



OFFICE OF THE PUBLIC AUDITOR  
Doris Flores Brooks, CPA, CGFM  
Public Auditor

## PROCUREMENT APPEALS

IN THE APPEAL OF,  
GUAM EDUCATION FINANCING  
FOUNDATION, INC.  
Appellant

APPEAL NO: OPA-PA-09-007  
DECISION

### I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on September 18, 2009, by GUAM EDUCATION FINANCING FOUNDATION, INC., (Hereafter "GEFF") regarding the DEPARTMENT OF PUBLIC WORKS, Government of Guam's (Hereafter "DPW") September 8, 2009 denial of GEFF's August 13, 2009 protest concerning DPW's solicitation of Request for Proposal for Project No. 700-5-1020-L-TAM (Construction of the New John F. Kennedy High School Finance, Demolition, Design, Build, Maintain, and Leaseback (FDDBML) – Part I and Part II (Hereafter "RFP"). The Public Auditor holds that there is no merit to GEFF's allegations that Interested Party INTERNATIONAL BRIDGE CORPORATION's (Hereafter "IBC") substantial price increase from IBC's initial proposal justifies awarding the contract to GEFF or indicates that IBC's proposal was made in bad faith, that IBC should be disqualified because their proposed new JFK campus did not satisfy the size requirements set forth in the RFP, and that IBC's failure to provide financing justify disqualifying IBC's proposal. Accordingly, GEFF's appeal is DENIED.

#### Decision - 1

1 **II. FINDINGS OF FACT**

2 The Public Auditor in reaching this Decision has considered and incorporates herein the  
3 procurement record and all documents submitted by the parties, as well as all testimony and  
4 arguments presented at the Hearing on the DPW's Motions for Protective Order and  
5 Confirmation of Substantial Interest in this matter which was held on October 23, 2009, and the  
6 Hearing in this matter which was held on December 7, 2009. Anthony R. Camacho, Esq. served  
7 as the Office of Public Accountability's Hearing Officer at said hearings. Based on the  
8 aforementioned record in this matter, the Public Auditor makes the following findings of fact:  
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11 1. JFK was closed on June 9, 2008 by the Health and Safety Task Force of the  
12 Government of Guam because it was in the poorest condition of all of the Department of  
13 Education's (Hereafter "DOE") schools due to years of neglect caused by lack of funding to  
14 maintain and repair it.<sup>1</sup>

15 2. On November 21, 2008, DPW issued the RFP.<sup>2</sup>

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17 3. The RFP Scope of Work had two parts. Part I concerned the financing of the project  
18 and included nine evaluation criteria with assigned weights that made up 70% of the overall  
19 score an offeror's proposal could obtain. Part II concerned the technical specification  
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21 <sup>1</sup> Guam Education Policy Board Resolution No. 2009-09 Relative to Re-Building  
22 John F. Kennedy High School, Exhibit D, and Declaration of Substantial  
23 Interest dated October 5, 2009.

24 <sup>2</sup> DPW Request for Proposals, Excerpt from Pacific Daily News dated November  
25 21, 2008. NOTE: DPW did not file its procurement record in this matter and  
26 used the procurement record it filed on September 17, 2009 in OPA-PA-09-005  
27 as its procurement record in this matter as said records are identical and  
28 voluminous.

1 and included two evaluation criteria with assigned weights that made up 30% of the overall score  
2 an offeror's proposal could obtain.<sup>3</sup>

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4 4. The RFP stated that each proposal submitted would be graded and evaluated based on  
5 the combined total weighted score of Parts I and II and that this evaluation would be conducted  
6 using an evaluation form attached to the RFP. The evaluation form set forth the following  
7 evaluation criteria and assigned weights for Part I of the Scope of Work (Financing):

<u>Evaluation Criteria</u>	<u>Percentage</u>
a. Term Sheet to include all interest charges, fee and expenses.	10%
b. Responsiveness of the proposal.	10%
c. Ability of Lessor to lease to Lessee the facilities described in the Technical Specification, Part II of the RFP.	15%
d. Ability of Lessor to structure municipal leases from \$10,000,000 to over \$300,000,000.	5%
e. Ability of Lessor to offer suggestions on various arrangements for services and maintenance contracts in support of the upkeep and service of the lease facility.	10%
f. Ability of Lessor to allow the purchase of the leased school facility by Lessee at any time during the lease period.	2%
g. Ability of Lessor to allow Lessee to cancel the lease obligation, without penalty, at the end of the current fiscal year in which appropriations were last budgeted, or otherwise made legally available, in the event budgetary funds become unavailable in future years (Event of Non-Appropriation).	5%
h. Ability of Lessor to provide 100% financing for the facility, including demolition, design, construction, maintenance, and other related costs to complete the projects as required in the RFP.	10%
i. Ability of Lessor to develop a payment schedule that can be structured on an annual basis.	3% <sup>4</sup>

27 <sup>3</sup> Section III (Scope of Work) and Section VI (Technical Specifications), pages  
28 2 and 6, respectively, RFP, Procurement Record filed on September 25, 2009.

