (B) briefly explain the reason for cancellation; and
 - (C) where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future solicitation of a similar Concession.
- (2) **After Opening.**
- (i) After opening, but prior to award, the Solicitation may be cancelled and all proposals may be rejected in whole or in part when the Executive Manager determines in writing that such action is in GIAA's best interest for reasons including, but not limited to:
 - (A) the Concession solicited is no longer required;
 - (B) ambiguous or otherwise inadequate terms and conditions were part of the Solicitation;
 - (C) the Solicitation did not provide for consideration of all factors or significance to GIAA;
 - (D) all otherwise acceptable proposals received present clearly unreasonable proposed Concession Fee; or
 - (E) there is reason to believe that the proposals may not have been independently arrived at in open competition, may have been collusive, and may have been submitted in bad faith.
 - (ii) A notice of cancellation and rejection should be sent to all Persons that submitted proposals, and it shall conform to Subsection 3107(d)(1)(iii).
- (3) **Record.** The reasons for cancellation and/or rejection shall be made part of the Solicitation Record and shall be available for public inspection.
- (e) **Rejection of Individual Proposals.**
- (1) **General.** This Section applies to rejection of individual proposals in whole or in part.
 - (2) **Notice in Solicitation.** Each Solicitation issued by GIAA shall provide that any proposal may be rejected in whole or in part when in the best interest of the GIAA as provided in these Concession Policies.
 - (3) **Reason for Rejection.**
Unless the Solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and GIAA's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

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(A) the Person that submitted the proposal is a not a responsible proposer as determined under § 3108 (Responsibility of Offerors and Proposers) of these Policies and Procedures;

(B) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of GIAA in some material respect; or

(C) the proposed Concession Fee is unreasonable.

(4) **Notice of Rejection.** Upon request, unsuccessful Offerors or Proposers shall be advised of the reasons therefor.

(f) **All or None Proposals.** Only when provided by the Solicitation may a proposal limit acceptance to the entire tender or proposal offering. Otherwise, such proposals shall be deemed to be nonresponsive. If the proposal is properly so limited, GIAA shall not reject part of such proposal and award on the remainder.

(g) **Disposition of Proposals.** When proposals are rejected, or a Solicitation cancelled after tenders or proposals are received, the tenders or proposals which have been opened shall be retained in the Solicitation Record, or if unopened, returned to the Offerors or Proposers upon request, at no cost to GIAA, or otherwise disposed of.

§ 3108. **Responsibility of Proposers.**

(a) **Determination of Nonresponsibility.** A determination of nonresponsibility shall be made in accordance with this Section. The unreasonable failure of a Proposer to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such Proposer.

(b) **Right of Nondisclosure.** Information furnished by a Proposer pursuant to this Section shall not be disclosed outside of GIAA without prior written consent of the Proposer.

(c) **Standards of Responsibility.** Factors to be considered in determining whether the standard of responsibility has been met include, but are not limited to, whether a prospective Concessionaire has:

(1) 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 at time of award;

(2) a satisfactory record of performance;

(3) a satisfactory record of integrity;

(4) qualified legally to contract with GIAA; and

(5) supplied all necessary information in connection with the inquiry concerning responsibility.

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- (d) **Information Pertaining to Responsibility.** The Proposer shall supply information requested by the Executive Manager concerning the responsibility of such Proposer. If such Proposer fails to supply the requested information, the Executive Manager shall base the determination of responsibility upon any available information or may find the Proposer nonresponsible if such failure is unreasonable.
- (e) **Ability to Meet Standards.** The Proposer may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:
- (1) evidence that such Proposer possesses such necessary items;
 - (2) acceptable plans to subcontract for such necessary items; or
 - (3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.
- (f) **Duty Concerning Responsibility.** Before awarding a Concession Agreement, the Executive Manager must be satisfied that the Proposer is responsible.
- (g) **Written Determination of Nonresponsibility Required.** If a Proposer who otherwise would have been awarded a Concession Agreement is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the Executive Manager. A copy of the determination shall be sent promptly to the nonresponsible Proposer. The final determination shall be made part of the Solicitation Record.

§ 3109. **Concession Agreement.**

- (a) **Type.** The use of any type of contract specifying the terms and conditions under which a Concessionaire may use, occupy and access certain Airport Property and manage and operate a Concession is permitted. The Concession Agreement must be consistent with GIAA's Concession Objectives set forth in Article 1 of these Concession Policies and Procedures and in the best interests of GIAA.
- (b) **Terms and Conditions.** All Concession Agreements must at a minimum include provisions pertaining to the following matters:
- (1) Term or duration, extensions and holdover.
 - (2) Exclusivity or non-exclusivity.
 - (3) Concession Fees and other fees and costs of the Concessionaire.
 - (4) Concession premises.
 - (5) Permitted uses and use restrictions.
 - (6) Default and remedies.
 - (7) Insurance.
 - (8) Indemnification and Faithful Performance Guaranty.
 - (9) Concession performance and operating standards.

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- (10) Reporting, record-keeping and audit requirements.
- (11) Modification, assignment and subleasing limitations or restrictions.
- (12) Termination.
- (13) Facility improvement and minimum investment requirements.
- (14) Maintenance and repair obligations.
- (15) Development and financing of improvements; and
- (16) Mandatory contract clauses as provided in these Concession Policies and Procedures.

§ 3110. **Multiple Awards.**

- (a) **General.** A multiple award is an award of a Concession opportunity to more than one Proposer.
- (b) **Limitations on Use.** A multiple award may be made when award to two or more Proposers for a Concession opportunity is necessary for adequate provision of the Concession on Airport Property as determined by the Executive Manager. Multiple awards shall not be made when a single award will meet GIAA's needs without sacrificing availability of the Concession to Airport users.
- (c) **Intent to Use.** If a multiple award is anticipated prior to issuing a solicitation, GIAA shall reserve the right to make such an award and the criteria for award shall be stated in the Solicitation.
- (d) **Determination Required.** The Executive Manager shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the Solicitation Record.

§ 3111. **Audit and Records.**

- (a) **Audit.** GIAA may during the term of a Concession Agreement and for a period of four years (4) from the date of expiration or termination of the Concession Agreement, at reasonable times and places, audit the books and records of any Concessionaire to the extent that such books and records relate to the Concession or Concession Agreement. The scope of the audit shall be determined by the Executive Manager.
- (b) **Retention of Books and Records.** All Concessionaires shall maintain all books and records that relate to the Concession or Concession Agreement for four (4) years from the date of expiration or termination of the Concession Agreement, unless a shorter period is otherwise authorized in writing by the Executive Manager.
- (c) **Subcontractors.** GIAA's right to audit the obligation to maintain all books and records shall apply to all Concessionaire's subcontractors.

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- (d) **Conditions for an Audit.** An audit may be warranted when, with respect to a Concessionaire or its subcontractor, there is:
- (1) a question as to the adequacy of accounting policies;
 - (2) a question as to financial condition, integrity, and/or reliability;
 - (3) a substantial change in the methods of levels of operation; or
 - (4) other evidence that an audit is in GIAA's best interests as determined by the Executive Manager.

§ 3112. **Finality of Determinations.** The determinations required by these Concession Policies are final and conclusive unless they are found to be clearly erroneous, arbitrary, capricious, or contrary to law.

§ 3113. **Reporting of Anticompetitive Practices.**

- (a) **Reporting.** When for any reasons collusion or other anticompetitive practices are suspected among Proposers, a notice of the relevant facts shall be transmitted to the Attorney General.
- (b) **Anticompetitive Practices.** For the purposes of this Section, an anticompetitive practice is a practice among Proposers, which reduces or eliminates competition or restrains trade. An anticompetitive practice can result from an agreement or understanding among competitors to restrain trade such as submitting collusive proposals, or result from illicit business actions which have the effect of restraining trade, such as controlling the proposed Concession Fee or an improper collective refusal to submit proposals. Indications of suspected anticompetitive practices include, but are not limited to, identical proposals, rotated proposed Concession Fees, sharing of the business, and group boycotts.
- (c) **Independent Concession Fee.** Every Solicitation shall provide that by submitting a proposal, the Proposer certifies that the proposed Concession Fee submitted was independently arrived at without collusion.
- (d) **Detection of Anticompetitive Practices.** In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the Executive Manager should be alerted and sensitive to conditions of the market or industry and evaluate past Solicitations including, as appropriate, the following:
- (1) a study of the proposal submission history of a particular Concession over a period of time sufficient to determine any significant patterns or changes;
 - (2) a review of similar Concession awards over a period of time; or
 - (3) consultation with outside sources of information, such as industry experts or Proposers who have competed for similar Concessions in the past, but who are no longer competing for such business.

