

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
SAIPAN, TINIAN, ROTA and NORTHERN ISLANDS**



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Department of Finance



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**PUBLIC NOTICE OF CERTIFICATION AND ADOPTION
OF REGULATIONS OF THE
DEPARTMENT OF FINANCE**

**PRIOR PUBLICATION IN THE COMMONWEALTH REGISTER
AS PROPOSED REGULATIONS**

Volume 40, Number 03, pp 040612-040637, of March 28, 2018

Regulations of the Department of Finance: Chapter 70-40.8 Electronic Gaming

ACTION TO ADOPT PROPOSED REGULATIONS: The Commonwealth of the Northern Mariana Islands, Department of Finance ("DOF"), HEREBY ADOPTS AS PERMANENT the Proposed Regulations which were published in the Commonwealth Register at the above-referenced pages, pursuant to the procedures of the Administrative Procedure Act, 1 CMC § 9104(a). The DOF announced that it intended to adopt them as permanent, and now does so. I also certify by signature below that:

As published, such adopted regulations are a true, complete and correct copy of the referenced Proposed Regulations, and that they are being adopted without modification or amendment.

PRIOR PUBLICATION: The prior publication was as stated above. These regulations were adopted as final on April 23, 2018.

MODIFICATIONS FROM PROPOSED REGULATIONS, IF ANY: None

AUTHORITY: These regulations are promulgated under the authority set forth in the Commonwealth Code including, but not limited to, 1 CMC § 2553, 1 CMC § 2557, and 4 CMC § 1503.

EFFECTIVE DATE: Pursuant to the APA, 1 CMC sec. 9105(b), these adopted regulations are effective 10 days after compliance with the APA, 1 CMC §§ 9102 and 9104(a) or (b), which, in this instance, is 10 days after this publication in the Commonwealth Register.

COMMENTS AND AGENCY CONCISE STATEMENT: Pursuant to the APA, 1 CMC sec. 9104(a)(2), the agency has considered fully all written and oral submissions respecting the proposed regulations. Upon this adoption of the regulations, the agency, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. Please see the following pages for this agency's concise statement, if there are any, in response to filed comments.

ATTORNEY GENERAL APPROVAL: The adopted regulations were approved for promulgation by the Attorney General in the above-cited pages of the Commonwealth Register, pursuant to 1 CMC sec. 2153(e) (To review and approve, as to form and legal sufficiency, all rules and regulations to be promulgated by any department, agency or instrumentality of the Commonwealth government, including public corporations, except as otherwise provided by law).

I DECLARE under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the ___th day of April, 2018, at Saipan, Commonwealth of the Northern Mariana Islands.

Certified and ordered by:



Larrisa C. Larson,
Secretary of Finance

4/23/18
Date

Filed and
Recorded by:



Esther SN. Nesbitt
Commonwealth Registrar

04.24.2018
Date



COMMONWEALTH PORTS AUTHORITY

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PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF THE CONCESSION REGULATIONS WITH AMENDMENTS FOR THE COMMONWEALTH PORTS AUTHORITY (CPA)

ACTION TO ADOPT THESE PROPOSED RULES AND REGULATIONS: The Commonwealth of the Northern Mariana Islands, CPA hereby ADOPTS AS PERMANENT the Concession Regulations which were published in the Commonwealth Register pursuant to the procedures of the Administration Procedure Act, 1 CMC § 9104(a).

PRIOR PUBLICATION: The Proposed Regulations were published in Volume 39, Number 10 on October 28, 2017, on pp. 040264 to 040289.

AUTHORITY: CPA has the authority to adopt and enforce rules and regulations for the orderly, safe, and sanitary operation of its ports per 2 CMC § 2122(j). CPA is empowered by 4 CMC § 2209 to promulgate such rules and regulations as it deems necessary to carry out the provisions and intent of 4 CMC Division 2 Chapter 2 and is commanded by 4 CMC § 2209 to promulgate rules and regulations to implement the concession program provided for in 4 CMC Division 2 Chapter 2, including the process for award of a concession per 4 CMC § 2206.

MODIFICATIONS FROM PROPOSED REGULATIONS: In response to comments received the proposed regulations were modified as follows, along with additional modifications, to add clarity and to correct errors:

- § 40-__-010(a) Applicability is modified to add the disclaimer specified in NMIAC § 40-50-110(e) that this chapter shall not be construed to limit or prevent the Authority's duty and power to lease out its real property pursuant to 2 CMC § 2122(e) and (g).
- § 40-__-015(d) is modified to add to the definition of "Concession" that the term, as used in this chapter, applies only to privileges granted pursuant to this chapter.
- § 40-__-015(f) is revised to modify the definition of "Concession Grantee" for agreement with the remainder of the chapter.
- § 40-__-015 Definitions is modified to add a definition of the term "retail services" at § 40-__-015(m) and re-lettering accordingly.
- § 40-__-101 Scope of Concession is revised to clarify the term "scope of concession."
- § 40-__-101 Scope of Concessions is modified by omitting the requirement that the writing setting forth the determination of the scope of the concession include the concession fee for the concession.
- § 40-__-101 Scope of Concessions is modified by adding the word "minimum" to clarify that the optional prepaid concession fee which may be included in the determination of the scope of the concession and in the writing explaining the scope of the concession is an

optional “prepaid minimum concession fee” to correspond with 4 CMC § 2203, § 40-__-201(b)(8), and § 40-__-205(c)(6).

- § 40-__-110 Establishment of Concession Fee is omitted to correspond to modifications in the “concession fee” establishment process made elsewhere in the modified regulations.
- § 40-__-201 New Concession via Bid is modified by omitting subsection 40-__-201(b)(11), and renumbering accordingly, to correspond to the modification of § 40-__-101 and the omission of § 40-__-110. Subsection 40-__-201(c)(1) is also modified to account for the omission of subsection 40-__-201(b)(11) and the according renumbering.
- § 40-__-201(e) New Concession via Bid is modified to bring it into agreement with § 40-__-201(i)(1) by stating it is the Authority Board of Directors that awards the concession.
- § 40-__-201(i)(2) New Concession via Bid is modified by adding determination and notice requirements for establishment of the concession fee for the awarded concession for compliance with the requirements of 4 CMC § 2210 due to the modification of § 40-__-101 and the omission of § 40-__-110.
- § 40-__-205(c) New Concession via Request for Proposal is modified by omitting subsection 40-__-205(c)(8), and renumbering accordingly, to correspond to the modification of § 40-__-101 and the omission of § 40-__-110.
- § 40-__-205(h)(3) New Concession via Request for Proposal is modified by adding determination and notice requirements for establishment of the concession fee for the awarded concession for compliance with the requirements of 4 CMC § 2210 due to the modification of § 40-__-101 and the omission of § 40-__-110.
- § 40-__-205(c)(1) New Concession via Request for Proposal is modified by adding a semicolon for consistency purposes;
- §40-__-205(b) New Concession via Request for Proposal was revised to clarify the structure of the proposal period for RFPs.
- §40-__-201(f) New Concession via Bid was revised to omit the inconsistency on awards based on invitations for bid by omitting that awards based on invitation for bids shall result in negotiations of a concession agreement.
- §40-__-205(h)(3) New Concession via Request for Proposal was revised to clarify the meaning of § 205(h)(3) and its applicability to proposals rather than bids by correcting the erroneous uses of the word “bid” with the word “proposal.”
- § 40-__-205(d) New Concession via Request for Proposal is revised by adding specific procedures for marking proposals, storing proposals prior to their review, and dealing with inadvertent openings similar to procedures in the bid process.
- § 40-__-205(g)(1) New Concession via Request for Proposal is modified to clarify that members of the evaluation committee, when practical, should have some training, familiarity, or experience with the subject matter of the scope of the concession, not the actual proposals.
- § 40-__-210(a) and (b) are modified to clarify that time restrictions they contain would not apply to the incumbent concessionaire at the adoption of these regulations.
- §40-__-301(a)(6) Cancellation was revised to omit an incorrect cross reference to § 201(d) and to add the appropriate cross reference to § 201(g).
- §40-__-401(a) Responsibility of Bidders and Proposers was revised to clarify the connection between the term “responsible” and the “financially responsible person of good moral character and reputable experience” requirement of 4 CMC § 2206(a).

- § 40-__-501 Protests Prior to Award is revised by inserting a new section (c) to provide guidance to the Executive Director and the Appeal Committee on remedies it may employ for successful protests prior to award of a concession.
- §40-__-505(c)(1)(ii) Remedies After Award is revised to omit the ability of CPA to ratify and confirm the grant of a concession to a Concession Grantee that has acted fraudulently or in bad faith.
- §40-__-510 Disputes with Concession Grantee or Concessionaire is revised to use the word “decision” instead of “description” where appropriate in § 510(b) and § 510(c)(2) and to amend its title to read “Disputes with Concessionaire” for agreement with the section’s content.
- §40-__-630 Validity of Concession Agreement is inserted to add a section on contract validity that corresponds to a similar section found in CPA’s procurement regulations.
- §40-__-710 Right to Audit Records is modified by omitting a duplicate “shall.”