1  
2 5. The RFP stated that DPW would establish a Proposal Evaluation Board or Committee  
3 to review and evaluate all proposals submitted in response to the RFP. This Committee would  
4 conduct a preliminary evaluation of all proposals on the basis of the information and other  
5 evaluation criteria set forth in the RFP.<sup>5</sup>

6  
7 6. DPW's Evaluation Committee members were DPW Deputy Director Andrew Leon  
8 Guerrero, who served as the committee's chairperson, GPSS JFK Exit Strategy Task Force  
9 Chairperson Gayle Hendricks Ed.D, GPSS JFK Exit Strategy Task Force Member Eunice  
10 Aflague, then GPSS Deputy Superintendent of Finance and Administrative Services Doreen T.  
11 Crisostomo Ph.D, DPW Engineer II Jeri C. Caloar, DPW Engineer III Dionisio M. De Leon,  
12 then GPSS Deputy Superintendent for Curriculum and Instructional Improvement Geraldine  
13 James Ed.D., and Guam Economic and Development Authority (GEDA) Public Finance Officer  
14 Antoinette Leon Guerrero.<sup>6</sup>

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16 7. Offerors submitted their proposals in response to the RFP on January 8, 2009.<sup>7</sup>

17  
18 8. The Evaluation Committee met on January 15, 2009 to hear presentations of the  
19 Offerors who submitted proposals in response to the RFP and to evaluate and score said  
20 proposals.<sup>8</sup> DPW subsequently compiled and tallied the evaluation scores.

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23 <sup>4</sup> Section VIII (General Conditions), Paragraph 3.2, Page 13, and Evaluation  
24 Form, Part I, Page 25, RFP, Procurement Record filed on September 25, 2009.

25 <sup>5</sup> Section VIII (General Conditions), Paragraph 4 (Evaluation of Proposals),  
26 page 14, RFP, Procurement Record filed on September 25, 2009.

27 <sup>6</sup> Memorandum to Evaluation Committee dated January 7, 2009 and Memorandum  
28 dated January 15, 2009, Procurement Record filed on September 25, 2009.

<sup>7</sup> Addendum No. 2, RFP, Procurement Record filed on September 25, 2009.

1 9. On January 16, 2009, the Evaluation Committee selected "IBC" as the best qualified  
2 offeror for the RFP, and on March 4, 2009, DPW Director Larry Perez approved the committee's  
3 recommendation.<sup>9</sup>

4 10. On August 13, 2009, Appellant lodged a protest with DPW.

5 11. On September 8, 2009, DPW denied Appellant's protest.

6 12. On September 18, 2009, Appellant filed this appeal.  
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10 **III. ANALYSIS**

11 **A. GEFF's Protest was timely.**

12 GEFF's protest and appeal were timely. DPW initially found that the GEFF's protest  
13 was untimely, but it did not state the reasons for making this finding.<sup>10</sup> Generally, a protest must  
14 be made in writing and filed with the Chief Procurement Officer, the Director of DPW, or the  
15 head of a purchasing agency within 14 days after a protestor either knows or should have known  
16 of the facts giving rise thereto. 5 G.C.A. 5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1).  
17 Here, although GEFF knew or should have known that IBC was selected as the best qualified  
18 offeror on or about March 5, 2009, it did not know the facts giving rise to its protest until on or  
19 after July 29, 2009, when a preliminary official statement, issued by Piper Jaffray & Co.,  
20 indicated that IBC was requesting financing in the amount of \$69,030,000 to begin and complete  
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25 <sup>8</sup> Addendum No. 4, RFP, dated January 9, 2009, Id.

26 <sup>9</sup> Letter dated January 16, 2009 from DPW to IBC, Id.

27 <sup>10</sup> Letter from Lawrence P. Perez dated September 8, 2009 to GEFF, Exhibit 2,  
28 Notice of Appeal filed on September 18, 2009.

1 the JFK project.<sup>11</sup> The Public Auditor notes that there was only a 15 day period between the day  
2 the aforementioned document was issued, July 29, 2009, and the filing of GEF's protest on  
3 August 13, 2009. It is unlikely that GEF learned of the document more than 14 days prior to  
4 GEF filing its August 13, 2009 protest. Thus, the Public Auditor finds that GEF's August 13,  
5 2009 protest was timely.  
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7 GEF's appeal was timely. Generally, an appeal of a protest decision must be made to  
8 the Public Auditor within 15 days after the protestant receives the purchasing agency's notice of  
9 decision. 5 G.C.A. §5425(e) and 2 G.A.R., Div. 4, Chap. 12, §12201(a). Here, GEF received  
10 DPW's denial of GEF's protest on September 14, 2009.<sup>12</sup> GEF filed its appeal in this matter  
11 on September 18, 2009 which is only ten days after DPW's September 8, 2009 Notice of  
12 Decision, and which is only four days after GEF received said Decision on September 14, 2009.  
13 Thus, the Public Auditor finds that GEF's appeal was timely.  
14

