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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 10-18-18

TIME: 4:05  AM  PM BY: JM

FILE NO OPA-PA: 18-006

6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 IN THE APPEAL OF

10 Guam Cleaning Masters,

12 Appellant.

APPEAL NO.: OPA-PA-18-006

**GDOE'S REBUTTAL TO  
APPELLANT'S COMMENTS**

14 Comes now the Guam Department of Education (GDOE), by and through its Legal  
15 Counsel James L.G. Stake and files its Rebuttal to Guam Cleaning Masters' (Appellant's)  
16 Comments to GDOE's Agency Statement pursuant to Title 2 of the Guam Administrative Rules  
17 and Regulations (GAR) Division 4 Section 12104(c)(4) in the appeal of GDOE Invitation for  
18 Bid (IFB) 013-2018.

19 **I. IFB 013-2018 AND ITS AMENDMENTS ARE IN ACCORDANCE WITH  
20 GUAM PROCUREMENT LAWS, RULES AND REGULATIONS.**

21 As already stated in GDOE's Agency Statement, Guam Procurement Law, Rules, and  
22 Regulations dictate the form, content, and manner an IFB is conducted in for purchasing  
23 agencies (such as GDOE). GDOE's Agency Statement explained that IFB 013-2018 and all of

1 its amendments were in full compliance with all relevant procurement laws and regulations.  
2 *See* Agency Statement, GDOE pp. 0817-0819.

3 GDOE demonstrated in its Agency Statement that IFB 013-2018 complies with the  
4 relevant laws and regulations throughout the entirety of the procurement process. However,  
5 Appellant completely ignored all the laws applicable to an IFB, and the facts presented by  
6 GDOE. Rather than tackle the law and facts at hand, Appellant chose to repeat its same  
7 arguments based on false allegations unsupported anywhere in Guam Law. Appellant brisks by  
8 the procurement laws because their arguments are not supported. Therefore, Appellant's failure  
9 to address GDOE's Agency Statement and the laws and facts supporting that the IFB and its  
10 amendments are proper, demonstrates that Appellant concedes the IFB is in full compliance  
11 with Guam Procurement Law, Rules and Regulations.

12 **II. GDOE PROPERLY ISSUED ITS INTENT TO AWARD TO LUCKY**  
13 **PURSUANT TO GUAM PROCUREMENT LAWS, RULES AND**  
14 **REGULATIONS, AND THE SPECIFICATIONS IN IFB 013-2018.**

15 As stated in GDOE's Agency Statement, Guam Procurement Law, Rules and  
16 Regulations provide that the evaluation and award shall be based on the lowest, responsible  
17 bidder whose bid meets the requirements set forth in the IFB (responsiveness). 5 GCA §§  
18 5211(e) & (g). *See also* Agency Statement p. 0820. As previously discussed, pursuant to Guam  
19 Procurement Laws, Rules and Regulations, and the IFB, the intent to award was determined  
20 based on price, responsiveness, and finally responsibility. *Id.* In GDOE's Agency Statement,  
21 GDOE confirmed its compliance with every single requirement in the law, and confirmed such  
22 compliance with actual evidence and facts. *Id.* pp. 0820-0825.

23 Lucky is undeniably the lowest bidder for the Northern, Central, and Southern districts.  
24 *See* Evaluations of Proposals, GDOE pp. 0639-0640. After determining the lowest bidder

1 GDOE looked to responsiveness. Responsiveness requires the bidder conforms in all material  
2 respects to the IFB. 5 GCA §5201(g). As previously stated, responsiveness for the IFB  
3 required that bidders respond and include all necessary forms and affidavits. See Agency  
4 Statement, GDOE p. 0822. Again, all bidders were responsive for IFB 013-2018; this includes  
5 Lucky. *Id.*

6 Responsibility was the final factor favoring the intent to award to Lucky. As stated in  
7 the Agency Statement, Guam Procurement Law provides exactly how this is decided. 5 GCA  
8 §5201(f). See also 2 GAR Div. 4 §§ 1106(27) and 3116(b)(2)(A). Responsibility is **the**  
9 **capability** in all respects to perform fully the contract requirements, and the integrity and  
10 reliability which will assure good faith performance. *Id.* A prospective contractor is  
11 responsible if they have available the appropriate resources, materials, personnel, expertise,  
12 etc., **or the ability to obtain them**, necessary to indicate capability to meet all contractual  
13 requirements. *Id.* It has been held that, **a bidder's responsibility may be established by a**  
14 **sufficient showing that it possesses the ability to obtain the resources necessary to**  
15 **perform its contractual obligations.** *Browning Ferris Inc. v. State of Hawaii, Department of*  
16 *Transportation, PCH-2000-4 p. 11.* In this regard, **“the procuring agency's determination**  
17 **will be given wide discretion and will not be interfered with unless the determination is**  
18 **unreasonable arbitrary or capricious.”** *Id.*

19 As already stated in the Agency Statement, Guam Procurement law, rules and  
20 regulations are clear on this matter: (1) responsibility can be determined by a **bidder's**  
21 **apparent ability and capacity to perform the contract requirements** and (2) responsibility  
22 and capability to perform work are determined **at any time up to the award.** 2 GAR §§  
23 3101(1) and 3116(b)(2)(A)(i).

