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PROCUREMENT APPEALS

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Attorneys for Z4 Corporation

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PROCUREMENT APPEAL

In the Appeal of )  
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)  
Z4 Corporation, )  
)  
)  
Appellant. )  
\_\_\_\_\_ )

Docket No. OPA- PA-09-012

**OPPOSITION TO APPELLEE'S  
MOTION TO DISMISS**

INTRODUCTION

The GDOE and GSA now realize that Eons' Alternate bid cannot support an award due to the failure to offer a full explanation or meet the specifications of the IFB. As stated in the GDOE's Motion to Dismiss, Eons "*continued to not meet the technical specifications of the project.*" Accordingly, in its motion, the GDOE and GSA no longer seek to affirm the award to Eons. Additionally, the GDOE has now reversed its position and argues that Z4's "Brochures/Literature were found Not to meet the technical specification of the project." The GDOE now seeks to restart the procurement process *for the third time*. The GDOE's *only* arguments are now: (1) Z4's bid was not in substantial

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conformance with the specification of the IFB; and (2) the alternate bid process should not have been used to procure this construction contract.

The public interest begs for this project to move forward. Someone needs to win this bid. The answer to any procurement irregularities cannot be to re-start this process for the third time, and possibly draw another protest. At this rate, by the time this gym is built, these kids will be in high school.

At this point, the only question is whether the award to Z4 should be affirmed. The GDOE should not be allowed to raise *one* “negligible” error to defeat a construction project valued at around \$800,000; holding so would only invite more protests in the future. Further, while this alternate bid process might not have been perfect, it produced a bidder who has complied with all the specification, save for one which can easily be remedied. The show must go on.

## ANALYSIS

### I.

#### **Z4’S BID IS IN SUBSTANTIAL COMPLIANCE WITH THE SPECIFICATIONS OF THE IFB**

##### A. Legal Standard of Minor Informality

“A minor informality is a matter of form, rather than substance evident from the bid document, *or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is effect on price, quantity, quality, delivery, or contractual conditions is negligible.*” In the appeal of Dick Pacific Const. Co. Ltd, OPA Appeal No. OPA-PA-07-007, citing 2 G.A.R. § 3109(m)(4)(B).

The GDOE and GSA properly waived the minor formality in Z4's bid because the difference between the pricing for the scoreboard is negligible and Eons was not prejudiced by the waiver.

**B. The GDOE Found that Z4's Bid Substantially Complied with the Specifications**

The GDOE waived any minor informality in Z4's bid. On July 16, 2009, TMRA reviewed the Basic bid of Z4 and the Alternate bid of Eons. TRMA only found that one (1) product submitted by Z4 was non-conforming, the scoreboard. On the other hand, TRMA found (5) of the products submitted by Eons were not acceptable, *including the same scoreboard offered by Z4.*

After review of TRMA's evaluation, the GDOE did not find that Z4's bid was non-conforming, simply due to this one item. Accordingly, the GDOE waived any minor informality and awarded the IFB to Z4.

**C. The GSA Also Found that Z4's Bid Substantially Complied with the Specifications of the IFB**

On another occasion, GSA separately evaluate Z4's bid and found that Z4 substantially complied with the specifications of the IFB. On October 9, 2009, GSA rejected Z4's due to "high price." *See Agency Report Exhibit 27.* However, GSA could have rejected Z4's bid due "non-conformance with the specification," as provided on the form. Therefore, GSA found that Z4's bid was in substantial compliance with the specifications and waived any minor informality.

D. **Z4's Failure to Meet the Specifications for the Scoreboard is "Negligible" and There Was No Prejudice to Eons**

The GDOE and GSA properly waived the minor formality in Z4's bid because the difference between the pricing was negligible between the unacceptable scoreboard and the specifications. According to the tabulation of Eons' Alternate and Basic bid, the cost difference between the substituted product and the specified product is \$8,000.00 (Eons' submitted the same unacceptable product). See Appellee's Exhibit 13 and 14. *This amount to less than 1% of Z4's total bid.* Furthermore, the "Explanation" Eons submitted with its Appeal to the OPA also indicated that the difference was insignificant. See In the Appeal of Eons Enterprises Co., OPA Appeal No. OPA-PA-09-006, Exhibit "5"; see also Appellant's Exhibit 15. Therefore, the unacceptable product will only have a negligible effect on the overall bid price for the IFB.

Finally, Eons was not prejudiced by the waiver of this minor informality, because Eons submitted the same unacceptable product. In addition, Eons also submitted four (4) other unacceptable products; and Eons later "*continued to not meet the technical specifications of the project.*" Thus, Eons was not prejudiced because Eons' Alternate bid contained numerous other unacceptable products, and still does.

