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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEAL

In the Appeal of

DICK PACIFIC CONSTRUCTION CO.
LTD.,

Appellant.

Docket No. OPA-PA _____

NOTICE OF APPEAL

COMES NOW, Appellant, DICK PACIFIC CONSTRUCTION CO., LTD. (hereinafter "DPC"), by and through its counsel of record and pursuant to 2 GAR Div. 4, Ch. 12 § 12201, does hereby submit its appeal of the Guam International Airport Authority's (hereinafter "GIAA") Procurement Protest Decision regarding IFB No. GIAA-C09-FY07. Said appeal is as follows:

APPELLANT INFORMATION

Name: Dick Pacific Construction Co., Ltd.
Mailing Address: P.O. Box 23068-GMF
Barrigada, Guam 96921
Business Address: 266D Finegayan Street
Harmon Industrial Park
Harmon, Guam 96912

Daytime Contact No.: 671-647-5500

APPEAL INFORMATION

- A) Purchasing Agency: Guam International Airport Authority
- B) Solicitation: IFB No. GIAA-C09-FY07 "Improve Airport Utilities Infrastructure (Water System), Phase 2 Reservoir & Support Building and GAC Water Treatment System AIP No. 3-66-0001-37/40/43/50, Project No. GIAA-FY03-06-05."
- C) Decision being appealed was made on July 18, 2007 by Jesse Q. Torres, Executive Manager of Guam International Airport Authority (hereinafter "GIAA").
- D) Appeal is made from a Decision on Protest of Method, Solicitation or Award.
- E) The competing bidders known to Appellant are as follows:
 - Rex International, Inc.
 - Leighton Contractors, Inc.
 - Maeda Pacific Corporation

FORM AND FILING

- I. Timeliness of Appeal
- II. Grounds for Appeal
- III. Statement of Ruling Requested
- IV. Supporting exhibits, evidence and documents

BACKGROUND

IFB No. GIAA-C09-FY07 was issued by GIAA calling for bids to be submitted by no later than 2:00 p.m. Guam Standard Time on June 12, 2007. On June 12, 2007, DPC timely submitted its bid in response to the IFB No. GIAA-C09-FY07. As admitted by GIAA, on June 15, 2007, and after the bids were opened by GIAA, revealing DPC's bid as the lowest bid, Alma

Javier, GIAA's Supply Management Administrator, called DPC to inquire about its shareholders and corporate structure. (See GIAA's Decision Letter pp. 9-10, attached as Exhibit B). DPC gave Ms. Javier the information she sought regarding their corporate structure and she ended the conversation stating that if she need anything further she would call DPC back.

On June 19, 2007, GIAA informed DPC via a Bid Status Notice of the same date from Jesse Q. Torres, Executive Manager of GIAA, that DPC was not awarded the bid despite it being the lowest bidder because DPC's response was not in conformance with the requirements of IFB No. GIAA-C09-FY07. The reasons stated for the rejection were (i) “[n]on-Conformance with the specifications/bid requirements”, (ii) failure “to comply with license requirements (C41 Classification)”, and (iii) failure “to submit RESUMES of key personnel; as identified on the Special Reminder to Prospective Bidders, item 7 and 13.” [sic] (emphasis in original). The Executive Manager’s decision rejecting DPC’s bid submission is attached as Enclosure 1 of Exhibit A.

On June 20, 2007, DPC, sent a letter to Jesse Q. Torres notifying GIAA that its A & B Licenses preclude the need for a C41 reinforcing steel specialty license and providing GIAA with all pertinent résumés which had indeed been inadvertently not put in the bid submission. The June 20, 2007 letter is attached hereto as Enclosure 2 of Exhibit A. It is not disputed that DPC's General Engineering License (A License) and the General Building License (B License) were submitted timely with the bid. These licenses specifically authorize the type and volume of work contemplated by IFB No. GIAA-C09-FY07, *including installation of reinforcing steel*. DPC requested review of these matters prior to the bid being awarded to anyone other than DPC. This letter was followed by a meeting with GIAA officials who took the matter under consideration but refused to reconsider and award the project to DPC.

On June 26, 2007 Mr. Salas, Deputy Executive Manager, responded in writing that GIAA was unable to consider the reasons DPC stated in its letter as the basis for GIAA to award DPC the contract instead of Rex International due to the fact that Rex International had complied with and met all conditions as called for in the bid requirements. GIAA acknowledged the \$376,646.40 difference between DPC's bid amount versus Rex International's but stated it was still bound by the bid requirements and all applicable regulations. The June 26, 2007 letter from Mr. Salas is attached hereto as Enclosure 3 of Exhibit A.

