



OFFICE OF PUBLIC ACCOUNTABILITY  
 Doris Flores Brooks, CPA, CGFM  
 Public Auditor

**PROCUREMENT APPEALS**

IN THE MATTER OF, ) **APPEAL NO: OPA-PA-12-010**  
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 )  
 ALLIED PACIFIC BUILDERS, INC., ) **DECISION**  
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 Appellant. )  
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**I. INTRODUCTION**

This is the Decision of the Public Auditor for appeal number OPA-PA-12-010 which was filed by ALLIED PACIFIC BUILDERS, INC. (Hereafter referred to as “APB”) on April 13, 2012 regarding the DEPARTMENT OF EDUCATION, GOVERNMENT OF GUAM’S (Hereafter Referred to as “DOE”) April 3, 2012 denial of APB’s January 5, 2012 Protest concerning Invitation for Bid Nos. DOE-IFB-035-2011 (Structural Repairs and Roof Coating-Northern A) (Hereafter Referred to as “Northern A IFB”) and DOE-IFB-036-2011, (Structural Repairs and Roof Coating-Northern B) (Hereafter Referred to as “Northern B IFB”) (Hereafter Collectively Referred to as “IFBs”). The Public Auditor holds that DOE correctly found that APB’s January 5, 2012 protest concerning the IFBs had no merit. Accordingly, APB’s appeal is hereby DENIED.

**II. FINDINGS OF FACT**

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties pursuant to APB’s June 13, 2012 Withdrawal of Request for Hearing. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1           1. On or about July 11, 2011, DOE issued the IFBs which solicited bids for structural  
2 repairs and roof coating for DOE's Northern A and B School Districts.<sup>1</sup> The Public Auditor  
3 finds that the IFBs were identical in language except as to the locations the services were to be  
4 performed. The Northern A IFB required services to be performed at DOE schools located in the  
5 Northern A School District, and the Northern B IFB required services to be performed at DOE  
6 schools located in the Northern B School District.

7           2. The IFBs stated in relevant part that:

8                 a. All instructions in the IFBs should be carefully followed and complied  
9 therewith and that bids and bidders who fail to follow the IFBs' instructions may be deemed  
10 nonresponsive and disqualified.<sup>2</sup>

11                 b. Bidders submitting bids in response to the IFBs will be presumed to have  
12 inspected the project site and to have read and be thoroughly familiar with the plans labeled as  
13 Appendices A through G to the IFBs, and which were available on DOE's website, and that the  
14 failure or omission of any bidder to inspect the project sites or examine any project plans,  
15 instruments, or documents shall in no way relieve any bidders from any obligation with respect  
16 to their bids.<sup>3</sup>

17                 c. One of the evaluation factors for award was the Competency of the bidder and  
18 the bidder's proposed subcontractors.<sup>4</sup>

19                 d. The IFBs required the Bidders to submit with their bids satisfactory evidence  
20 that the bidder, bidder's company, or the bidder's subcontractors had sufficient experience and  
21 that they were fully prepared with necessary capital, material, machinery, and skilled workmen  
22 and supervision staff to satisfactorily complete the project.<sup>5</sup>

23 \_\_\_\_\_  
24 <sup>1</sup> Newspaper Publication dated July 11, 2011, Exhibit 12, Bates Stamp No. GDOE00217, Procurement Record filed on April 24, 2012.

25 <sup>2</sup> Section 2.2.1 General Disclaimer Regarding Instructions, page 3, IFBs, Exhibit 1 for Northern A IFB, Exhibit 22 for Northern B IFB, Id.

26 <sup>3</sup> Section 2.1.3 Project Site and Plans, Page 3, IFBs, Id.

27 <sup>4</sup> Section 2.4.1 Evaluation Factors for Award, page 7, IFBs, Bates Stamp No. GDOE 008 for Northern A IFB and Bates Stamp No. GDOE00272 for Northern B IFB, Id.

28 <sup>5</sup> Section 2.5.1 Competency of Bidders, and Section 2.5.2 Competency of Subcontractors, Pages 7 and 8 Respectively, Bates Stamp No. GDOE008 and

1 e. That the following clause would be used as appropriate: “The contractor  
2 accepts the conditions at the construction site as they eventually may be found to exist and  
3 warrants and represents that the contract can and will be performed under such conditions, and  
4 that all materials, equipment, labor and other facilities required because of any unforeseen  
5 conditions (physical or otherwise) shall be wholly at the contractor’s own cost and expense,  
6 anything in this contract notwithstanding.”<sup>6</sup>

