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PROCUREMENT APPEALS

FEB 12 2010

TIME: 4:14  
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FILE No. OPA-PA 09-012

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5 **PROCUREMENT APPEAL**

6 In the Appeal of ) Docket No. OPA-PA-09-012  
7 )  
8 Z4 Corporation, )  
9 )  
Appellant. ) **MEMORANDUM IN SUPPORT OF  
APPELLEES MOTION GSA/GDOE  
TO DISMISS**

10 **TO: APPELLANT, Z4 CORPORATION AND ITS ATTORNEY OF RECORD**  
11 **AARON R. JACKSON, ESQ., MAIR, MAIR, SPADE & THOMPSON,**  
12 **LLC, 238 A.F.C. FLORES STREET, STE. 801, DNA BLDG, HAGATNA,**  
13 **GUAM 96910**

14 GPSS IFB-008-2009 Re-Bid for the repair of the Oceanview Middle School  
15 Gymnasium is the subject matter of the within Appeal. The construction process involved in  
16 repairing a school gymnasium is different than the process involved in the procurement of  
17 supplies or other services. A review of the public record of GPSS IFB-008-2009 Re-Bid as  
18 recorded brings into question whether the initial form of the process was in keeping with the  
19 letter and the spirit of Guam Procurement laws and regulations.

20 GSA/GDOE would like to Re-Bid this project and hereby move for dismissal of this  
21 action for that purpose.

22 GPSS IFB-008-2009 Re-Bid in its form permitted a Basic Bid and an Alternate Bid.  
23 Check Box #9 of the Government of Guam GPSS General Terms and Conditions of Seal Bids  
24 Solicitation of Award was checked.

**COPY**

1 9. Bidder's Prices. The Government will consider not more than (2) (Basic  
2 and Alternative) item prices and the Bidder shall explain fully each price if  
3 supplies, materials, equipment, and/or specified services offered comply with  
4 specifications and the product's origin. Where basic or alternate bid meets the  
5 minimum required specification, cost and other factors will be considered.  
6 Failure to explain this requirement will result in rejection of the bid (See Section  
7 23).

8 23. Award, Cancellation & Rejection: Award will be made to the lowest  
9 responsible and responsive Bidders, whose bid is determined to be the most  
10 advantageous to the Government, taking into consideration the evaluation facts  
11 set forth in this solicitation. No other facts or criteria shall be used in the  
12 evaluation.

13 .....

14 Section 20 defined descriptive literature.

15 20. Descriptive Literature

16 Descriptive literature(s) as specified in this solicitation must be furnished as part  
17 of the bid and must be received at the date and time set for opening Bids. The  
18 descriptive literature is required to establish, for purpose of evaluation and award  
19 details of the product(s) the bidder proposes to furnish including design  
20 materials, components, performance characteristics, methods of manufacture,  
21 construction, assembly or other characteristics which are considered appropriate.  
22 Rejection of the Bid will be required if the descriptive literature(s) do not show  
23 the product(s) offered conform(s) to the specification and other requirements of  
24 this solicitation. Failure to furnish the descriptive literature(s) by the time  
25 specified in the Solicitation will require rejection of this Bid.

Descriptive Literature was further called out in the Government of Guam GPSS Special  
Reminder to Prospective Bidders. :#7 Product Brochures/Descriptive Literature: Provide a  
complete Product Brochure/Descriptive Literature. Failure to comply with this requirement  
will result in rejection of the entire bid offer.”

In the pre-bid process there were two inquiries regarding Product Brochures/Descriptive  
Literature.

- (1) On 06-15-2009, EONS request for clarification “Item No. 7  
(Product/descriptive language; which requires a COMPLETE  
product brochures.) of the SPECIAL REMINDER TO

1 PROSPECTIVE BIDDERS where we believe not bidder can  
2 submit a complete "AS COMPLETE" product  
3 brochures/descriptive literatures of all (complete) items of material  
4 that is needed to complete the project. It is a very broad to detail  
5 all materials needed for the project.

6 If we many suggest that GPSS Procurement will provide  
7 the only specific or major items of materials to be used for the  
8 project, this is to attain the uniformity of the bidders for submitting  
9 product brochures/descriptive literatures of the given specific  
10 materials:

11 There are some discrepancies of the specifications and inquires as follows:

- 12 1. Telescopic Bleachers that has to be demolished and replaced by  
13 an electronic control, is it plastic or wood as stated in Section  
14 12760, subsection 1.3 and subsection 2.4.
- 15 2. Request to extend the bid dates for two weeks due to the request  
16 of brochures and new quotations for special materials intended for  
17 the project.
- 18 3. The liquidated damages is 100/day on item 41 of Invitation to  
19 Bid, while 400/day of General Provisions item No.3, which will  
20 govern?

- 21 (2) On 06-23-2009, Z4 Corporation, Pete M. Valencia made a request for  
22 Information: "We would like to clarify which one is to follow: General  
23 Provisions: GP-3 No 5 Material Specification: Submit with Proposal  
24 Work Schedule Already Amended")

25 While on the SPECIAL REMINDER TO PROSPECTIVE BIDDERS on  
No. 7, it was marked X regarding product brochures/ descriptive  
literatures.