15 **B. Standard of Review.**  
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17 DPW and IBC argues that the Public Auditor should affirm its decision denying GEF's  
18 protest if the decision had a rational basis and if it was not arbitrary, and that the Public Auditor  
19 should accord considerable weight to DPW's decision.<sup>13</sup> DPW relies on the rulings in *Pacific*  
20 *Data Systems, Inc. v. Superior Court of Guam*, Civ. No. 90-00029, page 2, (1990 WL 320357)  
21 (D.Guam A.D., October 24, 1990), *TRC Environmental Corporation v. Office of the Public*  
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23 <sup>11</sup> Letter from GEF to Lawrence P. Perez dated August 13, 2009, Exhibit 1,  
24 Notice of Appeal filed on September 18, 2009.

25 <sup>12</sup> Letter from Lawrence P. Perez to GEF dated September 8, 2009, Exhibit 2,  
26 Id.

27 <sup>13</sup> DPW's Hearing Brief filed on November 23, 2009 and IBC's Joinder to DPW's  
28 Hearing Brief filed on November 23, 2009.

1 Auditor, SP160-07, Decision and Order on Petition for Writ of Mandate (Guam Super. Ct., Nov.  
2 21, 2008), and *Fleet Services, Inc. v. Department of Administration and Kloppenburg*  
3 *Enterprises, Inc.*, 2006 Guam 6 (Supreme Court of Guam). The Public Auditor finds that the  
4 ruling in the *Pacific Data Systems, Inc.*, does not apply to the OPA because it pre-dates the  
5 OPA's statutory authority to review decisions on protests *de novo*. 5 G.C.A. §5425(g)(3) and  
6 §5703. Further, the rulings *TRC Environmental Corporation* and *Fleet Services* merely state the  
7 standard of the Court's review of agency decisions concerning procurement protests. Thus, the  
8 Public Auditor shall review DPW's September 8, 2009 decision denying GEFF's August 13,  
9 2009 protest *de novo*.  
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12 **C. IBC's Cost Increase**

13 GEFF alleges that IBC's proposal estimated that the total cost for the JFK rebuild project  
14 would be \$38,000,000 and that the total cost increased to \$69,030,000 on July 29, 2009 when  
15 Piper Jaffray & Co., issued its preliminary official statement.<sup>14</sup> GEFF's main argument is that  
16 GEFF should be awarded the contract because GEFF's proposal was \$58,000,000 which is  
17 \$11,000,000 lower than IBC's final project price.<sup>15</sup> GEFF also argues that IBC's price increase  
18 indicates that IBC's initial proposal was not made in good faith, and was only meant to get them  
19 selected as the best qualified offeror.<sup>16</sup> DPW denied GEFF's allegations concerning IBC's price  
20 increase because the solicitation was a request for proposal, and not an invitation for bid, and  
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24 <sup>14</sup> Letter from GEFF to Lawrence P. Perez dated August 13, 2009, Exhibit 1,  
25 Notice of Appeal filed on September 18, 2009.

26 <sup>15</sup> Part IV, Statement of Grounds for Appeal, Notice of Appeal filed on  
27 September 18, 2009 and GEFF's Hearing brief filed on November 23, 2009.

28 <sup>16</sup> *Id.*

1 because IBC's initial proposal was less than GEF's proposal.<sup>17</sup> The Public Auditor will  
2 examine whether GEF's allegations concerning the substantial increase in price between IBC's  
3 proposal and the financing IBC was attempting to obtain have merit.  
4

5 There is no merit to GEF's argument that it should be awarded the contract for the sole  
6 fact that its proposal was lower than IBC's proposal. Assuming *arguendo*, that GEF's proposal  
7 was in fact substantially lower than IBC's proposal, DPW could still select IBC as the best  
8 qualified offeror and DPW could still award the contract to IBC despite GEF's lower cost  
9 proposal. Guam procurement law and regulations provide for several methods of procuring  
10 government contracts applicable to the Executive Branch and expressly mandate the use of a  
11 competitive sealed bid process unless otherwise authorized by law. *Fleet Services Inc., v.*  
12 *Department of Administration et.al.*, 2006 Guam 6 ¶14 (Supreme Court of Guam). The statute  
13 requiring the RFP specifically mandates that the request for proposals form of solicitation be  
14 used for the JFK reconstruction project at issue here. 5 G.C.A. §58A105. The request for  
15 proposal form of solicitation allows the purchasing agency to validate the qualifications of the  
16 offerors, evaluate the proposals, and conduct discussions with the offerors, and then select, in the  
17 order of their respective qualification ranking, at least three best qualified offerors. 2 G.A.R.,  
18 Div. 4, Chap.3, §3114(j). The purchasing agency then negotiates a contract with the best  
19 qualified offeror for compensation determined in writing to be fair and reasonable. 2 G.A.R.,  
20 Div. 4, Chap. 3, §3114(l)(1). The purchasing agency can award the contract to the best qualified  
21 offeror after negotiation of compensation, contract requirements, and contract documents  
22 determined to be fair and reasonable. 5 G.C.A. §5216(e) and 2 G.A.R., Div. 4, Chap. 3,  
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27 <sup>17</sup> Letter from Lawrence P. Perez to GEF dated September 8, 2009, Exhibit 2,  
28 Notice of Appeal filed on September 18, 2009.