7 f. The term “installer” as used in the IFBs was defined as the contractor or another  
8 entity engaged by the contractor, either as an employee, subcontractor, or contractor of lower  
9 tier, to perform a particular construction activity, including installation, erection, application, and  
10 similar operations and the IFBs required installer to be experienced in the operations they are  
11 engaged to perform.<sup>7</sup>

12 g. The bidder awarded the contract was required to submit copies of permits,  
13 licenses, certifications, inspection reports, releases, jurisdictional settlements, notices, receipts  
14 for fee payments, judgments, and similar documents, correspondence and records established in  
15 conjunction with compliance with standards and regulations bearing upon performance of the  
16 work.<sup>8</sup>

17 h. The bidder awarded the contract was required to submit a copy of the  
18 Approved Applicator Letter or certificate issued by the Manufacturer of the elastomeric acrylic  
19 coating system.<sup>9</sup>

20 i. The bidder awarded the contract was required to be approved by the Coatings  
21 Manufacturer or application of the Manufacturer’s roof coating products, and was required to  
22 have a minimum of three (3) years experience in the application of elastomeric roof coatings and  
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25 GDOE009 for Northern A IFB and Bates Stamp No. GDOE00272 and GDOE00273 for  
26 Northern B IFB, Id.

26 <sup>6</sup> Site Conditions Contractor’s Responsibility, Section 4.3, Id.

27 <sup>7</sup> Paragraph 1.2.I, Definitions, Section 01095, Reference Standards and  
28 Definitions, Scope of Work and Specifications for IFBs, DOE Website.

28 <sup>8</sup> Paragraph 1.5, Id.

<sup>9</sup> Paragraph 1.2.C Applicator’s Qualifications, Section 071353, Elastomeric  
Acrylic Sheet Waterproofing, Id.

1 the bidder awarded the contract was required to provide a list of project references similar in  
2 nature to the one proposed in the IFBs.<sup>10</sup>

3 j. The bidders were required to submit lump sum offers for each of the schools  
4 located in the respective Northern A and B School Districts and were also required to give a  
5 detailed breakdown to support the lump sum offers by the square foot or linear foot for various  
6 categories of work.<sup>11</sup>

7 k. The Deadline to submit bids in response to the Northern A IFB was 10:00 a.m.  
8 on August 11, 2011.<sup>12</sup> The Deadline to submit bids in response to the Northern B IFB was  
9 August 12, 2011 at 10:00 a.m.<sup>13</sup>

10 3. On July 13, 2011, DOE issued Amendment No. 1 to the IFBs changing the time of the  
11 mandatory Pre-Bid Conference from 9:00 a.m. and 10:00 a.m., for the Northern A and B IFBs  
12 respectively, to 2:00 p.m. on July 18, 2011.<sup>14</sup> APB acknowledged receipt of Amendment No. 1  
13 on July 14, 2011 for the Northern A IFB and on July 13, 2011 for the Northern B IFB.<sup>15</sup>

14 4. On July 14, 2011 DOE issued Amendment No. 2 for the IFBs, which, in relevant part,  
15 amended Section 2.5.2 of the IFBs, regarding the competency of subcontractors, by requiring the  
16 bidders to submit all the information required by Section 2.4.1 of the IFB, regarding competency  
17 of contractors, with their bids.<sup>16</sup> This information required the bidders to submit with their bids:

- 18 a. Bidder's experience on similar projects with similar scopes of work.
- 19 b. Bidder's past performance in accomplishing projects on time.
- 20 c. Availability of plant, machinery, and other equipment necessary for work.

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23 <sup>10</sup> Paragraph 1.2.A Quality Assurance, Section 07545, Advanced Acrylic Fluid  
Applied Elastomeric Coating System, Id.

24 <sup>11</sup> Bid Cost Form, Id.

25 <sup>12</sup> Section 1.1. Invitation for Bid Timeline, Page 2, Northern A IFB, Exhibit  
1, Procurement Record filed on April 24, 2012.

26 <sup>13</sup> Section 1.1. Invitation for Bid Timeline, Page 2, Northern B IFB, Exhibit  
22, Id.

27 <sup>14</sup> Amendment No. 1, dated July 13, 2011, Exhibit 2 (Northern A IFB), Exhibit  
23 (Northern B IFB), Id.

28 <sup>15</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
IFB), Exhibit 32 (Northern B IFB), Id.

<sup>16</sup> Amendment No. 2 dated July 14, 2011, page 2, Exhibit 3 (Northern A IFB) and  
Exhibit 24 (Northern B IFB).

