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6 **II. FINDINGS OF FACT**

7 These Findings are based on the Procurement Record and all documents submitted by the  
8 parties in the appeal pursuant to the DPC's and GIAA's November 21, 2007, Stipulation to  
9 Withdraw Requests for Hearing and for and For Decision on Submitted Materials.

10 1. IFB No. GIAA-C09-FY07 solicited bids from contractors to improve airport utilities  
11 infrastructure (Water System) Phase 2 - Reservoir & Support Building and Granular Activated  
12 Carbon (GAC) Water Treatment System (the "Project").

13 2. IFB No. GIAA-C09-FY07 contained a Special Reminder to Prospective Bidders which  
14 stated, in relevant part:

15 a. The Bidders must complete, sign, and submit in the bid envelope with the Bid a  
16 Statement of Experience of Bidders along with the Resumes of identified personnel.<sup>1</sup>

17 b. The Bidders must submit a copy of a valid Contractor's License, including C41  
18 (Reinforcing Steel) Classification, or, if the scope of work for reinforcing steel is to be sub-  
19 contracted, a Bidders must submit a copy of its sub-contractor's C41 License.<sup>2</sup>

20 c. The Special Reminder also stated that failure to comply with requirements of the  
21 Special Reminder will mean disqualification and rejection of the bid.<sup>3</sup>

22 3. GIAA held a Pre-Bid Conference on May 17, 2007, at 10:00 A.M., at GIAA's Conference  
23 Room 2. The agenda for said conference included the bid submittal documents, and the form  
24 marked "Special Reminder to Prospective Bidders." During the pre-bid conference, Alma Javier,  
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26 <sup>1</sup>Addendum A to IFB No. GIAA-C09-FY07, Special Reminder to Prospective Bidders, Paragraph 7.

27 <sup>2</sup>*Id.*, Paragraph 13.

28 <sup>3</sup>*Id.*, Page 2.

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6 GIAA's Supply Management Administrator, explained that the Special Reminder was a checklist  
7 for bidders to ensure submission of certain documents together with their bids.<sup>4</sup> Javier also strongly  
8 cautioned those attending the pre-bid conference that failure to comply with the requirements in the  
9 Special Reminder would result in disqualification and rejection of bids.<sup>5</sup> Javier also explained that  
10 The Statement of Experience of Bidders required the bidders to name their key personnel and that  
11 the Bidders must submit the resumes of their key personnel.<sup>6</sup> Finally, Javier explained that each  
12 Bidder was required to have a C41 License and that if a Bidder planned to subcontract the  
13 Reinforcing Steel Work, then the Bidder had to submit its sub-contractor's C41 License.<sup>7</sup>

14 4. Willie Griva and Dads L. Pineda attended the pre-bid conference on behalf of DPC and  
15 they did not ask any questions about the licensing or resume requirements.<sup>8</sup>

16 5. The deadline for potential bidders to submit bid inquiries was May 21, 2007.<sup>9</sup> DPC  
17 submitted two (2) separate, written requests for clarification regarding certain items on Package B  
18 and D of the IFB, as well as a request prior to May 21, 2007, deadline to extend the deadline to  
19 submit bids. However, none of DPC's inquiries concerned the C41 Licensing requirement or the  
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21 <sup>4</sup>See Agency Report of Antonio B. Won Pat International Airport Authority, Guam (Hereafter "GIAA")  
22 Filed on August 16, 2007 (Hereafter "Agency Report"), Tab 4, Section I.A.1., Page 1.

23 <sup>5</sup>*Id.*

24 <sup>6</sup>*Id.*

25 <sup>7</sup>*Id.*, Page 2.

26 <sup>8</sup>*Id.*

27 <sup>9</sup>Paragraph 3, Explanation to Bidders, IFB No. GIAA-C09-FY07.  
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6 requirement that the resumes of key personnel be submitted with the Statement of Experience of  
7 Bidders.<sup>10</sup>

8         6. On June 12, 2007, which was the deadline to submit bids in response to IFB No. GIAA-  
9 C09-FY07, DPC timely submitted its bid.<sup>11</sup> DPC submitted copies of its General Engineering  
10 License (A License) and its General Building License (B License).<sup>12</sup> DPC did not submit a C41  
11 License because it does not hold one.<sup>13</sup> Further, DPC did not submit the resumes of its key personnel  
12 with its bid.<sup>14</sup>

13         7. GIAA also received bids for IFB No. GIAA-C09-FY07 from Rex International, Inc.,  
14 Leighton Contractors, Inc., Maeda Pacific Corporation. Each of the other bidders submitted either  
15 their or their sub-contractor's C41 Licenses, and each submitted resumes of their key personnel.<sup>15</sup>

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17         8. On June 12, 2007, GIAA publicly opened all bids for IFB No. GIAA-C09-FY07 and  
18 evaluated said bids.<sup>16</sup>

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20 <sup>10</sup>Agency Report of Antonio B. Won Pat International Airport Authority, Guam (Hereafter "GIAA")  
21 Filed on August 16, 2007 (Hereafter "Agency Report"), Tab 4, Section I.A.2., Page 3.