1 §3114(1)(3). In contrast, in a competitive sealed bidding process the contract is awarded to the  
2 lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth  
3 in the invitation to bids. 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1). Thus,  
4 the Public Auditor finds that the prices proposed by the offerors, by themselves, were not  
5 determinative of which offeror would be selected as the best qualified offeror and which offeror  
6 should be awarded the contract because DPW used the request for proposal method of  
7 solicitation instead of the invitation for bid method of solicitation.  
8

9  
10 The next issue is whether the total project cost in IBC's proposal was made in good faith.  
11 All parties involved in the negotiation, performance, or administration of Government of Guam  
12 contracts must act in good faith. 5 G.C.A. §5003 and 2 G.A.R., Div. 4, Chap. 1, §1105. Here, an  
13 *in camera* review of IBC's proposal indicates that the \$69,030,000 par amount stated in the  
14 preliminary official statement for IBC's Certificates of Participation is substantially higher than  
15 the total project cost in IBC's initial proposal.<sup>18</sup> As stated above, in the request for proposals  
16 method of solicitation, the final price is not what is contained in the proposals of the offerors, but  
17 is the price negotiated between the purchasing agency and the best qualified offeror which the  
18 purchasing agency determines to be fair and reasonable. 5 G.C.A. §5216(e) and 2 G.A.R., Div.  
19 4, Chap. 3, §3114(1)(3). Thus, the crux of this issue is whether IBC's total cost for the JFK  
20 reconstruction project increased due to DPW discovering that IBC's proposed costs were made  
21 in bad faith or whether IBC's costs increased as a result of DPW and IBC solidifying contract  
22 requirements and market conditions at the time IBC sought financing. The Public Auditor finds  
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27 <sup>18</sup> An *in camera* review is required as DPW has not awarded the project to IBC  
28 because IBC's proposal and any information contained therein is not public  
information at this time. 2 G.A.R., Div. 4, Chap. 3, §3114(i)(2).

1 that DPW's existing certification of procurement activities concerning the RFP were performed  
2 in good faith, however, it is insufficient because it lacks a proper analysis as to whether IBC's  
3 proposal was submitted in good faith. To determine whether IBC's proposal was submitted in  
4 good faith, the Public Auditor will first determine whether DPW scrutinized the total project  
5 costs IBC submitted in its proposal.  
6

7 As stated above, IBC's proposal was scored by the Evaluation Committee based on the  
8 RFP's evaluation criteria. Unfortunately, the RFP's broad and open-ended evaluation criteria did  
9 not require the offerors to submit proposals based on B or lower ratings despite the fact that  
10 realistic interest rates were tied to the Government's B+ rated Obligation Bonds, and offerors  
11 could submit term sheets based on a higher than B rated financing. Further, if the offeror had the  
12 ability to structure the lease and provide 100% of the financing, the offeror would have complied  
13 with the evaluation criteria. The Public Auditor finds that these broad based evaluation criteria  
14 allowed the offerors to submit proposals offering lower financing costs based on unrealistic or  
15 unachievable financing ratings and assumptions. The RFP was intended to procure the best  
16 possible financing and construction package, and the assigned weighted score of 70% for the  
17 project's financing was meant to allow DPW's Evaluation Committee to conduct a comparison  
18 analysis outlining the greatest benefit to the Government. The Public Auditor finds that the  
19 Evaluation Committee members relied on the RFP's criteria to make their selection of the best  
20 qualified offeror and they received little to no guidance from DPW or GEDA as to how to  
21 conduct their evaluation. The Committee's evaluation of the proposals to select the best  
22 qualified offeror in accordance with the Guam Procurement Law and Regulations, took place on  
23 January 15, 2009. In one day, the committee members reviewed the proposals, heard oral  
24 presentations given by each offeror, and then scored each proposal using the evaluation criteria  
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1 set forth in the RFP.<sup>19</sup> These scores were tallied and IBC was selected as the best qualified  
2 offeror because it received the highest number of points. However, the testimony of Andrew  
3 Leon Guerrero, DPW's Deputy Director and the chairman of the Evaluation Committee,  
4 indicates that he had doubts about whether the Committee had selected the proposal that offered  
5 the best value.<sup>20</sup> Specifically, on January 21, 2009, Leon Guerrero requested that the Guam  
6 Economic Development Authority (GEDA) conduct a financial feasibility analysis for all the  
7 proposals submitted.<sup>21</sup> On February 3, 2009, GEDA completed its analysis and found that IBC  
8 had in fact provided a lower cost proposal.<sup>22</sup> Thus, although DPW conducted a financial analysis  
9 of the proposals, it was done after the Evaluation Committee reviewed the proposals and after  
10 IBC was selected as the best qualified offeror. Such an analysis may have aided the Evaluation  
11 Committee as it would have enabled the members to better understand and compare the  
12 competing complex financing proposals submitted by the offerors. A good cost analysis would  
13 have allowed the Evaluation Committee to independently determine whether 30 or 20 year  
14 amortization periods were desirable, or whether the offerors' proposed interest rates and  
15 proposed maintenance costs were reasonable or achievable. The Public Auditor finds that DPW  
16 acted with an extreme lack of diligence in conducting its financial analysis of the proposal and  
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21 <sup>19</sup> Page 2, Line 3, Agency Report filed on October 5, 2009.