As discussed in further detail below, GIAA's rejection of DPC's bid was contrary to the solicitation terms, Guam Procurement Law and implementing regulations; further, under Section 8.2 of the Instructions to Bidders, rejection of the bid was contrary to the public purpose of completing the project using the lowest responsible bid.

On June 29, 2007, DPC submitted a formal protest of its bid rejection to GIAA, the same being attached hereto as Exhibit A. GIAA rejected DPC's protest via a decision letter dated July 18, 2007 and received by DPC on July 19, 2007, the same being attached hereto as Exhibit B.

I. Timeliness of Appeal

Pursuant to 5 GCA § 5425(e) and 2 GAR, Div. 4, Ch. 12 § 12201, an appeal may be made to the Public Auditor regarding the protest of a method of selection, a solicitation, or an award of a contract within fifteen (15) days of receipt by the protestor of the agency's decision. In accordance with 2 GAR Div. 4, Ch. 12 § 12103, the Public Auditor shall review and determine de novo the matter submitted.

DPC received GIAA's decision regarding rejection of its formal protest on July 19, 2007 as stated above in the background portion of this Notice of Appeal. Because the day of the act or event from which the time period begins is not calculated, DPC has until Friday, August 3, 2007

to timely submit its appeal. 2 GAR, Div. 4, Ch. 12 § 12102(g). As this appeal is being filed in triplicate with the Office of the Public Auditor and being served on GIAA on Thursday, August 2, 2007, it has been timely filed and served within the statutory limits.

II. Grounds for Appeal

A. **GIAA's rejection of DPC's Bid on the Grounds That DPC Did Not Submit a C41 Specialty Contractor's License is Erroneous Because DPC Did Not Legally Need Such A License to Perform the Work Contemplated by IFB No. GIAA-C09-FY07.**

Item 13 of the Special Reminder to Prospective Bidders requires a

“[c]opy of valid Contractor’s license, including C41 (Reinforcing Steel) *classification*. If scope of work for reinforcing steel is *to be sub-contracted*, submit copy of *sub-contractor’s* license for C41.”

DPC provided with its bid a copy of its A & B License, as well as its specialty classifications. Although DPC does not hold a C41 reinforcing steel license, such license is not required of DPC for this project because its A and B License expressly classifies and permits DPC to perform reinforcing steel work *so long as that work does not exceed 35% of the total project, which is the situation in this instance*. 29 GAR § 1421(3). In particular, 29 GAR § 1422 (d) & (e) states that one who holds an A & B License "shall automatically be deemed to hold, or be qualified for a contractor's license in specialty classification listed under § 1421". As set forth in 29 GAR § 1421, *reinforcing steel is on the list for the A & B License*.

Under its A & B License, DPC is qualified to do a number of heavy construction and building trades or crafts enumerated under 29 GAR § 1421(1) & (2), specifically including, installation of "Reinforcing Steel". In fact, the definition of a General Engineering Contractor and a General Building Contractor contemplate that the Contractor's business includes a broad range of trades and activities as follows:

A General Engineering Contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering

knowledge and skill including the following divisions and subjects: irrigation, drainage, water power, water supply ... pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances...

A General Building Contractor is a contractor whose principal contracting business is in connection with any structure built or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

29 GAR § 1422 (a) and (b).

In Guam, almost every structure is made of concrete reinforced with steel. It is therefore difficult to imagine a situation where a successful General Engineering Contractor or General Building Contractor such as DPC will not be qualified to install, and in fact install, the steel reinforcing in the structures listed in the definitions above.¹

A specialty contractor, on the other hand, focuses on a specialized area. The C41 License, for example, is a specialty license for a reinforcing steel sub-contractor whose primary business is to "fabricate, place and tie steel reinforcing bars (rods) ... to reinforce concrete buildings and structures." 29 GAR § 1421(4).

While a specialty subcontractor may need a C41 License to complete the portion of the project involving reinforcing steel because it would be the sole focus of his work, such a specialty license *is not required under 29 GAR § 1421(3) where the work is "less than thirty-five percent (35%) and supplemental to the performance of work in the craft for which the specialty contractor is licensed."*

DPC has demonstrated that it falls within the exemption. In this instance, the percentage of work involving the installation of reinforcing steel is well below the thirty-five percent (35%) threshold where a specialty license would be required. As indicated in the table attached to the

¹ As an example, DPC is the prime contractor on the DoD high school project at Naval Hospital and is installing all of the reinforcing steel.

formal protest by DPC, DPC calculates the percentage of the work involving reinforcing steel to be 4.49% of the entire project contemplated under IFB No. GIAA-C09-FY07. (See Enclosure 4 of Exhibit A.)