22 <sup>11</sup>Background, DPC's Notice of Appeal, Page 2.

23 <sup>12</sup>*Id.*, Page 3.

24 <sup>13</sup>*Id.*, Grounds for Appeal, Page 5.

25 <sup>14</sup>*Id.*, Grounds for Appeal, Page 10.

26 <sup>15</sup>Agency Report, Tab 4, Background, Pages 3-4.

27 <sup>16</sup>*Id.*, Page 4.

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6 9. On June 18, 2007, GIAA rejected DPC's bid for IFB No. GIAA-C09-FY07 because GIAA  
7 determined DPC's bid was non-responsive and that DPC was a non-responsible bidder. Specifically,  
8 GIAA determined the following:

9 ***Dick Pacific Construction Co., Ltd. DbA: Bishman Continental Services:***

10 The firm's bid of \$5,391,942.00 is 22% more than the government estimate.  
11 The bidder submitted a list of projects consisting of two project in the period  
12 of 2004 and 2007 and failed to provide the names and resumes of their key  
13 personnel. The firm indicated "Eureka Construction" as its sub-contractor  
14 for the civil works, "Gozum Construction" for painting and "Urethane Services"  
15 for waterproofing. Submitted copies of the bidder's C17, C19, C20, C25, C40,  
16 C44, and C51 classifications. Hence, the bidder does not possess the required  
17 contractor's license for C41 (Reinforcing Steel) classification and there was no  
18 indication in their bid that this scope of work will be subcontracted. Therefore,  
19 the firm is not licensed to perform Reinforcing Steel work which is required for  
20 this project. These requirements were made part of the bid package and was  
21 clarified and emphasized during the pre-bid meeting. Also, the "Special Reminder  
22 to Prospective Bidders" form referenced such requirements and indicated that  
23 failure to submit such requirements will mean disqualification and rejection of  
24 the bid. As a result of the bidder's non-submittal of the required documents,  
25 Dick Pacific Construction Co., Ltd., is deemed to be a non-responsive and a  
26 non-responsible bidder. Therefore, the bid is rejected.<sup>17</sup>

18 10. On June 19, 2007, GIAA informed DPC via a Bid Status Notice of the same date from  
19 Jesse Q. Torres, Executive Manager of GIAA, that DPC's bid for IFB No. GIAA-C09-FY07 was  
20 rejected due to non-conformance with the specifications/bid requirements because DPC failed to  
21 comply with license requirements (C41 Classification) and because DPC failed to submit resumes  
22 of DPC's key personnel as required by Special Reminder to Prospective Bidders, item 7 and 13.<sup>18</sup>  
23 The Bid Status Notice also informed DPC that those who had reviewed the bids recommended Rex  
24 International, Inc., for award of the contract for IFB No. GIAA-C09-FY07 and that Rex International  
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26 <sup>17</sup>*Id.*, Page 4-5.

27 <sup>18</sup>Notice of Appeal, Exhibit A, Enclosure 1.

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6 Inc.'s bid was for \$5,768,588.40, which is approximately \$376,646.40 higher than DPC's bid.<sup>19</sup>

7 11. On June 20, 2007, DPC sent a letter to GIAA stating DPC's intent to protest the award  
8 of the contract for IFB No. GIAA-C09-FY07 to Rex International and DPC argued that GIAA should  
9 award DPC the contract because DPC claims it was the lowest bidder and because DPC's A and B  
10 Licenses are sufficient to install the steel reinforcing in the concrete structures required by IFB No.  
11 GIAA-C09-FY07.<sup>20</sup> DPC enclosed in its letter the resumes of its key personnel.<sup>21</sup>

12 12. On June 29, 2007, DPC filed its formal protest with GIAA demanding that GIAA rescind  
13 its rejection of DPC's bid for IFB No. GIAA-C09-FY07, arguing: (1) The Scope of IFB No. GIAA-  
14 C09-FY07 does not require a C41 Specialty Contractor's License; (2) The bid solicitation material  
15 and the procurement law contemplate material conformity to the solicitation and waiver of mere  
16 informalities when waiver is in the best interest of the owner; (3) Rejection of DPC's bid, which was  
17 significantly lower than the next lowest bidder, is contrary to the best interests of GIAA and is not  
18 in accordance with the procurement laws and regulations.<sup>22</sup>

19 13. On July 18, 2007, GIAA denied DPC's June 29, 2007, protest finding that DPC's  
20 arguments had no merit and that DPC's bid was non-responsive.<sup>23</sup>

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23 <sup>19</sup>*Id.*

24 <sup>20</sup>*Id.*, Exhibit A, Enclosure 2.

