



award to Z4 on the faulty grounds that Eons did fully explain the Alternate bid, *at the opening*. Thereafter, GSA rejected Z4's bid due to "high price."

However, as recently indicated in the Appellee's Motion to Dismiss filed on February 12, 2009, the GDOE and GSA are now in agreement that Eons' Alternate bid cannot support an award due to the failure to offer a full explanation. As stated in the GDOE's Motion to Dismiss, Eons "continued to not meet the technical specifications of the project." Yet instead of simply affirming the award to Z4, the GDOE now seeks to cancel and re-bid the entire solicitation.

The GDOE wishes to re-bid the IFB, for the second time, because the GDOE made the alleged mistake of using the "alternate" bid process for this construction contract. However, the GDOE and GSA cannot simply cancel and re-bid the IFB at this point due to the GDOE's own mistake.<sup>1</sup> A solicitation may only be canceled under certain conditions, none of which are present here. Canceling the solicitation would allow the GDOE to punish the Z4 for its own mistake! The show must go on, and the IFB need not be canceled because Z4's bid can support an award.

The evidence will demonstrate that the OPA should affirm the award to Z4 because Z4's bid can support an award. Z4 was the lowest responsive and responsible bidder; and thus, the IFB need not be canceled and re-bid. In its Motion to Dismiss, the GDOE now asserts, for the first time, that Z4's "Brochure/Literature were found Not to meet the technical specifications of the project." However, the GDOE or GSA never determined that there were any discrepancies with Z4's bid or otherwise deemed it non-conforming, despite having multiple opportunities to do so. Rather, GSA rejected Z4's bid

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<sup>1</sup> Z4 will oppose Appellee's Motion to Dismiss in greater detail and timely file an opposition.

simply due to “high price,” not for “non-conformance.” Accordingly, this issue has been resolved by the GDOE and GSA, and counsel for the GDOE cannot now seek to cancel the IFB on this ground.

## ANALYSIS

### I.

#### **EONS ALTERNATE BID WAS PROPERLY REJECTED BECAUSE EONS DID NOT FULLY EXPLAIN THE TERMS OF THE ALTERNATE BID**

The crux of this appeal is whether Eons’ Alternate bid was properly rejected by the GDOE for failing to fully explain its terms; and, at the hearing, Z4 will show that that Eons’ Alternate bid was properly rejected on these grounds. Therefore, the OPA should set aside the award to Eons because its Alternate bid did not comply with the instructions of the IFB.

#### **A. The IFB Required Bidders to “Fully Explain” the Offerings**

The evidence will demonstrate that the instructions of the IFB required bidders to fully explain all terms of the bid and clearly stated that the failure to fully explain the products and terms of a bid will result in the rejection of the bid. Under Paragraph 9 of the General Terms and Conditions, the IFB stated that “**Failure to explain [the Alternate bid] will result in rejection of the bid.**” (Emphasis in original).

#### **B. Eons’ Alternate Bid Did Not Fully Explain its Offerings**

The evidence will show that despite being given multiple opportunities to fully explain the terms of its Alternate bid, at no point has Eons fully explained its offerings. The evidence will demonstrate that several actors evaluated Eon’s Alternate bid and each found that Eons failed to fully explain the terms of the Alternate bid. Finally, it is

now apparent that the GDOE not longer disputes this contention as the GDOE recently noted that Eons “continued to not meet the technical specifications of the project.” *See* Appellee’s Motion to Dismiss at p. 4. Thus, GSA unlawfully awarded the IFB to Eons based solely on Eons’ promise that the Alternate bid would meet the technical specifications of the IFB.

**C. The OPA Should Set Aside the Award to Eons**

Guam Procurement law provides that “Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose.” 5 G.C.A. § 5211(e). Further, the “contract *shall* be awarded . . . to the lowest bidder whose bid *meets the requirements and criteria set forth in the Invitation for Bids.*” 5 G.C.A. § 5211(g). Bids that do not comply with mandatory requirements of the solicitation shall be rejected. *See In the Appeal of Dick Pacific Co., Ltd.*, Appeal No. OPA-PA-07-007 (upholding the rejection of bid that did not comply with the requirements of the solicitation where the bidder was expressly warned that failure to supply information is grounds for rejection).