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- (e) **Identical Submissions and Concession Fee Fixing.** The term *identical submissions* means the submission by Proposers of the same Concession Fee. The submission of identical Concession Fees may or may not signify the existence of collusion. In seeking to determine whether collusion has taken place, the Executive Manager should view the identical submissions against present and past submissions, the structure and stated of the industry involved including the nature of the Concession involved.
- (f) **Rotated High Concession Fees.** Rotated high proposed Concession Fees result where all Proposers participating in the collusive scheme submit proposals and by agreement alternate submitting the highest Concession Fee. To aid in determining whether rotation may be occurring, the Executive Manager must review past similar Solicitations in which the same Proposers have participated.
- (g) **Sharing of the Business.** Sharing of the business occurs where potential Proposers allocate business among themselves based on the customers or the territory involved. Thus, the Executive Manager might discover that a potential Proposer is not participating in a Solicitation because a particular territory has not been allocated to such Proposer.
- (h) **Group Boycott.** A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a Concession Solicitation until the boycotting competitor's conditions are met by the boycotted competitor or GIAA. The boycott of a competitor by other competitors may have an effect on the market structure or the proposed Concession Fee.

§ 3114. Solicitation Record.

- (a) **Contents.** The Executive Manager shall cause a complete record of each Solicitation to be retained and disposed of in accordance with records retention guidelines and schedules approved by the Attorney General. The record shall include at a minimum the following (“**Solicitation Record**”):
 - (1) **Meeting log.** A log of all meetings related to the Solicitation. The log shall include the date, time, subject matter and names of participants;
 - (2) **Communications log.** A log of all communications between GIAA Employees and any member of the public, which is in any way related to the Solicitation;
 - (3) **Sound recordings.** Sound recordings of (i) all pre-proposal conferences and (iii) discussions and negotiations arising from a RFP;
 - (4) **Written determinations.** All written determinations required by these Concession Policies and Procedures.
- (b) **Retention.** The Solicitation Record for each Concession shall be retained and disposed of in accordance with GIAA's record retention policy as approved by the Attorney General.

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- (c) **Certification.** No Concession Agreement shall be awarded unless the Executive Manager certifies in writing under penalty of perjury that the Solicitation Record has been maintained and that it is complete and available for public inspection. The certificate is itself a part of the Solicitation Record.
- (d) **Public Record.** The Solicitation Record is a public record and, subject existing laws and regulations regarding confidentiality and these Policies and Procedures, any Person may inspect and copy any portion of a Solicitation Record after an award is made.
- (e) **Policy.** It is the policy of GIAA to maintain a complete Solicitation Record for each Concession to:
- (1) protect the integrity of the Solicitation process;
 - (2) protect the confidentiality of trade secrets;
 - (3) allow public access to the Solicitation Record at the earliest possible time.

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- § 4101. Protests of a Solicitation or Award.
- § 4102. Debarment or Suspension.
- § 4103. Contract and Breach of Contract Controversies.
- § 4104. Determination that a Solicitation or an Award Violates Law.
- § 4105. Violations of Law Found Prior to Award.
- § 4106. Ratification, Termination, or Cancellation of a Concession Agreement to Comply with the Law.
- § 4107. Interest.
- § 4108. Waiver of Sovereign Immunity.
- § 4109. Limitations on Actions.

§ 4101. Protests of a Solicitation or Award.

- (a) **Complaint to Executive Manager.** Complainants should seek resolution of their complaints initially with the Executive Manager. Such complaints may be made verbally or in writing.
- (b) **Protest.** A Proposer or Prospective proposer may protest a Solicitation or award to the Executive Manager.
- (c) **When Filed.** Protests shall be filed fourteen (14) calendar days after the protestor knows or should have known of the facts giving rise to the protest. A protest is considered filed when received by the Executive Manager. Protests filed after the 14-day period shall not be considered.
- (d) **Subject of Protest.** Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, solicitation, award, or disclosure of information marked confidential in the bid or offer.
- (e) **Form.** All protests shall be in writing, shall be submitted to the attention of the Executive Manager and shall be submitted in a sealed envelope clearly labeled “Protest – [Solicitation No.- Solicitation Name].” All protests shall:
 - (1) include the name, phone number, mailing address and email address of the protestor;
 - (2) include a statement of reasons for the protest and state with particularity the facts giving rise to the protest; and
 - (3) include 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.
- (f) **Additional Information.** Any additional information requested by GIAA should be submitted within the time periods established by GIAA in order to expedite consideration of the protest. Failure of the protestor to comply expeditiously with a request for

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information by GIAA may result in resolution of the protest without consideration of any information that is untimely filed pursuant to such request.

- (g) **Stay.** When a protest has been timely filed and before an award has been made, the Executive Manager shall not proceed further with the Solicitation or with the award of the Concession Agreement prior to final resolution of such protest, and any such further action is void, unless: (1) The Executive Manager, with the written concurrence of the Board, makes a written determination that the award of the Concession Agreement without delay is necessary to protect the substantial interests of GIAA (“§ 4101(g) Determination”); and (2) Absent a declaration of emergency by the Governor, the Protestor has been given at least two (2) days’ written notice (exclusive of weekends and government of Guam holidays) of the § 4101(g) Determination.
- (1) Final resolution of protest as used in Subsection (e) shall mean a final written decision on the Protestor’s appeal issued by the Appeal Panel in accordance with Subsection (j).
- (2) If an appeal of the protest is pending before the Appeal Panel, and the Board has confirmed such determination, or if no such appeal is pending, the Protestor has not filed a request with the Appeal Panel to review the § 4101(g) Determination prior to the expiration of the two-day period specified in this subsection.
- (h) **GIAA Decision.** The Executive Manager shall respond in writing to the protest within thirty (30) days of GIAA’s receipt of the protest. A copy of the decision shall be made or otherwise furnished immediately to the Protestor.
- (1) **Preparation Costs.** In addition to any other relief, the Executive Manager shall award the Protestor its reasonable proposal preparation costs, excluding attorneys’ fees, when a protest is sustained and the Protestor should have been, but was not awarded the Concession Agreement under the Solicitation.
- (2) **GIAA costs.** A Protestor shall be liable for GIAA’s reasonable costs associated with responding to the protest, excluding attorneys’ fees, upon a finding by the Executive Manager that the protest was made fraudulently, frivolously or solely to disrupt the Solicitation process.
- (i) **Request for Reconsideration.** Reconsideration of a decision of the Executive Manager may be requested by the Protestor, within fifteen (15) days after receipt by the Protestor of the notice of decision. Reconsideration can also be requested by an appellant or any Interested Party who submitted comments during consideration of the protest. The same time frame applies herein. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. A request for reconsideration does not extend the time to appeal the decision of the Executive Manager to the Appeal Panel.
- (j) **Appeal to the Appeal Panel.**

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- (1) Denial of Protest. If the protest is denied by the Executive Manager, the Protestor may appeal the denial by filing a Notice of Appeal with the Executive Manager. The protestor shall file its appeal and with the Executive Manager within fifteen (15) calendar days of the Protestor's receipt of Executive Manager's decision to deny the protest. The Appeal Panel shall determine whether a decision on the protest is in accordance with the statutes, regulations, and the terms and conditions of the Solicitation. The Appeal Panel shall have no jurisdiction to consider an appeal that is not filed within the time required by this Section.
- (2) Appeal Procedures. For all appeals to the Appeal Panel pursuant to this Section, the Appeal Panel shall conduct a review of the Executive Manager's denial of the protest pursuant to Article 5 of these Policies and Procedures. The Appeal Panel shall issue a written decision on the appeal within ninety (90) calendar days of the Executive Manager's receipt of the appeal.

(k) **Reserved.**

(l) **Reserved.**

(m) **Finality.** The decision of the Executive Manager is final unless a Person adversely affected by the decision timely appeals the decision to the Appeal Panel in accordance with these Concession Policies and Procedures.

(n) **Making Information on Protests Available.** The Executive Manager shall upon written request make available to any Person information submitted that bears on the substance of the protest except where the information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted and the legal basis to keep such information confidential, and indicating on the front page of each document that it contains such information.

§ 4102. Debarment or Suspension.

(a) **Application.** This Section applies to all debarment or suspensions of Persons from consideration for award of Concession Agreements by the Executive Manager.

(b) **Authority.** The Executive Manager after consultation with GIAA's counsel, and in accordance with this Section, shall have authority to debar a Person for cause from consideration for award of Concession Agreements. The debarment shall not be for a period of more than two (2) years. The Executive Manager, after consultation with GIAA's counsel, shall have authority to suspend such Person from consideration for award of Concession Agreements if there is probable cause for debarment.

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(c) **Suspension.**

- (1) **Initiation.** After consultation with the Concessionaire or prospective Concessionaire who is to be suspended, where practicable, upon written determination by the Executive Manager that probable cause exists for debarment, a Concessionaire or prospective Concessionaire may be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended Concessionaire or prospective Concessionaire.
- (2) **Notice of Suspension.** The notice of suspension shall state that:
 - (i) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of the debarment decision, but not for a period in excess of three (3) months; and
 - (ii) proposals will not be solicited from the suspended Person, and, if they are received, they will not be considered during the period of suspension.
- (3) **Effect of Notice of Suspension.** A suspension is effective upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be terminated by the Executive Manager or by a court, but otherwise shall only terminate when the suspension has been in effect for three (3) months.

- (d) **Debarment.** Proceedings for the possible debarment of a Concessionaire or prospective Concessionaire shall be initiated by the service of an accusation and statement of issues on such Person in accordance with Article 2 of the Administrative Adjudication Law (5 GCA Chapter 9, Articles 1 and 2), as such law may be amended from time to time (the "AAL"). In addition to the requirements under the AAL, the accusation shall: (1) state that debarment is being considered; (2) set forth the reasons for the action; and (3) state that the debarment proceedings are being conducted pursuant to Article 2 of the AAL.