COMMENTS AND AGENCY CONCISE STATEMENT: Pursuant to the APA, 1 CMC § 9104(a)(2), CPA has considered fully all written submissions respecting the proposed regulations. Upon this adoption of the regulations, CPA, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for overruling the considerations urged against adoption. Please see the following for CPA’s concise statements in response to filed comments.

1. The term “scope of a concession” is included in 4 CMC § 2201(b) as follows:
“Concession” means a privilege of establishing, operating, and maintaining facilities at a port of entry for the sale or delivery of merchandise (including food and beverages for on-premises consumption) and/or the provision of retail services (including advertising). The scope of a concession shall be determined by the Commonwealth Ports Authority.
 In response to a concern raised in a comment, CPA agrees to further clarify the definition of “scope of concession” to eliminate concerns about its definition.
2. CPA received a comment regarding the establishment of the concession fee at the time of the determination of the scope of concession. The comment suggested that determination of the concession fee at this stage of either the RFP or Invitation for Bid process would be improper, as CPA should use the concession fee in the bidding/proposal process to determine who is the “highest” bidder or “best” proposer. The comment suggested either eliminating the determination of the concession fee at the time of the determination of the scope of the concession, or alternatively making it an established “minimum concession fee.”

CPA concurs with this comment and has modified several sections of the proposed regulations accordingly. The writing containing the concession fee for the concession is removed from § 101 and the prepaid concession fee referenced in § 101 is clarified to be a “prepaid minimum concession fee” to correspond with 4 CMC § 2203, § 201(b)(8), and § 205(c)(6). Establishment of the concession fee for inclusion in the determination of the scope of the concession is removed by omitting § 110. The requirements to include the concession fee in the invitation for bid and the public notice for the RFP are also removed by omitting § 201(b)(11) and § 205(c)(8). Lastly, as the written determination, reasoning, and notice of the setting of a certain

concession fee required to be in the regulations by 4 CMC § 2210 is eliminated by the omission in § 101 and the omission of § 110, the determination, reasoning, and notice requirements are reinserted in § 201(i)(2) for the bidding process and § 205(h)(3) for the proposal process.

3. CPA received a comment asking for content requirements for Invitation for Bids to be included in the published notices for RFPs – in other words, what CPA has to publish in the newspaper about RFPs. The comment mistakenly asserts that § 201(b) – which lists the minimum inclusions for an invitation for bid – corresponds to § 205(c) – which deals with the requirements of published notices for an RFP. In actuality, the corresponding regulation on requirements of published notices for invitations for bids is found in § 201(c)(1) and its required published notice content corresponds to the required published notice content for RFPs in § 205(c). The comment also sought public notice of additional RFP details.

While the comment correctly states that the proposed regulations do not include a listing of required inclusions in RFPs similar to the listing for invitations for bid, the regulations as proposed do meet the minimum requirements of the statute and require the RFP’s content to correspond to the concession’s determined scope. Further, requiring CPA to publish in the newspaper the equivalent of the content requirements for an Invitation for Bids in the published notices of RFPs is an unreasonable over-publication requirement.

4. CPA received a comment suggesting that the regulations require the proposal evaluation plan required by §205(e)(2), which itself is based on publicly-announced factors included in the RFP, be made available to the public when the RFP is publicly announced. The regulation already has the evaluation plan being approved by the CPA Board of Directors and the regulations do not prohibit the publication of elements of the evaluation plan in the RFP – which CPA historically has done with its procurement RFPs and intends to do with its concession RFPs. However, requiring publication of the entire evaluation plan beyond its required approval by the CPA Board of Directors is an unnecessary change and regulatory requirement.
5. CPA received a comment suggesting a structure for determining the “proposal period.” This proposed change would be beneficial as there is not a current structure for the “proposal period” and it is incorporated into the modified regulations.
6. CPA received a comment regarding the award of a concession by invitation for bid, highlighting that in one section on awards based on invitations for bid the awardee receives an opportunity to negotiate a concession agreement (§ 201(f)), while in another section the awardee receives a signed concession agreement or an invite to receive one (§ 201(i)(3)). This is an inconsistency that, in the context of invitation for bids, is better resolved by removing the “negotiation” option from § 201(f).
7. CPA received a comment recommending an addition to make substitution of bids prior to the bid submission deadline because of an inadvertent error allowed only “with the approval of the Executive Director or her/his authorized designee in writing.” Though it would be more congruent with CPA procurement regulations and may potentially add an additional “check” on potential bid manipulation, since such a substitution would occur prior to bid opening, or

even the bid submission deadline, the Executive Director would have little information to rely upon that the unopened bid contained an inadvertent error. So there is little guidance for the Executive Director to exercise her/his discretion under this option to approve or not approve the requested withdrawal/replacement. Because of the lack of guidance on how the Executive Director is to exercise the discretion suggested by the change, and because there would be little information at this point and time in the bid process upon which the Executive Director could rely in exercising the discretion suggested by the change, CPA declines to accept the change.

8. CPA received a comment recommending an addition of a standard for withdrawal or substitution of proposals similar to the recommended standard for withdrawal or substitution of a bid. This recommended addition is not necessary for the similar reasons discussed above. Further, additional options absent in bid process are present in the proposal process whereby a proposer may account for an inadvertent error. The proposal process includes an option for a proposer to request discussions on its proposal prior to award for clarification of its proposal and an opportunity for proposal revision under proposed § 205(f). Further, if an error in a proposal leads to an award of a concession to a proposer that does not want the concession on the terms of its submitted proposal, it can refuse to execute the concession agreement if the error cannot be settled by negotiation for the concession agreement (see the process under proposed § 205(h)(3) &(4)).
9. CPA received a comment suggesting additional procedural safeguards for the handling of submitted proposals. The suggested additional language included in the comment also establishes a “time set for review by the Evaluation Committee” – a requirement that is not currently in either the procurement regulation or the proposed concession regulation for considering RFPs. The proposed procedures set forth a specific procedure for marking proposals, storing proposals prior to their review, and dealing with inadvertent openings that are beneficial to add to the regulation. The regulation already states a general “confidentiality” requirement.
10. 4 CMC § 2206(a) sets forth specific factors a proposer must meet to receive a concession:

Each new concession granted via request for proposal shall be granted to that financially responsible person of good moral character and reputable experience who, in the sole opinion of the Commonwealth Ports Authority, makes the best proposal.

The proposed regulations at § 401(a) integrated these requirements into the “responsibility” determination required for all successful proposers. CPA received a comment that the proposed regulation implementing this statutory requirement, as applied to proposers in § 205(g)(3), was not clear. The proposed regulations sufficiently implement this requirement by preventing a proposal from a person who is not “a financially responsible person of good moral character and reputable experience” from being ranked by the Evaluation Committee, reaching the Authority Board of Directors for its consideration, and being selected by the Authority Board of Directors to receive a concession (§ 205(g)(3); § 205(h)(1)).

11. CPA received a comment suggesting the elimination of time restrictions in the concession renewal process set forth in § 210 because of concerns over rights of the current-incumbent concessionaire and because the proposed regulations go beyond the authority granted to CPA.

First, the restrictions in the renewal process proposed in § 210 are an appropriate exercise of CPA's power to promulgate rules and regulations granted under 4 CMC § 2209. In this statute the legislature commanded CPA to:

- a) "promulgate such rules and regulations as it deems necessary to carry out the provisions and intent of this chapter;" and
- b) "promulgate rules and regulations to implement the concession program provided in this chapter, including the process for award of a concession per 4 CMC § 2206."

4 CMC § 2209. Concession renewal is a part of the "award of a concession" process in 4 CMC § 2206(b). The restrictions in the renewal process set forth in proposed § 210 provide a process for the renewal or non-renewal of a concession. Moreover, this process provides predictability to both CPA, incumbent concessionaires, and potential bidders or proposers as to when decisions on expiring concessions must be made.

Second, the comment CPA received properly points to the requirement in 4 CMC § 2206(c) that the rights of current concessionaires as they existed on January 12, 2017 (the effective date of Pub. L. 19-76) cannot be extinguished by these regulations and any regulation promulgated under the authority of 4 CMC § 2209 would be ineffective to the extent that they extinguished those contractual rights. In response to this comment, CPA has clarified § 210 such that the time restrictions they contain would not apply to an incumbent concessionaire in existence at the adoption of these regulations.

