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FILE No. OPA-PA 09-005

Office of the Attorney General
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Attorneys for the Department of Public Works

BEFORE THE PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:) DOCKET NO. OPA-PA 09-005
)
GUAM COMMUNITY IMPROVEMENT)
FOUNDATION, INC.)
)
Appellant.)
)
)

**NOTIFICATION
NOTICE OF APPEAL TO
INTERESTED PARTY**

To: International Bridge Corporation

YOU ARE HEREBY NOTIFIED pursuant to 2 GAR Div 4, Section 12104(c) (2) that an appeal has been filed by Guam Community Improvement Foundation, Inc. to the denial of its protest of the procurement of Construction of the New John F. Kennedy High School, Finance, Demolition, Design, Build, Maintain, and Leaseback Project No. 700-5-1020-L-TAM.

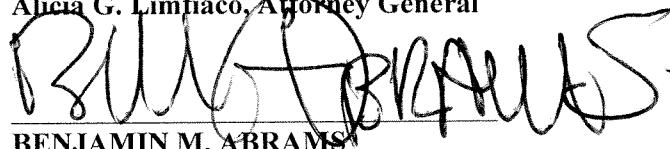
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ORIGINAL

1 Attached hereto find a copy of the Notice of Appeal and related documents filed by Guam Community
2 Improvement Foundation, Inc. in initiating this appeal.

3 Dated this 1st day of September, 2009.

4 OFFICE OF THE ATTORNEY GENERAL
5 ~~Alicia G. Limtiaco, Attorney General~~



6 By:

7 **BENJAMIN M. ABRAMS**
8 Assistant Attorney General
9 Office of the Attorney General
10 Attorneys for Department of Public Works

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LAW OFFICES

CUNLIFFE & COOK

210 Archbishop F.C. Flores Street

Hagåtña, Guam 96910

Telephone: (671) 472-1824

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Attorneys for: **Appellant**

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PROCUREMENT APPEALS

AUG 26 2009

TIME: 3:28 PM

BY: *Rajm*

FILE No. OPA-PA - 09-005

OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEAL

IN THE APPEAL OF:)
)
)
GUAM COMMUNITY IMPROVEMENT)
FOUNDATION, INC.)
)
Appellant.)
_____)

NOTICE OF APPEAL

Docket No. OPA-PA - 09-005

Appellant Information:

Name: **GUAM COMMUNITY IMPROVEMENT FOUNDATION, INC.**
% Cunliffe & Cook
210 A.B. Flores F.C. Flores Street
Hagatna, Guam 96910
(671) 472-1824

Appeal Information:

- A. Purchasing Agency: **Department of Public Works**
- B. Identification Number of Procurement, Solicitation or Contract:
RFP No. 700-5-1020-L-TAM
- C. Decision being appealed was made on **August 11, 2009 and August 14, 2009** by **Director Public Works.**

D. Appeal is made from:

Decision on Protest of Method, Solicitation or Award. A copy of said decisions are attached hereto and marked Exhibits "1" and "2", respectively.


E. Names of Competing Bidders, Offerors, or Contractors Known to Appellant:

**International Bridge Corporation (IBC)
Guam Education Financing Foundation, Inc.**

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

Submitted this 26 day of August, 2009.

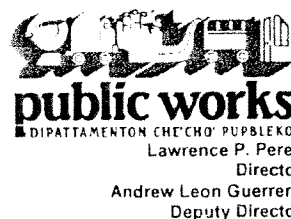
CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant
Guam Community Improvement
Foundation, Inc.

By 
F. RANDALL CUNLIFFE, ESQ.



The Honorable
Felix P. Camacho
Governor

The Honorable
Michael W. Cruz, M.D.
Lieutenant Governor



Lawrence P. Perez
Director
Andrew Leon Guerrero
Deputy Director

August 11, 2009

Law Offices of Cunliffe and Cook
Suite 200
210 Archbishop F.C. Flores Street
Hagatna, Guam 96910

Attn: Attorney F. Randall Cunliffe

RE: **NOTICE OF DECISION**

Handwritten notes: "2009" and "353 PM" with a signature.

Buenas yan Hafa Adai Mr. Cunliffe,

Pursuant to 5GCA§54-25 (b), as the Director of the Department of Public Works (DPW), I wish to exercise my authority to respond to the "Protest" letter, filed with DPW on August 5, 2009, by the Law Firm of Cunliffe and Cook, on behalf of the client, Mr. Anthony Sgro, President - Guam Community Improvement Foundation, Inc. (GCIFI).

