

1 following findings of fact:

2 1. On or about May 11, 2011, DOE issued the IFB.¹ The IFB was DOE's solicitation
3 for the purchase of laptop computer systems situated on mobile computer labs necessary to
4 support teaching and learning in public school classrooms and to purchase laptops for other
5 programs and purposes.²

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7 2. The IFB contract is to be funded using monies from the 2009 American Recovery and
8 Reinvestment Act (Hereafter referred to as "ARRA") pursuant to U.S. Department of Education
9 Grant Award S394A090055/CFDA#84.394A.³

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11 3. The IFB required, in relevant part, that the successful bidder will be required to
12 furnish a performance bond on either a Government Standard Form PB-1, standby irrevocable
13 Letter of Credit or Certified Check or Cashier's Check payable to the Treasurer of Guam issued
14 by any of the local Banks or Bonding Institutions in the amount equal to one hundred percent
15 (100%) of the contract prices as security for the faithful performance and proper fulfillment of
16 the contract.⁴

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18 4. The IFB also required in relevant part, that the bidders submit bids for: (a) A
19 minimum of thirteen (13) Mobile Labs each lab containing thirty (30) laptops for a minimum
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23 ¹ Paragraph 1.1, IFB Timeline, page 2, IFB, Exhibit 2, Procurement Record
filed on June 3, 2011.

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25 ² Paragraph 2.1, Gateway to Success-Indefinite Quantity of Laptops and the
Purchase of Mobile Computer Labs, page 3, Id.

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27 ³ Paragraph 2.2.10. Requirements for all Solicitations funded by ARRA, page
11, Id.

28 ⁴ Paragraph 2.5.4.3., Performance Bond Requirement, page 16, Id.

1 total of three-hundred-ninety (390) laptops;⁵ (b) One-thousand-seven-hundred-thirty-five
2 (1,735) Teacher Laptops;⁶

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4 5. Bid opening was originally scheduled for June 6, 2011.⁷ However, the IFB was
5 amended and bid opening was rescheduled to June 27, 2011.⁸

6 6. On May 27, 2011, STG filed a protest with the Public Auditor, pursuant to 5 G.C.A.
7 §5425A, alleging that paragraph 2.5.4.3 of the IFB violates 5 G.C.A. §5212(g) because it
8 requires a performance bond in the amount of one-hundred-percent (100%) of the contract price.⁹
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10 11 **III. ANALYSIS**

12 The Public Auditor has the jurisdiction to hear STG's Protest. Persons aggrieved in
13 connection with DOE contract awards or solicitations involving ARRA funds, in whole or in
14 part, shall submit their protests to the Public Auditor. 5 G.C.A. §5425A(a). Further, if the
15 protest is not resolved by mutual agreement, the Public Auditor shall issue a decision, in writing
16 no more than ten (10) working days of receipt of the protest. Id. Here, STG's protest was filed
17 with the Office of Public Accountability on May 27, 2011. The Public Auditor finds, as set
18 forth above, that the IFB is based in whole or in part on ARRA funds. Further, the parties were
19 not able to resolve the protest by mutual agreement as will be described below. Thus, the Public
20 Auditor must issue a decision to resolve STG's Protest no later than ten (10) working days after
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23 ⁵ Paragraph 2.1.2. Purchase Description, Item A, page 4, Id.

24 ⁶ Id, Item B, page 5.

25 ⁷ Paragraph 1.1. Invitation for Bid Timeline, page 2, Id.

26 ⁸ Statement made by Rebecca A. Perez, Esq., Attorney for DOE, Hearing Re
27 Protest, June 9, 2011.

28 ⁹ STG Protest, filed on May 27, 2011.

1 May 27, 2011, which expires on June 13, 2011.

2 **A. The IFB Violates 5 G.C.A. §5212(g).**

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4 The IFB violates Guam Procurement Law. Generally, the bid security that shall be held
5 until complete delivery of the supplies or services by the successful bidder is deemed to be
6 satisfactory to adequately protect the best interest of the government of Guam from default, and
7 thus, no separate performance bond shall be required of the successful bidder on a contract for
8 supplies and services. 5 G.C.A. §5212(g). Here, as stated above, the IFB required, in relevant
9 part, that the successful bidder will be required to furnish a performance bond in an amount
10 equal to one hundred percent (100%) of the contract price as security for the faithful
11 performance and proper fulfillment of the contract.¹⁰ The Public Auditor finds that this IFB
12 provision clearly violates Guam's Procurement Law because it requires a separate performance
13 bond in addition to the IFB's required bid security.
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16 DOE's Procurement Regulations concerning performance bonds should not be followed
17 to the extent they conflict with Guam's Procurement Law. Where DOE's Superintendent
18 determines to require a performance bond, she shall determine that amount that will adequately
19 protect DOE. Chapter III, §3.9.3.4.2, DOE Procurement Regulations.¹¹ Further, DOE's
20 Superintendent can require a performance bond in the amount of one-hundred percent (100%) of
21 the contract price if the contract is in excess of twenty-five-thousand-dollars (\$25,000). Chapter
22 III, §3.2.5, and Chapter V, §5.3.1.1, DOE Procurement Regulations. Thus, pursuant to DOE's
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26 ¹⁰ Paragraph 2.5.4.3., Performance Bond Requirement, page 16, IFB, Exhibit 2,
27 Procurement Record filed on June 3, 2011.