However, GIAA wholly failed to address the distinction between classification and licensures for specialty work as well as issue of the 35% threshold in its rejection of DPC's protest. GIAA completely ignores this requirement and fails to refute or provide any evidence that the reinforcing steel portion of the project exceeds 35%. Rather, GIAA blithely points out that GIAA mandated submission of the C41 license; however, it understandably provides no legal basis for this mandate. In fact, it is noteworthy that the Guam Contractors License Board ("GCLB") enforces the provisions creating this 35% threshold and other licensing requirements because GIAA should not be allowed to "mandate" that a qualified contractor obtain specialty licenses unnecessarily or to comply with requirements contrary to law.

Although GIAA points to a letter from GCLB for support, a closer look at this letter shows GIAA has self-servingly misinterpreted the letter. (See letter from GCLB dated July 22, 2005, attachment of Exhibit B.) GIAA contends the letter states that one who holds an A & B License "is also qualified to be licensed in a specialty classification." (See Exhibit B, p. 8.) In fact, the letter makes the point that a General Building Contractor ("GBC") cannot contract a roofing project, but a GBC can be used where two or more trades are involved or where a complete renovation is necessary. (See letter from GCLB dated July 22, 2005 attachment of Exhibit B.) A roofing project clearly is one where the only trade being performed is roofing and is thus by default greater than 35% of the project. On the other hand, a complete renovation, which may also require roofing, will require work in several trades which are supplemental to the renovation as a whole, such that a General Contractor can complete all aspects of the project so

long as it has the necessary classifications.

Furthermore, it is difficult to see how GIAA relied upon this letter for their determination that one who will be performing a specialty trade must always have a specialty license. (See Exhibit B, p. 8.) In light of the fact that (1) the letter was a general information letter dated in July of 2005 and (2) that GIAA required no other specialty licenses even though other specialty trades are likely required in the project, one must question - rhetorically - whether this letter was considered in conjunction with the original bid process or simply an afterthought. GIAA's so-called "reliance" on the 2005 letter is contrived in order to support an award made in contradiction to the laws governing contractors and the procurement laws of Guam.

As noted above, and as set forth in Enclosure 4 of Exhibit A, reinforcing steel makes up a very small percentage of the scope of work contemplated under IFB No. GIAA-C09-FY07. Other trade and skill areas such as asphalt paving and surfacing; concrete placement; demolition; electrical placement; excavation, grading, and trenching; fencing; fire protection; painting and decorating; plumbing; sewer, sewage disposal drain, and cement pipe laying; and water chlorination all comprise a part of this project. There are specialty "C" licenses for each of these areas, yet GIAA did not request specialty licenses in the IFB for these disciplines. There is no need for these other specialty licenses for the same reason there is no need for a reinforcing steel license: where the specialty work is not 35% or more of the project, by law, only an A & B License with appropriate classifications is necessary in order to perform the work. The C41 *Specialty License* is redundant in the case of a Contractor such as DPC with an A & B License and *specialty classification*, and therefore, is not required. Requiring a specific specialty license arbitrarily and without legal cause or justification is contrary to both Guam's licensing and procurement laws.

GIAA has understandably produced no evidence that the steel reinforcement work required under the IFB will constitute thirty-five percent (35%) or more of the work contemplated thereunder. The request under Item 13 of the Special Reminder to Prospective Bidders for a C41 license can, therefore, only make sense where a sub-contractor will be utilized or where one does not hold an A & B License. The only interpretation of Item 13 consistent with applicable law requires the exemption of contractors holding an A & B License due to the very nature of the license and the composition of the project (i.e., where the steel reinforcement work is less than 35% of the project). In this case, DPC did meet the IFB requirements by submitting its A & B License, which was sufficient to establish DPC's qualifications to complete the reinforcing steel work.

In this instance, DPC's A & B License is sufficient to qualify DPC to install the reinforcing steel as that work does not equal or exceed the 35% threshold. Furthermore, DPC does not intend to use a sub-contractor to perform the steel reinforcement necessary for the project, as is clear from its bid submission. Rather, the reinforcing steel portion of this project is only 4.49% of the total project as noted above. Such installation of reinforcing steel in reinforced concrete structures, especially on Guam, is routine for DPC and would be routine in connection with the work contemplated under IFB No. GIAA-C09-FY07. Although GIAA disingenuously contends that DPC's submission of other specialty licenses belies DPC's good faith under its protest, the fact is that DPC submitted all licenses held as it routinely does in a bid. DPC has obtained these other specialty licenses where it was legally required to do so on other projects where the specialty work exceeded 35% of the project.