As stated above, the evidence will demonstrate that Eons’ Alternate bid did not comply with the instructions of the IFB because it did not fully explain the products offered. Further, it is clear that the GDOE and GSA do not believe that Eons’ Alternate can support or award because they now seek to cancel the entire IFB. Therefore, the OPA should set aside the award to Eons because the award was contrary to the Procurement Law as Eons’ Alternate bid did not comply with the instructions of the IFB.

## II.

### **THE REVOCATION OF Z4'S AWARD WAS ARBITRARY AND CAPRICIOUS; AND THUS; THE OPA SHOULD AFFIRM THE AWARD TO Z4**

The aggrieved bidder bears the burden of showing that cancellation of the bid was "arbitrary or capricious." "A necessary corollary to that burden is consideration of the discretion accorded to procurement officials." Parcel 49C Ltd. Partnership v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994). It is the burden of the aggrieved bidder to demonstrate that the challenged agency decision is either irrational or involved a clear violation of applicable statutes and regulations. Banknote Corp. of America, Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004).

The evidence will show that the GDOE lawfully award the IFB to Z4 and GSA on its own initiative arbitrarily and capriciously revoked the award. Accordingly, the OPA should affirm the award of the IFB to Z4 and set aside the unlawful award to Eons.

#### **A. The IFB was Lawfully Awarded to Z4**

In competitive bidding process, there are two separate and distinct events which trigger certain rights and responsibilities: the award and the execution of the contract. It has long been the rule that the government's acceptance of the bid, not the formal signing of the contract, makes the revocation of the award unlawful. See Lee C. Hess Co. v. City of Susanville, 1 Cal. Rptr. 586, 599 (Ct. App. 1960) (holding that city could not rescind the award, even though the formal contract had not yet been signed).

At the hearing, GSA will likely argue that no award had been made to Z4 because Z4 had not yet submitted the performance bond. However, the evidence will demonstrate that, in fact, an award had been made to Z4. The evidence will further show

that the performance bond was not yet due because the time for the execution of the contract had not yet arrived.

1. **The Bid Status and the Notice to Proceed Were the Award**

The evidence will demonstrate that the GDOE lawfully awarded the IFB to Z4. The original Bid Status noted that “award is made to the lowest bidder,” which was determined and approved to be Z4. Thus, this document effectively awarded the IFB to Z4, without further action by Z4, including the submission of the performance bond. Furthermore, the GDOE also issued the “Notice to Proceed” to Z4 notifying Z4 that it was awarded the contract, which actually instructed Z4 to begin performance. Specifically, the Notice to Proceed instructed Z4 that: “*as agreed, you are hereby notified to commence work on the above contract on August 10, 2009* and you are to complete all work in the contract within 180 days.” *Id.* (Emphasis added). Accordingly, a lawful award was made.

The evidence will further demonstrate that even Eons believed that an award had been made as Eons stated that “On August 6, 2009, the [GDOE] *awarded* the Oceanview Middle School Gymnasium Repairs Contract to Z-4 Corporation . . . .” (Emphasis added).

2. **The Bond Was Due at the Signing of the Contract Not Award**

The relevant procurement law cited in GSA’s Bid Protest Rejection letter holds that the submission of the performance bond is due *at the time of execution* of the contract, *not the award*, as follows: (1) “the performance bond shall be delivered . . . at same time the contract is executed,” Department of Education Procurement Regulations Section 5.3.1.1 (emphasis added); and (2) “the following bond or security shall be delivered to the Territory and shall be become binding *upon the execution of the*

*contract*,” 5 G.C.A. § 5304 (emphasis added). Therefore, according to both sections cited by GSA, the performance bond shall be delivered at the *execution* of the contract, NOT at the time of *award*. The evidence will demonstrate that Z4 was not late in submitting the performance bond because the time for execution of the contract had not arrived. Furthermore, the evidence will further demonstrate that GSA will be estopped from requiring the performance bond at this point due to GSA’s acquiescence to Z4’s request for an extension.

**B. At the Request of the GDOE, Z4 Began Preparations for the Project**

The evidence will show that Z4 began the initial preparations for the project, as requested by the GDOE. The evidence will show that at the request of the GDOE, Z4 officials attended the Pre-Construction meeting with officials from the GDOE and the project architect. The meeting was further memorialized by the “Minutes of Meeting,” which indicated that the parties discussed the further performance of the project, as required by the IFB “*after award*.”