- (e) **Maintenance of List of Debarred and Suspended Persons.** The Executive Manager shall maintain and update a list of Persons debarred or suspended from participation in a Concession Solicitation. Such list shall include the date of expiration of the suspension or debarment. Such list shall be available to the public upon request.

§ 4103. **Contract and Breach of Contract Controversies.**

(a) **Authority to Resolve Contract and Breach of Contract Controversies.**

- (1) **General.** It is GIAA's policy to try to resolve all controversies with Concessionaires by mutual agreement without litigation. Resolution may be by informal discussions, mediation or other dispute resolution processes agreed to by the parties.
- (2) **Scope.** This Section is applicable to controversies between GIAA and a Concessionaire that arise under, or by virtue of, a Concession Agreement between them. The word *controversy* is meant to be broad and all-encompassing and includes without limitation controversies based upon breach of contract, mistake, misrepresentation, modification, reformation, or rescission.

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(b) **Failure to Resolve.**

(1) **Final Decision.** When a controversy cannot be resolved by mutual agreement, the Executive Manager shall, after written request by the Concessionaire for a final decision, promptly issue a written decision. Such decision must state that it is the “Final Decision” of GIAA on the controversy.

(2) **Contents of Final Decision.** The Executive Manager shall immediately furnish a copy of the decision to the Concessionaire, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

- (i) a description of the controversy;
- (ii) references to pertinent contract provisions;
- (iii) a statement of the factual areas of agreement or disagreement;
- (iv) the basis for the decision;
- (v) the following statement: “This is the final decision of the Executive Manager regarding this matter.

(3) **Failure to Timely Issue a Final Decision.** If the Executive Manager does not issue a written decision within sixty (60) days after the Executive Manager’s receipt of written request from the Concessionaire for a final decision, or within such longer period as may be agreed upon by the parties, then the Concessionaire may proceed as if an adverse final decision had been received.

(4) **Appeal of Final Decision.** For claims involving money damages, the Concessionaire must file a claim with GIAA in accordance with the Government Claims Act.

(c) **Controversies Involving GIAA Claims Against the Concessionaire.** All controversies involving claims asserted by GIAA against a Concessionaire that cannot be resolved by mutual agreement shall be the subject of a final decision by the Executive Manager.

(d) **Disputes Clause.** Language substantially similar to the following clause shall be inserted in all Concession Agreements:

DISPUTES

(1) The Authority and Concessionaire agree to attempt resolution of all controversies that arise under, or by virtue of, this Agreement through mutual agreement. If the controversy is not resolved by mutual agreement, then the controversy shall be decided by the Authority in writing within sixty (60) days after Concessionaire’s written request that the Authority issue a final decision concerning the controversy. If the Authority does not issue a written decision, within sixty (60) days after Concessionaire’s written request for a final decision, or within such longer period as may be agreed upon by the parties, then Concessionaire may proceed as if an adverse decision had been received.

(2) The Authority shall immediately furnish a copy of the decision to Concessionaire, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(3) The Authority’s decision shall be final and conclusive, unless fraudulent, or unless for disputes involving money owed by or to Concessionaire under this

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Agreement, Concessionaire files appeal an of the decision in accordance with the Government Claims Act by filing a government claim with the Authority no later than eighteen months after the decision is rendered by the Authority or from the date when a decision should have been rendered.

(4) Concessionaire shall exhaust all administrative remedies before filing an action in the Superior Court of Guam in accordance with applicable laws.

(5) Concessionaire shall comply with the Authority's decision and proceed diligently with performance of this Agreement pending final resolution of any controversy arising under, or by virtue of, this Agreement, except where Concessionaire claims there has been a material breach of the Agreement by the Authority. However, if the Authority determines in writing that continuation of services under this Agreement is essential to the public's health or safety, then Concessionaire shall proceed diligently with performance of the Agreement notwithstanding any claim of material breach by the Authority.

§ 4104. Determination that a Solicitation or an Award Violates Law.

(a) **Applicability.** This Section applies where it is determined administratively that a Solicitation or award of a Concession Agreement is in violation of law.

(b) **Determination that a Solicitation or an Award Violates Law.**

(1) **Determination.** A Solicitation or award may be in violation of the law or these Policies and Procedures due to actions of GIAA employees, proposers, Concessionaires, or other Persons. After consultation with GIAA counsel, the Executive Manager, or in an appeal over which it has jurisdiction, the Appeal Panel may determine that a Solicitation or award is in violation of the provisions of law or these Policies and Procedures. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination by the Executive Manager is subject to appeal to the Appeal Panel.

(2) **Finding of Bad Faith or Fraud.** Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

§ 4105. Violations of Law Found Prior to Award.

(a) **Remedies Prior to an Award.** If prior to award it is determined that a Solicitation or proposed award of a Concession Agreement is in violation of the law, then the Solicitation or proposed award shall be:

- (1) cancelled; or
- (2) revised to comply with the law.

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- (b) **Cancelling or Revising Solicitation or Proposed Award to Comply with the Law.** A finding by the Executive Manager, after consultation with GIAA counsel, that the Solicitation or proposed award is in violation of law will constitute a cogent and compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with Section 3107 (Cancellation of Solicitations) of these Policies and Procedures.

§ 4106. Ratification, Termination, or Cancellation of Concession Agreement to Comply with the Law.

- (a) **Remedies After an Award.** If after an award it is determined that a Solicitation or award of a Concession Agreement is in violation of law, then:
- (1) if the Person awarded the Concession Agreement has not acted fraudulently or in bad faith:
 - (i) the Concession Agreement may be ratified and affirmed, provided it is determined that doing so is in the best interests of GIAA; or
 - (ii) the Concession Agreement may be terminated and the Person awarded the Concession Agreement shall be compensated for the actual expenses reasonably incurred under the Concession Agreement prior to the termination;
 - (2) if the Person awarded the Concession Agreement has acted fraudulently or in bad faith:
 - (i) the Concession Agreement may be declared null and void; or
 - (ii) the Concession Agreement may be ratified and affirmed if such action is in the best interests of GIAA, without prejudice to GIAA's rights to such damages as may be appropriate.
- (b) **No Fraud or Bad Faith by Concessionaire.**
- (1) **General.** Upon finding after award that GIAA has made an unauthorized award of a Concession Agreement or that a Solicitation or award is otherwise in violation of law where there is no finding of fraud or bad faith, the Executive Manager may ratify or affirm the Concession Agreement or terminate it in accordance with this Section after consultation with GIAA counsel.
 - (2) **Ratification and Affirmation.**
 - (i) **Waiver of violation.** If the violation can be waived without prejudice to GIAA or other Proposers, the preferred action is to ratify and affirm the Concession Agreement if such action is in the best interests of GIAA.
 - (ii) **No waiver of violation.** If the violation cannot be waived without prejudice to GIAA or other Offerors or Proposers and:
 - (A) if performance has not begun, and if there is time for resoliciting, the Concession Agreement shall be terminated. If there is no time for resoliciting, the Concession Agreement may be amended appropriately, ratified, and affirmed if such action is in the best interests of GIAA.
 - (B) if performance has begun, the Executive Manager shall determine in writing whether it is in the best interest of GIAA to terminate or to amend,

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ratify, and affirm the Concession Agreement. Termination is the preferred remedy.

(iii) Best interests of GIAA. The following factors are among those pertinent in determining GIAA's best interest:

(A) the costs to GIAA's best interest;

(B) the progress made toward performing the whole contract; and

(C) the possibility of obtaining a more advantageous contract by resoliciting.

(iv) **Termination.** Concession Agreements based on awards or Solicitations that were in violation of law shall be terminated at no cost to GIAA, if possible. If a termination claim is made by the Concessionaire, settlement shall be made in accordance with the Concession Agreement. If there are no applicable termination provisions in the Concession Agreement, settlement shall be made on the basis of actual costs reasonably incurred by the Concessionaire through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Anticipated profits are not allowed.

(c) **Fraud or Bad Faith by the Concessionaire.**

(1) **General.** Upon finding after award that a Solicitation or award is in violation of law and that the recipient of the Concession Agreement acted fraudulently or in bad faith, the Executive Manager may, after consulting with GIAA's counsel, declare the contract null and void or ratify and affirm it in accordance with this Section.

(2) **Declaration of Concession Agreement Null and Void.** The Concession Agreement shall be declared null and void unless ratification and affirmation is found to be in GIAA's best interest under Subsection 4106(b)(2)(iii) of this Section.

(3) **Ratification and Affirmation.** The Concession Agreement shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the Concession under the Concession Agreement and:

(i) there is no time to resolicit and award the Concession Agreement; or

(ii) the Concession Fee is higher than it could be otherwise.

(4) **Effect of Declaring a Concession Agreement Null and Void.** In all cases where a contract is voided, GIAA is entitled to recover damages under any applicable legal theory from the faithful performance guaranty

(5) **Effect of Ratification.** GIAA shall be entitled to any damages it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the Concession Agreement.