22 <sup>20</sup> December 7, 2009 testimony of Andrew Leon Guerrero.

23 <sup>21</sup> Memorandum from Andrew Leon Guerrero to GEDA Administrator dated January  
24 21, 2009, Exhibit E2, Agency Report filed on October 5, 2009 and December 7,  
25 2009 Testimony of Andrew Leon Guerrero and Tina Garcia.

26 <sup>22</sup> Letter from Anthony C. Blas to Lawrence P. Perez dated February 3, 2009,  
27 Exhibit E3, Agency Report filed on October 5, 2009 and December 7, 2009  
28 testimony of Andrew Leon Guerrero and Tina Garcia.

1 should have done this analysis prior to the Evaluation Committee selecting IBC as the best  
2 qualified offeror. Despite this, GEDA's financial feasibility analysis shows that IBC submitted  
3 the lowest cost proposal and it confirms the Evaluation Committee's selection of IBC as the best  
4 qualified offeror. Thus, the Public Auditor finds that there is no merit to GEF's allegations that  
5 IBC submitted their proposal in bad faith. The Public Auditor will now attempt to determine  
6 why IBC's total project costs increased.  
7

8 The negotiations between DPW and IBC did result in cost increases to IBC's initial  
9 proposal. DPW argues that its additional requirements which it negotiated increased IBC's  
10 overall costs for the JFK reconstruction project.<sup>23</sup> The RFP method of solicitation allows for a  
11 potential increase in financing costs. Generally, an award shall be made to the offeror  
12 determined to be the best qualified based on the evaluation factors stated in the request for  
13 proposals and negotiation of compensation determined to be fair and reasonable. 5 G.C.A.  
14 §5216(e) and 2 G.A.R., Div. 4, Chap. 3, §3114(1)(1). During the seven month negotiation period  
15 beginning on January 16, 2009, the date IBC was selected as the most qualified offeror, and  
16 August 5, 2009, the date IBC's efforts to finance the project were halted due to a protest, DPW  
17 and IBC negotiated a design of the new JFK campus; the collateral equipment to be installed on  
18 the new campus; a maintenance and service obligation agreement for a 30 year term; the ground  
19 lease and lease-back agreements between the Government of Guam and IBC for a 30 year term;  
20 an agreement on capital reserves and capitalized interest for 2010 and 2011; an agreement on  
21 annual lease payments over a 30 year period; and IBC's financing using tax exempt Certificates  
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27 <sup>23</sup> Page 5, Letter from Lawrence P. Perez to OPA dated October 5, 2009, Exhibit  
28 G1, Agency Report filed on October 5, 2009.

1 of Participation.<sup>24</sup> DPW negotiated for a longer 30 year amortization period, 30 to 32 months of  
2 capitalized interest, additional reserves, and additional collateral equipment and constructions  
3 requirements.<sup>25</sup> The Public Auditor finds that these additional requirements did in fact increase  
4 the total project costs over what IBC initially proposed. Further, the Public Auditor finds that  
5 these additional costs would have been added at DPW's request to any of the other offeror's  
6 proposals had they been selected as the best qualified offeror.  
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8 The 30 year maintenance and service obligation agreement deserves special attention in  
9 this analysis because it substantially increases IBC's total project costs. This agreement is  
10 significant because it is supposed to prevent the Government of Guam from incurring additional  
11 expenses of any kind in connection with maintenance, including capital and preventative  
12 maintenance, replacement of fixed equipment, janitorial services, grounds keeping, and trash  
13 disposal for the new JFK campus during the 30 year lease term.<sup>26</sup> GEF's alleges that GEF's  
14 annual maintenance cost for the JFK project would be \$570,000 and IBC's proposed  
15 maintenance cost would be \$1,800,000 for a difference of \$1,230,000.<sup>27</sup> IBC argued that  
16 GEF's completed Certificates of Participation Series 2006A for \$50,880,000 issued on October  
17 4, 2006 for the construction and maintenance of four DOE schools, Adacao Mangilao  
18 Elementary School, Ligan Terrace Dededo Elementary School, Astumbo Dededo Middle  
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22 <sup>24</sup> Page 2, Line 20, and Page 5, Line 16, Agency Report filed on October 5,  
23 2009 and December 7, 2009 testimony of Tina Garcia and Andrew Leon Guerrero.