E. **Eons' Alternate Bid Cannot Support and Award because Eons Errors Cannot be Waived**

The difference between the Eons' Alternate bid and Z4's bid is only Z4's bid can an award; and it is now clear that GSA has realized that Eons' Alternate bid cannot support an award. As noted in the motion to dismiss:

At later points in history of the procurement EONS Enterprises was permitted to submit two additional written

clarifications Brochures/Literature and to list different materials. The submittals by EONS Enterprises that were reviewed by *TRMA continued to not meet the technical specifications of the project.* [Emphasis Added].

Appellee's Motion to Dismiss at p. 4.

Eons had multiple opportunities to submit products that meet the technical specifications of the IFB. However, at no point, did the GDOE, GSA, or TRMA hold that Eons' Alternate bid could meet the specifications of the IFB. Therefore, Eons' Alternate bid cannot support award because its omissions amount to unwaivable material defects.

In addition, Eons Alternate bid was rejected for failure to fully explain the terms of the IFB. This failure also cannot be waived because failing to fully explain the offerings of a bid will undoubtedly prejudice other bidders. Additionally, the IFB specifically noted that failure to explain the Alternate bid would result in its rejection. Thus, Eons' failures cannot be waived, and *the GDOE no longer argues otherwise.*

**F. The Public Interest Supports Finding A Waiver**

Granting this motion would set a dangerous precedent for agencies, including the GDOE and GSA. A minor informality is one that has a "*negligible*" "effect on price." As stated above, the difference for the scoreboard item is less than one-percent (1%) of Z4's total bid price. Accordingly, if it is deemed that a 1% deviation is not a minor informality, then agencies will have to re-bid nearly all construction contracts because change orders and other inconsistencies are inevitable for such large and complicated projects. Granting this motion would only invite more protests in the future.

## II.

### **THE GDOE HAS WAIVED ITS OBJECTION TO Z4'S BID BEING NON-CONFORMING**

It is long established that an answer must contain any affirmative defenses that the defendant may have to the claim. The answer must provide fair notice of any such defense so the aggrieved party may develop any responses to the defenses. *See Woodfield v. Bowman*, 193 F.3d 354, 362 (5<sup>th</sup> Cir. 1999). Bid rejection/protest letters are no different.

As noted above, GSA rejected Z4's bid due to "high price," not due to another available option of "non-conformance with the specifications." In GSA's Bid Protest Rejection letter, GSA failed to raise the issue of any material defect with Z4's bid. Additionally, in the Agency Report, GSA also failed to raise this supposed objection to Z4's bid. Thus, on three separate occasions, GSA failed to raise any issue of non-conformance in Z4's bid.

If the GDOE and GSA truly believed that Z4's bid was non-conforming, they would have raised this issue in a timely manner. However, at no point did the GDOE or GSA raise this issue. Thus, the GDOE and GSA should be barred from raising this issue *on the eve of the hearing* and it should be considered waived.

## III.

### **THE IFB SHOULD NOT BE CANCELED SIMPLY BECAUSE THE ALTERNATE BID PROCESS WAS USED**

In its motion, the GDOE acknowledges its own mistake in the bid process and even argues that the IFB should be re-bid because this type of IFB is "not common in construction procurement." *See Appellee's Motion to Dismiss* at p. 4. In support, the

GDOE attaches the statement of Mark Ruth, who also indicates that this was an unusual process. However, there is nothing *per se* unlawful about using this procurement method for this type of contract. While it may not have been the *best* method to procure this construction project; there was nothing illegal with using this process. Thus, this reason cannot support cancellation of the IFB.

Furthermore, the process has been effective. The GDOE now has a bidder, Z4, who has met the specification for entire project, save for one small item. In the event Z4 is awarded this project, Z4 will easily cure its defect, *as in the usual process*. In comparison, Eons was given the opportunity to cure its defects, but it could not.

Finally, the public interest begs for this project to move forward as it has been delayed for several years. This project has already been re-bid once, and now the GDOE seeks to start this process from the beginning for the *third time*? This project should be awarded to someone. This IFB should not be dismissed at this point.

### CONCLUSION

The show must go on. Someone should be awarded this contract and this gym must be built. Accordingly, Z4 respectfully requests for the Appellee's Motion to Dismiss to be DENIED.

Respectfully submitted this 19<sup>th</sup> day of February, 2010.