§ 4107. Interest. Interest on amounts ultimately determined to be due to a Concessionaire shall be payable at the statutory rate from the date the claim arose through the date of decision or judgment, whichever is later. Interest on amounts ultimately determined to be due to GIAA shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

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§ 4108. Reserved.

§ 4109. Reserved.

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Appendix A: Notice of Appeal Form

APPEAL
GIAA CONCESSION RULES AND REGULATIONS

PART I- To be completed by APPEAL PANEL /
DESIGNATED GIAA ADMINISTRATIVE STAFF

In the Appeal of
(Name of Company), APPELLANT

NOTICE OF APPEAL

PART II- Appellant Information

Name:
Mailing Address:
Business Address:
Daytime Contact No:

I. PART III- Appeal Information

- A) Agency: Antonio B. Won Pat International Airport Authority, Guam (GIAA)
B) Identification/Number of Solicitation or Concession Agreement:
C) Decision being appealed was made on (date) by GIAA Executive Manager.

Note: You must serve GIAA 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
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 GIAA)

1
2 E) Names of Competing Proposers or Concessionaires known to Appellant:

3 _____
4 _____
5 _____
6 _____

7 **PART IV- Form and Filing**

8 In addition to this form, the Rules of Procedure for Appeals (Art. 5 of GIAA Concession
9 Policies and Procedures) require the submission together with this form of additional
10 information, including BUT NOT LIMITED

11 TO:

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

17 Submitted this ___ day of _____, 20__.

18 By: _____
19 APPELLANT

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- § 5101 Appeal Panel
 - § 5101.1 Appointment and Authority of Hearing Officer
 - § 5102. Jurisdiction; Exhaustion of Remedies.
 - § 5104. Form and Filing of Appeal.
 - § 5105. Agency Report.
 - § 5106. Making Information on Appeals Available.
 - § 5107. *Ex Parte* Communications with Hearing Officer.
 - § 5108. Hearing Procedures.
 - § 5109. Reserved.
 - § 5110. Decisions of the Hearing Officer.
 - § 5111. Finality of Decisions.
 - § 5112. Appeal to Appeal Panel relative to Method, Solicitation, or Award.
 - § 5113. Reserved.
 - § 5114. Appeal to Appeal Panel of Debarment or Suspension.
 - § 5115. Review of Award Pending Protest or Appeal.
 - § 5116. Reserved.
- Appendices A-D.

§ 5101. Appeal Panel. (a) A three-person Appeal Panel, designated by I Maga Hagan Guahan shall be constituted to administratively consider appeals from decisions of the Executive Manager, as allowed by these Concession Policies and Procedures. Prior to any solicitation for a concession agreement, GIAA shall enter a memorandum of understanding with I Maga Hagan Guahan to constitute such panel, which shall include the Director of the Department of Administration, the Chief Procurement Officer of the General Services Agency and the General Services Agency Procurement Counsel. If one or more of these positions are vacant or there is a conflict of interest precluding an individual's designation or participation at any time I Maga Hagan Guahan makes such designation, then I Maga Hagan Guahan may appoint any other appropriate individual employed within the Executive Branch of the Government of Guam, provided at least one individual is an attorney employed by Government of Guam Executive Branch.

(b) GIAA shall designate administrative staff responsible for handling any Appeal, and for supporting the needs of the Appeal Panel. These staff members shall be called the "Designated GIAA Staff."

(c) GIAA shall provide the necessary facilities for all proceedings required in an appeal.

(d) GIAA shall maintain records of every Appeal, including a complete docket of all documents filed concerning an Appeal, which shall be publicly posted on GIAA's website while an Appeal is ongoing and for a least 6 months following the final decision related to any Appeal.

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(e) GIAA shall bear all administrative costs concerning Appeals under this section, including for providing necessary facilities, maintaining an electronic and physical docket with all documents filed concerning an Appeal, and for any audio or other recordings for any hearings.

(f) The Appeal Panel shall be an ad hoc committee, and is not intended to be a Public Agency within the meaning of the Guam Open Government Law.

§ 5101.1 Appointment and Authority of the Hearing Officer. For any hearing required under this Article, the Appeal Panel shall appoint its attorney member as the Hearing Officer related to the Appeal. The Hearing Officer shall receive written, oral, or otherwise presented testimony, evaluate such testimony and make recommendations to the Appeal Panel. No prior determination shall be final or conclusive. The Hearing Officer has the power, among others, to:

- (a) Hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or *sua sponte*;
- (b) Require parties to state their positions with respect to the various issues in the proceeding;
- (c) Require parties to produce for examination those relevant witnesses and documents under their control;
- (d) Rule on motions, and other procedural items on matters pending before such officer;
- (e) Regulate the course of the hearing and conduct of participants therein;
- (f) Receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (g) Fix time limits for submission of written documents in matters before such officer;
- (h) Impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 - (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (2) Excluding all testimony of an unresponsive or evasive witness;
 - (3) Expelling any party or person from further participation in the hearing; and
 - (4) Taking official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.
- (i) Compel attendance and testimony of and production of documents by any employee of the government of Guam, including any employee of any autonomous agency, public corporation or board or commission;
- (j) Consider testimony and evidence submitted by any competing proposer or Concessionaire of the protestant or appellant; and
- (k) Make written recommendations concerning any findings of fact or conclusions of law necessary for a final decision by the Appeal Panel.

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§ 5102. Definitions. As used in this Article, unless the context in which they are used requires a different meaning, the following definitions shall apply.

- (a) *Appeal* means an appeal of a decision of the Executive Manager to the Appeal Panel in accordance with these Concession Policies and Procedures.
- (b) *Appellant* means an aggrieved person who appeals a decision of the Executive Manager to the Appeal Panel.
- (c) *Designated GIAA Staff* mean those GIAA employees designated by GIAA to administratively support the Appeal Panel, who shall have no involvement, directly or indirectly, with GIAA's defense, response, or other litigation-related-action concerning an Appeal pending before the Appeal Panel.
- (d) *GIAA Administrative Offices* means the Executive Offices of the A.B. Won Pat International Airport Authority, Guam located at 355 Chalan Pasaheru, Tamuning, Guam 96913 on the 3rd floor.
- (e) *Hearing Officer* means the attorney member of the Appeal Panel designated pursuant to Section 5101.1 to *inter alia* preside over a hearing on an Appeal.
- (f) *Interested Party* means a Concessionaire or an actual or prospective Proposer who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied.
- (g) *Protestor* means any actual or prospective Proposer or Concessionaire who is aggrieved in connection with the Solicitation or Award of a Concession Agreement and who filed a protest, or who has received a notice of suspension or debarment. Such a Protestor is sometimes referred to herein as an "aggrieved person."
- (h) *Prospective proposer* means a Person who will actually submit a proposal in response to a RFP, and would provide a Concession if such Person would prevail in the Appeal.
- (i) *File and submit* mean receipt by the Administration Offices of GIAA, as the case may be.
- (j) In computing any period of time prescribed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, a Sunday, a Government of Guam holiday, in which event a period extends until the end of the next day which is not a Saturday, a Sunday, a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, legal holidays shall be excluded in the computation.

§ 5103. Jurisdiction of the Appeal Panel; Exhaustion of Remedies.

- (a) **Jurisdiction.** The Appeal Panel shall have the power to review and determine *de novo* any matter properly submitted to it. The Appeal Panel or the Hearing Officer shall have the power to compel attendance and testimony of, and production of documents by, any employee of the government of Guam, including any employee of any autonomous agency, public corporation or board or commission. The Appeal Panel may consider testimony and evidence submitted by any party to the Appeal.

§ 5104. Form and Filing of Appeal.

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- (a) **When Filed.** Appeals shall be made in writing to the Executive Manager and shall be filed in triplicate. An Appeal is considered filed when received by the GIAA Administrative Offices, which shall cause evidence of the date of filing to be stamped upon each Appeal and triplicate. Appeals filed after the allowable filing period set forth in statute or these rules shall not be considered.
- (b) **Form.** To expedite handling of Appeals, the envelope, transmittal letter, and the actual Appeal shall be labeled “Antonio B. Won Pat International Airport Authority Guam Concession Solicitation Appeal”. The written Appeal shall be in substantially the same format as **Appendix A** to this Article, and include at a minimum the following:
- (1) The name, mailing and business address of the Appellant;
 - (2) Appropriate identification of the Solicitation, and, if a contract has been awarded, its number; a concise, logically arranged, and direct statement of the grounds for Appeal;
 - (3) A statement specifying the ruling requested;
 - (4) 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;
 - (5) A copy of the final decision on the protests or contract disputes or debarment action that are being Appealed; or copy of the request for final decision and any agreement to extend the decision deadline;
 - (6) An Appeal shall be signed by an Appellant, by an officer of the Appellant, or by the Appellant’s duly authorized representative or attorney, and the facts therein verified.
 - (7) A protest may be dismissed for failure to comply with any of the requirements of this section.
- (c) **Notice of Appeal, Submission of Report and Time for Filing of Comments on Report.**
- (1) The Appellant shall file a copy of the Appeal, and all supporting documents with the GIAA Administrative Offices. It shall be the duty of the Executive Manager to give notice of the Appeal to counsel for the Authority.
 - (2) The Executive Manager shall give notice of the Appeal to the Concessionaire if award has been made or, if no award has been made, to all Interested Parties; shall instruct said parties to communicate directly with the GIAA Administrative Offices regarding the status of the Appeal, and directly with the Executive Manager as allowed by law regarding the protested Solicitation.
 - (3) The Executive Manager shall submit to the Appeal Panel a complete copy of the Solicitation Record relevant to the Appeal within five (5) working days of receiving notice of an Appeal, in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents. It shall additionally submit an answer to the Appeal in the form of a detailed Agency Report, and shall furnish a copy of the report to the Appellant. This Agency Report shall comply to the requirements of § 5105 of this Article. The Agency Report shall be submitted within ten (10) working

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days of receipt of by the Executive Manager of the notice of Appeal. The Agency Report shall be submitted within twenty (20) days of receiving the notice of Appeal or notice of Appeal of a Debarment.