24 <sup>25</sup> Page 2, Letter from DPW to OPA, Exhibit G1, Agency Report filed on October  
25 5, 2009 and Testimony of Aulii Limtiaco and Tina Garcia on December 7, 2009.

26 <sup>26</sup> Sections VIII and X, Part II, RFP, Tab B, Procurement Record filed on  
27 September 25, 2009.

28 <sup>27</sup> GEF Exhibit 1, December 7, 2009 Hearing.

1 School, and Wettengel (Ukudu) High School, indicates the Government of Guam's annual  
2 maintenance cost is \$1,000,000 for all four schools.<sup>28</sup> The Public Auditor finds that the  
3 \$1,800,000 estimated annual maintenance cost for the new JFK campus is suspiciously high  
4 when compared to the \$1,000,000 total annual maintenance costs for the four aforementioned  
5 DOE schools.  
6

7 DPW argues that the analysis in GEFF's Exhibit 1 is irrelevant because any comparison  
8 to IBC's proposal numbers cannot be considered an equitable "apples to apples" comparison  
9 because GEFF has not included DPW's financing requirements or additional rents to cover items  
10 other than debt service that are not present in GEFF's proposal which affect the overall cost of  
11 the project.<sup>29</sup> This argument is not supported by the Public Auditor's *in camera* review of the  
12 procurement file which indicates DPW did not complete a written and extensive analysis to  
13 justify the significantly higher annual maintenance costs for the new JFK campus. The Public  
14 Auditor finds that DPW's current procurement record is devoid of DPW's justification for the  
15 higher maintenance cost and further finds that DPW must include a written justification and cost  
16 comparison showing whether such increased costs are fair and reasonable prior to making a final  
17 award decision.  
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20 The additional costs that occurred during the negotiation period do not adequately explain  
21 the \$69,030,000 par value of IBC's Certificates of Participation. On July 16, 2009 GEDA did  
22 analyze some of the costs associated with the \$69,030,000 par value of IBC's Certificates of  
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26 <sup>28</sup> IBC Exhibit 1, December 7, 2009 Hearing.

27 <sup>29</sup> Letter from DPW to OPA dated October 5, 2009, page 5, Exhibit G1, Agency  
28 Report filed on October 5, 2009.

1 Participation.<sup>30</sup> However, an *in camera* review of this analysis fails to explain approximately  
2 \$19,000,000 of the \$69,030,000 par amount. GEDA alleges that the difference is for the longer  
3 amortization period, the increased capitalized interest, and the additional reserves DPW  
4 negotiated with IBC.<sup>31</sup> The Public Auditor finds that some of the unexplained \$19,000,000  
5 amount may indeed be for the amortization period, capitalized interest and the additional  
6 reserves. However, GEDA's existing analysis does not indicate how much of \$19,000,000  
7 consists of these costs. The Sources and Uses of Funds analysis, which is mentioned in the  
8 Preliminary Official Statement, but not included, would typically be the document that would  
9 explain the use for the entire \$69,030,000 par amount. The Public Auditor determines that the  
10 Sources and Uses of Funds analysis, although preliminary, would have been prepared but for the  
11 August 5, 2009 protest, which stayed IBC's efforts to sell its Certificates of Participation. Had  
12 the Certificates been sold and the final price of the Certificates been determined from their sale,  
13 it is very likely that a final Sources and Uses of Funds analysis would have been completed.

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17 DPW argues that the \$69,030,000 is only a preliminary estimate and the final total cost  
18 will not be known until IBC's Certificates of Participation are sold.<sup>32</sup> Although it is true that the  
19 \$69,030,000 par value of IBC's Certificates of Participation would increase or decrease based on  
20 the interest rate at the time they are priced and sold, there would probably not be a significant  
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23 <sup>30</sup> Testimony of Tina Garcia on December 7, 2009 and Tab 59, Augmentation of  
24 Procurement Record dated September 22, 2009, Procurement Record filed on  
25 September 25, 2009.

26 <sup>31</sup> Testimony of Tina Garcia on December 7, 2009 and Letter from GEDA to OPA  
27 dated October 2, 2009, Exhibit G2, Agency Report filed on October 5, 2009.

28 <sup>32</sup> Page 8, Letter from Lawrence P. Perez to OPA dated October 5, 2009, Exhibit  
G1, Agency Report filed on October 5, 2009.