There was no written response/clarification or Addendum issued in response to either  
of the inquires.

By its terms IFB-008-2009 (Re-Bid) set forth inclusion of the Product  
Brochures/Literature that met the technical specification of the project as part of being  
"responsive" to the bid by its terms; and also permitted an alternate bid; but by its terms  
required the alternate bid be explained. This process in this procurement of office supplies or

1 other goods is common. It is not common in construction procurement. (See Attached Motion  
2 Exhibit A) 02-12-2010 letter from H. Mark Ruth, FAIA from Taniguchi Ruth Makio Architects  
3 (TRMA), the Designer of the technical specifications for IFB-008-2009 (Re-Bid). The  
4 inclusion of the requirement in the IFB-008-2009 (Re-Bid) created a lack of clarity and uneven  
5 ground for potential bidders as exemplified in the unanswered written inquires of EONS  
6 Enterprises and Z4 Corporations. No Written Addendums on the issue are part of the IFB.

7  
8 There were 4 companies that responded with bids to the IFB out of the 20 that picked  
9 up packages. One company EONS Enterprises include a Basic Bid and an Alternate Bid. Only  
10 Z4 Corporations Basic Bid and EONS Enterprises were sent out TRMA for review of the  
11 Brochure/Literature as being in keeping with the technical specifications of the projects. Both  
12 Z4 Corporations and EONS Enterprises Brochures/Literature were found Not to meet the  
13 technical specification of the project.

14 At later points in the history of the procurement EONS Enterprises was permitted to  
15 submit two additional written clarifications Brochures/Literature and to list different materials.  
16 The submittals by EONS Enterprises that were reviewed by TRMA continued to not meet the  
17 technical specifications of the project. On October 7, 2009, there was a check box marked as  
18 to concurred "meeting specifications".

19  
20 Remarks: "Require EON's Enterprises Corp confirmation letter that all materials  
21 shall comply with Tech Specs w/NO additional cash as their Bid Price during  
22 construction state of project."

23 ////

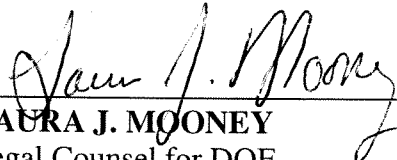
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The initial process of the IFB is clouded and GSA/DOE would like to REBID it in keeping with the spirit of the procurement laws and regulations. Exhibit B – GSA Acting Chief Procurement Officer’s letter.

Respectfully submitted this 12<sup>th</sup> day of February, 2010.

  
LAURA J. MOONEY  
Legal Counsel for DOE

February 12, 2010

Attorney Laura Mooney, Legal Counsel  
Department of Education  
Government of Guam  
Hagatna, GU 96910

Subj: Oceanview Gymnasium

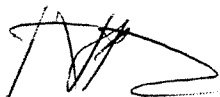
Dear Attorney Mooney;

At your request, I am commenting on the bid procedures used for solicitation of construction bids for construction of the Oceanview Gymnasium. As discussed, we prepared technical drawings and specifications for the work, but were not involved in the preparation or issuance of the bid document allowance for alternate bids.

In my 38 years of practice as an architect on Guam, I have not been involved in a bid process which allowed the contractors to propose "unsolicited" and open substitutions with multiple bid proposal amounts. The standard practice is for the contractor to bid on the technical specifications as written and it is unusual to request bids on the basis that the bidder is permitted to propose alternates to the specification. Typically, in order to ensure a level playing field, bidders would not be permitted to qualify bids other than as specifically requested.

Submittals to substantiate materials are then made after the construction contract is signed. If alternate products are proposed, they are reviewed on a basis that they must be equal or better than the specified product. Specification section 01600 is specific as to the procedures for submittals, product options and substitutions. In this case, following receipt of bids I was requested by DOE to review the alternate products proposed. This was an unusual request and my letters comparing proposed products were my best effort recognizing that the substitutions were not provided with sufficient documentation to allow determination if the substituted product met the intent of the technical specifications.

Very truly yours,



H. Mark Ruth, FAIA

Felix P. Camacho  
Governor

Lourdes M. Perez  
Director  
Department of Administration

**GENERAL SERVICES AGENCY**

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Michael W. Cruz, M.D.  
Lt. Governor

Joseph C. Manibusan  
Deputy Director  
Department of Administration

February 12, 2010

**MEMORANDUM**

To: Laura Mooney  
Department of Education  
Legal Counsel

From: Acting Chief Procurement Officer  
General Services Agency

Subject: Appeal of Z4 Corporation OPA-PA-09-012

Dear Ms. Mooney:

Based upon our conversation this date and a review of the documentation in this matter, the General Services Agency support the Motion to Dismiss on the basis that the initial forum of the process was not in conformity with the spirit of the procurement rules. We believe that cancellation and a re-bid would be in the government's best interest and sends a strong message of ensuring a level playing field.

*Robert H. Kono*  
ROBERT H. KONO  
Acting

COMMITTED TO EXCELLENCE

*Exhibit B*