- (4) Comments on the Agency Report by an Appellant or an Interested Party, including testimony and evidence by any competing proposer or Concessionaire of the Appellant, shall be filed with the GIAA Administrative Offices within ten (10) days after receipt of the report. Any rebuttal by GIAA Management shall be filed with the GIAA Administrative Offices within five (5) working days after receipt by the Appeal Panel of the comments to which rebuttal is directed, with a copy to the Appellant. Unsolicited rebuttals by GIAA shall be considered if filed within five (5) working days after receipt by the GIAA Administrative Offices of the comments to which rebuttal is directed.
- (5) The failure of an Appellant or any Interested Party to comply with the time limits stated in this section may result in resolution of the Appeal without consideration of the comments untimely filed.
- (6) If the Appellant or GIAA considers that the Appeal, the Solicitation Record, the Agency Report, or any other report or material submitted contains material which shall be withheld pursuant to law or regulation, a statement advising of this fact must be affixed to the front page of the document and the allegedly exempted information must be so identified wherever it appears.
- (7) Requested Information Time for Filing. In order to expedite consideration of the Appeal, any additional information requested by the Hearing Officer shall be submitted within five working (5) days of receipt of such request unless another time is established in the request. Failure of any party to comply expeditiously with a request for information by the Hearing Officer may result in resolution of the Appeal without consideration of any information, which is untimely filed pursuant to such request.
- (8) After notice of an Appeal to the Appeal Panel has been filed a party may not discontinue such Appeal without prejudice, except as authorized by the Appeal Panel.

§ 5105. Agency Report. The Agency Report shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file and shall include the following, if not already submitted to the GIAA Administrative Offices as part of the Solicitation Record required by § 3114 of these Policies and Procedures:

- (a) A copy of the protest;
- (b) A copy of the proposal submitted by the Appellant and a copy of the proposal that is being considered for award or the proposal being protested, if any had been submitted prior to the protest;
- (c) A copy of the Solicitation;
- (d) A copy of the abstract of proposals or relevant or portions thereof relevant to the protest;
- (e) Any other documents which are relevant to the protest; including the Concession Agreement, if one has been awarded, and all amendments;

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(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant;

(g) A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal;

(h) If the award was made after receipt of the protest, the report will include the determination required under § 4101(g) of these Policies and Procedures; and

(i) A statement in substantially the same format as **Appendix B** to this Article, indicating whether the matter is the subject of a court proceeding.

§ 5106. Making Information on Appeals Available. GIAA shall, upon written request, make available to any Person information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation or these Policies and Procedures. Persons who wish to keep such information submitted by them confidential shall so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

§ 5107. Ex Parte Communications with Hearing Officer.

(a) **No Ex Parte Communications.** No Person directly or indirectly involved in an Appeal shall communicate with the Appeal Panel or the Hearing Officer regarding any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an Appeal except:

(1) At a hearing; or

(2) With the written consent of all other parties or their counsel in such matters; or

(3) In the presence of all other parties or their counsel in such matters;

(4) By means of papers provided for or allowed by these rules or by law; Or

(5) Designated GIAA Administrative Staff shall maintain a record for every appeal, and may communicate with the Appeal Panel concerning the records maintained for the appeal.

(b) **Unrelated Matters.** Nothing in this rule shall prevent the Appeal Panel and GIAA staff from entertaining questions or complaints that are not related to the substance of a pending Appeal. Appeal Panel members and Hearing Offices shall report communications regarding a pending Appeal to all the parties in the pending Appeal.

§ 5108. Hearings Procedures.

(a) **Request for Hearing.** In all Appeals to the Appeal Panel of suspension or debarment, a hearing shall be conducted. In all other Appeals, the parties shall either request a hearing in writing or waive their right to a hearing and submit the case on the record without a

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hearing. Request for a hearing shall be made prior to the expiration of the time period allowed for filing comments on the Agency Report and shall be in a form substantially similar to **Appendix D** to this Article. Except in unusual circumstances found by the Appeal Panel, requests for a hearing received after such time will not be honored.

- (b) **Time and Place for Hearings.** Hearings shall be held at the place set by the Hearing Officer. The time for hearings shall be set by the Hearing Officer. Ordinarily, only one hearing will be held on an Appeal. Such hearing may be held by telephone conference call or other means at the discretion of the Hearing Officer.
- (c) **Notice of Hearing.** The Hearing Officer shall send a written notice of the time and place of the hearing to the Appellant and to the Executive Manager at least ten (10) days prior to the hearing unless the parties agree on a shorter period. It shall be the duty of each of these entities to notify its own counsel. Notice shall be sent by the Hearing Officer by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and shall state the nature and purpose of the proceedings, and shall substantially follow the format of **Appendix C** of this Article. The notice shall also state that the Appellant may be represented by counsel. Notices of hearings shall be promptly acknowledged by the parties. The Hearing Officer can require attendance of parties he or she deems appropriate.
- (d) **Hearing Proceedings.** Hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence or by technical or formal rules of procedure except as provided by Guam law and the Concession Policies and Procedures. The testimony presented shall be written, oral or otherwise. The weight to be attached to evidence presented in any particular form will be within the discretion of the Hearing Officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate to the testimony that would be given by a witness if the witness were present. The Hearing Officer may require evidence in addition to that offered by the parties. Where not otherwise provided for by these Concession Policies and Procedures or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on subpoenas and contempt.
- (e) **Record of Hearings.** A hearing shall be recorded by GIAA, at GIAA's cost, but need not be transcribed, except at the request and expense of the person making the request. The audio recording, together with the written record of the time, place, and persons present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record. An audio copy of the recorded hearing shall be made available to the parties in electronic or digital format.

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- (f) **Opening Statements.** Opening statements may be made unless a party waives this right, subject to time limits that may be set by the Hearing Officer.
- (g) **Public Hearings.** Hearings shall be open and accessible to the public.
- (h) **Judicial Notice.** In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of Guam. Parties present at the hearing shall be informed of the matters to be noticed, and these matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, subject to time constraints imposed by the Hearing Officer.

§ 5109. Reserved.

§ 5110. Recommendation of the Hearing Officer.

- (a) **Time.** Within thirty (30) days of a hearing on an Appeal or after the parties have formally waived a hearing in accordance with § 5108(a) of these Policies and Procedures, the Hearing Officer shall issue a final written recommendation to the Appeal Panel, who shall within fourteen (14) days of receipt of such recommendation act by majority to either affirm or reverse, in whole or in part, the decision of the Executive Manager on Appeal.
- (b) **Distribution.** A copy of any final decision on an Appeal shall be immediately mailed via certified mail, return receipt requested, or furnished by any other method that provides evidence of receipt, to the Appellant, to any other participating party and to the Executive Manager. All decisions shall be posted on the GIAA website within ten (10) days of issuance.

§ 5111. Finality of Decision.

- (a) **Board Action.** Within 14 days of a Hearing Officer's Recommendation concerning an appeal under this Article, the Appeal Panel shall meet on the record of any Appeal and either confirm, deny or modify the recommendation of the Hearing Officer. The Appeal Panel's final decision, which shall be made part of the record, shall be in writing and shall recite the evidence relied upon which the decision is based.
- (b) **Appeal.** Any Person receiving an adverse recommendation, including GIAA, by the Hearing Officer may seek reconsideration, in writing, before the Appeal Panel prior to their action to confirm, deny or modify the recommendation. Such request for reconsideration shall be filed at the GIAA Administrative Offices within 7 calendar days of the Hearing Officer's recommendation. Any interested party may respond to such request for reconsideration by the Appeal Panel in writing within 4 calendar days of receipt.

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- (c) **Standard of Review.** Any determination of an issue or a finding of fact by the Hearing Officer shall be final and conclusive unless found to be arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. Any decision of the Hearing Officer, including any determination regarding the application or interpretation of Guam law and the Concession Policies and Procedures, shall be entitled to great weight and the benefit of reasonable doubt, although it shall not be conclusive on the Appeal Panel.