28 ¹¹ Pursuant 5 G.C.A. §5130(a) and §5131, DOE is authorized to promulgate its
own Procurement Regulations.

1 procurement regulations, DOE can require a performance bond in the amount of one-hundred-
2 percent (100%) of the contract price separate and apart from any required bid security.

3 However, these regulations clearly conflict with 5 G.C.A. §5212(g)'s prohibition against a
4 separate performance bond. The Public Auditor must resolve this conflict to determine whether
5 Guam Procurement Law or DOE's Procurement Regulations control this issue. Whenever
6 Guam procurement law applies to an agency's procurement activities and such agency's
7 procurement regulations conflict with Guam procurement law, such agency's procurement
8 activities must satisfy the requirements of Guam's Procurement Law and not the conflicting
9 agency procurement regulation. *Guam Imaging Consultants, Inc., and RADS v. Guam Memorial*
10 *Hospital Authority*, 2004 Guam 15, ¶41 (Supreme Court of Guam). Thus, the Public Auditor
11 resolves this conflict by finding that 5 G.C.A. §5212(g) controls this issue and not DOE
12 Procurement Regulations to the extent they conflict with the aforementioned Procurement Law.
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16 **B. The Parties Proposed Mutual Agreement Violates Guam's Procurement Law.**

17 DOE and STG proposed to resolve the protest by amending the IFB. Specifically, DOE,
18 on June 8, 2011 issued IFB Amendment No. 2, removing IFB paragraph 2.5.4 in its entirety.¹²
19 The aforementioned paragraph included section 2.5.4.2. which included a bid guarantee
20 requirement stating that the bidders were required to submit a Bid Guarantee Bond or standby
21 irrevocable Letter of Credit or Certified Check in the same bid envelope to be held by the
22 Government pending award in the amount of fifteen-percent (15%) of the bidder's highest total
23 bid offer.¹³ However, Guam's Procurement Law mandates that bid security is required for all
24 competitive sealed bidding for the procurement of supplies or services when the total price is
25 estimated to exceed twenty-five-thousand-dollars (\$25,000). 5 G.C.A. §5212(a). As stated
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27 ¹² Submission of Proposed Resolution filed on June 8, 2011.

28 ¹³ Paragraph 2.5.4.2, Bid Guarantee Requirement, page 16, IFB, Exhibit 2, DOE Procurement Record filed on June 3, 2011.

1 above, DOE through the IFB is seeking to purchase at least: (a) A minimum of thirteen (13)
2 Mobile Labs each lab containing thirty (30) laptops for a minimum total of three-hundred-ninety
3 (390) laptops;¹⁴ and (b) One-thousand-seven-hundred-thirty-five (1,735) Teacher Laptops;¹⁵ The
4 Public Auditor finds that the reasonable estimated cost of these computers exceed the amount
5 twenty-five-thousand-dollars (\$25,000). Thus, the Public Auditor is unable to accept the
6 proposed resolution of the parties as the deletion of section 2.5.4.2 of the IFB violates the bid
7 security requirements mandated by 5 G.C.A. §5212(a).

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9 **C. DOE must amend the IFB to Comply with Guam Procurement Law.**

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11 DOE must amend the IFB to comply with Guam Procurement Law. The Public Auditor
12 May resolve a protest by amending the solicitation. 5 G.C.A. §5425A(a)(1). As stated above,
13 the IFB violates Guam Procurement because it required a performance bond separate from the
14 bid security and because the parties' attempted mutual agreement deleted the IFB's requirement
15 for bid security. The Public Auditor finds that DOE must amend the IFB by deleting the IFB's
16 requirement for a performance bond separate from the bid security, and by reinstating the IFB's
17 requirements for bid security in conformance with 5 G.C.A. §5212(a), (b), and (g).

18
19 **IV. CONCLUSION**

20 Based on the foregoing, the Public Auditor hereby determines the following:

21 1. Paragraph 2.5.4.3 IFB violates 5 G.C.A. §5212(g) because it requires a performance
22 bond in the amount of one-hundred-percent (100%) of the contract price separate from the bid
23 security.

24 2. The parties' proposed mutual agreement violates 5 G.C.A. §5212(a)and (b) because
25 it removes the required bid security from the IFB.

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28 ¹⁴ Paragraph 2.1.2. Purchase Description, Item A, page 4, Id.

¹⁵ Id, Item B, page 5.



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Re: **Protest No. OPA-PP-11-008 DECISION**
(filed pursuant to P. L. 31-12)

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