12. CPA received a comment that properly identifies an inaccurate cross reference from § 301 "Cancellation." The appropriate cross reference is not to § 201(d) "Bid Receipt" but is to § 201(g) "Bid Rejection" section I.
13. CPA received a comment about the regulations on "responsibility" determination that appropriately points out the regulations do not explicitly make the connection between the term "responsible" and the "financially responsible person of good moral character and reputable experience" requirement of 4 CMC § 2206(a). However, the suggested additional language goes farther than is needed to make this connection, as an addition of just one sentence sufficiently makes the connection and resolves the comment.
14. CPA received a comment suggesting the removal of the limitation on the requirement that a protesting party provide notice of its protests to only other bidders or proposers "known to the protesting party." It is fair to say that a protesting party may know a prospective bidder or proposer who has not yet submitted its proposal or bid, so it is also fair to require the protesting party to provide notice to that known prospective bidder or proposer. It is also fair to say that it should not be required for a protesting party to identify all bidders and proposers in order to file a protest. In any event, the last sentence in both § 501(a)(2) and § 505(a)(2) includes a requirement that all bidders or proposers be advised that they may submit their views on the

protest to the Executive Director, and the only way to ensure this is done is for CPA to undertake such notification as well (thus protecting due process rights). For these reasons CPA declines to make a change based on the comment.

15. CPA received a comment that the regulations do not adequately provide for a situation, during the pre-award process, where the Executive Director both fails to decide on a protest (§ 501(a)(4)) and fails to follow the instructions of the Appeal Committee of the CPA Board of Directors “to provide the Appeal Committee all materials necessary to consider the protest” (§ 505(a)(4)). The comment suggests eliminating renewal of a protest to the Appeal Committee if the Executive Director fails to act on the protest, as required by § 505(a)(4), and instead allow the protesting party to proceed to court.

CPA considers this scenario raised in the comment to be unlikely. Further, the cure the comment wishes to apply to the problem of the Executive Director failing to act – proceeding to court to compel agency inaction – is equally applicable to compel the Executive Director to provide the Appeal Committee the required documents under these sections as it is to compel the Executive Director to make a decision on a protest. There are sufficient safeguards in the proposed regulations and CNMI law to protect from the scenario envisioned in the comment, so no change to the proposed regulations was made based on the comment.

16. CPA received a comment that, unlike in CPA’s procurement regulations, the proposed regulations do not list remedies available to redress a protest filed prior to award of a concession. The comment suggests incorporating the same language from CPA’s procurement regulations for such a scenario in the proposed regulations. CPA concurs with the suggestion that some consistency between the regulations is beneficial, and clarifies the proposed regulations by inserting a new section on “remedies prior to award” that grants latitude to the Executive Director and the Appeal Committee to decide protests.

17. CPA received a comment suggesting the elimination of CPA’s ability to ratify and affirm a grant of a concession after it has been awarded if, as the result of a protest, the invitation for bid, request for proposal, or award of a concession was in violation of regulation and the Concession Grantee acted fraudulently or in bad faith.

This ability exists throughout the regulations of other Commonwealth agencies, including in CPA’s procurement regulations. However, the untested element here is the requirement of 4 CMC § 2206(a) that new concessions only be granted “to that financially responsible person of good moral character and reputable experience.” While it would be consistent with existing Commonwealth procurement regulations to allow for the possibility of ratifying and affirming a contract to a person who acted fraudulently or in bad faith, it may not comply with this statutory requirement. Elimination of CPA’s ability to “ratify and confirm” removes the potential for a conflict over a CPA ratification and confirmation based on that statutory requirement.

18. CPA received a comment that the word “decision” should be used instead of “description” in proposed § 510(b) and § 510(c)(2). This language in this regulation comes from CPA’s procurement regulations, which uses the word “description,” so consistency would require use of the word “description.” However, the section in question is clearly discussing a decision by

the Executive Director, so a change to "decision" from "description" is consistent with the surrounding language. While reviewing this comment, CPA noticed the heading of §510 erroneously included the words "Concession Grantee or," indicating that a Concession Grantee may utilize the dispute mechanism in contradiction to the remainder of §510. Discovery of this error led to changes in the title of §510 and to the definition of "Concession Grantee" such that a Concession Grantee that is not a concessionaire may utilize the "protest after award" mechanism of §505.

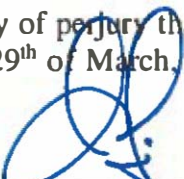
19. CPA received a comment that a section on "Validity of Contract," which is present in CPA's procurement regulations, be added to the proposed regulations. Addition of a corresponding section in the proposed regulations provides consistency between CPA's procurement and concession regulations.

** During its consideration of the comments it received and the adoption process, CPA made additional modifications to the proposed regulations to add clarity or to correct errors, including addition of a definition of "retail services," a disclaimer on the regulations' impact on the Authority's power and duty to lease its property, a modification in the preferred qualifications of Proposal evaluation committee members, and other minor modifications and edits deemed necessary to carry out the provisions and intent of 4 CMC Division 2 Chapter 2.

These modifications were presented to and adopted by the CPA Board of Directors during a Regular Board of Directors meeting held on March 20, 2018.

EFFECTIVE DATE: The Concession Regulations will be effective ten days after publication of the Notice of Adoption in the Commonwealth Register. 1 CMC § 9105(b)

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 29th of March, 2018, on Saipan, Commonwealth of the Northern Mariana Islands.

Submitted by  Date: 3/29/18
CHRISTOPHER S. TENORIO, Executive Director

Pursuant to 1 CMC § 2153(e) and 1 CMC § 9104(a)(3) the certified final regulations, modified as indicated above from the cited proposed regulations, have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General and shall be published. (1 CMC § 2153(f))

Dated this 16 day of April, 2018.


EDWARD MANIBUSAN
Attorney General

File and Recorded by:  Date: 04.23.2018
ESTHER SN. NESBITT
Commonwealth Register

CONCESSION REGULATIONS

Part 001 - General Provisions

§ 40-_-001 Authority

The rules and regulations in this chapter are promulgated by the Authority in accordance with 4 CMC § 2209 and the Authority's power and duty to administer port concessions as set forth in 2 CMC § 2122(s) and 4 CMC § 2202.

§ 40-_-005 Purpose of Regulations

The purpose of this chapter is to provide rules and regulations to implement the concessions program set forth in 4 CMC § § 2201-13 and to provide for fair, equitable, and effective administration of port concessions by the Authority on behalf of the Commonwealth.

§ 40-_010 Applicability

(a) **Applicability.** This chapter applies to concessions granted by the Authority. These provisions shall be construed and applied in a manner consistent with all federal laws and regulations, including, but not limited to 49 C.F.R. Part 23 Participation of Disadvantaged Business Enterprise in Airport Concessions requirements relating to recipients of Department of Transportation financial assistance through the programs of the Federal Aviation Administration. This chapter does not apply to contracts between the Authority and the government or its political subdivisions or other governments. Nothing in this chapter shall be construed to prevent the Authority from complying with the terms and conditions of any grant, cooperative agreement, or memoranda of understanding, nor shall this chapter be construed to limit or prevent the Authority's duty and power, pursuant to 2 CMC § 2122(e) and (g), to lease out its real property.

(b) **Existing Rights.** Any concession shall not become effective in any manner that would impair the rights granted to any person by the Authority or the Commonwealth under a contract in existence on January 12, 2017. Rights of a concessionaire in existence on January 12, 2017, shall exist until those rights conclude under the terms of the concessionaire's then-existing contract with the Authority.

§ 40-_-015 Definitions

(a) "Appeal Committee" means the special committee of the Board authorized to hear appeals. It shall be comprised of three (3) members of the Authority Board of Directors appointed by the Chairman of the Authority Board of Directors to hear any appeal under this chapter. There shall be an Appeal Committee Chairman selected from the three appointed members of the Authority Board of Directors by their agreement or selection by vote. The Chairman of the Authority Board of Directors shall not be a member of the Appeal Committee.

(b) "Authority" means the Commonwealth Ports Authority.

(c) "Authority Concession Grant" means the writing by the Authority Board of Directors in which a determination to grant a concession is made and the reasoning for the determination to grant the concession is explained.

(d) "Concession" means a privilege of establishing, operating, and maintaining facilities at a port of entry for the sale or delivery of merchandise (including food and beverages for on-premises consumption) and/or the provision of retail services (including advertising) granted pursuant to this chapter. The scope of a concession shall be determined by the Authority.

(e) "Concession agreement" means a contract between the Authority and a person awarded a concession in accordance with the provisions of this chapter delineating the terms upon which facilities operating under a concession shall be established, operated, and maintained.

(f) "Concession Grantee" means a person who has been granted a concession by the Authority through the invitation for bid or request for proposal processes set forth in this chapter ~~but has not yet executed a concession agreement with the Authority.~~

(g) "Concessionaire" means a person operating under the privilege of a concession.

(h) "Dispute" means a disagreement concerning the legal rights and obligations of the parties to a concession agreement.

(i) "Executive Director" means the Executive Director of the Authority.