§ 5112. Appeal Relative to Method, Solicitation, or Award. A Protestor may Appeal a decision under § 4101(h) relative to the protest of a method of selection, a Solicitation, an award of a Concession Agreement or regarding entitlement to costs, within fifteen (15) days of receipt by the Protestor of the decision. The Hearing Officer shall determine whether a decision on the protest of method of selection, Solicitation or award of a Concession, or entitlement to costs is in accordance with applicable statutes, regulations, these Policies and Procedures, and the terms and conditions of the solicitation.

§ 5113. Reserved.

§ 5114. Appeal of Debarment or Suspension.

This section applies to Appeals of debarment or suspensions of persons from consideration for award of Concession Agreements imposed by the Executive Manager. An aggrieved person may Appeal a suspension or debarment action within sixty (60) days of receipt of a decision under subsection § 4102 of these Policies and Procedures. The Appeal Panel shall review actions between GIAA and a person who is subject to a suspension or debarment proceeding, to determine whether, or the extent to which the debarment or suspension was imposed on a contractor in accordance with applicable statutes, regulations, these Policies and Procedures, and the best interest of GIAA, and was fair. A decision on Appeal of a suspension or debarment shall set for the reasons for such action and shall inform the debarred or suspended person involved of his right to judicial review as provided in these Policies and Procedures and Article 4 (Legal and Contractual Remedies) of these Policies and Procedures.

§ 5115. Review of Award Pending Protest or Appeal.

- (a) Any Protestor may protest a determination by the Executive pursuant to § 4101(g) of these Policies and Procedures that award of a Concession Agreement without delay pending Appeal is necessary to protect the substantial interests of GIAA. Said protest must be filed in writing at the Appeal Panel within two (2) days of receipt by Protestor of the notice of determination. The Appeal Panel shall either confirm or reject the determination during a duly noticed meeting of the Appeal Panel.
- (b) After an Appeal is filed with the Appeal Panel relative to method of selection, solicitation, or award pursuant to § 4101(h) of these Policies and Procedures, the hearing officer shall make a recommendation to confirm or reject any determination by the Executive Manager

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pursuant to § 4101(g) that award of a Concession Agreement without delay pending Appeal is necessary to protect the interests of GIAA.

(c) Reserved.

(d) Any additional information requested by the Hearings Officer shall be submitted within the time periods established by the requesting source in order to expedite review. Failure of any party to comply expeditiously with a request for information by the Hearings Officer may result in a recommendation by the Hearing Officer without consideration of any information that is untimely filed pursuant to such request.

§ 5116. Reserved.

DRAFT

1 *Appendix C: Notice of Hearing Form*

2 **APPEAL**

3 **GIAA CONCESSION POLICIES AND PROCEDURES**

4)
5 In the Appeal of)

NOTICE OF HEARING

6)
7 _____)
(Name of Company), APPELLANT)
8 _____)

9
10 You are hereby notified that a hearing will be held before the Hearing Officer for Appeals
11 at the _____ on the _____ day of _____, 20__, at the hour of _____,
12 relative to the above referenced Appeal. You may be present at the hearing; may, but need not
13 be, represented by counsel; may present any relevant evidence; and will be given full opportunity
14 to cross-examine all witnesses testifying against you. You are entitled to the issuance of
15 subpoenas to compel the attendance of witnesses and the production of books, documents or
16 other things by applying to the Hearing Officer for the Appeal Panel.
17

18 Please acknowledge receipt of this Notice and return it to the GIAA Administrative
19 Offices.

20 **Acknowledged receipt:**

21 _____
22 Receiver's Signature

23 _____
24 Print Name

25 _____
26 Date

Appendix D: Hearing Request/Waiver Form

APPEAL

GIAA CONCESSION POLICIES AND PROCEDURES

HEARING REQUEST/WAIVER

In the Appeal of

(Name of Company), APPELLANT

Please select one:

The undersigned party does hereby request a hearing on the appeal stated above.

The undersigned party does hereby waive his/her right to a hearing and is submitting the appeal stated above on record without a hearing.

Submitted this ___ day of _____, 20__.

By: (Please select one)

___ APPELLANT

___ GIAA

Print Name

Sign Name

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ARTICLE 6
ETHICS IN PUBLIC CONTRACTING

- § 6101. Definitions of Terms Used in this Article.
- § 6102. Purpose and Policy.
- § 6103. General Ethical Standard for Non-GIAA Employees.
- § 6104. Criminal Sanctions.
- § 6105. Ethical Standard - Conflicts of Interest.

- § 6106. Ethical Standard – Gratuities, Kickbacks and Favors
- § 6107. Ethical Standard - Contingent Fees
- § 6108. Employment Prohibitions and Restrictions.
- § 6109. Use of Confidential Information
- § 6110. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards
- § 6111. Civil and Administrative Remedies Against Non-Employees who Breach Ethical Standards.
- § 6112. Recovery of Value Transferred or Received in Breach of Ethical Standards.
- § 6114. Ethics Enforcement.

§ 6101. Definitions of Terms Used in this Article.

- (a) *Bona Fide Employee* means an individual employed by a prospective proposer and subject to the prospective proposer’s supervision and control as to the time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain a Concession Agreement. In determining whether a bona fide employment relationship exists, the following factors should be considered:
 - (1) whether the employment is continuous;
 - (2) whether the person is subject to the supervision and control of the prospective offeror or proposer;
 - (3) whether the size of any contingent fee is reasonable in relation to the services performed;
 - (4) whether the method of payment of the contingent fee is customary in the trade; and
 - (5) whether the person is employed solely by the prospective offeror or proposer.
- (b) *Bona Fide Established Commercial Selling Agency* means a Person that neither exerts nor proposes to exert improper influence to solicit or obtain a Concession Agreement. In determining whether a Person is a Bona Fide Established Commercial Selling Business, the following factors should be considered:
 - (1) whether the Person is one which has either been active for a considerable period of time or is presently a going concern and is likely to continue as such;
 - (2) whether the Person uses its own name and is characterized by the customary indicia of the conduct of a regular business;
 - (3) the degree to which the Person’s activities are directed toward the solicitation of

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Concessions;

- (4) whether the size of any contingent fee is reasonable in relation to the services performed; and
- (5) whether the method of payment to the contingent fee is customary in the trade.

§ 6102. Purpose and Policy.

- (a) **Purpose.** This Article prescribes the standards of conduct for Government Employees in general and establishes specific standards of conduct for non-government employees with regard to Solicitations.
- (b) **Policy.** Public employment is a public trust. It is the policy of GIAA to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by GIAA. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service. Government Employees must discharge their duties impartially so as to assure fair competitive access to Solicitations by responsible proposers. Moreover, Government Employees should conduct themselves in such a manner as to foster public confidence in the integrity of the Solicitation process. To achieve the purpose of and uphold the policies of this Article, it is essential that those seeking Concession opportunities at GIAA also observe the ethical standards prescribed herein.

§ 6103. General Ethical Standard for Non-Government Employees.

- (a) **No Influence.** Any effort to influence any Government Employee to breach the standards of ethical conduct set forth in this Article or 4 GCA Chapter 15 is also a breach of ethical standards.
- (b) **Required Declaration.** Every proposer shall submit a declaration regarding the ethical standard not to influence Government Employees. Such declaration shall be in a form established by GIAA.
- (c) **Required Clause.** The following clause shall be conspicuously set forth in every Solicitation and Concession Agreement:

REPRESENTATION REGARDING ETHICAL
STANDARD NOT TO INFLUENCE GOVERNMENT EMPLOYEES

Proposer or Concessionaire represents that it has not knowingly influenced and promises that it will not knowingly influence a Government Employee to breach any of the ethical standards set forth in Article 6 of the GIAA Concession Policies and Procedures or 4 GCA Chapter 15 (Standard of Conduct for Elected

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Officers, Appointed Officers, and Public Employees of the Government Of Guam).

§ 6104. Criminal Sanctions. To the extent that violations of the ethical standards of conduct set forth in this Article constitute violations of Title 9 GCA (Crimes and Corrections), they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Article.

§ 6105. Ethical Standard – Government Employee Conflicts of Interest.

- (a) **(Conflict of Interest.** It shall be a breach of ethical standards for any Government Employee to participate directly or indirectly in a Solicitation when the Government Employee knows that:
- (1) the Government Employee or any member of the Government Employee's Immediate Family has a Financial Interest pertaining to the Solicitation;
 - (2) a Business in which the Government Employee, or any member of the Government Employee's Immediate Family has a Financial Interest, has a Financial Interest pertaining to the Solicitation; or
 - (3) any Person with whom the Government Employee or any member of the Government Employee's Immediate Family is negotiating or has an arrangement concerning prospective employment has a Financial Interest in the Solicitation.
- (b) **Financial Interest in a Blind Trust.** Where a Government Employee or any member of the Government Employee's Immediate Family holds a Financial Interest in a Blind Trust, the Government Employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that Financial Interest, provided that disclosure of the existence of the Blind Trust has been made to the Civil Service Commission.
- (c) **Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.** Upon discovery of an actual or potential conflict of interest, a Government Employee shall promptly file a written statement of disqualification with the Executive Manager and shall withdraw from further participation in the Solicitation. The Government Employee may, at the same time, apply to the Civil Service Commission pursuant to 5 GCA 5676(b) for an advisory opinion as to what further participation, if any, the employee may have in the Solicitation.
- (d) **Notice.** Notice of this prohibition shall be provided in accordance with regulations promulgated by the Civil Service Commission.
- (e) **Application for a Waiver of Prohibition Against Conflict of Interest.**
- (1) Application for Waiver. (Reserved).
 - (2) Grant or Denial of Waiver. The Civil Service Commission, may grant a Government

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Employee and/or the Concessionaire a waiver of the conflict of interest prohibition where the interests of the GIAA so require or when the ethical conflict is insubstantial or remote.