25 <sup>21</sup>*Id.*

26 <sup>22</sup>*Id.*, Exhibit A.

27 <sup>23</sup>*Id.*, Exhibit B.

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6 14. On July 19, 2007, DPC received GIAA's denial of DPC's protest.<sup>24</sup>

7 15. On August 2, 2007, fourteen (14) days after receiving GIAA's denial of its protest, DPC  
8 filed this appeal arguing that GIAA's rejection of DPC's protest and bid submission is contrary to  
9 law and the best interests of GIAA and to applicable procurement regulations and bids and DPC  
10 requests the Public Auditor to rescind GIAA's rejection of DPC's protest and bid submission and  
11 award the contract for IFB No. GIAA-C09-FY07 to DPC.<sup>25</sup>

12 16. On August 16, 2007, GIAA filed its Agency Report arguing that GIAA properly rejected  
13 DPC's bid because DPC failed to submit key documents identified in the IFB and GIAA requested  
14 the Public Auditor to dismiss DPC's appeal.<sup>26</sup>

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16 **III. ANALYSIS**

17 **A. GIAA properly rejected DPC's bid because it was non-responsive.**

18 DPC's bid was non-responsive to IFB No. GIAA-C09-FY07. In competitive sealed bidding,  
19 contracts shall be awarded to the lowest responsible and responsive bidder whose bid meets the  
20 requirements and criteria set forth in the invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R. Div.  
21 4, Chap. 3, §3109(n)(1). The term "responsive bidder" is defined as a bidder who has submitted a  
22 bid which conforms in all material respects to the invitation for bids. 5 G.C.A. §5201(g) and 2  
23 G.A.R. Div. 4, Chap. 3, §3109(n)(2). Here the plain language of IFB No. GIAA-C09-FY07 required

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25 <sup>24</sup>*Id.*, Page 4.

26 <sup>25</sup>*Id.*, Pages 13-14.

27 <sup>26</sup>Agency Report, Page12.  
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6 all bidders to submit with their bids their own or their subcontractor's C41 License and the resumes  
7 of their key personnel.<sup>27</sup> The C41 License and the resumes of key personnel were material  
8 requirements because their omission would result in the disqualification and rejection of the bid.<sup>28</sup>  
9 Therefore, based on the plain language of IFB No. GIAA-C09-FY07, the Hearing Officer  
10 recommends that the Public Auditor find that the C41 License and the resumes of key personnel  
11 were material requirements of IFB No. GIAA-C09-FY07.

12 There is no dispute that DPC did not submit a C41 License and the resumes of its key  
13 personnel with its bid for IFB No. GIAA-C09-FY07 on the June 12, 2007 bid submission deadline.  
14 DPC seeks to justify the omission of its C41 License from its bid by arguing that DPC does not  
15 require such a license because DPC's A and B Licenses authorize DPC to perform reinforcing steel  
16 work so long as that work does not exceed 35% of the total project and that DPC estimates that the  
17 reinforcing steel work required by the project is only 4.49% of the total project.<sup>29</sup> The Hearing  
18 Officer recommends that the Public Auditor find that this justification does not excuse DPC from  
19 IFB No. GIAA-C09-FY07's material requirement that all bidders submit their or their subcontractor's  
20 C41 Licenses. Nor should the Public Auditor find that this justification makes DPC a responsive  
21 bidder because without the C41 License, DPC's bid did not conform in all material respects to the  
22 invitation for bids as required by 5 G.C.A. §5201(g) and 2 G.A.R. Div. 4, Chap. 3, §3109(n)(2).  
23 Further, the Hearing Officer recommends that the Public Auditor find that the fact that DPC may

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25 <sup>27</sup>Special Reminder to Prospective Bidders, IFB No. GIAA-C09-FY07, Paragraphs 7 and 13.

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

27 <sup>29</sup>Notice of Appeal, Page 6.