- d. Quality of work presently performed for government and private entities.
- e. Bidder's diligence in carrying out responsibility.
- f. Record of good owner-contractor relationship.
- g. Previous record of bid qualifications.
- h. Qualifications of supervisory personnel.
- i. Record of past performance of contracts including record of default and nonpayment of obligations.
- j. Disclosure of financial resources.<sup>17</sup>

5. APB acknowledged receipt of Amendment No. 2 on July 14, 2011 for both IFBs.<sup>18</sup>

6. On July 14, 2011, DOE issued Amendment No. 3 to the IFBs, which replaced the IFBs' existing Bid Cost Form, with a Revised Bid Cost Form. Said form had blank spaces for the bidders to state their lump sum offers for Structural Repairs and Roof Repairs and Coatings for each school that was relevant to the School District the specific IFB applied to. Additionally, the Revised Bid Cost Form stated that Plans, drawings, and specifications will be the basis of all offers provided and that the bidders shall carefully review all plans and specifications of each respective school. Further the Revised Bid Cost Form, required the bidders to breakdown their offers to support their Lump Sum Offers by stating their cost per square foot or linear foot for the categories of work, which included:

- a. Roof Coating for Concrete.
- b. Roof Coating for Metal.
- c. Roof Crack Repair.
- d. Ceiling Crack Repair.
- e. Ceiling Spall Repair.
- f. Beam to Roof/Ceiling crack repair.
- g. Wall Crack Repair.

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<sup>17</sup> Section 2.5.1. Competency of Bidders, page 7, IFBs, Exhibit 1 (Northern A IFB), Exhibit 22 (Northern B IFB), Id.

<sup>18</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A IFB), Exhibit 32 (Northern B IFB), Id.

- 1 h. Wall to Ceiling Joint Crack Repair.
- 2 i. Wall Spall Repair.
- 3 j. Beam to Wall Joint Crack Repair.
- 4 k. Column to Wall Joint Crack Repair.
- 5 l. Beam Crack Repair.
- 6 m. Column Crack Repair.
- 7 n. Slab Joint Crack Repair.
- 8 o. Removal, Staging and Transportation of all inoperable fixed assets.
- 9 p. Disposal Fee of all inoperable fixed assets.<sup>19</sup>

10 7. APB did not acknowledge receipt of Amendment No. 3.<sup>20</sup>

11 8. The Pre-Bid Conference for the IFB's was held on July 18, 2011 as scheduled in the  
12 IFBs and Amendment No. 1. The potential bidders who attended the conference were advised to  
13 submit their questions, in writing, as per the IFB, and were given a project overview by DOE or  
14 its designees. The potential bidders were also briefed concerning documents that concerned  
15 contractor qualifications that were to be submitted with the bids. Further, DOE advised the  
16 potential bidders of the site visits locations and times which would take place from July 19, 2011  
17 for the Northern A School District, and on July 20, 2011 for the Northern B School District at the  
18 following locations:

19 a. Northern A Buildings: Machananao Elementary School, Finegayan  
20 Elementary School, Astumbo Elementary School, Maria Ulloa Elementary School, Wentengel  
21 Elementary School, and VSA Benevente Middle School.

22 b. Northern B Buildings: D.L. Perez Elementary School, F.B. Leon Guerrero  
23 Middle School, Simon Sanchez High School, and J.M. Guerrero Elementary School.<sup>21</sup>

24 9. Ronald Torente represented APB at the Pre-Bid Conference.<sup>22</sup>

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26 <sup>19</sup> Amendment No. 3, dated July 14, 2011, Exhibit 4 (Northern A IFB), Exhibit  
25 (Northern B IFB), Id.

27 <sup>20</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
IFB), Exhibit 32 (Northern B IFB), Id.

28 <sup>21</sup> Pre-Bid Conference Agenda, Exhibit 14 (Northern A IFB) and Exhibit  
35 (Northern B IFB), Id.

<sup>22</sup> Pre-Bid Conference Attendees Sign In Sheet, Id.

1 10. Between July 8, 2011 and December 7, 2011, APB did not submit any written  
2 questions to DOE concerning the IFBs.<sup>23</sup>

3 11. On August 8, 2011, DOE issued Amendment No. 4 which extended the deadline to  
4 submit bids in response to the Northern A and B IFBs from August 11, 2011 at 10:00 a.m. to  
5 September 19, 2011 at 10:00 a.m., and from August 12, 2011 at 10:00 a.m. to September 20,  
6 2011 at 10:00 a.m., respectively.<sup>24</sup>

7 12. APB acknowledged receipt of Amendment No. 4 for both IFBs on August 9, 2011.<sup>25</sup>

8 13. On September 13, 2011, DOE issued Amendment No. 5, which extended the  
9 deadline to submit bids in response to the Northern A and B IFBs from September 19, 2011 to  
10 September 26, 2011 at 10:00 a.m., and from September 20, 2011 to September 27, 2011 at 10:00  
11 a.m., respectively.<sup>26</sup>

