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THE OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

IN THE APPEAL OF, Z4 CORPORATION, Appellant.	**APPEAL NO: OPA-PA-09-012** **Z4'S REPLY IN SUPPORT OF ITS STATEMENT OF COSTS AND REASONABLE PROFIT AND MOTION FOR ATTORNEYS' FEES AND COSTS**

INTRODUCTION

COMES NOW Z4 Corporation's ("Z4") Reply in Support of its Statement of Costs and Reasonable Profit and Motion for Attorney's Fees and Costs.

The Guam Department of Education (the "DOE") largely agrees with Z4's Statement of Costs and Reasonable Profit, as noted in the DOE's Response to Z4 Corporations Statement of Costs and Reasonable Profit and Z4's Motion for Attorney's Fees and Costs ("Response"). First, it appears that the DOE has verified that Z4 is entitled to at least $6,581.00 in costs. Second, it also appears that the DOE agrees that a reasonable calculation of profits prior to termination of contract should be based on a *pro rata* share of the total profit for the amount of time Z4 performed under the contract.

However, the DOE does oppose Z4's request for attorneys' fees as costs on narrow grounds; yet, the DOE has failed to dispute that case law supports such an award. Further, the DOE argues that the industry standard for profit is not 20%. However, again, the DOE does not offer any competent evidence to the contrary and ignores that in the instant solicitation, Eons Enterprises Corp. ("Eons") submitted a bid with a total mark-up of 21%. Thus, the OPA should grant Z4's statement of costs and reasonable profit as stated and grant Z4's request for attorneys' fees as costs.

ANALYSIS

I.

THE OPA HAS THE AUTHORITY TO DETERMINE "COSTS" AND Z4'S COSTS SHOULD INCLUDE ATTORNEYS' FEES

The DOE opposes Z4's request for attorneys' fees on the narrow grounds of "lack of jurisdiction." Response at 3. However, the DOE does not dispute that the Supreme Court of Hawaii allows recovery of attorneys' fees as costs. Instead, the DOE simply, and in a conclusory manner, argues that Section 5452 does not provide for attorneys' fees. Z4 maintains that in limited circumstances, which are present here, attorneys' fees should be awardable as costs.

A. Z4 Is Not "Contesting" the OPA's Award of Damages to Z4

In its Response, the DOE argues that Z4's "Motion for Attorney Fees and Cost is not properly before the [OPA]." Response at 1. Perhaps the DOE makes this argument because the DOE has mischaracterized Z4's request. This is not an appeal of the damages awarded nor is Z4 "contesting" the damages it was awarded. Rather, Z4 is

simply stating its costs and requests that the OPA find that Z4's "costs" include attorneys' fees. Thus, Z4 was not required to file an "appeal," which Z4 did not file so the project could move forward.

B. Several Other Jurisdictions Allow Attorneys' Fees as Costs

Significantly, the DOE does not dispute that the Supreme Court of Hawaii holds that attorneys' fees are properly chargeable as "reasonable costs" in certain situations. *See* Carl Corp. v. State, Dept. of Educ., 946 P.2d 1, 31 (Hawai'i 1997). It is unclear why the DOE does not believe Z4 is entitled to charge attorneys fees as costs, because the DOE states in one conclusory statement that section 5452 does not allow for the requested attorney fees. *See* Response at p. 2. However, the DOE fails to point to any authority interpreting section 5452 or any authority that supports such a conclusion.

Hawai'i is only one of several other jurisdictions that allows recovery of attorneys' fees as costs in procurement appeals. The Sixth Circuit Court of Appeals holds that an unsuccessful bidder may recover "the expenses it incurred in its unsuccessful participation in the competitive bidding process as ***well as the costs incurred in its successful attempt to have the award to [the successful bidder] rescinded as having been made in violation of the statute***." Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084, 1096 (6th Cir. 1981). Other jurisdictions recognize Owens as sound law and apply its holding in determining awardable costs, which include attorneys' fees. *See* Telephone Associates, Inc. v. St. Louis County Bd., 364 N.W.2d 378, 383 (Minn. 1985) (finding that bidder was "entitled to recover the costs incurred in preparing the unsuccessful bid . . . and its expenses, ***including reasonable attorney fees***, from the time it first intervened at the

county board to prevent the award of the contract to [the successful bidder]") (emphasis added).