**MAIR, MAIR, SPADE & THOMPSON, L.L.C.**  
Attorneys for Z4 Corporation

By   
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**AARON R. JACKSON**

Schedule of Values (ALTERNATE BID)  
 Ocean View Middle School Gymnasium Repair

| ITEM                   | DESCRIPTION  | UNIT | QTY   | ER | U/P  | LABOR AMOUNT | BID AMOUNT | ALTERNATE |
|------------------------|--|------|-------|----|------|--------------|------------|-----------|
|                        |  |      |       |    |      |              |            |           |
| IFB-008-2008 ( Re-bid) |  |      |       |    |      |              |            |           |
| ARCHITECTURAL WORKS    |  |      |       |    |      |              |            |           |
| A1                     | Replace court floor system (7MM)   | SF   | 4194  |    | 7    | 29358        | 7          | 58716     |
|                        | REMOVAL AND DISPOSAL   |      | 4194  |    |      |              | 1          | 4194      |
| A2                     | Paint concrete floor at gymnasium  | SF   | 2958  |    | 2    | 5916         | 2          | 11832     |
| A3                     | Provide new VCT at band room, band storage, classrooms and offices                                 | SF   | 2804  |    | 1.5  | 4206         | 2          | 9814      |
| A4                     | Clean and regrout floor tiles  | SF   | 4900  |    | 0.1  | 490          | 0.5        | 2450      |
| A5                     | Clean floor and repair floor cracks  | LF   | 0     |    | 0    | 0            |            | 0         |
| B1                     | Remove existing wood partition walls and doors at locker room                                      | LF   | 52    |    | 0    | 0            | 9          | 468       |
| B2                     | Clean and paint all interior and exterior walls, exposed conduits, concrete gutters and structures |      |       |    |      |              |            |           |
| B3                     | Clean and regrout wall tiles   | SF   | 33200 |    | 0.75 | 24900        | 0.75       | 24900     |
| B4                     | Provide rubber wall base   | SF   | 1626  |    | 0.01 | 16.26        |            | 0         |
| B5                     | Seal breezeblock   | LF   | 112   |    | 0.7  | 78.4         | 1          | 112       |
| C1                     | Replace bleachers  | SF   | 90    |    | 4    | 360          | 3          | 270       |
| C2                     | Provide fire extinguishers at locker rooms and gymnasium office                                    | SET  | 4     |    | 6000 | 24000        | 4000       | 16000     |
|                        |  | PC   | 3     |    | 150  | 450          |            | 0         |
| C3                     | Repair basketball gol winch sytem, clean backboards and repaint rims and structures                | SET  | 6     |    | 150  | 900          | 500        | 3000      |
| C4                     | Provide wall padding   | SF   | 300   |    | 14   | 4200         |            | 0         |
| C5                     | Replace scoreboard   | SET  | 1     |    | 8000 | 8000         | 1200       | 1200      |
| C6                     | Replace casework at band room, and concessions room  | LS   | 1     |    | 3000 | 3000         | 3500       | 3500      |
| C7                     | Provide accoustical wall panels, remove wood wall trim & accoustical wall tiles at band room       | SF   | 640   |    | 8.5  | 5440         | 3          | 1920      |
| C8                     | Provide writing boards and trackboards at band room and classrooms                                 | LS   | 1     |    | 1000 | 1000         | 450        | 450       |
| C9                     | Replace lockers and benches at locker rooms  | PC   | 120   |    | 320  | 38400        | 40         | 4800      |
| C10                    | Replace scorers table  | EA   | 1     |    | 350  | 350          | 80         | 80        |
| C11                    | Provide ADA bench at shower  | EA   | 2     |    | 400  | 800          | 150        | 300       |
| C12                    | Replace toilet accessories provide grab bar at ADA toilets   | EA   | 1     |    | 35   | 35           | 35         | 35        |
| C13                    | Replace toilet stall doors at restrooms  | EA   | 6     |    | 87   | 522          | 55         | 330       |
| C14                    | Provide new toilet partition at office restrooms   | LF   | 10    |    | 22   | 220          | 25         | 250       |
| D1                     | Retape and paint ceiling boards  | SF   |       |    |      | 0            |            | 0         |
| D2                     | Replace missing ceiling board and paint  | SF   | 64    |    | 5    | 320          | 5          | 320       |
| D3                     | Replace roof gutter interior closure trim, continuous  | LF   | 200   |    | 3.5  | 700          | 5          | 1000      |
| D4                     | Replace ACT and suspension grid  | SF   | 3450  |    | 2.25 | 7762.5       | 2.5        | 8625      |
| D5                     | Provide water resistant gypsum board ceiling   | SF   | 1882  |    | 2.5  | 4705         | 4          | 7528      |
| D6                     | Replace damage roof insulation at classroom, approx 32 sf  | SF   | 32    |    | 2    | 64           | 4.5        | 144       |
| D7                     | Provide exterior cement board soffit at east and west gymnasium entrance                           | SF   | 418   |    | 1.8  | 752.4        | 2.5        | 1045      |