12 14. APB acknowledged receipt of Amendment No. 5 on September 14, 2011 for both  
13 IFBs.<sup>27</sup>

14 15. On September 16, 2011, DOE issued Amendment No. 6 to the IFBs, which were  
15 DOE's answers to written questions submitted by potential bidders.<sup>28</sup>

16 16. APB acknowledged receipt of Amendment No. 6 on September 21, 2011 for both  
17 IFBs.<sup>29</sup>

18 17. On September 20, 2011, DOE issued Amendment No. 7 to the IFBs wherein DOE  
19 amended the IFBs' provisions by stating that the project shall be completed within one hundred  
20 sixty (160) calendar days, that the contractor would be paid based on a monthly payment

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22 <sup>23</sup> Log of Communications between DOE Employees and Members of the Public,  
23 Potential Bidders, Vendors or Manufacturers Relating to the IFBs, Exhibit 15  
(Northern A IFB) and Exhibit 36 (Northern B IFB), Id.

24 <sup>24</sup> Amendment No. 4, dated August 8, 2011, IFB Exhibit 5 (Northern A IFB),  
25 Exhibit 26 (Northern B IFB), Id.

26 <sup>25</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
27 IFB), Exhibit 32 (Northern B IFB), Id.

28 <sup>26</sup> Amendment No. 5, dated September 13, 2011, Exhibit 6 (Northern A IFB) and  
29 Exhibit 27 (Northern B IFB), Id.

<sup>27</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
IFB), Exhibit 32 (Northern B IFB), Id.

<sup>28</sup> Amendment No. 6, dated September 16, 2011, Exhibit 7 (Northern A IFB),  
Exhibit 28 (Northern B IFB), Id.

<sup>29</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
IFB), Exhibit 32 (Northern B IFB), Id.

1 application and percentage of work completed according to a Schedule of Values approved by  
2 DOE's project manager, and amending Appendix H of the IFBs with the Revised Bid Cost Form  
3 set forth in Amendment No. 3 with the addition of an affirmation section requiring the bidder to  
4 affirm that the lump sum offers and per unit prices represent the entire cost to complete the work  
5 in accordance with the contract documents.<sup>30</sup>

6 18. APB acknowledged receipt of Amendment No. 7 on September 21, 2011 for both  
7 IFBs.<sup>31</sup>

8 19. On September 23, 2011, DOE issued Amendment No. 8, which extended the  
9 deadline to submit bids in response to the Northern A and B IFBs from September 26, 2011 to  
10 October 3, 2011 at 10:00 a.m., and from September 27, 2011 to October 4, 2011 at 10:00 a.m.,  
11 respectively.<sup>32</sup>

12 20. APB acknowledged receipt of Amendment No. 8 on September 30, 2011 for both  
13 IFBs.<sup>33</sup>

14 21. On September 28, 2011, DOE issued Amendment No. 9 to the IFBs, which amended  
15 the IFBs' bond requirements and performance guarantees, included a Labor and Material  
16 Payment Bond Form for the IFBs, detailed responses from DOE to potential bidder WILCO  
17 Strategic Partners DV, LLC's written questions, and amended the project's specifications by  
18 prohibiting the applicator from applying any material when environmental conditions will not  
19 permit a set before rain and requiring a minimum of five (5) years experience for Fluid-Applied  
20 Roofing Material Manufacturer Companies, Applicator Companies, Manufacturers, and that  
21 Applicators be approved and certified by Manufacturers. The Amendment also required the  
22 contractor to have a Pre-Roofing Conference prior to starting application of fluid-applied roofing  
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25 <sup>30</sup> Amendment No. 7, dated September 20, 2011, Exhibit 8 (Northern A IFB) and  
26 Exhibit 29 (Northern B IFB), Id.

27 <sup>31</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
28 IFB), Exhibit 32 (Northern B IFB), Id.

<sup>32</sup> Amendment No. 8, dated September 23, 2011, Exhibit 9 (Northern A IFB),  
28 Exhibit 30 (Northern B IFB), Id.

<sup>33</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
IFB), Exhibit 32 (Northern B IFB), Id.