The award of attorneys' fees to aggrieved bidders is based on sound public policy. As the Minnesota Supreme Court stated, "proper challenges to the bid-letting process should be encouraged . . . [the unsuccessful bidder] should not have to bear the expense of its actions." *Id.* Likewise, the Hawai'i Supreme Court noted that the protestor should not "bear the financial burden of enforcing the Code." Carl Corp. 946 P.2d at 31. Further, requiring the bidder to bear the financial burden of enforcing the Code "undermines the purpose of the Code." *Id.*

Here, as in Owen and Telephone Associates, Z4 incurred legal expenses simply to "have the award to the [successful bidder] rescinded as having been made in violation of the statute." Owen, 648 F.2d at 1096. Z4 should not be required to bear these costs. *See* Carl Corp., 946 P.2d at 28.

C. The OPA Has the Authority to Award Attorneys Fees

In other sections of the Guam Procurement Code, the OPA is vested with the authority to award attorneys' fees. For example, the OPA can award the governmental agencies "reasonable costs including attorney fees" in cases where protests are made "fraudulently, frivolously or solely to disrupt the procurement process." 5 G.C.A. § 5424(h)(2). Additionally, the Procurement Code provides the Court authority to assess "reasonable attorneys fess and other litigation costs reasonably incurred" when the government improperly withholds procurement data from the complainant. 5 G.C.A. § 5485(d). Thus, since the Guam Procurement Code contemplates the award of attorneys'

fees in other sections, it follows that the OPA has the authority to award attorneys fees as costs. *See* Carl Corp., 946 P.2d at 28 ("Because nothing in the procurement code precludes an award of attorney's fees to a successful protestor, and, under the circumstances of this case, requiring CARL to bear the fees incurred in its protest would undermine the purposes of the Code").

D. The GSA Recklessly Disregarded the Procurement Law and Z4 Should be Compensated for Enforcing the Procurement Law

In the instant appeal, the General Services Agency (the "GSA") recklessly disregarded the procurement law and needlessly caused Z4 to file an appeal. The OPA found that GSA entered this procurement without any authority to do so. Decision at p. 10. GSA even knew that it lacked authority as GSA's Chief Procurement Officer testified that GSA "did not normally handle the procurement of construction services." Decision at p. 12.

Further, this particular IFB should have been canceled and re-solicited long before Z4's appeal. As noted by the OPA, "Eons withdrew its appeal to the OPA in exchange for GSA agreeing to cancel the IFB." Decision ¶20 at p. 5. However, "instead of canceling the IFB, on October 8, 2009, GSA issued a Notice of Intent of Possible Award to Eons." Decision ¶21 at p. 6. If GSA had done what it told the OPA it was going to do, Z4's appeal would have been unnecessary and *Z4 would have been spared its costs to enforce Guam's Procurement law.*

In the end, the public benefitted from Z4's appeal. As a result of the appeal of Z4, the OPA was able to discover an "unacceptable risk of public harm." Decision at p. 16. Such risk included "[c]atastrophic failure of the repair work [which] would likely

result in severe physical injury to students, their families, and school facility." *Id. If Z4 had not submitted this appeal, the IFB would have been performed by Eons under this severe risk of harm.* Therefore, Z4's attorneys' fees should be chargeable as costs because Z4 should be compensated for its costs incurred in enforcing the procurement law.

II.