(j) "Person" means any individual, partnership, proprietorship, company, corporation, joint venture, association, or other enterprise or entity.

(k) "Port of entry" means any publicly owned or operated seaport or airport in the Commonwealth, together with all related lands and facilities. These include, but are not limited to:

(i) Saipan:

- (1) Port of Saipan; and
- (2) Francisco C. Ada/Saipan International Airport.

(ii) Tinian:

- (1) Tinian Harbor; and
- (2) Tinian International Airport.

(iii) Rota:

- (1) Rota West Harbor; and
- (2) Benjamin Taisacan Manglona International Airport.

(l) "Prospective concessionaire" means any actual or prospective bidder or proposer responding to an invitation for bid or request for proposal issued pursuant to this chapter.

(m) "Retail services" means ancillary services provided within an Authority building directly offered for use to traveling individuals arriving or departing through a port of entry, including advertising from designated advertising space, but does not include air or sea navigation or transportation services within or to or from the Commonwealth (including services for the

receiving, discharging, loading, or removal of cargo or luggage and incident thereto), or services directly related to air or sea navigation or transportation.

(m) "Solicitation" means an invitation for bid or request for proposal issued pursuant to this chapter.

(n) "Ungranted," as used in describing a concession, means a concession that has not been granted.

Part 100 - Determination of Scope of Concession

§ 40-101 Scope of Concession

The Authority, before soliciting bids or proposals for a concession, shall set forth in writing the scope of the concession. The "scope of the concession" means a clear statement of the privilege(s) to be granted to the concessionaire. The scope of every concession granted by the Authority shall be approved in writing by the Authority Board of Directors. The determination of the scope of the concession shall also be made in writing, and the writing shall explain the reasoning for the scope of the concession. The writing shall include ~~the concession fee for the concession and~~ whether the Authority requires bids or proposals on the basis of a prepaid minimum concession fee. Adequate notice of this determination shall be provided to potential bidders or proposers via a meeting of the Authority Board of Directors and through a publicly posted notice made available at the Authority's office located in the Francisco C. Ada/Saipan International Airport. The publicly posted notice shall be made available for a period of fourteen (14) calendar days. The scope of a concession shall be announced prior to the commencement of the process to award the concession via bid or request for proposal.

§ 40-105 Change of the Scope of a Concession; Elimination of a Concession

The Authority shall not change the scope of a granted concession or eliminate a granted concession, unless the granted concession has been rescinded per NMIAC § 40-505(c)(1). If a concession is ungranted, upon recommendation of the Executive Director or her/his authorized designee the Authority Board of Directors may change the scope of the ungranted concession or eliminate the ungranted concession. The determination to change the scope of an ungranted concession or eliminate an ungranted concession shall be made in writing explaining the reasoning for the determination. Adequate notice of this determination shall be provided to potential bidders or proposers via a meeting of the Authority Board of Directors and by publicly posting notice of such determination at the Authority's office in the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days.

~~§ 40-110 Establishment of Concession Fee~~

~~The concession fee for a concession shall be established by the Authority Board of Directors and included in the determination of the scope of the concession.~~

Part 200 - Concession Award and Renewal

§ 40- -201 New Concession via Bid

(a) A new concession may be awarded by bid. The Executive Director or her/his authorized designee may issue an invitation for bid for a new concession when the Authority Board of Directors determines in writing that the best interests of the Authority are served by awarding the new concession by bid. Adequate notice of this determination shall be provided to potential bidders via a Authority Board of Directors meeting and by publicly posting notice of such determination at the Authority's office in the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days.

(b) Invitation for Bid. An invitation for bid shall be issued and shall include at the minimum:

- (1) An invitation for bid's number or "CPA Concession No." designation
- (2) Date of issuance;
- (3) Name, address, and location of issuing office;
- (4) Specific location where bids must be submitted;
- (5) Date, hour, and place of bid opening;
- (6) The scope of the concession as determined by the Authority;
- (7) A full statement of the requirements of a responsive bid corresponding to the concession's determined scope;
- (8) Whether bids are required to include a prepaid minimum concession fee;
- (9) The time, place, and method of delivery or performance requirements;
- (10) The essential contractual terms and conditions for the concession agreement;
- ~~(11) The amount of the concession fee as established by the Authority;~~
- ~~(11)~~ (12) Statement of any reasonable administrative fee for costs associated with handling and consideration of the bid, such as for scanning, duplication, or preparation depending on the nature or complexity of the invitation for bid;
- ~~(12)~~ (13) An accurate reflection of the Authority requirement to allow bidders to properly respond and evaluations to be made on a uniform basis; and
- ~~(13)~~ (14) A detailed explanation of how the Authority will calculate the total amount of the bid in order to determine the highest responsive bid that fully meets the requirements of the invitation for bid.

(c) Public Notice and Bidding Period.

(1) The Executive Director or her/his authorized designee shall publicize the invitation for bid in order to increase competition, broaden industry participation, and provide adequate notice of the opportunity to bid to potential bidders. The Executive Director or her/his authorized designee shall publish notice of the invitation for bids in two newspapers of general circulation in the Commonwealth at least twice each week from the time the invitation for bid is issued, including the week when the bidding period expires. This published notice shall include the information on the invitation for bid as set forth in subsections (b)(1) through (b)(5), (b)(8), (b)(9), and (b)(11); ~~and (b)(12)~~ of this section.

(2) The invitation for bid shall provide for a bidding period of at least thirty (30) calendar days, unless the Executive Director or her/his authorized designee certifies that a shorter

time period is reasonable and necessary. The bidding period shall never be less than fourteen (14) calendar days.

(3) The Executive Director or her/his authorized designee may, upon consultation and approval by the Authority Board of Directors, extend the bidding period for up to an additional ninety (90) calendar days for good cause. The length of the extension and the justification for the extension shall be in writing. Examples of good cause include but are not limited to the degree of urgency, the complexity of the contract requirements, the anticipated need and extent for subcontracting, the geographical distribution of bidders, and the transmittal time of the invitation for bid and bids.

(d) Bid Receipt.

(1) All bids shall be submitted to the Authority Administration Section, Office of the Executive Director of the Authority at the Francisco C. Ada/Saipan International Airport unless otherwise designated by the Executive Director or her/his authorized designee. Bids shall be submitted in sealed envelopes and unopened so as to avoid disclosure of contents to competing bidders. Sealed bid envelopes shall have conspicuous markings that indicate the invitation for bid's number or "CPA Concession No.," state that it is an "Invitation for Bid Submission: Confidential," and be directed to the attention of the Executive Director or her/his authorized designee. Bids shall be received prior to the time set for opening and shall be maintained sealed in a locked receptacle until the time set for opening.

(2) If a bid is opened by mistake, it shall be resealed and the person who opened the bid shall write his signature and print his title on the envelope and deliver it to the Executive Director or her/his authorized designee. No information contained in the bid shall be disclosed prior to the bid opening. The Executive Director or her/his authorized designee shall cause the opened bid to be placed into a sealed receptacle and cause it to be sealed until the bid opening.

(e) Bid Opening; Public Inspection of Bids. The bid opening shall be conducted by the Executive Director or her/his authorized designee at the Conference Room of the Authority at the Saipan International Airport or some other pre-designated location. Bids shall be opened publicly at the time and place designated in the invitation for bids. The total amount of each bid, together with the name of each bidder, shall be recorded on a "Bidder's Submission List." The Bidder's Submission List shall be open to public inspection. However, the content of each bid submitted may only be subject to public inspection after the Authority Board of Directors ~~the Executive Director~~ has awarded the concession to the highest responsive bidder pursuant to this chapter and 4 CMC § 2206(a). After such award, the content of each bid submitted shall be open to public inspection pursuant to the Open Government Act subject to any applicable exemptions.

(f) Bid Acceptance and Bid Evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized in this chapter. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria as is necessary to reasonably permit a determination as to the acceptability of the bid for the particular purpose intended. A bid may only be considered by the Authority if the bidder accepts all material terms and conditions of the invitation for bid. ~~Any award based upon the bid shall result in negotiation for a concession agreement with essential contractual terms and conditions which follow and do not vary from the requirements of the invitation for bid.~~

(g) Bid Rejection.

