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PROCUREMENT APPEALS

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Attorneys for Z4 Corporation

THE OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

IN THE APPEAL OF,	)	APPEAL NO: OPA-PA-09-012
	)	
Z4 CORPORATION,	)	STATEMENT OF COSTS AND
	)	REASONABLE PROFIT AND
	)	MOTION FOR ATTORNEYS'
	)	FEES AS COSTS
Appellant.	)	
_____	)	

**INTRODUCTION**

COMES NOW Z4 Corporation ("Z4") who hereby submits its Statement of Costs and Reasonable Profit and Motion for Attorneys' Fees as Costs in the above-captioned matter.

**STATEMENT OF REASONABLE COSTS AND REASONABLE PROFIT**

In its May 5, 2010 Decision in this appeal, the OPA held that "Z4 is entitled to be compensated for the actual expenses reasonably incurred under the contract, plus, a reasonable profit for the services it rendered prior to the termination of its award and any resulting contract." Decision at p. 18. The "reasonable costs" incurred by Z4 and its "reasonable profit" are itemized on the attached document marked as "Exhibit 100." See

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Declaration of Pete Valencia at ¶ 3 (June 11, 2010) (“Valencia Declaration”). Further, as noted below, Z4 hereby requests the costs to include its attorneys’ fees incurred in this appeal.

**A. “Actual Expenses” Incurred by Z4**

As itemized in Exhibit 100, Z4 incurred “actual expenses” totaling \$13,167.44. *See* Valencia Declaration at ¶ 3.

**B. Statement of Reasonable Profit**

As noted above, Z4 is also entitled to a “reasonable profit” for the time performing on the IFB after it received the award. The most equitable way to determine Z4’s “reasonable profit” is to determine the *pro rata* share of Z4’s anticipated profit for the IFB based on the actual days Z4 performed on the IFB.

Z4’s bid for the project was \$810,000. The customary profit in the industry is twenty percent (20%) of the total cost of a solicitation. *See* Valencia Declaration at ¶4. Thus, Z4’s total profit for the IFB was to be \$162,000. Accordingly, Z4 is entitled to the *pro rata* share of the anticipated profit of \$162,000 for the time it performed on the IFB. The Notice to Proceed provided that the contract was to be performed in 180 days. Thus, this *pro rata* share is to be calculated based on a term of 180 days.

The OPA found that “DOE issued a Notice to Proceed to Z4 authorizing Z4 to commence work . . . on August 10, 2009.” Decision at pp. 4-5. Z4 began performance on the IFB, as instructed on August 10, 2009, and performed until August 28, 2009, when GSA issued the notice of stay. Accordingly, Z4 performed on the IFB for a total of eighteen (18) days out of a total of 180 days. Thus, Z4’s *pro rata* share of the anticipated

profit is ten percent (10%). Therefore, Z4's is entitled to a *pro rata* share of 10% of its total profit of \$162,000, which equals \$16,200.

### **MOTION FOR ATTORNEYS' FEES AS COSTS**

Z4 should be compensated for attorneys' fees incurred in this appeal because Z4 was forced to prosecute this appeal simply to move GSA to do what it promised the OPA, that GSA would cancel and rebid the solicitation. Further, Z4 should not be burdened with the cost of enforcing Guam's Procurement Law in this particular appeal, which revealed an "unacceptable risk of harm to the public," because GSA blatantly disregarded Guam's Procurement Law.

Z4 does not maintain that attorneys' fees should be chargeable as costs in *all* appeals; however, as in the instant appeal, where an agency recklessly disregarded the procurement law and needlessly caused a bidder to file an appeal, attorneys' fees should be chargeable as costs.

#### **A. Attorneys' Fees Are Chargeable as "Costs"**

The Supreme Court of Hawai'i 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). In Carl Corp., the agency awarded the contract in violation of the mandatory stay on the procurement activities. *Id.* at 19. Further, the court found the award of the contract was done in bad faith as the agencies actions were in "reckless disregard of clearly applicable laws or rules." *Id.* at 22.

Accordingly, the Supreme Court of Hawai'i reviewed its statutory procurement remedies which provided that "the protesting bidder or offeror shall be

entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorneys' fees." *Id.* at 28, *citing* HRS §103D-701(g). The court noted that "nowhere in the Code is the award of attorneys' fees incurred in a protest expressly prohibited." *Id.* at 29. Thus, the court found that the protestor should not "bear the financial burden of enforcing the Code." *Id.* at 31. Accordingly, the court awarded the bidder its attorneys' fees finding that requiring the bidder to bear the financial burden of enforcing the Code "undermines the purpose of the Code." *Id.*

Guam law also allows recovery for attorneys' fees as "costs" or "actual expenses." The OPA awarded Z4 its expenses under section 5452(a)(1)(ii) of the Guam Procurement Law. Section 5452 is silent as to the award of attorneys' fees as costs or as "actual expenses." Moreover, as noted in Carl Corp., this statute does not expressly prohibit attorneys' fee nor are attorneys' fees prohibited under Guam Procurement law. Moreover, Section 5452 is even more permissive than the statute in Hawai'i which was deemed to allow the award of attorneys' fees as costs. Accordingly, attorneys' fees are properly charged as "actual expenses" under section 5452 because it would "undermine the purpose of the code" for Z4 to bear the financial burden of enforcing the Code.

As noted above, Z4 is not advocating that attorneys' fees should be award any time a bidder is successful in its appeal; however, where, as here, an agency recklessly disregarded the procurement law, such an award is necessary.

**B. Z4's Appeal Was Granted**

Z4's prosecution of its appeal was successful. Z4 originally filed its appeal after the IFB was awarded to Eons Enterprises ("Eons"). Accordingly, the relief requested

by Z4 was for the OPA to “affirm the award of [the IFB] to Z4. *In the alternative, Z4 requests the OPA to cancel the entire IFB.*” Notice of Appeal at p. 2 (emphasis added). If Z4 has not filed this appeal, Eons would be performing the IFB and, likely, using numerous products which would not withstand the harsh elements of Guam. Therefore, the OPA granted the appeal of Z4 in part.

C. **Z4’s Appeal Revealed an “Unacceptable Risk of Public Harm”**

The public benefitted from Z4’s appeal and, thus, Z4 should be compensated for its costs incurred in enforcing the procurement law. 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. Eons would likely have installed products which would not have been able to withstand the elements of Guam and the severe injury to students, their families, and school facility could have occurred.

D. **GSA Blatantly Disregarded Guam Procurement Law and GSA’s Actions Support an Award of Attorneys’ Fees as Costs**

Z4 should not have been required to prosecute this appeal and incur its legal costs for enforcing Guam’s Procurement Law. 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.*

GSA blatantly disregarded Guam's Procurement Law. 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.

Most damaging was that *such disregard of the law caused Z4 to incur unnecessary legal fees* simply to force GSA or the GDOE to do what it said it was going to do and cancel the solicitation! Z4 filed this appeal to enforce its rights under the Procurement Law of Guam. Although Z4 was not awarded the IFB, it was granted its requested relief: the opportunity to re-bid on the IFB. Further, since this appeal served the public good, Z4 should not be required to "bear the financial burden of enforcing the Code." Carl Corp., 946 P.2d at 31. Further, requiring Z4 to bear the financial burden of enforcing the Code "undermines the purpose of the Code." *Id.* Therefore, Z4 should recover its attorneys' fees as costs.

### 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

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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 June, 2010.

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By   
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