THE DOE HAS VERIFIED $6,581.00 OF Z4'S COSTS AND THE REMAINING COSTS ARE SUPPORTED BY COMPETENT EVIDENCE

Primarily, it must be noted that the DOE does not dispute that Z4 is entitled to at least $6,581.00 in costs. *See* Response at p. 3. Both Billy Cruz and Rodrigo Traya stated that these costs are "verified" or are "legitimate claims." The only item seriously disputed is "Item A," which is the preparation for temporary fence and fabrication at stockyard. *See* Exhibit 100. The costs associated with this item are solely for labor. Certainly, professional time and labor expended by employees of Z4 on the contract are "actual expenses" because such resources could have been spent on other projects.

In its Reponses, the DOE faults Z4 for failing to provide "documentation" of this cost or labor. Response at p. 3. However, documentation of labor is not practical or available. The only documentation of labor is payroll documents; yet, such documents do not demonstrate the task of the employee. See Appellant's Exhibit 103. Payroll documents simply provide information on certain employees and the total hours spent. *Id.* On the other hand, Z4 provided competent evidence to establish the amount of labor expended in preparation of the project in the form of testimonial evidence and, thus, the statement of costs should be awarded in full.

III.

THE DOE HAS NOT PROVIDED COMPETENT EVIDENCE TO DEPART FROM Z4'S METHOD FOR DETERMINING "REASONABLE PROFIT"

It appears that the DOE does not dispute that Z4 is entitled to a *pro rata* share of the total profit for the time Z4 performed under the contract. *See* Response at p. 3 ("Once Reasonable Cost are calculated taking an industry agree percentage of that would be an acceptable methodology for the calculation."). However, the DOE disputes Z4's assertion of the industry standard for profit is 20%, without competent evidence.

A. Z4 is Requesting a Share of its "Reasonable Profit"

Z4's *pro* rata calculation of reasonable profit is in line with general contract principles. It is black letter law that "contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in a position as he would have been in had the contract been performed." Restatement (Second) of Contracts § 347 *Measure of Damages in General* (1981). Expectancy damages include lost profits. *See* California Federal Bank v. U.S., 395 F.3d 1263, 1267 (Fed. Cir. 2005). Therefore, ordinarily, the measure of damages, including lost profits, would be based on the entire contract in order to make the aggrieved party whole.

Here, Z4 calculates its reasonable profit on a *pro rata* basis for the total contract profit. Thus, Z4 is entitled to a share of the lost profits for the time it performed under the Bid. This is in accordance with contract law and no other reasonable method has been proposed by the DOE.

B. The DOE's Industry Standard is Not Supported by Competent Evidence

The DOE does not dispute that Z4 is entitled to a *pro rata* share of profit for the entire project based on the industry standard. However, the DOE argues that the industry standard is 6 – 10%. Yet, the DOE fails to provide any competent evidence supporting this supposed industry standard. Instead of citing or providing any competent authority, the DOE offers its own unsworn statements as evidence of the industry standard without providing any sworn declarations or anything else supporting these bare allegations. Apparently, we are just to take the DOE at its word for the matter. However, "[s]tatements by counsel in briefs are not evidence." Skyline Corp. v. N.L.R.B., 613 F.2d 1328, 1337 (5th 1980).

C. Z4's Industry Standard is Supported by the Bid Documents

In addition to failing to provide any competent evidence, the position of the DOE is disingenuous and unsupported by the bids submitted for this solicitation. For example, Eons, the very company which the DOE fought to award the Bid, marks-up its Bids by ***twenty-one percent (21%)*** for profit, labor mark up and overhead. *See* Appellants Exhibit 101. Thus, since the DOE stood ready to award the contract to Eons, the DOE can hardly argue that industry standard is not 20%.

CONCLUSION

Z4 is entitled to "actual expenses" in the amount of $13,167.44, and "reasonable profit" at a *pro rata* rate of 10% for the total profit of $162,000 it would have realized, which equals $16,200. Finally, Z4's appeal alleviated a severe risk of harm to the public and, thus, Z4 should not be required to bear the burden of enforcing the

Procurement Law. Therefore, Z4's request for attorneys' fees as costs should be GRANTED.

Dated this 14th day of July, 2010.

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