(1) The Authority, through the Executive Director or her/his authorized designee, may reject any or all bids if it determines to do so would be in the best interests of the Commonwealth. The determination to reject any bid shall be made in writing explaining the reasoning for the determination. Adequate notice of such determination shall be accomplished by informing the corresponding bidder of the determination in writing and publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days. Further, the Authority has determined that any bid may be rejected for any one of the following reasons, as doing so would be in the best interests of the Commonwealth:

- (i) Failure to conform to the requirements of a responsive bid corresponding to the concession's determined scope;
- (ii) Failure to meet the requirements of the invitation for bid;
- (iii) Imposition of conditions or restrictions in the bid which modify or alter requirements of the invitation for bid, modify or alter requirements the scope of the concession, or limit the bidder's liability to the Authority;
- (iv) Unreasonableness as to prices charged;
- (v) The bidder is a non-responsible bidder according to this chapter;
- (vi) The bid states a price but qualifies it as subject to a price in effect at time of delivery;
- (vii) The bid protects against future changes in conditions, such as increased costs;
- (viii) The bid limits the rights of the Authority;
- (ix) A change in requirements for the invitation for bid;
- (x) Any material confusion relating to the invitation for bid;
- (xi) A change or modification in the scope of the concession;
- (xii) Necessary additional requirements for bidders or bids; or
- (ix) Any other reason determined by the Authority, through the Executive Director or her/his authorized designee, to be in the best interests of the Commonwealth.

(2) Should the Authority reject all bids responding to an invitation for bid, the Executive Director or her/his authorized designee may re-issue the invitation for bid, issue a new invitation for bid corresponding to the concession's determined scope, recommend a change in the concession's determined scope in writing to the Authority Board of Directors, or recommend elimination of the concession in writing to the Authority Board of Directors.

(h) Correction or Withdrawal of Bids; Cancellation of Awards.

(1) Correction or Withdrawal of Bids. Prior to the bid submission deadline, any bidder may withdraw its bid or submit a replacement bid to correct inadvertent errors in the original bid in accordance with the terms of the invitation for bid. After the bid submission deadline, no changes in bid price or other provisions of bids prejudicial to the interest of the Authority or fair competition shall be allowed. Whenever an inadvertently erroneous bid is suspected by the Authority, the Authority shall request confirmation of the bid from the bidder in writing prior to award and shall not proceed to award the concession until receiving a response from the bidder in the timeframe set forth in that writing, which shall be within seven (7) days from the bidder's receipt of that writing. In such an instance, if the bidder alleges an error, the Authority shall only

permit correction of the bid or withdrawal of the bid in accordance with the following:

(i) Correction of bids. Correction of bids shall only be permitted when:

(a) An obvious clerical mistake is clearly evident from examining the bid materials. Examples of such mistakes are errors in addition or the obvious misplacement of a decimal point; or

(b) The otherwise highest responsive bidder alleges a mistake and the intended bid is evident from the bid materials or is otherwise supported by clear and convincing evidence as to the bid intended and the corrected bid remains the highest responsive bid. A high bidder may not be permitted to correct a bid mistake resulting from an error in judgment.

(ii) Withdrawal of Bids. Withdrawal of a bid shall only be permitted where the otherwise highest responsive bidder alleges a mistake and there is clear and convincing evidence as to the existence of a mistake.

(2) Cancellation of Awards. The cancellation of an award or a concession agreement shall only be permitted when:

(i) Evidence as to the existence of the inadvertently erroneous bid is not discovered until after the award;

(ii) There exists clear and convincing evidence to support the bid was unintended; and

(iii) Performance of the concession agreement at the award price would be unconscionable.

(3) Writing Required. Correction or withdrawal of inadvertently erroneous bids after the bid submission deadline, or cancellation of awards or concession agreements based on the existence of an inadvertently erroneous bid, must be approved by the Executive Director or her/his authorized designee in writing. Such writing shall state the reason for the determination to allow the correction of the bid, the withdrawal of the bid, or the cancellation of the award.

(i) Award.

(l) A concession awarded by bid shall be awarded by the Authority Board of Directors by granting the concession to the highest responsive bidder whose bid fully meets the requirements of the invitation for bid and who is determined to be a financially responsible person of good moral character and reputable experience as determined by the Executive Director or her/his authorized designee in accordance with this chapter. This person shall be referred to as the "Concession Grantee." The determination to grant the concession shall be made in writing explaining the reasoning for the determination. This writing shall be referred to as the "Authority Concession Grant."

(2) The Executive Director or her/his authorized designee shall send written notice of the award of the concession, along with a copy of the Authority Concession Grant, with reasonable promptness to the Concession Grantee. This written notice must contain the reasoning for the determination of the Authority to grant the concession to the Concession Grantee, to set the concession fee for the concession at the bid amount of the Concession Grantee, and to enter into the concession agreement with the Concession Grantee. Unsuccessful bidders shall receive a similar written notice, sent on the same day as the written notice to the Concession Grantee, containing the reasoning for the determination of the Authority to grant the concession to the Concession Grantee, to set the concession fee for the concession at the bid amount of the Concession Grantee, and to enter into the concession agreement with the Concession Grantee.

These writings constitute adequate notice of ~~this~~ these determinations by the Authority.

(3) Notice of the award granting the concession to the Concession Grantee shall be accompanied with the presentation of a concession agreement with all of the required Authority signatures to the Concession Grantee or an invitation to receive such a concession agreement from the Authority. No acceptance of an offer shall occur nor shall any contract be formed until the concession agreement is written and has been approved of and signed by all required personnel of the Authority and the Concession Grantee.

§ 40-205 New Concession via Request for Proposal

(a) A new concession may be awarded via request for proposal. The Executive Director or her/his authorized designee may issue request for proposal for a new concession when the Authority Board of Directors determines in writing that the best interests of the Authority are served by awarding the new concession via request for proposal. Adequate notice of this determination shall be provided to potential proposers via a meeting of the Authority Board of Directors and by publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days.

(b) Request for proposal. Proposals shall be solicited through a Request for Proposal or "RFP". The request for proposals shall provide for a proposal period of at least thirty (30) calendar days, unless the Executive Director or her/his authorized designee certifies that a shorter time period is reasonable and necessary. The proposal period shall never be less than fourteen (14) calendar days.

(c) Public Notice. The Executive Director or her/his authorized designee shall publicize the request for proposal in order to increase competition, broaden industry participation, and provide adequate notice of the opportunity to submit proposals to potential proposers. The Executive Director or her/his authorized designee shall publish notice of the request for proposal in two newspapers of general circulation in the Commonwealth at least twice each week from the time the request for proposal is issued, including the week when the proposal period expires. This published notice shall include the following information:

- (1) A RFP number or "CPA Concession No." designation;
- (2) Date of issuance of the RFP;
- (3) Name, address, and location of issuing office;
- (4) Specific location where proposals must be submitted;
- (5) Date and time the proposal period expires;
- (6) Whether proposals are required to include a prepaid minimum concession fee;
- (7) The time, place, and method of delivery or performance requirements;
- ~~(8) The amount of the concession fee as established by the Authority;~~
- (8) Statement of any reasonable administrative fee for costs associated with handling and consideration of the proposal, such as for scanning, duplication, or preparation depending on the nature or complexity of the RFP and that such a fee is non-refundable.

(d) Receipt of sealed proposals. Proposals shall be submitted in sealed envelopes and unopened so as to avoid disclosure of contents to competing proposers during the process of negotiation of the concession agreement. Sealed proposals shall have conspicuous markings that indicate the RFP number or "CPA Concession No.," state that it is a "RFP Proposal: Confidential," and state that it

is to be directed to the Evaluation Committee. Proposals shall be maintained sealed in a locked receptacle until the Evaluation Committee commences its review of proposals. If a proposal is opened by mistake, it shall be resealed and the person who opened the proposal shall write his or her signature and title on the envelope, deliver it to the Executive Director or his/her authorized designee, and not disclose any information contained in the proposal prior to the award. The Executive Director or his/her authorized designee shall cause the opened proposal to be placed into a sealed receptacle and cause it to be sealed until the Evaluation Committee commences its review of proposals. Proposals shall be restricted to the members of the Evaluation Committee and shall not be disclosed nor discussed to anyone outside of the Evaluation Committee until after the completion of the evaluation and ranking of proposals. After the concession is granted and the concession agreement is executed, proposals, excluding materials protected as confidential, private, or exempt per NMIAC § 40-701, may be prepared and opened for public inspection.

(e) Evaluation Factors and Plan.

(1) The Executive Director, or her/his authorized designee, will determine the factors the Authority will employ to evaluate proposals for a concession. The request for proposal for the concession shall state these factors. These factors shall correspond to the concession's determined scope. These factors shall be publicly announced prior to or concurrently with the release of the request for proposal.

(2) Before conducting an evaluation of proposals pursuant to an RFP, the Executive Director or her/his authorized designee shall develop, and the Authority Board of Directors shall approve, an evaluation plan for evaluating submitted proposals. This evaluation plan at a minimum shall include:

- (i) A statement of the evaluation factors;
- (ii) A description of the evaluation process, including a tentative timeline and the composition of the evaluation committee;
- (iii) The point system to be used in scoring the evaluation factors, the methodology to be employed in considering the evaluation factors, and/or the techniques to be used in considering the evaluation factors; and
- (iv) Documentation requirements.