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6 have been the lowest bidder does not entitle DPC to award of the contract because Guam  
7 Procurement Laws and Regulations require that a successful bidder be the lowest bidder and be a  
8 responsive bidder and DPC was not a responsive bidder. 5 G.C.A. §5211(g) and 2 G.A.R. Div. 4,  
9 Chap. 3, §3109(n)(1).

10 **B. GIAA's requirement for a C41 License in IFB No. GIAA-C09-FY07 was not arbitrary or**  
11 **a clear and prejudicial violation of applicable laws, regulations, or statutes.**

12 DPC also argues that IFB No. GIAA-C09-FY07's requirement for a C41 License is arbitrary  
13 and without legal cause or justification, and that such requirement is contrary to Guam's licensing  
14 and procurement laws.<sup>30</sup> This argument is untimely. The jurisdiction of the Public Auditor to review  
15 and decide matters is limited to matters that are properly submitted to her. 5 G.C.A. §5703.  
16 Generally, a procurement protest must be filed no later than fourteen (14) days after an aggrieved  
17 person knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R., Div.  
18 4, Chap. 9, §9101(c)(1). A person who believes that the actual invitation to bid was itself improper  
19 or illegal should seek to enjoin the bid process. A protestor who submits a bid pursuant to the IFB  
20 cannot claim after its bid has been submitted and the deadline for submission has passed that the  
21 invitation for bid was contrary to law. *L.P. Ganacias Enterprises dba Radiocom, vs. Guam*  
22 *International Airport Authority and Guam Cell Communications*, Civil Case No. CV1787-00,  
23 Decision and Order dated November 13, 2000, Page 19 (Superior Court of Guam).

24 The Hearing Officer recommends that the Public Auditor find that on May 17, 2007, DPC  
25 knew or should have known of IFB No. GIAA-C09-FY07's material requirement that each bidder

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27 <sup>30</sup>*Id.*, Page 8.  
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6 must submit its or its sub-contractor's C41 License with its bid because DPC representatives Willie  
7 Griva and Dads L. Pineda attended the pre-bid conference on behalf of DPC. DPC had until May  
8 31, 2007, to file a protest if it believed that IFB No. GIAA-C09-FY07's requirement for a C41  
9 License was arbitrary or illegal. Instead, DPC simply submitted its bid without a C41 License.  
10 Therefore, the Hearing Officers recommends that the Public Auditor find that she does not have the  
11 jurisdiction to review or decide this issue because it is not properly before the Public Auditor because  
12 it is untimely due to DPC's failure to file a protest on this issue by May 31, 2007.

13         Assuming *Aruguendo*, or in the alternative should it be later found that the Public Auditor  
14 has the jurisdiction to review this matter, the Public Auditor should not be convinced that IFB No.  
15 GIAA-C09-FY07's requirement for a C41 License is arbitrary and without legal cause or  
16 justification, or that such requirement is contrary to Guam's licensing and procurement laws.  
17 Generally a disappointed bidder can find relief from a government agency's procurement decision  
18 if it can show either the government's decision lacked a rational basis or there was a clear and  
19 prejudicial violation of applicable laws, regulations, or statutes. *Tumon Corporation vs. Guam*  
20 *Memorial Hospital Authority*, CV1420-01, Line 9, Page 9 of Decision and Order (Superior Court  
21 of Guam, November 28, 2001). This requires a two-part analysis.

22         The first part of this analysis is to determine whether there was a rational basis for GIAA's  
23 requirement of the C41 License in IFB No. GIAA-C09-FY07. The Public Auditor should not be  
24 convinced that GIAA's requirement for a C41 License in IFB No. GIAA-C09-FY07 was arbitrary  
25 or without legal cause or justification. GIAA asserts that its reason for requiring the C41 License  
26 is that the Guam Contractors Licensing Board (GCLB), which is the government agency responsible  
27 for supervising the licensing of contractors on Guam, had advised GIAA in 2005 that contractors  
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6 who perform specialty trades on a job must have the specialty classification for that trade.<sup>31</sup> The  
7 C41 License is the specialty classification for reinforcing steel contractors. 29 G.A.R., Chapter 1,  
8 Article 4, §1421(4). Further, it is undisputed that reinforcing steel is part of the services required  
9 by the IFB. The Hearing Officer recommends that the Public Auditor find that GIAA's compliance  
10 with GCLB's 2005 advisement by requiring the C41 License for the project's reinforcing steel work  
11 was reasonable and rational.