B. DPC's Omission of Resumes Regarding Key Personnel Was A Mere Informality that Should Have Been Waived By GIAA Because the Bid Material and The Procurement Law Contemplate Material Conformity and Waiver When in the Best Interest of the Owner.

The integrity of the procurement system rests greatly in the secret and confidential nature of bids, as well as requiring responsiveness and responsibility among bidders. Even so, the process also contemplates that minor omissions or informalities may occur. In fact, this IFB contains a notice that GIAA may "waive any and all informalities", when doing so could be in GIAA's best interest. A similar statement appears again on page 11 of the Notice to Bidders and in Section 8.2 of the Instructions to Bidders.

The fact that Section 8.2 explicitly reserves this right "when such waiver is in the interest of the Owner", and Section 8.1 states the intent to award the contract to the "lowest responsible, responsive bidder" creates the expectation that a minor inadvertent flaw in the bid, that does not affect the bid price or the ability of the bidder to perform, will be waived where, as here, doing so would significantly benefit GIAA. Here, the significant benefit is self-evident: saving the hardly insignificant sum of \$376,646.40 to GIAA and the taxpayers of Guam. GIAA's statement that it is "bound by the bid requirements" is not true where the requirement is of a minor nature and where waiving it would be in the best interest of GIAA.

The only missing item in the bid, the résumés, was promptly (i.e., within 24 hours) submitted when DPC was notified of its omission. Even so, the omission in no way affected the price of the bid or the ability of DPC to complete the project per GIAA's specifications. When the statutes allow for required specifications, the criteria enumerated include items like inspection, testing, quality, and workmanship. See 5 GCA § 5211(e). Award of the contract shall be to the lowest responsible bidder who meets the criteria of the IFB. 5 GCA § 5211(g). In this case, DPC was the lowest responsible bidder and did meet the criteria of the IFB. DPC has

promptly and fully responded to all inquiries and those responses have shown DPC's knowledge, skill ability, and qualification to be awarded this contract.

Although GIAA claims that DPC's failure to submit resumes with its bid was not a minor informality, its actions prior to rejection show that this is not the case and rather that GIAA is simply engaging in more after-the-fact contriving. Ms. Javier called DPC on June 15, 2007 to inquire about its *corporate structure*, three (3) days after all bids were opened. (See Enclosure 2 of Exhibit A, p. 2.) Had the omission of resumes been truly one of substance and not merely one of form it follows that DPC's bid would have been rejected immediately and no further inquiries made. Instead, Ms. Javier called to inquire about DPC's corporate structure after opening DPC's bid most likely because it was in fact the lowest bid. GIAA's current position is yet another afterthought to bolster its unjustifiable rejection of the most qualified and lowest bidder, DPC. Indeed, DPC has in the past completed two projects for GIAA, as well as two projects for FAA and TSA, respectively.² Therefore, GIAA is more than just familiar with DPC's reputation as a competent contractor.

GIAA's argument that it cannot waive this informality because other bidders met the requirement is likewise weak. The fact that others met the requirement does not change a minor informality to one of substance. Anywhere a minor informality occurs one can assume that every other bidder did not also make the same mistake or omission, yet waiver is still allowed. While the Procurement process strives to be fair and equitable, it is not meant to eliminate the use of reasoning, which is why it allows for waivers where doing so would be in the best interest of the Owner.

² DPC completed the GIAA Perimeter Security Access Control in Tiyan, Guam on May 31, 2000 and the GIAA Fuel Storage Tank at Tiyan, m Guam on July 11, 1999. DPC also completed a project at the control tower building directly for the FAA and a baggage screening project for TSA.

C. Rejection of DPC's Bid, Which Was Significantly Lower than the Next Lowest Bidder, Is Contrary to the Best Interests of GIAA and Guam and is Not in Accordance with the Procurement Laws and Regulations.

The IFB, related material and the purpose of the Guam Procurement Law all contemplate a system of integrity that encourages competition and allows the Territory to maximize its purchasing power by accepting work, services and products from the lowest responsive and responsible bidder. Indeed, 5 GCA § 5001(b) specifically lists increasing public confidence in the public procurement process and maximizing the purchase value of public funds as stated purposes of the procurement law. Finally, 5 GCA § 5003 requires the agency requesting bids to act in good faith.