**C. The Performance Bond was Not Due and Cannot Support Rejection**

The evidence will show that GSA acted arbitrary and capricious in rejecting Z4’s bid because Z4 was not late in submitting the performance bond because the time for execution of the contract had not arrived, as noted above. Furthermore, the evidence will further demonstrate that GSA will be estopped from rejecting Z4’s bid for this reason.

**D. GSA Unlawfully Revoked Z4’s Award Because “Eons Did Explain and Justified What They Were Offering on Their Alternate Bid” At the Opening**

The evidence will demonstrate that GSA based the revocation of the award to Z4 on the erroneous conclusion that Eons submitted a full explanation of the Alternate

bid *at the time of the opening of the bids*. In the Bid Protest Rejection letter, GSA stated that “*the alternate bid contained the [explanation] documents at the time of bid opening.*” In support of this statement, GSA submitted an August 28, 2009, memorandum from a GDOE procurement official which stated that that “Eons did in fact submit and had given the full explanation as to the breakdown of the offer to their submittal of their Alternate Bid as stipulated in the requirements of the bid.”

However, the evidence will clearly show that Eons did not provide a full explanation at the time of the opening, or at any time thereafter, despite being given multiple opportunities to do so. Moreover, GSA’s previous position was recently reversed by the GDOE’s statements that Eons “continued to not meet the technical specifications of the project.” *See* Appellee’s Motion to Dismiss at p. 4. Thus, since the revocation of the award to Z4 was based on this ground, the revocation was arbitrary and capricious.

### III.

#### **Z4 WAS THE LOWEST RESPONSIVE AND RESPONSIBLE BIDDER; AND THUS, THE OPA SHOULD AFFIRM THE AWARD OF THE IFB TO Z4**

For the first time in four (4) months since GSA revoked the award to Z4, the GDOE has now reversed its position and argues that Z4’s “Brochures/Literature were found Not to meet the technical specification of the project.” *See* Appellee’s Motion to Dismiss at p. 4. However, the evidence will demonstrate that the GDOE properly awarded the IFB to Z4 because Z4 was the lowest responsive and responsible bidder. Z4’s bid was not rejected for failure to offer a full explanation; neither was Z4’s bid rejected for non-conformance with the specifications of the IFB.



Further, the evidence will demonstrate that both the GDOE and GSA had multiple opportunities to find any discrepancies in Z4's bid; yet, neither agency determined that Z4's bid was non-conforming. Rather, on October 9, 2009, GSA simply rejected Z4's bid due to "high price." GSA had the opportunity to reject Z4's bid for "non-conformance with the specifications"; but GSA did not do so because Z4's bid was in substantial conformance with the specifications. Therefore, even if there were any minor discrepancies with Z4's bid, it is inappropriate for counsel for the GDOE to now attempt to cancel the entire solicitation based on these grounds, which have never been raised by the GDOE or GSA and, thus, would be deemed waived. Thus, the OPA should affirm the award to Z4 who is the lowest responsive and responsible bidder.

**A. The GDOE Cannot Cancel and Re-Bid the Solicitation**

One week before the hearing, the GDOE and GSA now seek to cancel and re-bid the entire solicitation on the grounds that the alternate bid process should not have been used for this construction contract. However, Guam's Procurement law only allows for the cancellation and re-bid of a solicitation on certain enumerated grounds, none of which are present here. 5 G.C.A. § 5225; 2 G.A.R. § 3115. Furthermore, acceptable grounds for cancellation are only available *before* award. 3 G.A.R. § 3115. Accordingly, the evidence will demonstrate that the GDOE has not met the requisite grounds for cancellation of the entire IFB. Thus, the GDOE cannot punish Z4 for its own mistake in the process, which has never been raised by any party until this late date.

**CONCLUSION**

The GDOE properly rejected the Alternate bid of Eons because Eons failed to explain its offering, which the GDOE apparently no longer disputes. The revocation of

Z4's bid was arbitrary and capricious because it was based on the erroneous conclusions that: (1) Eons fully explained the terms of the Alternate bid; and (2) Z4 was late in submitting the performance bond. Finally, the OPA should not cancel the solicitation because Z4's bid can support an award. Therefore, Z4's appeal should be GRANTED and the OPA should AFFIRM the award of the IFB to Z4.

Submitted this 17th day of February, 2010.

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