1 difference between their stated par value and their sale value.<sup>33</sup> This \$19,000,000 unexplained  
2 difference is too large for DPW to ignore and too large for DPW to rely on IBC to independently  
3 justify. One of the policies of Guam's Procurement Law and Regulations is to provide increased  
4 economy in procurement activities and to maximize to the fullest extent possible the purchasing  
5 value of public funds of the Government of Guam. 5 G.C.A. §5001(b)(5) and 2 G.A.R., Div. 4,  
6 Chap. 1, §1102(4). Thus, the Public Auditor finds that DPW must determine the specific use of  
7 the entire \$69,030,000 par amount of IBC's Certificates of Participation prior to the sale of said  
8 certificates in order to confirm that such uses are necessary and truly maximize the purchasing  
9 value of Guam's scant public funds for the JFK reconstruction project. The Public Auditor  
10 further finds that GEDA, in working with its financial consultant and DPW, would have had to  
11 prepare a preliminary Sources and Uses of Funds analysis as the basis for arriving at the  
12 \$69,030,000 par value for the Certificates of Participation. Both GEDA's deputy director and  
13 financial consultant testified that such a document was prepared; however, the procurement  
14 record filed with the OPA was completely devoid of a Sources and Uses of Funds analysis.  
15 DPW must conduct a more complete analysis of why the financing costs increased from what  
16 IBC initially proposed, and such analysis must be made a part of the procurement record.  
17 Currently the procurement record is devoid of any analysis justifying the total increase in IBC's  
18 financing costs. DPW is reminded that the cost of the JFK's reconstruction is ultimately paid for  
19 by Guam's taxpayers and they deserve DPW's best efforts to enforce the policy of maximizing  
20 the purchasing value of their tax dollars on this project.  
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28 <sup>33</sup> Testimony of Aulii Limtiaco on December 7, 2009.



1 **D. IBC's Proposal Conformed to the Size Specifications of the rebuilt JFK.**

2 There is no merit to GEF's allegation that IBC's proposal failed to meet the size  
3 specifications of the new JFK campus set forth in the RFP. GEF argues that the square footage  
4 of the IBC's proposed JFK campus does not meet the size requirements set forth in the RFP and  
5 that GEF's larger proposed campus does.<sup>34</sup> The RFP's Technical Specifications required a two  
6 story main building capable of housing 2,300 students, an 8,600 square foot library, and a  
7 cafeteria capable of seating 300 to 350 students.<sup>35</sup> Further, the RFP set forth square footage size  
8 specifications for specific spaces such as classrooms, offices, locker areas etc.<sup>36</sup> However, there  
9 was not an overall specification requiring the new JFK campus to be a specific total square  
10 footage or size.<sup>37</sup> As a result, all three proposals submitted in response to the RFP offered  
11 campuses that differed in their total square footage.<sup>38</sup> GEDA's February 3, 2009 Financial  
12 Feasibility Analysis confirmed that IBC's proposal provided a lower cost and smaller JFK  
13 campus than GEF.<sup>39</sup> IBC's proposed campus is 230,000 square feet and the total size of  
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20 <sup>34</sup> Part IV, Statement of Grounds for Appeal, Notice of Appeal filed on  
21 September 18, 2009.

22 <sup>35</sup> Paragraph 3, 7, and 8, Attachment A, Technical Specifications, RFP, Tab B,  
23 Procurement Record filed on September 25, 2009.

24 <sup>36</sup> Attachment B, Id.

25 <sup>37</sup> Testimony of Andrew Leon Guerrero and Tina Garcia on December 7, 2009.

26 <sup>38</sup> Id.

27 <sup>39</sup> Letter from Tony C. Blas to Lawrence P. Perez dated February 3, 2009,  
28 Exhibit E3, Agency Report filed on October 5, 2009.

1 GEFf's proposed campus is 236,000 square feet.<sup>40</sup> The Public Auditor finds that the 6,000  
2 square foot difference between the two proposed campuses is minimal and that IBC's proposed  
3 campus complied with the space specifications set forth in the RFP's Technical Specifications.  
4

5 **E. IBC was able to provide financing for the Project.**

6 There is no merit to GEFf's allegation that IBC failed to provide financing. GEFf  
7 alleges that IBC's financing proposal was not backed by a financing source or underwriting  
8 commitment and that IBC failed to secure the financing and had to have GEDA come in to assist  
9 them.<sup>41</sup> The RFP only required the offerors to have and be willing to commit sufficient staff,  
10 resources, and capital to finance, develop, perform, and deliver the services required by the  
11 RFP.<sup>42</sup> The evidence does indicate that IBC was about to obtain financing required by the RFP,  
12 and further, there is no evidence to indicate that the RFP was amended after IBC was selected as  
13 the best qualified offeror. Thus the Public Auditor finds that the RFP did not require IBC to  
14 have a financing source or underwriting commitment at the time it submitted its proposal.  
15  
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17 GEDA's involvement is required by statute and is not proof that IBC could not obtain  
18 financing on its own. The law authorizing the RFP specifically requires that to minimize the  
19 financing costs, the financing used by the contractor shall be through tax-exempt obligations or  
20 other financial instruments provided such financing is available at interest rates determined to be  
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22 <sup>40</sup> Page 3, Line 15, Agency Report filed on October 5, 2009 and Part IV,  
23 Statement of Grounds for Appeal, Notice of Appeal filed on September 18,  
24 2009.