| Schedule of Values ( Basic Bid)           |  |      |       |       |                    |              |        |                     |  |  |
|---|--|------|-------|-------|--------------------|--------------|--------|---------------------|--|--|
| Ocean View Middle School Gymnasium Repair |  |      |       |       |                    |              |        |                     |  |  |
| IFB -008-2009 ( Re-bid)                   |  |      |       |       |                    |              |        |                     |  |  |
| ITEM                                      | DESCRIPTION  | UNIT | QTY   | U/P   | MATERIALS<br>BASIC | LABOR<br>U/P | AMOUNT | BID AMOUNT<br>BASIC |  |  |
| ARCHITECTURAL WORKS                       |  |      |       |       |                    |              |        |                     |  |  |
| A1  | Replace court floor system (7MM)   | SF   | 4194  | 30    | 125820             | 10           | 41940  | 167760              |  |  |
| REMOVAL AND DISPOSAL                      |  |      |       |       |                    |              |        |                     |  |  |
| A2  | Paint concrete floor at gymnasium  | SF   | 4194  |       | 0                  |              | 5032.8 | 5032.8              |  |  |
| A3  | Provide new VCT at band room, band storage, classrooms and offices                                 | SF   | 2958  | 4     | 11832              | 2            | 5916   | 17748               |  |  |
| A4  | Clean and regrout floor tiles  | SF   | 2804  | 2.25  | 6309               | 2            | 5608   | 11917               |  |  |
| A5  | Clean floor and repair floor cracks  | SF   | 4900  | 0.1   | 490                | 0.5          | 2450   | 2940                |  |  |
| B1  | Remove existing wood partition walls and doors at locker room                                      | LF   | 0     | 0     | 0                  |              | 0      | 0                   |  |  |
| B2  | Clean and paint all interior and exterior walls, exposed conduits, concrete gutters and structures | LF   | 52    | 0     | 0                  | 9            | 468    | 468                 |  |  |
| B3  | Clean and regrout wall tiles   | SF   | 33200 | 1.1   | 36520              | 1.2          | 39840  | 76360               |  |  |
| B4  | Provide rubber wall base   | SF   | 1626  | 0.1   | 162.6              |              | 0      | 162.6               |  |  |
| B5  | Seal breezeblock   | LF   | 112   | 0.7   | 78.4               | 1            | 112    | 190.4               |  |  |
| C1  | Replace bleachers  | SF   | 90    | 4     | 360                | 3            | 270    | 630                 |  |  |
| C2  | Provide fire extinguishers at locker rooms and gymnasium office                                    | SET  | 4     | 12000 | 48000              | 4000         | 16000  | 64000               |  |  |
|   |  | PC   | 3     | 150   | 450                |              | 0      | 450                 |  |  |
| C3  | Repair basketball gol winch system, clean backboards and repaint rims and structures               | SET  | 6     | 150   | 900                |              | 3000   | 3900                |  |  |
| C4  | Provide wall padding   | SF   | 300   | 14    | 4200               |              | 0      | 4200                |  |  |
| C5  | Replace scoreboard   | SET  | 1     | 16000 | 16000              | 1200         | 1200   | 17200               |  |  |
| C6  | Replace casework at band room and concessions room   | LS   | 1     | 3000  | 3000               | 3500         | 3500   | 6500                |  |  |
| C7  | Provide acoustical wall panels, remove wood wall trim & acoustical wall tiles at band room         | SF   | 640   | 8.5   | 5440               | 3            | 1920   | 7360                |  |  |
| C8  | Provide writing boards and trackboards at band room and classrooms                                 | LS   | 1     | 1000  | 1000               | 450          | 450    | 1450                |  |  |
| C9  | Replace lockers and benches at locker rooms  | PC   | 120   | 600   | 72000              | 40           | 4800   | 76800               |  |  |
| C10                                       | Replace scorers table  | EA   | 1     | 350   | 350                | 80           | 80     | 430                 |  |  |
| C11                                       | Provide ADA bench at shower  | EA   | 2     | 300   | 600                | 150          | 300    | 900                 |  |  |
| C12                                       | Replace toilet accessories provide grab bar at ADA toilets   | EA   | 1     | 35    | 35                 | 35           | 35     | 70                  |  |  |
| C13                                       | Replace toilet stall doors at restrooms  | EA   | 6     | 87    | 522                | 55           | 330    | 852                 |  |  |
| C14                                       | Provide new toilet partition at office restrooms   | LF   | 10    | 22    | 220                | 25           | 250    | 470                 |  |  |
| D1  | Retape and paint ceiling boards  | SF   |       |       | 0                  |              |        | 0                   |  |  |
| D2  | Replace missing ceiling board and paint  | SF   | 64    | 5     | 320                | 5            | 320    | 640                 |  |  |
| D3  | Replace roof gutter interior closure trim, continuous  | LF   | 200   | 3.5   | 700                | 5            | 1000   | 1700                |  |  |
| D4  | Replace ACT and suspension grid  | SF   | 3450  | 2.5   | 8625               | 2.5          | 8625   | 17250               |  |  |
| D5  | Provide water resistant gypsum board ceiling   | SF   | 1882  | 2.5   | 4705               | 4            | 7528   | 12233               |  |  |
| D6  | Replace damage roof insulation at classroom, approx 32 sf  | SF   | 32    | 2     | 64                 | 4.5          | 144    | 208                 |  |  |
| D7  | Provide exterior cement board soffit at east and west gymnasium entrance                           | SF   | 418   | 1.8   | 752.4              | 2.5          | 1045   | 1797.4              |  |  |

