



OFFICE OF THE PUBLIC AUDITOR
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF, GUAM EDUCATION FINANCING FOUNDATION, INC., Appellant	}	APPEAL NO: OPA-PA-09-007 DECISION AND ORDER RE PURCHASING AGENCY'S MOTION FOR PROTECTIVE ORDER
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To: **Purchasing Agency:**
Department of Public Works, Government of Guam
C/O Benjamin M. Abrams, Esq., Assistant Attorney General
Civil Division, Office of the Attorney General
287 West O'Brian Drive
Hagåtña, Guam 96910
Facsimile: (671) 472-2493

Appellant:
Guam Education Financing Foundation, Inc.
Mr. John R. Hand, President
3060 Peachtree Road, Suite 1700
Atlanta, GA 30305
Facsimile: (404) 504-2790

Interested Party:
International Bridge Corporation
C/O Joyce C.H. Tang, Esq.
Civille & Tang, PLLC
330 Hernan Cortez Ave., Suite 200
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THIS MATTER came before the Office of Public Accountability on October 23, 2009 pursuant to Purchasing Agency's Motion for a Protective Order. The Appellant appeared *Pro Se* through the appearances of its board member Mr. Philip J. Flores and its secretary Mr. Michael Alvarez. The Purchasing Agency was represented by Assistant Attorney General Benjamin M.

1 Abrams, Esq. Interested Party International Bridge Corporation (Hereafter Referred to as "IBC")
2 was represented by its Counsel of Record, Joyce C.H. Tang, Esq. After hearing the arguments of
3 the parties, the Public Auditor hereby issues her Decision and Order on said Motion for a
4 Protective Order.
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6 7 **BACKGROUND**

8 On June 9, 2008, John F. Kennedy High School (Hereafter referred to as "JFK") was
9 closed by a Government of Guam Health and Safety Task Force (Hereafter referred to as "Task
10 Force"). On November 21, 2008, the Government of Guam's Department of Public Works
11 (Hereafter referred to as "DPW") issued Request for Proposal for Project No. 700-5-1020-L-
12 TAM (Construction of the New John F. Kennedy High School - Finance, Demolition, Design,
13 Build, Maintain, and Leaseback (FDDBML) Part I and Part II (Hereafter referred to as "RFP").
14 In a letter dated January 16, 2009 which was signed by DPW Director Lawrence P. Perez on
15 March 4, 2009, DPW selected "IBC" as the best ranked qualified Offeror for the RFP. On or
16 about August 13, 2009 the Appellant lodged a protest with DPW. On September 8, 2009, DPW
17 denied the Appellant's protest. On September 18, 2009, the Appellant filed this appeal. On
18 October 5, 2009, the Purchasing Agency filed its Motion for Protective Order. On October 15,
19 2009, the Appellant filed its Opposition to the Purchasing Agency's Motion for a Protective
20 Order. On October 21, 2009 the Purchasing Agency filed its Reply.
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24 25 **DISCUSSION**

26 The Purchasing Agency moves the Public Auditor to seal all proposals submitted by the
27 Offerors in response to the RFP which are a part of the Procurement Record submitted by the
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1 Purchasing Agency. The Appellant argues that the information contained in the proposals is
2 what is at issue in their appeal and that the Appellant's ability to defend its position is
3 significantly limited without access to such information.¹ Generally, a procurement record is a
4 public record and any person may inspect and copy any portion of the procurement record. 5
6 G.C.A. §5249 and §5251, and 2 G.A.R., Div. 4, Chap. 3, §3129 and §3131. However, there are
7 several exceptions to this general rule that are necessary to preserve the integrity of the
8 procurement process. For requests for proposals, such as the RFP in this matter, proposals shall
9 not be opened publicly nor disclosed to unauthorized persons. 2 G.A.R., Div. 4, Chap. 3,
10 §3114(h)(1). A Registrar of Proposals must be established containing the name of each offeror,
11 and this Registrar shall not be opened to public inspection until after award of the contract. Id.
12 Proposals of offerors not awarded the contract shall not be opened to public inspection. Id.
13 Further, the Purchasing Agency is prohibited from disclosing any information contained in any
14 of the proposals until after an award of the contract is made and only the proposal of the offeror
15 awarded the contract is opened to public inspection unless otherwise required by the contract. 2
16 G.A.R., Div. 4, Chap. 3, §3114(i)(2). Thus, the Public Auditor finds that there can be no public
17 inspection of the proposals in this matter until after an award has been made and only the
18 proposal of the offeror awarded the contract can be inspected by the public.
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22 The Public Auditor must now determine whether an award has been made. Generally,
23 the request for proposal method of solicitation contains three phases which are the proposal
24 stage, the price solicitation, negotiation and agreement stage, and the award stage. *TRC*
25 *Environmental Corporation v. Office of the Public Auditor*, SP160-07, page 7, line 24, Decision
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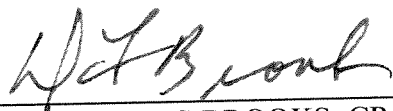
27 ¹ The Appellant's Opposition to Motion for Protective Order dated October 15,
28 2009, page 3.