1 systems, and to have a manufacturer's warranty for the entire roofing system, including flashings  
2 and accessories.<sup>34</sup>

3 22. APB acknowledged receipt of Amendment No. 9 on September 30, 2011 for both  
4 IFBs.<sup>35</sup>

5 23. On October 3, 2011, DOE received and opened bids submitted in response to the  
6 Northern A IFB from BASCON CORPORATION (Hereafter Referred to as "BC"), whose bid  
7 price was two-million-two-hundred-ninety-nine-thousand-dollars (\$2,299,000), J&B MODERN  
8 TECH (Hereafter Referred to as "J&B"), whose bid price was one-million-three-hundred-  
9 twenty-nine-thousand-five-hundred-thirty-dollars (\$1,329,530), and APB, whose bid price was  
10 five-million-three-hundred-eight-thousand-dollars (\$5,308,000).<sup>36</sup>

11 24. On October 4, 2011, DOE received and opened bids submitted in response to the  
12 Northern B IFB from BC, whose bid price was one-million-five-hundred-thirty-five-thousand-  
13 dollars (\$1,535,000), J&B, whose bid price was one-million-two-hundred-forty-five-thousand-  
14 five-hundred-seventy-two-dollars (\$1,245,572), MEGA UNITED CORPORATION (Hereafter  
15 Referred to as "MUC"), whose bid price was one-million-one-hundred-eighty-four-thousand-  
16 nine-hundred-eighty-two-dollars (\$1,184,982), and APB, whose bid price was two-million-  
17 eight-hundred-twenty-six-thousand-five-hundred-dollars (\$2,826,500).<sup>37</sup>

18 25. On December 15, 2011, DOE's Evaluation Team recommended J&B's bid as the  
19 lowest and most responsive bid for the Northern A IFB.<sup>38</sup>

20 26. On December 19, 2011, DOE issued its Letter of Intent to award the contract for the  
21 Northern A IFB to J&B and a Bid Status to all other bidders on December 27, 2011 advising  
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25 <sup>34</sup> Amendment No. 9, dated September 28, 2011, Exhibit 10 (Northern A IFB),  
26 Exhibit 31 (Northern B IFB), Id.

27 <sup>35</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 11 (Northern A  
IFB), Exhibit 32 (Northern B IFB), Id.

28 <sup>36</sup> Abstract of Bids for Northern A IFB, Exhibit 17, Id.

<sup>37</sup> Abstract of Bids for Northern B IFB, Exhibit 37, Id.

<sup>38</sup> Ranking Memorandum dated December 15, 2011 for Northern A IFB, Exhibit 18,  
Id.

1 them of the recommended award to J&B and advising BC and APB that their bids were not  
2 selected due to high prices.<sup>39</sup>

3 27. APB received a bid status from DOE notifying them that its bid for the Northern A  
4 IFB was not selected due to high price at approximately 3:25 p.m. on January 4, 2012.<sup>40</sup>

5 28. On December 29, 2011, DOE's Evaluation Team recommended MUC's bid as the  
6 lowest and most responsive bid for the Northern B IFB.<sup>41</sup>

7 29. That same day, DOE issued a Letter of Intent to award the contract for the Northern  
8 B IFB to MUC and a Bid Status to all the bidders advising them of the recommended award to  
9 MUC and advising BC, J&B, and APB that their bids were not selected due to high prices.<sup>42</sup>

10 30. There is no evidence in the procurement record that DOE transmitted, or that APB  
11 received a Bid Status notifying APB that their bid was rejected due to high price.

12 31. On January 5, 2012, approximately one (1) day after APB received notice that its bid  
13 for the Northern A IFB was not selected due to high price, APB delivered a protest letter to DOE  
14 alleging: (1) MUC and J&B were not qualified to perform the services required by the IFBs; (2)  
15 During the bid opening the qualifications of the bidders were not read aloud by DOE; and (3)  
16 The lowest bids were questionable because the square footage of the costs submitted for the roof  
17 coating does not conform to the required area to be coated. APB also sought clarification as to  
18 whether DOE evaluated the bids in accordance with Section 2.4 of the IFBs or whether they  
19 based their award for the IFBs on price alone.<sup>43</sup>

20 32. On April 3, 2012, nearly three (3) months after receiving APB's protest, DOE denied  
21 APB's protest alleging that: (1) The IFBs did not require bidders to have any special licensing  
22 or classification in order to bid, only that certain work under the IFB be performed by a certified  
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24 <sup>39</sup> Letter of Intent dated December 19, 2011 and Bid Status dated December 27,  
25 2011 for Northern A IFB, Exhibits 19 and 20, respectively, Id.

26 <sup>40</sup> DOE FAX Transmission Report dated January 4, 2012, for Bid Status Addressed  
27 to APB, Exhibit 20, Id.

28 <sup>41</sup> Ranking Memorandum dated December 29, 2011 for Northern B IFB, Exhibit 38,  
29 Id.

<sup>42</sup> Letter of Intent and Bid Status both dated December 29, 2011 for Northern B  
30 IFB, Exhibits 39 and 40, respectively, Id.