12 The second part of the analysis is to determine whether GIAA's requirement for a C41  
13 License in IFB No. GIAA-C09-FY07 was a clear and prejudicial violation of applicable laws,  
14 regulations, or statutes. DPC is correct in asserting that it can perform reinforcing steel work  
15 pursuant to its A & B Licenses so long as that work does not exceed 35% of the total project. 29  
16 G.A.R., Chap. 1, Article 4, §1421(3) and §1422 (d) and (e). However, these regulations, by  
17 themselves, do not expressly prohibit GIAA from requiring a C41 License for the project in IFB No.  
18 GIAA-C09-FY07.

19 The Public Auditor must also consider Guam procurement laws and regulations to complete  
20 this analysis. All parties involved in the negotiation, performance, or administration of Government  
21 of Guam Contracts must act in good faith. 5 G.C.A. §5003 and 2 G.A.R., Div. 4, Chap. 1, §1105.  
22 Also, one of the main purposes of Guam's procurement laws and regulations is to foster effective  
23 broad-based competition in the free enterprise system. 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4,  
24 Chap. 1, §1102(5). Thus, Guam procurement laws and regulations require that GIAA's requirement  
25 for a C41 License in IFB No. GIAA-C09-FY07 be made in good faith and not unduly restrict

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27 <sup>31</sup>Agency Report, Page 7.

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6 competition. The Hearing Officers recommends that the Public Auditor find that the C41 License  
7 requirement was made in good faith because, as set forth above, GIAA was following GCLB's 2005  
8 advice. The Hearing Officer recommends that the Public Auditor also find that the C41 License  
9 requirement did not unduly restrict competition because all the other bidders submitted their or their  
10 sub-contractor's C41 License in compliance with the provisions of IFB No. GIAA-C09-FY07.

11 Based on the foregoing, the Hearing Officer recommends that the Public Auditor find that  
12 GIAA's requirement for a C41 License in IFB No. GIAA-C09-FY07 was not arbitrary or a clear and  
13 prejudicial violation of applicable laws, regulations, or statutes.

14 **C. DPC's Omission of the Resumes of its Key Personnel was not a Minor Informality that**  
15 **could be waived by GIAA.**

16 GIAA could not waive DPC's omission of the resumes of DPC's key personnel from DPC's  
17 bid as a minor informality. A minor informality is a matter of form, rather than substance evident  
18 from the bid document, or insignificant mistakes that can be waived or corrected without prejudice  
19 to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is  
20 negligible. 2 G.A.R. Div. 4, Chap. 3, §3109(m)(4)(B). IFB No. GIAA-C09-FY07 specifically  
21 required the bidders to submit the resumes of their key personnel and stated that failure to do so will  
22 mean disqualification and rejection of the bid.<sup>32</sup> Thus, the Hearing Officer recommends that the  
23 Public Auditor find that DPC's failure to submit the resumes was not an insignificant mistake  
24 because the terms of IFB No. GIAA-C09-FY07 mandate the rejection and disqualification of bids  
25 without such resumes. Further, as the other bidders submitted the resumes of their key personnel

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27 <sup>32</sup>Special Reminder, IFB No. GIAA-C09-FY07.  
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6 with their bids in compliance with the mandates of IFB No. GIAA-C09-FY07, the Hearing Officer  
7 recommends that the Public Auditor find that the other bidders would be prejudiced if the  
8 requirement for the resumes were waived.

9 **IV. CONCLUSION**

10 Based on the foregoing, the Hearing recommends that the Public Auditor determine the  
11 following:

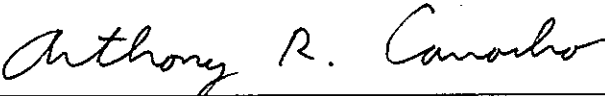
12 1. DPC was a not a responsive bidder for IFB No. GIAA-C09-FY07 because DPC's bid did  
13 not conform in all material respects to the invitation for bids due to DPC's failure to submit a C41  
14 License and the resumes of DPC's key personnel.

15 2. GIAA properly rejected DPC's bid for IFB No. GIAA-C09-FY07 because DPC was not  
16 a responsive bidder.

17 3. DPC's Appeal is hereby denied and GIAA's July 18, 2007, Decision denying DPC's June  
18 29, 2007 Protest is hereby sustained.

19 A copy of this Finding shall be provided to the parties and their respective attorneys, in  
20 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
21 [www.guamopa.org](http://www.guamopa.org).

22 **RESPECTFULLY SUBMITTED** this 18<sup>th</sup> day of January, 2008.

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25 ANTHONY R. CAMACHO, ESQ.  
26 Hearing Officer, Office of the Public Auditor  
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