The following is my response with reference to:

INQUIRY #1
(Paragraph 1)

On November 18, 2008, a Request for Proposal for the construction of a new JFK High School, Finance, Demolition, Design, Build, Maintain and Leaseback was issued under your signature. In Addendum No. 2, dated December 19, 2008, in response to questions 5 and 6 contains the following indications:

The RFP was intended to procure the best possible financing and construction package.... The intent of placing the financing as a critical aspect of the RFP as it will involve comparison analysis outlining the greatest benefits to the Government.

DPW Response
GCIFI "Protest"

- 1 -

RESPONSE #1:

Every effort was exerted to maximize professional competition through the careful structuring of the selection criteria. The selection criteria and the weight factors were tailored to the RFP.

DPW concurs and supports the critical components of the RFP with a total weighted score for Part I Financing package - 70%, and Part II Construction package - 30 %.

INQUIRY #2:
(Paragraph 2)

On page 10 of 25, item 3.13(b) and 3.13(c) of the RFP requests that each proposer submit the firm's financial structure in detail to include term sheets and other hypothetical scenarios, including interest rates.

RESPONSE #2:

Indications on the Financing Structure

With respect to the requirements of Part I of the RFP, Section VIII General Conditions, Paragraph 3 Content of Proposal, Items 3.1.3(b) and 3.1.3(c):

These items require the submission of: proposed structure in detail, as well as provisions for extension of maturity or roll-over, or any other hypothetical scenario; and a preliminary term sheet, or similar format, outlining terms and conditions of the proposed lease agreement, including interest rates.

The proposers provided these items in detail, along with supporting appendix information in fashion and form suitable to the government. These items were evaluated as part of the overall proposal, in accordance with the applicable selection criteria by the designated evaluation committee.

INQUIRY #3:
(Paragraph 3)

A letter dated January 16, 2009, signed by Lawrence P. Perez on or about March 4, 2009, addressed to Mr. Anthony Sgro, President, Guam Community Improvement Foundation, Inc., contained the following paragraph:

Upon the completion of the evaluation of the interview forms, we wish to inform you of your firm ranking as number 3, by the selection/evaluation committee Although your proposal will not be subject for contract negotiations at this time, please be advised that

DPW wishes to retain your proposal as the initial evaluation and not exclude your proposal from further consideration.

RESPONSE #3:

The selection/evaluation committee thoroughly reviewed and evaluated each proposal based on the combined total weighted score of Part I - Financing (70%) and Part II - Construction (30%), as guided by criteria and the evaluation form specific to this RFP.

Ultimately, the evaluation scores determined the ranking of the proposals in order of highest to lowest by overall total score. Upon conclusion of this process the recommendation from the evaluation committee was forwarded to the DPW Director, who further reviewed the recommendation of the evaluation committee and rendered his decision to approve the recommended proposer to advance to the negotiation phase.

In the event a selected proposer elects not to participate at any time after selection, or if faulted and determined not to be the most responsive, DPW reserves the right to select the next highest ranking proposer.

INQUIRY #4

(Paragraph 4)

On or about June 19, 2009, it was reported in the local news media that Lawrence P. Perez, Director of the Department of Public Works indicated that if Bill 1(4-S) was passed into law, the existing Request for Proposal would be cancelled and a new RFP would be forthcoming. That bill passed into law shortly thereafter.

RESPONSE #4

To my understanding, Bill 1(4-S) was vetoed on June 23, 2009, by acting Governor Michael W. Cruz, M.D

INQUIRY #5

(Paragraph 5)

On or about July 31, 2009, it was reported again in the Guam news media that GEDA was in the United States seeking bonding funds for this project, along with one of the other bidders, International Bridge Corporation (IBC).

RESPONSE #5

It would be unfair for me to comment on behalf of GEDA and the media.

INQUIRY #6

(Paragraph 6)

As this RFP included finance, as Addendum No. 2 indicated that the RFP was intended to procure the best possible financing and construction package, it appears that the Scope of Work III(h) Ability of Lessor to Provide One Hundred Percent Financing for the Facility as being followed by the Government, the protestor can only surmise one of two things. Either IBC did not comply, and cannot comply with the financing requirements and therefore should be excluded from the bid, or the Government has changed the request to exclude the financing which was an integral part of the initial bids and DPW is going forward under those circumstances. Either scenario is a violation of law

RESPONSE #6

The assertion appears to be that there exists one of two scenarios (as follows), either of which would compromise the procurement process:

1. "IBC did not comply, or could not comply with the financing requirements,"

To address the first scenario of whether IBC did or could comply with the financing requirements – The selected offeror proposed 100% financing of the project by offering Certificates Of Participation in the financial markets, as a tax-exempt offering in accordance with the RFP and PL 29-114. The Public Law states that the Guam Legislature,

“desires to authorize the Government of Guam to enter into contracts for the financing, design, construction and long-term capital maintenance of the John F. Kennedy High School with private sector contractors who can provide long-term financing obtained through tax-exempt obligations or other competitive alternative financing based on long-term leasebacks to the Government of Guam.”