<sup>43</sup> APB Protest dated January 5, 2012, attached to Notice of Appeal filed on  
31 April 13, 2012.

1 contractor; (2) DOE's opening of the IFBs was in accordance with Guam Procurement Law and  
2 Regulations; and (3) APB's allegations that the lowest bids were questionable because of the  
3 difference in APB's estimated area is without merit.<sup>44</sup> As these projects involve American  
4 Recovery and Reinvestment Act funds and are time-sensitive in nature, DOE should have been  
5 more timely in responding to APB's protest. Instead, the Public Auditor finds that it took DOE  
6 nearly ninety (90) days to issue its protest decision contributing significantly to the delay in  
7 obligating the funds by September 30, 2012.

8 33. On April 13, 2012, ten (10) days after DOE issued its Decision denying APB's  
9 January 5, 2012 Protest, APB filed this appeal.

### 11 III. ANALYSIS

12 Pursuant to 5 G.C.A. §5703, the Public Auditor shall review DOE's April 3, 2012  
13 Decision denying APB's January 5, 2012 protest *de novo*.

#### 14 **A. The IFB did not require bidders to submit specific construction licenses with their bids.**

15 APB argues that MUC and J&B are not properly licensed to perform the work required  
16 by the IFBs.<sup>45</sup> DOE correctly asserts that the IFBs did not require the bidders to have any special  
17 licensing or classifications in order to bid.<sup>46</sup> As stated above, one of the evaluation factors for  
18 award was the competency of the bidder and the bidder's proposed subcontractors.<sup>47</sup> To evaluate  
19 this factor, the IFBs required the bidders to submit with their bids satisfactory evidence that the  
20 bidder, the bidder's company, or the bidder's subcontractors had sufficient experience and that  
21 they were fully prepared with necessary capital, material, machinery, and skilled workmen and  
22 supervision staff to satisfactorily complete the project.<sup>48</sup> As stated above, Amendment No. 2 for  
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24 <sup>44</sup> Protest Denial dated April 3, 2012, Id.

25 <sup>45</sup> Page 1, APB Protest dated January 5, 2012 attached to Notice of Appeal  
26 filed on April 13, 2012

27 <sup>46</sup> Page 1, DOE's Protest Decision dated April 3, 2012, Id.

28 <sup>47</sup> Section 2.4.1 Evaluation Factors for Award, page 7, IFBs, Bates Stamp No.  
GDOE 008 for Northern A IFB and Bates Stamp No. GDOE00272 for Northern B IFB,  
Id.

<sup>48</sup> Section 2.5.1 Competency of Bidders, and Section 2.5.2 Competency of  
Subcontractors, Pages 7 and 8 Respectively, Bates Stamp No. GDOE008 and

1 the IFBs, effectively extended this requirement to the bidder's subcontractors.<sup>49</sup> Although these  
2 IFB provisions and amendments required the bidders to submit with their bids the qualifications  
3 of the bidder's and subcontractor's supervisory personnel, the IFBs did not require the bidders to  
4 submit any specific licenses or certifications, except for manufacturer certifications which are  
5 beyond the scope of the issues in this appeal. There is no evidence submitted by the parties  
6 indicating that MUC or J&B failed to comply with this requirement. APB's argument depends  
7 solely on its assertion that MUC A&B classifications and J&B's C68 licenses are not sufficient  
8 to complete the project.<sup>50</sup> However, even assuming *arguendo* that APB is correct, the IFB  
9 allows the successful bidders to obtain any additional licenses and certifications in the post  
10 award period. As stated above, the IFBs clearly stated that the bidder awarded the contract was  
11 required to submit copies of permits, licenses, certifications, inspection reports, releases,  
12 jurisdictional settlements, notices, receipts for fee payments, judgments, and similar documents,  
13 correspondence and records established in conjunction with compliance with standards and  
14 regulations bearing upon performance of the work.<sup>51</sup> The Public Auditor finds that this language  
15 would allow MUC and J&B or their respective subcontractors who would actually perform the  
16 work, to obtain any additional licenses and certifications necessary to perform the work during  
17 the post award period.

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19 **B. The IFBs Bid Openings complied with Guam Procurement Law and Regulations.**

20 There is no merit to APB's assertion that the bid opening for the IFBs was faulty because  
21 DOE did not read aloud the qualifications of the bidders. Generally, bids shall be opened  
22 publicly in the presence of one (1) or more witnesses at the time and place designated in the  
23 invitation for bids and the name of each bidder, the amount of each bid, and such other relevant  
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25 GDOE009 for Northern A IFB and Bates Stamp No. GDOE00272 and GDOE00273 for  
26 Northern B IFB, Id.