(f) Discussion with responsible proposers and revisions to proposals. As provided in the request for proposal, discussions may be conducted with responsible proposers who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements. The Executive Director may initiate such discussions or any proposing party may request such discussions. However, such discussions may only occur after advance written notice to all proposers as to the nature of the discussion and issues to be clarified and the date and time for such discussion(s). There shall be no separate discussions nor communications between the Executive Director with any proposer at any time. Proposers shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing proposers. The Executive Director may, after such discussions, invite "Best and Final Offers" from each proposer to be submitted on a certain date. The Executive Director may only receive best and final offers from each proposer where, after discussions, there

is clarification of the request for proposal and resolution of any ambiguities or vagaries in the request by the Authority for such proposals.

(g) Evaluation Committee:

(1) Composition. The Executive Director or her/his authorized designee shall designate an Evaluation Committee to evaluate proposals responding to a specific RFP. The Evaluation Committee shall be comprised of no less than three of the following Authority sections/divisions:

- (i) Accounting Section;
- (ii) Administration Section;
- (iii) Engineering Section;
- (iv) Ports Police;
- (v) Aircraft Rescue & Firefighting (ARFF);
- (vi) Operations Section; and
- (vii) Maintenance Section.

The Evaluation Committee may also include willing non-Authority employees, such as and for example a representative from the Commonwealth Development Authority, the Office of the Public Auditor, or the Department of Public Works Technical Services Division, if the Authority Board of Directors determines, in writing, that the participation of the non-Authority employee(s) would be in the best interest of the Commonwealth. Non-Authority employees shall be compensated for their time spent and expenses incurred in service on an evaluation committee in the same manner as Authority Board members are compensated under 2 CMC § 2125. The Evaluation Committee shall be composed of no less than three (3) members and no more than five (5) members. Whenever practical, members of the Evaluation Committee should have some training, familiarity, or experience with the subject matter related to the scope of the concession proposals being reviewed. The Executive Director shall not serve on an Evaluation Committee.

(2) Interaction with Executive Director. The Executive Director shall, by Memorandum, direct the Evaluation Committee to convene as soon as practical following the close of the period for submission of proposals. The Evaluation Committee and the Executive Director may communicate regarding the proposals under its consideration only insofar as to facilitate discussions with responsible proposers who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements. After these discussions have concluded, the Evaluation Committee may recommend to the Executive Director that the Executive Director invite "Best and Final Offers" from each proposer to be submitted on a certain date.

(3) Evaluation and Report. After reviewing and deliberating the proposals, applying the evaluation factors as set forth in the evaluation plan, applying any additional requirements set forth in the RFP, and determining whether each proposer is a financially responsible person of good moral character and reputable experience, the Evaluation Committee shall rank the proposals meeting the minimum requirements of the RFP from financially responsible persons of good moral character and reputable experience according to the quality of their proposals as measured by the evaluation plan. After completing this ranking, the Evaluation Committee shall report its ranking to the Executive Director or her/his authorized designee.

(h) Award.

(1) Upon consideration of the rankings provided by the Evaluation Committee, a concession awarded by request for proposal shall be awarded by the Authority Board of Directors by granting the concession to the ranked proposer who, in the sole opinion of the Authority, makes the best proposal in accordance with this chapter. This person shall be referred to as the "Concession Grantee." The determination to grant the concession shall be made in writing explaining the reasoning for the determination. This writing shall be referred to as the "Authority Concession Grant."

(2) The Executive Director or her/his authorized designee shall send written notice of the award of the concession, along with a copy of the Authority Concession Grant with reasonable promptness to the Concession Grantee. This writing must contain the reasoning for the determination of the Authority to grant the concession to the Concession Grantee and to enter into negotiations for a concession agreement with the Concession Grantee. Unsuccessful proposers shall receive a similar written notice, sent on the same day as the written notice to the Concession Grantee, containing the reasoning for the determination of the Authority to grant the concession to the Concession Grantee and to enter into negotiations for a concession agreement with the Concession Grantee. The notice to an unsuccessful proposer shall also inform the unsuccessful proposer of the number of proposals received, the name and address of the Concession Grantee, and in general terms the reason why the unsuccessful proposer's proposal was not accepted. These writings constitute adequate notice of this determination by the Authority. In no event shall any proposer's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other proposer.

(3) Upon grant of the concession to the Concession Grantee, the Authority shall commence negotiations with the Concession Grantee for a concession agreement. The concession agreement shall include the terms set forth in the RFP and the Concession Grantee's proposal bid, encompassing the aspects of the Concession Grantee's proposal bid required to be in the concession agreement. The Authority shall provide adequate public notice of its determination of the established concession fee contained in the concession agreement, and its reasoning therefore, by publicly posting notice of the same in writing at the Authority's office in the Francisco C. Ada/Saipan International Airport, following the execution of the concession agreement, for a period of fourteen (14) calendar days. The concession agreement file shall contain the basis on which the award was made, all evaluation sheets, and the report of the Evaluation Committee. The concession agreement file shall also contain the selected proposal and the information and basis on which the award was made.

(4) If the Concession Grantee and the Authority cannot come to an agreement as to the terms of the Concession Agreement within forty-five (45) days from the grant of the concession to the Concession Grantee, the Executive Director may cancel the award of the concession per § 40-__-301 of this chapter. Upon such cancellation, the Executive Director shall inform the Authority Board of Directors of the cancellation and the reasoning for the cancellation in writing, and may recommend changing the scope of the concession, eliminating the concession, or proceeding to award the concession by granting it to another ranked proposer. The Authority Board of Directors shall then decide to either award the concession by granting it to another ranked proposer, change the scope of the concession, eliminate the concession, or determine that the concession should be awarded via a new request for proposal. Such determination shall be made in a writing explaining the reasoning for the determination. Adequate notice of this determination shall be provided to potential proposers via a meeting of the Authority Board of Directors and by

publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days.

§ 40-_-210 Concession Renewal

(a) The Authority may renew concessions with existing concessionaires only if the then-incumbent concessionaire is in compliance with its current concession agreement and the Authority determines that renewal of the concession by negotiation is in the best interests of the Commonwealth. This determination, including an assessment of whether the then-incumbent concessionaire is in compliance with its current concession agreement, shall be made by the Authority Board of Directors in writing explaining the reasoning for the determination. This determination shall be made and communicated to the then-incumbent concessionaire no sooner than one (1) year before and no later than ninety (90) days before the expiration of the then-incumbent concessionaire's concession agreement. If this determination is made regarding the incumbent concessionaire in existence at the adoption of this regulation, the time restriction within which this determination shall be made and communicated contained herein shall not apply in that instance. Adequate notice of this determination shall be provided via a meeting of the Authority Board of Directors and by publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days. The term of a renewed concession agreement shall not exceed 20 (twenty) years from the renewal of the concession.

(b) If the then-incumbent concessionaire and the Authority cannot agree upon terms and conditions for renewal of the concession and execute a new concession agreement by 11:59 PM ChST on the last day of the then-incumbent concessionaire's existing concession agreement, the opportunity for renewal of the concession will have expired, the concession will expire, and the Authority may award a new concession pursuant to procedures set forth in 4 CMC § 2206(a). The time limitation for agreement upon terms and conditions for renewal of a concession and execution of a new concession agreement contained herein shall not apply in the instance of negotiations to renew the then-existing concession of the incumbent concessionaire in existence at the adoption of this regulation, should the Authority determine to pursue such renewal.

Part 300 - Cancellation of Invitation for Bid or Request for Proposal

§ 40-_-301 Cancellation

(a) An invitation for bid or request for proposal may be cancelled prior to award of the corresponding concession, and any and all bids or proposals may be rejected, by the Executive Director or her/his authorized designee, or the Board upon the consideration of an appeal by the Appeals Committee, when it is determined to do so would be in the best interests of the Commonwealth. Further, the Authority has determined that any and all bids or proposals may be rejected for any one of the following reasons, as doing so would be in the best interests of the Commonwealth:

(1) Inadequate or ambiguous specifications contained in the invitation for bid or request for proposal;

- (2) Requirements of the responsive bid or factors employed to evaluate the proposals have been revised;
- (3) Inadequate consideration given to all factors of cost to the Authority in the invitation for bid or request for proposal;
- (4) Bids or proposals received indicate that the Authority can achieve greater benefit for the Commonwealth by changing the scope of the corresponding concession;
- (5) Bids were collusive;
- (6) Any reason set forth in section 201(dg) of this chapter;
- (7) Any other reason determined by the Authority, through the Executive Director or her/his authorized designee, or the Board on appeal, to be in the best interests of the Commonwealth.

(b) The Executive Director or her/his authorized designee, or the Board on appeal, shall have the right to cancel an award of a concession without any liability to the bidder or proposer including, but not limited to, interest charges, compensatory damages, consequential damages, attorneys' fees, restocking charges, shipping charges, surety or bonding charges, taxes, or any other costs, except the return of any deposit, guarantee, or other security, at any time before a concession agreement has been fully executed by all parties.