1 and Order dated November 24, 2008 (Superior Court of Guam). The purchasing agency and the
2 best qualified offeror can only go from the price solicitation, negotiation, and agreement stage to
3 the award stage if compensation, determined to be reasonable, contract requirements, and
4 contract documents can be agreed upon. 5 G.C.A. §5216(e) and 2 G.A.R., Div. 4, Chap. 3,
5 §3114(1)(3). Here, there is no signed contract between DPW and IBC concerning the RFP. No
6 award was made in a request for proposal where the purchasing agency only gave notice that it
7 had selected the best qualified offeror and that negotiations between the best qualified offeror
8 and the purchasing agency regarding the terms and conditions of the contract were not complete
9 at the time of the protest. *Guam Imaging Consultants, Inc., and RADS v. Guam Memorial*
10 *Hospital Authority and Guam Radiology Consultant's, Inc.*, 2004 Guam 15, ¶130 (Superior Court
11 of Guam). Further, receipt of a price offer in a request for proposals does not indicate that an
12 agreement has been reached, nor that negotiations on such offer have begun. *TRC*
13 *Environmental Corporation v. Office of the Public Auditor*, SP160-07, page 8, line 25, Decision
14 and Order dated November 24, 2008 (Superior Court of Guam). Thus, without an executed
15 contract between the Purchasing Agency and IBC, the Public Auditor finds that no award of the
16 contract has been made and that the proposals of all the Offerors which are part of the
17 procurement record submitted by the Purchasing Agency may not be open for public inspection
18 at this time. Additionally, the Public Auditor finds that not disclosing the proposals at this time
19 is necessary to preserve the integrity of the RFP process because, if the Purchasing Agency and
20 IBC are unable to agree on contract terms, then the Purchasing Agency will have to begin
21 negotiations with the next best qualified Offeror and the other Offerors will have an unfair
22 advantage if they know the contents of each others' proposals.
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1 **CONCLUSION**

2 Based on the foregoing, the Purchasing Agency's Motion for a Protective Order is hereby
3 GRANTED. The proposals of the offerors submitted in response to the RFP are hereby sealed
4 and are not available for public inspection or disclosure to the Appellant, Interested Parties, or
5 the other Offerors. Further, any documents in the procurement record that contain any
6 information from said proposals shall have such information redacted.
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9 **SO ORDERED** this 16th day of November, 2009 by:

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13 _____
14 DORIS FLORES BROOKS, CPA, CGFM
15 Public Auditor
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OFFICE OF THE PUBLIC AUDITOR

Fax

To: Mr. Benjamin M. Abrams, Assistant AG;
Mr. John R. Hand, Guam Education
Financing Foundation, Inc. / Appellant;
Joyce Tang, Civile and Tang, Interested
Party (Attorney for IBC)

From: Doris Flores Brooks, Public Auditor
OPA Procurement Appeals

Agency: Office of the Attorney General; Guam
Education Financing Foundation,
Inc./Appellant; Civile and Tang

Pages: 6 (Including cover)

CC: All Media

Date: Monday, November 16, 2009

Fax: 472-2493 / (404) 504-2790 / 477-2511

Phone: 475-0390 x 219 (Anne) x 210 (Lou)

Re: OPA-PA-09-007: Decision and Order Re Purchasing Agency's Motion for Protective Order

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Anne Camacho, x 219, acamacho@guamopa.org

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