27 <sup>49</sup> Amendment No. 2 dated July 14, 2011, page 2, Exhibit 3 (Northern A IFB) and  
28 Exhibit 24 (Northern B IFB).

<sup>50</sup> Page 1, APB Protest dated January 5, 2012, Id., and Pages 1-2, APB's  
Response and Comments on GDOE Motion to Dismiss, filed on May 18, 2012.

<sup>51</sup> Paragraph 1.5, Exhibit 1 (Northern A IFB), Exhibit 22 (Northern B IFB),  
Procurement Record filed on April 24, 2012.

1 information as may be specified by regulation or as is deemed appropriate by the Superintendent  
2 of Education, shall be read aloud or otherwise made public and recorded, and the record of each  
3 bid shall be open to public inspection. 5 G.C.A. §5211(d) and Chapter III, Section 3.9.12.2,  
4 DOE Procurement Regulations. Here, as stated above, DOE held the bid opening for Northern A  
5 IFB on October 3, 2011, and held the opening for the Northern B IFB on October 4, 2011. The  
6 abstracts of bid for the IFBs indicate that DOE received and opened bids submitted in response  
7 to the Northern A IFB from BC, whose bid price was two-million-two-hundred-ninety-nine-  
8 thousand-dollars (\$2,299,000), J&B, whose bid price was one-million-three-hundred-twenty-  
9 nine-thousand-five-hundred-thirty-dollars (\$1,329,530), and APB, whose bid price was five-  
10 million-three-hundred-eight-thousand-dollars (\$5,308,000).<sup>52</sup> And DOE received and opened  
11 bids submitted in response to the Northern B IFB from BC, whose bid price was one-million-  
12 five-hundred-thirty-five-thousand-dollars (\$1,535,000), J&B, whose bid price was one-million-  
13 two-hundred-forty-five-thousand-five-hundred-seventy-two-dollars (\$1,245,572), MUC, whose  
14 bid price was one-million-one-hundred-eighty-four-thousand-nine-hundred-eighty-two-dollars  
15 (\$1,184,982), and APB, whose bid price was two-million-eight-hundred-twenty-six-thousand-  
16 five-hundred-dollars (\$2,826,500).<sup>53</sup> No evidence was submitted by any of the parties that a  
17 procurement or other regulation or that the DOE's Superintendent of Education required the  
18 qualifications of the bidders to be read aloud during the bid opening. The Public Auditor finds  
19 that DOE complied with 5 G.C.A. §5211(d) and Chapter III, Section 3.9.12.2, DOE Procurement  
20 Regulations by opening the bids submitted in response to the IFBs at the date, time, and place  
21 stated in the IFBs and their amendments, by opening the bids publicly in the presence of  
22 witnesses, and by recording the names of the bidders and the amount of each bid.

23 It appears that APB was most troubled by DOE not reading the qualifications of the  
24 bidders at the bid opening because APB believed that without such a reading, they could not  
25 verify whether the competing bidders had submitted the materials required by the IFBs.<sup>54</sup> As  
26

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27 <sup>52</sup> Abstract of Bids for Northern A IFB, Exhibit 17, Id.

28 <sup>53</sup> Abstract of Bids for Northern B IFB, Exhibit 37, Id.

<sup>54</sup> Page 1, Procurement Protest dated January 5, 2012 attached to Notice of Appeal filed on April 13, 2012.

1 stated above, reading the qualifications was not required by law, regulations, or DOE's  
2 Superintendent. However, APB should know that it has the right to inspect the competing bids  
3 to verify whether the competing bidders complied with the IFBs' requirements. One of the  
4 paramount policies underlying Guam's Procurement Law and DOE's Procurement Regulations  
5 is the policy to require public access to all aspects of procurement consistent with the sealed bid  
6 procedure and the integrity of the procurement process. 5 G.C.A. §5001(b)(8) and Chapter I,  
7 §1.2.8, DOE Procurement Regulations. Guam's Procurement Laws and DOE's Regulations  
8 fulfill this policy by making procurement records public records that are subject to public  
9 inspection and copying. 5 G.C.A. §5249 and §5251, and Chapter III, §3.27.3 and §3.27.5. Thus,  
10 APB has the right to inspect the competing bids submitted in response to the IFBs.  
11

12 **C. The IFBs allowed the bidders to submit their own estimate quantities for the work.**