25 <sup>41</sup> Paragraph 3, GEFf Letter to DPW dated August 13, 2009, Exhibit 1, Notice of  
26 Appeal filed on September 18, 2009.

27 <sup>42</sup> Section IV(2), Proposer Qualifications, Part I, RFP, Tab B, Procurement  
28 Record filed on September 25, 2009.

1 reasonable and competitive. 5 G.C.A. §58A108. Further, the law requires that GEDA shall act  
2 as a central financial manager and consultant for those agencies or instrumentalities of the  
3 Government requiring financial guidance and assistance and such technical assistance shall  
4 include, in relevant part, but not be limited to, structuring such bond issuances, preparation and  
5 dissemination of financial and investment information, including bond prospectuses,  
6 development of interest among investment bankers and bond brokers, and the maintenance of  
7 relationships with bond rating agencies and brokerage houses. 12 G.C.A. §50103(k). Here,  
8 GEDA assisted DPW with the financing component of the RFP and the project by coordinating  
9 all information that the Government of Guam needed to provide in order for IBC's Certificates  
10 of Participation to be marketable, and GEDA was overseeing the marketing and sale process so  
11 that the best price on the certificates could be obtained.<sup>43</sup> The Public Auditor finds that these  
12 activities are merely the fulfillment of GEDA's statutory duties and do not constitute GEDA  
13 providing any financing for IBC.  
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#### 17 18 **IV. CONCLUSION**

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

- 20 1. GEFF's Protest was timely.
- 21 2. The Public Auditor reviewed DPW's September 8, 2009 decision denying GEFF's  
22 August 13, 2009 Protest *de novo*.

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26 <sup>43</sup> Page 2, Letter from J. Patrick Mason, Deputy Attorney General, to Senator  
27 Vicente C. Pangelinan dated August 10, 2009, Exhibit A, Purchasing Agency's  
28 Reply to Appellant's Response to Agency Report filed on October 21, 2009.

1           3. There is no merit to GEFf's allegation that GEFf should be awarded the contract  
2 because GEFf's proposal was \$58,000,000 which is \$11,000,000 lower than IBC's final project  
3 price.  
4

5           4. There is no merit to GEFf's allegation that IBC's proposal was submitted in bad faith.

6           5. There is no merit to GEFf's allegation that IBC's proposal failed to meet the size  
7 specifications of the new JFK campus set forth in the RFP.

8           6. There is no merit to GEFf's allegation that IBC failed to provide financing.

9           7. Prior to a final award decision, (a) DPW must determine the sources and uses of the  
10 entire \$69,030,000 par amount of IBC's Certificates of Participation prior to the sale of said  
11 certificates in order to confirm that such uses are necessary and truly maximize the purchasing  
12 value of Guam's scant public funds for the JFK reconstruction project and said analysis shall be  
13 made part of the procurement record; (b) Conduct an analysis and cost comparison as to the  
14 reasonableness of IBC's proposed annual maintenance cost and include said analysis as a part of  
15 the procurement record; and (c) Conduct an analysis and cost comparison as to why the  
16 government has to pay the Certificates of Participation over a 30 year period versus a 20 year  
17 period and include said analysis as a part of the procurement record .  
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19

20           8. GEFf's appeal is hereby DENIED.  
21

22           This is a Final Administrative Decision. The Parties are hereby informed of their right to  
23 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
24 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
25 Decision. 5 G.C.A. §5481(a).  
26

27           A copy of this Decision shall be provided to the parties and their respective attorneys, in  
28

1 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
2 [www.guamopa.org](http://www.guamopa.org).  
3

4  
5 **DATED** this 6<sup>th</sup> day of January, 2010.

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9 DORIS FLORES BROOKS, CPA, CGFM  
10 PUBLIC AUDITOR  
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Office of Public Accountability  
Suite 401 DNA Building  
238 Archbishop Flores St.  
Hagatna, Guam 96910  
Tel: (671) 475-0390  
Fax: (671) 472-7951



# Fax

**To:** Mr. Benjamin Abrams, Assistant AG;  
Mr. John R. Hand, GEFF, Appellant  
Ms. Joyce Tang, IBC, Interested Party

**From:** Doris Flores Brooks, CPA, CGFM  
Public Auditor

**Agency:** Office of the Attorney General;  
Guam Education Financing Foundation;  
Civille and Tang

**Pages:** 22 (includes cover page)

**CC:** All Media

**Date:** January 6, 2010

**Fax:** 472-2493 (OAG); (404) 504-2790 (GEFF);  
477-2511 (C & T)

**Phone:** 475-0390 x 219 (Anne Camacho)  
Or x 210 (Lourdes Perez)

**Re:** **DECISION – Appeal No. OPA-PA-09-007**

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