(c) The determination to cancel an invitation for bid, cancel a request for proposal, reject any or all bids, reject any or all proposals, or cancel an award of a concession made pursuant to this Part shall be made in writing explaining the reasoning for the determination. Adequate notice of such determination shall be accomplished by informing the corresponding bidder, bidders, proposer, proposers, or Concession Grantee of the determination in writing and publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days.

Part 400 - Qualifications and Duties

§ 40-401 Responsibility of Bidders and Proposers

(a) Concessions shall be granted only to a financially responsible person of good moral character and reputable experience. Such a person shall be considered "responsible" for the purposes of this chapter. Although the below-listed factors are not deemed to be exclusive, in order to be determined a financially responsible person of good moral character and reputable experience, a bidder or proposer must:

- (1) Have adequate financial resources to perform its bid or proposal, or the ability to obtain them;
- (2) Be able to comply with the method of delivery or performance requirements;
- (3) Have a satisfactory performance record;
- (4) Have a satisfactory record of integrity and business ethics including a current tax clearance; no adverse record relating to employment matters including but not limited to matters before the CNMI Department of Labor, Federal Immigration Laws, Davis Bacon Act, the CNMI Division of Environmental Quality or the U.S. Environmental Protection Agency, U.S. Department of Labor, U.S. Department of Commerce, the Federal Aviation Administration; the Federal Maritime Commission; the United States Coast Guard and the United States Equal

Employment Opportunity Commission; or the U.S. Internal Revenue Service;

(5) Have the necessary organization, experience and skills, (or the ability to obtain them) required to successfully perform as a concessionaire;

(6) When required by the Authority, have a valid CNMI Business License and, whenever practical, an office in the CNMI; and

(7) Be otherwise qualified and eligible to be granted a concession under applicable laws and rules.

(b) Obtaining information. Prior to award, the Executive Director or her/his authorized designee shall obtain information from the bidder or proposer necessary to make a determination of responsibility using the factors in subsection (a) above. The unreasonable failure of a bidder or proposer to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for determination of non-responsibility with respect to that bidder or proposer.

(c) Right of non-disclosure. Information furnished by a bidder or proposer pursuant to subsection (b) may not be disclosed outside of the office of the Authority without prior consent by the bidder or proposer.

(d) Non-responsibility determination. When a bid or proposal on which a concession would otherwise be granted is rejected because the prospective concessionaire is found to be non-responsible, a written determination shall be signed by the Executive Director or her/his authorized designee stating the basis for the determination. This determination shall be communicated to the prospective concessionaire and shall be placed in the contract file.

Part 500 - Protests, Disputes, and Appeals

§ 40-_-501 Protests Prior to Award

(a) Procedure for Protest.

(1) Prior to an award of a concession, any actual or prospective bidder or proposer for that concession who asserts a claim or asserts that it has been aggrieved in connection with an invitation for bid or request for proposal may protest to the Executive Director. The protest shall be received by the Executive Director in writing within ten (10) days after such aggrieved actual or prospective bidder or proposer knows or should have known of the facts giving rise thereto. The written protest shall state fully the factual and legal grounds for the protest. The Executive Director shall consider all protests.

(2) Other persons, including other actual or prospective bidders or proposers known to the protesting party, involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases. The protesting party shall provide such notice and a copy of its protest to all proposers or bidders involved in or affected by the protest and shall file a declaration or proof of service with the Executive Director. Proof of Notice is required by the protesting party to these actual or prospective bidders or proposers within three (3) calendar days of filing its protest. These actual or prospective bidders or proposers shall also be advised that they may submit their views and relevant information to the Executive Director within ten (10) calendar days of their receipt of notice of the protest.

(3) The Executive Director shall decide the protest in writing within thirty (30) calendar days after all interested parties have submitted their views unless the Executive Director certifies that the complexity of the matter requires a longer time, in which event the Executive Director shall specify the appropriate longer time. The decision of the Executive Director shall constitute a final agency action by the Authority on the protest.

(4) If the Executive Director fails to render a decision within the time allotted, the protesting party may renew its protest to the Appeal Committee of the Authority's Board of Directors, as set forth in NMIAC § 40-50-925, by filing its protest renewal with the Chairperson of the Authority's Board of Directors through the Board Secretary at the Authority Administration Section, Saipan International Airport. Upon receipt of such protest renewal, jurisdiction over the protest shall transfer to the Appeal Committee and the Appeal Committee shall compel the Executive Director to provide to the Appeal Committee all materials necessary to consider the protest, including all submissions on the protest made by actual or prospective bidders or proposers. The Appeal Committee shall consider the protest upon their receipt. The Appeal Committee shall decide the protest in writing within thirty (30) calendar days after its receipt of these materials unless it certifies that the complexity of the matter requires a longer time, in which event the Appeal Committee shall specify the appropriate longer time. The decision of the Appeal Committee under this procedure shall constitute a final agency action by the Authority on the protest.

(b) Award Pending Protest.

(1) When a protest or appeal has been filed before award, the Authority Board of Directors will not make an award prior to resolution of the protest except if, upon recommendation of the Executive Director, the Authority Board of Directors determines that:

- (i) Fulfillment of the scope of the concession is urgently required;
- (ii) Delivery or performance will be unduly delayed by failure to make an award promptly; or
- (iii) A prompt award will be advantageous to the Authority.

(2) In the event the Authority Board of Directors determines that an award is to be made during the pendency of a protest, the Authority Board of Directors shall notify the Executive Director and the Appeal Committee of this determination in writing stating the reasoning for the determination. This writing shall be included in the protest file to explain the need for the immediate award. The Authority Board of Directors shall also give written notice to the protester and others concerned of the decision to proceed with the award. Adequate notice of such determination shall be accomplished by the foregoing and by publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days.

(c) Remedies Prior to Award. The Executive Director and the Appeal Committee shall have wide latitude to decide a protest made prior to award and to order the appropriate remedy in accordance with the confines and intent of this chapter. If prior to award the Executive Director or the Appeal Committee specifically determines that a solicitation or proposed award of a concession is in violation of law or regulation, then the solicitation or proposed concession shall be:

- (1) Cancelled; or
- (2) Revised to comply with law or regulation.

§ 40-505 Protests After Award

(a) Procedure for Protest.

(1) After an award of a concession, any actual bidder or proposer for that concession who asserts a claim or asserts that it has been aggrieved in connection with an invitation for bid or request for proposal may protest to the Executive Director. The protest shall be received by the Executive Director in writing within ten (10) days after such aggrieved bidder or proposer knows or should have known of the facts giving rise thereto. The written protest shall state fully the factual and legal grounds for the protest. The Executive Director shall consider all protests.

(2) Other persons, including other actual bidders or proposers known to the protesting party, involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases. The protesting party shall provide such notice and a copy of its protest to the Concession Grantee and shall file a declaration or proof of service with the Executive Director. Proof of Notice is required by the protesting party to these actual bidders or proposers, including the Concession Grantee, within three (3) calendar days of filing its protest. These bidders or proposers and the Concession Grantee shall also be advised that they may submit their views and relevant information to the Executive Director within ten (10) calendar days of their receipt of notice of the protest;

(3) The Executive Director shall decide the protest in writing within thirty (30) calendar days after all interested parties have submitted their views unless the Executive Director certifies that the complexity of the matter requires a longer time, in which event the Executive Director shall specify the appropriate longer time. The decision of the Executive Director shall constitute a final agency action by the Authority on the protest.

(4) If the Executive Director fails to render a decision within the time allotted, the protesting party may renew its protest to the Appeal Committee of the Authority's Board of Directors, as set forth in NMIAC § 40-50-925, by filing its protest renewal with the Chairperson of the Authority's Board of Directors through the Board Secretary at the Authority Administration Section, Saipan International Airport. Upon receipt of such protest renewal, jurisdiction over the protest shall transfer to the Appeal Committee and the Appeal Committee shall compel the Executive Director to provide to the Appeal Committee all materials necessary to consider the protest, including all submissions on the protest made by bidders or proposers or the Concession Grantee. The Appeal Committee shall consider the protest upon their receipt. The Appeal Committee shall decide the protest in writing within thirty (30) calendar days after its receipt of these materials unless it certifies that the complexity of the matter requires a longer time, in which event the Appeal Committee shall specify the appropriate longer time. The decision of the Appeal Committee under this procedure shall constitute a final agency action by the Authority on the protest.

(b) When it appears likely that an award may be invalidated and a delay in operations under the concession is not prejudicial to the Authority's interest, the Executive Director should consider seeking a mutual agreement with the Concession Grantee to suspend performance on a no-cost basis.

(c) Remedies after Award.