13 APB argues that the lowest bid was questionable because the square footage they were based  
14 on differed from APB's bid.<sup>55</sup> Specifically, APB questions whether the competing bidder's  
15 estimated footage for the work meets the footage quantities the project requires.<sup>56</sup> This project is  
16 a sequential design and construction project.<sup>57</sup> Generally, in a sequential design and construction  
17 project, comprehensive plans and specifications that are precise enough to allow prospective  
18 prime contractors to submit a competitive sealed bid should be prepared, Section 5.1.5.1.,  
19 Chapter V, DOE Procurement Regulations. Here, the Public Auditor finds that the IFB's project  
20 scope, specifications, and drawings are precise enough to allow prospective prime contractors to  
21 submit a competitive sealed bid. After reviewing the IFB, the Public Auditor finds that there are  
22 three (3) primary construction tasks required by the project scope which are generally stated as  
23 repair of cracks and spalls, roofing, and painting. Further, the Public Auditor finds that the  
24 project scope's structural repairs to slabs, walls, columns, beams, ceilings, and roofs requires the  
25

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26 <sup>55</sup> Id., and page 3, APB's Response and Comments on GDOE's Motion to Dismiss  
27 filed on May 18, 2012.

<sup>56</sup> Id.

28 <sup>57</sup> Paragraph 85, Page 3, End-User Review Memorandum For Invitation for Bid,  
Exhibit 21 (Northern A IFB), and Exhibit 41 (Northern B IFB), Procurement  
Record, filed on April 24, 2012.

1 repair of cracks, spalls, and joint separation in concrete, precast concrete, and masonry . Further,  
2 the IFBs' drawings clearly describe the location, type and extent of structural repairs to be done  
3 and the details provide information as to recommended methods for correction of the  
4 deficiencies. The drawings are specific as to locations, crack lengths, spall sizes, etc. The Public  
5 Auditor finds that by using the drawings and specifications along with verification by field  
6 inspections of the sites, prospective bidders should be able to develop a reasonable estimate of  
7 repair quantities and costs to develop their bids. As stated above, the IFB requires the bidders to  
8 verify and accept site conditions and makes them responsible for costs caused by unforeseen  
9 conditions. Generally, a requirement that the contractor accepts the conditions at the  
10 construction site as they may eventually be found to exist and that the contractor warrant and  
11 represent that the contract can and will be performed under such conditions and that all materials,  
12 equipment, labor, and other facilities required because of any unforeseen conditions shall be  
13 wholly at the contractor's cost and expense are authorized by DOE's Procurement Regulations.  
14 Section 5.4.6., Alternative B, Chapter 5, DOE Procurement Regulations. Further, such a clause  
15 ensures that unforeseen conditions do not eliminate the main advantage of the sequential design  
16 and construction contract which is accepting a fixed price for the project before construction has  
17 begun. Section 5.1.9.2, Chapter V, DOE Procurement Regulations. Although sequential design  
18 and construction projects solicited by the IFBs placed a heavy burden on the prospective bidders  
19 to develop their bid price, they were authorized by DOE's Procurement Regulations. The Public  
20 Auditor finds no merit in APB's allegations that other bids are questionable simply because other  
21 bidders' estimated quantities for square footage differed from APB's estimates.

#### 22 23 **IV. CONCLUSION**

24 Based on the foregoing, the Public Auditor hereby determines the following:

25 1. The Public Auditor finds no merit in APB's allegation that MUC and J&B are not  
26 properly licensed to perform the work required by the IFBs because the IFBs did not require the  
27 bidders to submit specific licenses with their bids and because Paragraph 1.5 of the IFBs allow  
28 MUC and J&B or their respective subcontractors who would actually perform the work, to

1 obtain any additional licenses and certifications necessary to perform the work during the post  
2 award period.

3 2. . The Public Auditor finds that DOE complied with 5 G.C.A. §5211(d) and Chapter  
4 III, Section 3.9.12.2, DOE Procurement Regulations by opening the bids submitted in response  
5 to the IFBs at the date, time, and place stated in the IFBs and their amendments, by opening the  
6 bids publicly in the presence of witnesses, and by recording the names of the bidders and the  
7 amount of each bid.


8 3. The Public Auditor finds no merit in APB's allegation that the lowest bids submitted  
9 in response to the IFBs were questionable because of differences in the estimated square footage  
10 of the bids because the sequential design and construction projects solicited by the IFBs allowed  
11 the bidders to make their owns estimates of the work required.

12 4. APB's Appeal is hereby DENIED.

13 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
14 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
15 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
16 Decision. 5 G.C.A. §5481(a).

17 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
18 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
19 [www.guamopa.org](http://www.guamopa.org).

20  
21 DATED this 18<sup>th</sup> day of July, 2012.

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27 DORIS FLORES BROOKS, CPA, CGFM  
28 PUBLIC AUDITOR