# EONS ENTERPRISES CORPORATION TABLE AND SPREADSHEET

| Materials Offered for the Basic and Alternate bids:         |   | Oceanview Gymnasium Repairs (FB 008-2009) (Re Bid)              |  | Remarks  |  | difference in price basic bid alternate |  |
|---|---|---|--|--|--|---|--|
| Item  | Major Item/Materials                              | Basic Bid Materials   | Alternate Bid Materials                          |  |  |   |  |
| 1   | Atlethic/Resilient flooring                       | 1) MRI Polytex Gym, 7mm PU<br>\$ 167,760.00                     | Lesulan BP2, 7mm PU<br>\$ 58,716.00              | Made in London, good quality. Too Expensive<br>Floor system is available of range of specs<br>High Shipment / Freight Expenses!<br>Longer time in shipping and handling 60days |  | \$ 109,044.00                           |  |
| 2   | Bleachers   | Irwin Telescopic Seating Co<br>Irwin Model 4500<br>\$ 64,000.00 | Synergy<br>Telescopic Bleachers.<br>\$ 40,000.00 | Made in China, in compliance with the specs.<br>Inexpensive<br>Longer warranty   |  | \$ 24,000.00                            |  |
| 3   | Metal Doors/ frames<br>Roof up doors and          | Doorimat USA<br>\$ 90,160.00                                    | Mexkin<br>\$ 61,520.00                           | Made in USA (Longer Delivery time)<br>Standards<br>Made in China<br>Joint Venture with US Group<br>Conforms USA standards  |  | \$ 28,630.00                            |  |
| 4   | Panic devices/closers                             | Stanley<br>e.g. door closer, panic device                       | Note: This is included at the doors accessories  | Made in USA, in compliance w/ the specs<br>High price, good quality  |  |   |  |
| 5   | Resilient Flooring, vinyl tiles                   | Armstrong, 12"x12"x1/8"<br>\$ 11,917.00                         | Regent 12x12x4mm<br>\$ 9,814.00                  | Made in Taiwan<br>Meets the specs and inexpensive!<br>Inexpensive shipment and delivery<br>Simple mechanism and maintenance friendly<br>UL approved                            |  | \$ 2,103.00                             |  |
| 6   | Locker  | Hallowell Brand   | Hallowell Brand                                  | Standard quality and materials<br>special order  |  |   |  |
| 7   | Scoreboard  | Scoreboard 2655   |  | Standard quality and materials<br>Little Cheaper than Armstrong and easy to ship. (available at our stocks)  |  |   |  |
| 8   | Drinking Fountain                                 | Haws  | Haws   | Made in USA<br>Meets the specs   |  |   |  |
| 9   | Waterproofing                                     | Gacorroof   | Gacorroof  | Made in USA<br>Meets the specs   |  |   |  |
| 10  | Paints  |   |  | same basic ans alternate materials<br>same basic ans alternate materials   |  |   |  |
| 11  | Gypsum boards and metal studs                     |   |  | same basic ans alternate materials<br>same basic ans alternate materials   |  |   |  |
| 12  | other materials necessary to complete the project |   |  | same basic ans alternate materials<br>same basic ans alternate materials   |  |   |  |
| major items difference basic vs alternate (Basic is higher) |   |   |  |  |  | \$ 163,777.00                           |  |