Prior to granting or denying a waiver, the Civil Service Commission shall make such investigation as it may deem appropriate and which is not in violation of the Government Employee's or the Concessionaire's rights, privileges, and immunities. Factors to be considered by the Civil Service Commission when determining whether to grant a waiver shall include:

- (i) the degree of involvement of the Government Employee or Concessionaire;
- (ii) the size and character of the Financial Interest of the Government Employee or a member of such employee's Immediate Family or a Concessionaire which relates to the particular Solicitation;
- (iii) the likelihood of the appearance of impropriety;
- (iv) the availability of prospective proposers with which a Concession Agreement would not present a conflict; and
- (v) the extent to which GIAA's interests will be affected by a waiver.

§ 6106. Reserved

§ 6107. Ethical Standard – Gratuities and Kickbacks.

- (a) **Gratuities.** It shall be a breach of ethical standards for any person to offer, give, or agree to give any Government Employee or former Government Employee, or for any Government Employee or former Government Employee to solicit, demand, accept, or agree to accept from another Person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a Solicitation, influencing the content of any Solicitation standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any Concession or a Concession Agreement, or to any Solicitation or proposal therefor.
- (b) **Kickbacks.** It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the Concessionaire or higher tier subcontractor or any person associated therewith, as an inducement of the award of a subcontract or order.
- (c) **Contract Clause.** The prohibition against gratuities and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.
- (d) **Favors to the Government of Guam.** For purposes of this subsection, a favor is anything, including raffle tickets, or more than de minimis value and whether intended for the

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personal enjoyment of the receiver or for the department or organization in which they are employed or for any person, association, club or organization associated therewith or sponsored thereby. It shall be a breach of ethical standards for any person who is or may become a Concessionaire, a subcontractor under a Concession Agreement to the Concessionaire, or any person associated therewith, to offer, give or agree to give any Government Employee or agent of the government of Guam or for any Government Employee or agent of the government of Guam to solicit or accept from any such person or entity or agent thereof a favor or gratuity on behalf of the government of Guam whether or not such favor or gratuity may be considered a reimbursable expense of the government of Guam, during the pendency of any Solicitation.

(e) **Intentionally Omitted.**

(f) **Gratuities Prohibition.**

- (1) Breach. It is a breach of § 6107(a) (Gratuities and Kickbacks - Gratuities) of these Policies and Procedures:
 - (i) for any Person to offer, give, or agree to give any Government Employee or former Government Employee a gratuity of offer of employment; or
 - (ii) for any Government Employee or former Government Employee to solicit, demand, accept, or agree to accept a gratuity or an offer of employment; provided that the gratuity or offer of employment is in relation to a particular matter in accordance with § 6107(f)(2) of these Policies and Procedures, and pertains to any Concession, Concession Agreement, subcontract, or Solicitation or proposal therefor.
- (2) Relationship of Gratuity. In addition, the gratuity or offer of employment must be made in relation to any proceeding or application, request for a ruling, determination, claim or controversy, or other particular matter, to constitute a breach, and in connection with any:
 - (i) decision;
 - (ii) approval;
 - (iii) disapproval;
 - (iv) recommendation;
 - (v) preparation of any part of a Solicitation;
 - (vi) action to influence the content of any Solicitation;
 - (vii) rendering of advice;
 - (viii) investigation;
 - (ix) auditing; or
 - (x) other advisory capacity.
- (3) Family. This prohibition extends to the giving of gratuities to anyone on the Government Employee's or former Government Employee's behalf such as a member of the Government Employee's or former Government Employee's Immediate Family.

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- (g) **When Prohibition Against Gratuities not Applicable.** Section 6107(a) (Gratuities and Kickbacks-Gratuities) of these Policies and Procedures does not prohibit:
- (1) the solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation for the transaction is unrelated to any Solicitation or Solicitation requirement with GIAA and is based upon a personal or family relationship;
 - (2) the participation in the activities of, or the acceptance of an award for, a meritorious public contribution or achievement from a charitable, religious, professional, social, or fraternal organization, or from a non-profit educational, recreational, public service, or civic organization;
 - (3) acceptance only on current customary terms of finance of a loan from a bank or other financial institution for proper and usual activities of Government Employees, such as home mortgage loans; or
 - (4) acceptance of unsolicited advertising products or promotional material, such as pens, pencils, note pads, calendars, and other items under nominal value as described in § 1106(cc) (Definitions-Gratuity) of these Policies and Procedures.
- (h) **Payment of a Kickback.** The prohibition against kickbacks set forth in § 6107(b)11206(2) (Gratuities and Kickbacks-Kickbacks) of these Policies and Procedures applies whether a kickback is made prior to or after the award of a Concession Agreement.
- (i) **Contract Clause.** The following clause shall be conspicuously set forth in every Concession Agreement and Solicitation therefor:

REPRESENTATION REGARDING GRATUITIES AND KICKBACKS

The Proposer or Concessionaire represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in § 6107 (Gratuities and Kickbacks) of the GIAA Concession Policies and Procedures.

§ 6108. Contingent Fees.

(a) **Prohibition Against Contingent Fees.**

- (1) Contingent Fees. It shall be a breach of ethical standards for a Person to be retained, or to retain a Person, to solicit or secure a Concession Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of Bona Fide Employees or Bona Fide Established Commercial Selling Agencies for the purpose of securing a Concession.
- (2) Representation of Concessionaire. Every Person, before being awarded a Concession Agreement, shall represent, in writing, that such Person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitute a breach of ethical standards.

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(3) Contract Clause. The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every Concession Agreement and Solicitation therefor.

(b) **Intentionally Omitted.**

(c) **Influence Peddling.** The prohibition in § 6108(a)(1) (Prohibition Against Contingent Fees-Contingent Fees) of these Policies and Procedures covers influence peddling and particularly that which might occur when a former Government Employee is hired on contingent basis by a business seeking a Concession Agreement.

(d) **Relationship of Commercial Selling Agency to the Prospective Concessionaire.** The relationship between a Bona Fide Established Commercial Selling Agency and the prospective Concessionaire should be characterized by the following:

(1) the fees charged by the commercial selling agency are commensurate with the nature and extent of the business's services actually rendered to the prospective Concessionaire; (2) the commercial selling agency has adequate knowledge of the the prospective Concessionaire which it represents to judge whether the the prospective Concessionaire may be able to meet GIAA's requirements; and (3) the relationship between the commercial selling agency and the prospective Concessionaire is or is contemplated to be continuing.

(e) **Improper Influence.** A business employee or commercial selling agency should be conclusively presumed not to be bona fide if GIAA determines that improper influence has been or is being used to secure a Concession Agreement.

(f) **Solicitation Clause.** Every Solicitation for a Concession shall conspicuously set forth the following provision to be completed and submitted with every prospective Concessionaire's proposal:

PROSPECTIVE CONCESSIONAIRE'S REPRESENTATION REGARDING
CONTINGENT FEES

The prospective Concessionaire represents as a part of its proposal that it has/has not (circle applicable word or words) retained any person or agency on a percentage, commission, or other contingent arrangement to secure this Concession.

(g) **Information on Contingent Fees.** Any prospective Concessionaire who has completed the clause set forth in § 6108(f) (Solicitation Clause) in the affirmative and is the apparently successful proposer shall submit the following information:

(1) the full name and business address of the business or person retained, and the type of business organization;
(2) the relationship of the business or person to the prospective Concessionaire;

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- (3) the terms of the retention agreement or copy of such agreement;
 - (4) if such person is a business employee: (i) the duration of employment; (ii) whether that employee is on the Concessionaire's payroll for purposes of social security and federal or local income tax withholding; (iii) whether that employee represents other businesses and, if so, the names and addresses of such businesses;
 - (5) whether the business or person represents the prospective Concessionaire on: (i) both government and commercial business; (ii) only government business; or (iii) only the present Concession;
 - (6) the extent of the duties of the business or person; and
 - (7) the duration the business or person has been engaged in a particular type of work and has performed this type of work for the Concessionaire.
- (h) **Contract Clause.** The following clause shall be conspicuously set forth in every Concession Agreement and Solicitation therefor:

REPRESENTATION REGARDING CONTINGENT FEES

The Concessionaire represents that it has not retained a Person to solicit or secure a Concession Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of Bona Fide Employees or Bona Fide Established Commercial Selling Agencies for the purpose of securing a Concession.

§ 6109. Employment Prohibitions and Restrictions.

(a) Restrictions on Employment of Present and Former Government Employees.