The IFB specifically states that the lowest responsible bidder will be awarded the contract. It also represents that informalities can be waived when doing so is in the best interest of GIAA. Good faith requires that GIAA demonstrate how saving \$376,646.40 and using a well-qualified construction team would not be in its best interest, for this is the only way rejection of DPC's bid can be justified. This is especially pertinent in light of the current financial crisis in which the government of Guam finds itself. It seems imperative that agencies be especially cost conscious where savings can be realized without sacrificing the quality of the work or product purchased. The alleged nonconformance cited by the GIAA is a blatant case of following form over substance to the detriment of taxpayers.

GIAA argues that the six-figure extra expense on this project does not affect Guam's taxpayers because the funds come from a federal grant. GIAA seems to conveniently overlook the fact that Guam's taxpayers are also U.S. citizens and are concerned with the proper use of government funds, whether those funds come from local or federal coffers. The argument that wasting federal funds does not affect Guam taxpayers is ludicrous. Even in light of the FAA's so-called "concurrence" with GIAA's decision to not award the bid to DPC does not excuse

GIAA's disregard of the Procurement Laws or change the fact that the extra expenses of \$376,646.40 will be a clear waste of government funds. Furthermore, if FAA knew that the bid requirements as enforced by GIAA violate the procurement laws, it would certainly not have concurred.

Perhaps if Guam's agencies were more efficient with the grant money awarded, more could be entrusted to the government of Guam and accomplished for its people. Guam's dire financial position is a result of many things, inappropriate use and overspending being two primary culprits.

DPC is also genuinely concerned about this island's well-being and is offended at GIAA's veiled threat, faulting DPC with the "loss of millions" in federal grant money due to the protest and this appeal, when in fact GIAA has no one but itself to blame if grant money is lost. (See Exhibit B, p. 11.) GIAA is unable to hide its own short-comings and instead as cover suggests DPC should not exercise its legal rights to protest and appeal when federal money is at stake. GIAA was fully aware of the grant requirements and in complete control of when the bid process was initiated. Protests and appeals are provided as a legal right to bidders and are hardly a rarity or exception on Guam. GIAA should have issued its solicitation for bids in such a manner and in time to accommodate the legal rights of its bidders to protest without losing funds. The attempted blame-shifting of GIAA to a bidder for availing itself of its legal rights is inappropriate and highlights that actual fault for putting federal grant money lies squarely with GIAA.

III. Statement of Ruling Requested

GIAA's rejection of DPC's protest and bid submission is contrary to law and the best interests of GIAA and to applicable procurement regulations and bids. DPC's appeal is

meritorious. Therefore, DPC requests the Public Auditor to rescind GIAA's rejection of DPC's protest and bid submission and award the contract for IFB No. GIAA-C09-FY07 to DPC. Accordingly, DPC asks that the reviewing authority grant the corrective action requested above.

IV. Supporting exhibits, evidence and documents are as follows:

- A. Exhibit A: Formal Protest dated June 29, 2007 from DPC
- B. Exhibit B: Letter dated July 18, 2007 from Jess Q. Torres rejecting bid protest

DECLARATION REGARDING COURT ACTION

DPC does hereby confirm that to the best of its knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Respectfully submitted this 2nd day of August, 2007.



DAVID P. LEDGER
CAREY MCALISTER AUSTIN

Attorneys for Appellant
Dick Pacific Construction Co., Ltd.

VERIFICATION

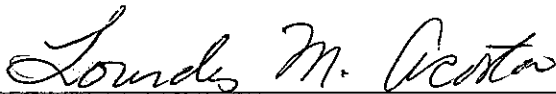
GUAM, U.S.A.)
) SS.
MUNICIPALITY OF HAGÁTÑA)

GLEN DAVIES, being first duly sworn on oath, deposes and says he is the duly authorized representative of Dick Pacific Construction Co. Ltd., and as such he is authorized to make and hereby make(s) this verification on behalf of Dick Pacific Construction Co. Ltd. herein, that he has read the foregoing Notice of Appeal including without limitation, all of the factual allegations therein, know(s) the contents thereof, and the same is true to the best of his knowledge and belief.



GLEN DAVIES

Subscribed and sworn to before me this
2nd day of August, 2007



Notary Public, Territory of Guam

My Commission expires: 4-6-11

LOURDES M. ACOSTA
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: April 06, 2011
P. O. Box 23068 GMF Barrigada, GU 96921