(1) If after an award the Executive Director or the Appeal Committee determines that an invitation for bid, request for proposal, or award of a concession is in violation of regulation, then:

(i) If the Concession Grantee has not acted fraudulently or in bad faith:

(a) The grant of concession or the concession agreement may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Commonwealth, that the reasoning for this determination is set forth in writing, and that adequate notice of this determination is accomplished by publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days; or

(b) The grant of concession may be rescinded or the concession agreement may be terminated and the person awarded the concession shall be compensated for the actual expenses reasonably incurred under the concession;

(ii) If the Concession Grantee has acted fraudulently or in bad faith:

(a) The grant of concession ~~may~~ shall be rescinded; or the concession agreement shall be terminated.

~~(b) The grant of concession or the concession agreement may be ratified and affirmed provided it is determined that doing so is in the best interests of the Commonwealth, that the reasoning for this determination is set forth in writing, and that adequate notice of this determination is accomplished by publicly posting notice of such determination at the Authority office at the Francisco C. Ada/Saipan International Airport for a period of fourteen (14) calendar days, without prejudice to the Authority's rights to such damages as may be appropriate.~~

§ 40-510 Disputes with ~~Concession Grantee or~~ Concessionaire

(a) Any dispute between the Authority and a concessionaire relating to the performance under or interpretation of a concession agreement must be filed in writing with the Executive Director within ten calendar days after knowledge of the facts surrounding the dispute.

(b) When a claim by or against a concessionaire cannot be satisfied or settled by mutual agreement and a decision on the dispute is necessary, the Executive Director shall review the facts pertinent to the dispute, secure necessary legal assistance and prepare a written decision description within thirty (30) calendar days of receipt of the dispute that shall include:

- (1) A description of the dispute;
- (2) Reference to pertinent concession agreement terms;
- (3) A statement of the factual areas of disagreement or agreement; and
- (4) A statement of the decision as to the factual areas of disagreement and conclusion of the dispute with any supporting rationale.

(c) Appeals.

(1) A written appeal to the Appeal Committee from a decision by the Executive Director on a concessionaire's dispute may be taken provided that the concessionaire taking the

appeal has first submitted a written dispute to the Executive Director and the Executive Director has issued a written decision on the dispute as set forth in NMIAC § 40-510(b) or has failed to timely act on the dispute. An appeal from the Executive Director's decision must be received by the Appeal Committee not later than ten calendar days after the concessionaire receives the decision of the Executive Director, or, in the event that the Executive Director has not decided the dispute within ten calendar days from the date that the Executive Director should have decided the dispute as set forth in NMIAC § 40-510(b). Any appeal received after these time limits shall not be considered by the Appeal Committee unless good cause is shown or unless the Appeal Committee determines that the appeal presents issues significant to concession practices that are not outweighed by the detriment to the Authority should the appeal be considered.

(2) When a dispute has been appealed to the Appeal Committee, the Executive Director shall provide the Appeal Committee a copy of its written decision description, as set forth in NMIAC § 40-510(b), as well as any other documents that are relevant to the dispute. The Appeal Committee may request additional information from the Executive Director or the concessionaire as it sees fit.

(3) The Appeal Committee shall hear, review and render a decision on an appeal from an adverse decision timely taken by a concessionaire. The Appeal Committee shall hold a hearing on the appeal. The Appeal Committee shall provide the concessionaire and the Executive Director with adequate notice of this hearing, including the process established by the Appeal Committee for acceptance and consideration of evidence, both exhibits and testimony, to be followed at the hearing. The Appeal Committee shall review the Executive Director's decision *de novo*. The Appeal Committee may affirm, reverse or modify the decision of the Executive Director, or remand that decision back to the Executive Director for further consideration.

(4) The Appeal Committee shall, if possible, issue a decision on the appeal within thirty (30) calendar days after all information necessary for the resolution of the appeal has been received. A copy of the decision shall immediately be mailed or otherwise transmitted to the concessionaire and the Executive Director. Unless the concessionaire or the Executive Director timely requests reconsideration of the decision, the decision shall constitute a final agency action by the Authority on the dispute.

(5) Reconsideration of a decision of the Appeal Committee may be requested by the concessionaire or the Executive Director. 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. Request for reconsideration of a decision of the Appeal Committee shall be filed not later than ten calendar days after the decision. There shall be no further hearing nor conference on any request for reconsideration and the Appeal Committee shall decide the request for reconsideration within five (5) calendar days. This decision shall be made in writing, shall immediately be mailed or otherwise transmitted to the concessionaire and the Executive Director, and shall constitute a final agency action by the Authority on the dispute.

(d) Duty to Continue Performance. A concessionaire that has a dispute pending before the Executive Director or an appeal before the Appeal Committee must continue to perform according

to the terms of the concession agreement and failure to so continue shall be deemed to be a material breach of the concession agreement unless the concessionaire obtains a waiver of this provision from the Authority Board of Directors.

(e) A determination of an issue of fact by the Appeal Committee under this part shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous. Any aggrieved party may thereafter seek judicial review of such a determination as a final agency action per 1 CMC § 9112 with the CNMI Superior Court.

Part 600 - Signatures, Ethics, Good Faith, and Required Concession Agreement Language

§ 40_-601 Execution and Administration of Concession Agreements

All concession agreements executed under this chapter shall be executed, applied, overseen, and enforced by the Authority in the same manner as procurement contracts per § §40-50-101, 40-50-105, and 40-50-110. Ultimately, the Executive Director shall have the responsibility for compliance with this chapter and its application or enforcement. The Executive Director may direct the establishment of Standard Operating Procedures for Concessions, which shall contain the developed and approved forms and procedures consistent with this chapter.

§ 40_-605 Authority Ethics

All rules and regulations on ethics in contracting set forth in Chapter 40-50 Part 1000 shall be applicable to the concession program set forth in this chapter, except for § 40-50-1030.

§ 40_-610 Gratuities and Kickbacks

(a) **Gratuities.** The members of the Authority Board of Directors and Authority employees cannot accept from any person any gift of value given to them with the intent to influence their business judgment. It shall be a breach of ethical standards for any person to offer, give or agree to give any member of the Authority Board of Directors or Authority employee or for the same 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, or preparation influencing the content of any concession requirement, 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 to any solicitation, bid, or proposal therefore.

(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 sub-concessionaire under a concession to a higher tier concessionaire or any person associated therewith as an inducement for the award of a sub-concession or order.

§ 40_-615 Prohibition Against Contingent Fees

(a) **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 Authority concessions 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 business.

(b) Representation of Prospective Concessionaire. Every person, before being granted an Authority concession, shall represent, in writing that such person has not retained anyone in violation of this section. Failure to do so constitutes a breach of ethical standards.

§ 40-_-620 Contract Clauses

The prohibitions against gratuities, kickbacks, and against contingent fees contained in this part shall be conspicuously set forth in every concession agreement, invitation for bid, and request for proposal made under this chapter.

§ 40-_-625 Requirement of Good Faith

This chapter requires all parties involved in the negotiation, bidding, performance, proposal for or administration of Authority concessions to act in good faith.

§40-_-630 Validity of Concession Agreement

No Authority concession agreement covered by this chapter shall be valid unless it complies with this chapter.

Part 700 - Information Storage and Access

§ 40-_-701 Public Access to Information Regarding Concession Solicitations

Information regarding concession solicitations, whenever practical, shall be a matter of public record and shall be available for public inspection pursuant to the CNMI Open Government Act at 1 CMC § 9901 et seq. Information regarding concession solicitations may be kept confidential when necessary to insure proper bidding procedures or to protect private; confidential; financial or technical data; trade secrets; or other proprietary information submitted by a proposing party or bidder or any other applicable exemption under the Open Government Act. This decision shall be made only by the Executive Director or her/his authorized designee.

Further, any prospective concessionaire submitting information, whether technical or proprietary as to price, shall so indicate to the Authority through the Executive Director in any submission and explain the nature of the information and why it must be designated as private or confidential/exempt under the Open Government Act. Any request for public records of exempt or private materials shall also require reasonable notice to any prospective concessionaire whose information is requested so the prospective concessionaire may be allowed to respond or undertake measures to protect such information.

§ 40-710 Right to Audit Records

The Public Auditor of the Commonwealth of the Northern Mariana Islands ~~shall~~, pursuant to 1 CMC § 7845, shall have the right to examine and copy any records, data or papers relevant to an Authority Concession Grant or concession agreement until the expiration of three (3) years after final payment under the concession agreement. A statement to this effect shall be included as a clause in any Authority Concession Grant or concession agreement.

§ 40-715 Retention of Concession Records

All records regarding a concession and the corresponding concession agreement shall be retained by the Executive Director or her/his authorized designee within a designated office or location in hard-copy format and digital format until the expiration of three (3) years after final payment under the concession agreement, three (3) years after the change in the concession's determined scope, or three (3) years after elimination of the concession, whichever occurs later. After expiration of the applicable three-year (3-year) time period, the Authority may, at its discretion, retain all such records in digital format only and dispose of the corresponding hard copies.