- (1) Restrictions on Former Government Employees in Matters Connected with Their Former Duties.
 - (i) Permanent Disqualification of Former Government Employee Personally Involved in a Particular Matter. It shall be a breach of ethical standards for any former Government Employee knowingly to act as a principal, or as an agent for anyone other than GIAA, in connection with any:
 - 1. judicial or other proceeding, application, request for ruling, or other determination;
 - 2. Concession Agreement;
 - 3. claim; or
 - 4. charge or controversy; in which the former Government Employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while a Government Employee, where GIAA is a party or has a direct and substantial interest.
 - (ii) One year representation restriction regarding matters for which a former Government Employee was officially responsible. It shall be a breach of ethical standards for any former Government Employee, within after cessation of the

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former employee's official responsibility, knowingly to act as principal, or as an agent for anyone other than GIAA, in connection with any:

1. judicial or other proceeding, application, request for a ruling, or other determination;
2. Concession Agreement;
3. claim; or
4. charge or controversy; in matters which were within the former Government Employee's official responsibility, where GIAA is a party or has a direct or substantial interest.

(2) Disqualification of Business When a Government Employee has a Financial Interest. It shall be a breach of ethical standards for a business in which an Government Employee has a Financial Interest knowingly to act as a principal, or as an agent for anyone other than GIAA, in connection with any:

- (i) judicial or other proceeding, application, request for a ruling, or other determination;
- (ii) Concession Agreement;
- (iii) claim; or
- (iv) charge or controversy; in which the Government Employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the Government Employee's official responsibility, where GIAA is a party or has a direct and substantial interest.

(3) Selling to GIAA After Termination of Employment is Prohibited. It shall be a breach of ethical standards for any former Government Employee, unless the former Government Employee's last annual salary did not exceed \$12,000, to engage in selling to the GIAA for ninety (90) days following the date employment ceased. The term Sell as used herein means signing a proposal or Concession Agreement; negotiating a Concession Agreement; contracting any employee for the purpose of obtaining, negotiating, or discussing changes in a Solicitation or other terms of a Concession Agreement; settling disputes concerning performance of a Concession Agreement; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual Concession Agreement, therefore, is subsequently negotiated by another person; provided, however, that this Section is not intended to preclude a former Government Employee from accepting employment with private industry solely because the former Government Employee's employer is a Concessionaire with GIAA nor shall a former Government Employee be precluded from serving as a consultant to GIAA.

(b) Contemporaneous Employment Prohibition. (Reserved).

(c) Permanent Disqualification of Former Government Employee.

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- (1) Personal and Substantial Participation. For the Government Employee to have “participated personally and substantially” in a matter, such employee's involvement must have been more than merely ministerial in nature. Factors to be considered in determining personal and substantial participation of a former government employee while a government employee shall include but are not limited to:
- (i) the former Government Employee's degree of involvement in the particular matter;
 - (ii) the degree of involvement of the former employee with a subordinate who had substantial participation in the matter;
 - (iii) the effect or appearance of the involvement of the former government employee; and
 - (iv) the relative time spent on the particular matter by the former government employee.
- (2) Matter must be a Particular Matter Involving Identifiable Parties. The activities listed in § 6109(a)(1)(i) (Restrictions on Employment of Present and Former Employees-Permanent Disqualification of Former Employee Personally Involved in a Particular Matter) of these Policies and Procedures generally describe matters in which issues are defined and parties are identified, such as specific proceedings affecting the legal rights of parties, or isolated transactions or related sets of transactions between identifiable parties. Matters of general application, such as regulation and policy formulation, are not intended to be covered under those activities listed under § 6109(a)(1)(i). Therefore, only a particular matter involving an identifiable party or parties is subject to the permanent prohibition set forth under § 6109(a)(1)(i).
- (3) The Same particular matter must be involved. The prohibition set forth in § 6109(a)(1)(i) (Restrictions of Employment of Present and Former Employees-Disqualification of Former Employee Personally Involved in a Particular Matter) of these Policies and Procedures applies only with regard to those same particular matters in which the former Government Employee participated personally and substantially while a government employee. In determining whether two particular matters are the same, the following factors should be considered:
- (i) the factual basis of the matters;
 - (ii) the relationship of the issues involved in each matter;
 - (iii) the identity of the parties involved in each matter; and
 - (iv) the continued existence of an important GIAA interest.
- (d) **One year restriction for a former Government Employee.**
- (1) Official responsibility.
- (i) Intentionally Omitted.
 - (ii) Scope. The scope of a Government Employee's Official Responsibility is determined by the territory's statutes, regulations, executive orders, case law, or job descriptions, or may result from the lawful delegation of another Government Employee's duties.

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- (iii) Requirement That Matters Have Been Actually Pending. In order for a matter to have been within a former Government Employee's Official Responsibility, it must have in fact been assigned to or under consideration by persons under the former Government Employee's Official Responsibility.
- (2) One year restriction. The one year restriction set forth in § 6109(a)(1) (Restrictions on Employment of Present and Former Employees-Restrictions on Former Employees in Matters Connected with Their Former Duties) of these Policies and Procedures is measured from the time the former Government Employee's Official Responsibility ended in a particular matter.
- (e) **Disqualification of a Business.**
- (1) Personal and Substantial Participation. Personal and substantial participation is discussed in § 6109(c)(1) (Permanent Disqualification of Former Government Employee-Personal and Substantial Participation) of this Article.
- (2) Official Responsibility. Official Responsibility is discussed in § 6109(d)(1) (One Year Restriction for a Former Government Employee- Official Responsibility) of this Article.
- (3) Determination of Business Knowledge. In ascertaining whether a business has knowledge that a Government Employee has a Financial Interest in that business for the purpose of applying the prohibition in § 6109(a)(2) (Restrictions on Employment of Present and Former Employees-Disqualification of a Business When an Employee Has a Financial Interest) of these Policies and Procedures, the factors to be considered should include the following:
- (i) the size of the business;
 - (ii) the percentage of ownership in the business by the Government Employee;
 - (iii) the nature of the dealings of the Government Employee with the business regarding such employee's Financial Interest; and
 - (iv) such other evidence as may be relevant and material.
- (f) **Prohibition Against Selling to the Territory.**
- (1) Prohibition; Applicability. Section 6109(a)(3) (Restrictions on Employment of Present and Former Employees-Selling to the Territory After Termination of Employment is Prohibited) of these Policies and Procedures, prohibits a former Government Employee whose annual salary exceeded \$12,000 from selling or attempting to sell to GIAA within ninety (90) days following the date employment ceases. This prohibition applies with regard to any Government Employee who used to be employed.
- (2) Sell Defined. Section 6109(a)(3) (Restrictions on Employment of Present and Former Employees-Selling to GIAA After Termination of Employment is Prohibited) of these Policies and Procedures, defines sell for the purpose of prohibiting selling to GIAA to mean:
- (i) signing a proposal or Concession Agreement;

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- (ii) negotiating a Concession Agreement;
 - (iii) contracting any employee for the purpose of obtaining, negotiating, or discussing changes in a Solicitation or other terms of a Concession Agreement;
 - (iv) settling disputes concerning performance of a Concession Agreement; and
 - (v) any other liaison activity with a view toward the ultimate consummation of a sale although the actual Concession Agreement, therefore, is subsequently negotiated by another person. Requests for information are not included within the term "Sell."
- (g) **Employment with a Concessionaire.** The ninety (90) days prohibition against selling contained in § 6109(f) of these Policies and Procedures shall not prohibit a former Government Employee from obtaining employment with a Concessionaire, but such employee shall not Sell to GIAA as defined in § 6109(f)(2) (Prohibition Against Selling to the Territory-Sell Defined.)

§ 6110. Use of Confidential Information.

It shall be a breach of ethical standards for any Government Employee or former Government Employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.

§ 6111. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards. (Reserved).

§ 6112. Civil and Administrative Remedies Against Non-Employees who Breach Ethical Standards.

- (a) **Existing Remedies Not Impaired.** Civil and administrative remedies against non-employees which are in existence on the effective date of these Policies and Procedures shall not be impaired.
- (b) **Supplemental Remedies.** In addition to existing remedies for breach of the ethical standards of this Article, GIAA, in connection with non-employees, may impose any one or more of the following: (a) written warnings or reprimands; (b) termination of transactions; and (c) debarment or suspension from being a Concessionaire under a Concession Agreement.
- (c) **Right to Recover From Non-Employee Value Transferred in Breach of Ethical Standards.** The value of anything transferred in breach of the ethical standards of this Article by a non-employee shall be recovered by GIAA.
- (d) **Right of the Territory to Debar or Suspend.** Debarment or suspension may be imposed by GIAA in accordance with these Concession Policies and Procedures (Authority to Debar or Suspend) for breach of the ethical standards of this Article, provided that such action

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may not be taken without the concurrence of the Attorney General.

- (e) **Due Process.** All procedures under this Section shall be in accordance with these Concession Policies.

§ 6113. Recovery of Value Transferred or Received in Breach of Ethical Standards.

- (a) **General Provisions.** The value of anything transferred or received in breach of the ethical standards of this Article by a Government Employee or non-employee may be recovered from both the employee and non-employee.
- (b) **Recovery of Kickbacks by the Territory.** Upon a showing that a subcontractor made a kickback to a Concessionaire or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the territory and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.