Specifically, Section 58A108 of Title 5 of the GCA was enacted to read as follows:

“To minimize the financing cost to the Education Agency, financing utilized by the Contractor to fund the design

and construction of an Education Facility shall be through tax-exempt obligations or other financial instruments provided such financing is available at interest rates determined by the Education Agency to be reasonable and competitive.”

The financial documents related to the proposed offering of the Certificates of Participation for the financing of the project clearly state that the IBC's finance partner, CapFA, will offer the Certificates of Participation in the capital markets and not the Government of Guam. Such financial offering cannot be undertaken without the assistance and involvement of the Guam Economic Development Authority pursuant to Guam Law (Title 12 of the GCA, Chapter 50).

Therefore, GEDA's assistance with the offering of the Certificates of Participation is not indicative of any inability or unwillingness on the part of IBC to provide its proposed 100% financing of the project.

2. “the Government has changed the request to exclude the financing which was an integral part of the initial bids..”

To address the second scenario, DPW, as the contracting authority for the issuance of this RFP for the Reconstruction of JFK (FDDBML) project, has issued an original RFP, and four addenda. None of these RFP documents amended the requirement for financing and the financing by the proposer remains a valid and enforceable provision of the RFP documents.

Having addressed and thoroughly reviewed the circumstances surrounding the concerns as the Director of Department of Public Works, I wish to attest that the execution of the RFP procurement procedures were guided by the Guam Code Annotated, Chapter 5 – Guam Procurement Law, in addition to the complying to the mandates of Public Law 29-114, relative to the Construction of the New John F. Kennedy High School.

Further, protecting the government's integrity while implementing essential standards of ethical conduct in such a manner as to foster public confidence in the administration of public service is given the highest consideration.

While deliberating on the concerns presented, I failed to ascertain the substantiating significance to your inquiries that suggest ambiguity and conflict with the due process of the RFP. Instead, I have determined your claims as baseless, wholly unfounded and clearly without merit.

Therefore, I wish to inform you of my decision to Deny the “Protest”.

At this time, DPW is ascertaining if the "Protest" is in compliance with § 5425 (a) statute, defining the 14 days timeline and the conditions for submitting the protest.

Additionally, in as much as the activities and related expenditures were incurred as a result of the "Protest", DPW shall further revisit the circumstances at hand and issue a determination.

Please be informed that you have the right to appeal this decision to the Office of the Public Auditor within 15 days after receipt of the Notice of Decision.

Respectfully submitted,

 8/11/09
LAWRENCE P. PEREZ
Director

CC: Office of the Governor
Attorney General's Office
Office of the Public Auditor
Anthony Blaz, Admin. (GEDA)
Nerissa Bretania Underwood, Superintendent (DOE)
Robert Toelkes, President (IBC)
M.C. Bordallo, Vice President (IBC)
Ramon B. Padua, P.E., Chief Engineer (DPW)
GEFF



The Honorable
Felix P. Camacho
Governor

The Honorable
Michael W. Cruz, M.D.
Lieutenant Governor



public works
DIPATTAMENTON CHE'CHO' PUPBLEKO
Lawrence P. Perez
Director
Andrew S. Leon Guerrero
Deputy Director

Law Offices of Cunliffe and Cook
Suite 200
210 Archbishop F.C. Flores Street
Hagatna, Guam 96910


Attn: Attorney F. Randall Cunliffe

RE: NOTICE OF DECISION - ADDITIONAL GROUNDS

Hafa Adai Mr. Cunliffe,

I take this opportunity to inform you that your protest to RFP Construction of the New John F. Kennedy High Finance, Demolition, Build, Maintain, and Leaseback, Project No. 700-5-1020-L-T-A, filed with DPW on August 5, 2009, is denied on the ground that your protest is not timely pursuant to 5 GCA 5425(a). This additional ground for denial of your protest supplements, but does not take away from the grounds for denial stated in my letter to you dated August 11, 2009.

Respectfully Submitted,


LAWRENCE P. PEREZ
Director

8/14/09