1 Based on the information provided, GDOE's award to Lucky complies with Guam  
2 Procurement laws, rules and regulations and properly determined Lucky's responsibility. *See*  
3 Agency Statement, GDOE pp. 0822-0825. These Guam Procurement laws, rules and  
4 regulations are **the only controlling factors for a purchasing agency to award**. Therefore,  
5 because Lucky was the lowest bidder for all three (3) districts, fully responsive, and fully  
6 responsible, GDOE rightly issued its intent to award to Lucky. However, Appellant completely  
7 ignores all the laws and facts presented, therefore conceding that GDOE properly issued its  
8 intent to award.

9 **III. APPELLANT'S FALSE ALLEGATIONS AND ASSERTIONS FAIL TO**  
10 **CITE ANY AUTHORITY AND DO NOT ADDRESS ANY OF GDOE'S**  
11 **RESPONSES BASED ON LAW AND FACTS.**

12 GDOE strongly contests all of Appellant's false allegations and arguments that are not  
13 supported by law. Appellant's Comments are unclear and alternate back and forth between  
14 unorganized arguments. Despite Appellant's lack of clarity and organization, the underlying  
15 problem with all of their arguments is the same: **Appellant fails to provide any legal**  
16 **authority to support any of their false allegations and erroneous positions**. Appellant's  
17 Comments show Appellant is choosing to blatantly ignore all of the actual procurement laws  
18 and facts presented in GDOE's Agency Statement.

19 **a. Appellant's arguments concerning amendments have no merit.**

20 Appellant repeats their same previous argument that there was an error in the  
21 amendments, in that Amendment 1 supposedly fails to disclose to other bidders that Advance  
22 Management made an inquiry. *See* Appellant's Comments p. 3. Appellant claims that  
23 questions that contain information should be provided to all potential bidders, to "increase  
24 public confidence in the procurement process per 2 GAR§3109(g)(4)." *Id.* p. 3-4. First,

1 Appellant erroneously cites 2 GAR Div. 4 §3109(g)(4), the regulation for pre-bid conferences,  
2 which has nothing to do with their claims. Second, Appellant fails to provide any applicable  
3 law that supports their claim that IFB amendments must include the names of those that have an  
4 inquiry.

5 Appellant repeats their other prior argument that the inquiry from Maids to Order  
6 (MTO) should have been included in the Amendments. As already stated in GDOE's Agency  
7 Statement, the question from MTO was an irrelevant error. GDOE p. 0243-0244. MTO  
8 mistakenly thought there was a pre-bid conference, but MTO was looking at IFB 015-2018 and  
9 not IFB 013-2018. Appellant again fails to provide any actual law to support their argument  
10 that this mistake should be included in an amendment. Appellant also fails to explain the  
11 relevance and purpose of this. GDOE responded to both these assertions the first time in its  
12 Agency Statement, however the Appellant does not address GDOE's response and repeats the  
13 exact same faulty argument without support. *See* Agency Statement, GDOE pp. 0818-0819.

14 Appellant contends that because of the changes made with Amendment 3 the IFB  
15 should have been rebid. *See* Appellant's Comments p. 9. Once again, GDOE is left  
16 guessing as to why rebidding is required. Appellant's argument appears to be an obviously  
17 desperate attempt to get the IFB thrown out so they can somehow leap frog into the winning  
18 position. Appellant does this without any legal support for their irrelevant argument. As stated  
19 above, GDOE acted in accordance with all Guam Procurement laws and regulations for  
20 Amendments. *See* Agency Statement, GDOE pp. 0817-0819. Title 2 GAR Div. 4 Section  
21 3115(d)(1)(B)(iii), states that prior to opening, a solicitation **may be cancelled in whole or in**  
22 **part when the Chief Procurement Officer or head of a purchasing agency determines** in  
23 writing that such action is in the territory's best interest for reasons including proposed  
24 amendments to the solicitation **would be of such magnitude that a new solicitation is**  
**desirable**. The law specifically gives the authority to the Chief Procurement Officer or head of

1 a purchasing agency, that they may cancel a solicitation if the amendment would be of such  
2 magnitude a new solicitation is desirable. The power is with the purchasing agency, not a  
3 losing bidder. Therefore, in accordance with Guam Procurement Regulations, GDOE properly  
4 determined that Amendment 3 and its content was not of such magnitude that a new solicitation  
5 was required, and thus the purchasing agency therefore did not have to rebid the solicitation.

6 **b. Appellant's arguments concerning responsiveness have no merit.**

7 As stated numerous times, GDOE required several forms and affidavits to be completed  
8 to confirm responsiveness, and then GDOE investigated and confirmed responsibility. Each  
9 and every step was required and performed in accordance with Procurement Laws and  
10 Regulations. Therefore, Appellant is wrong in claiming that GDOE should have excluded the  
11 most responsive and responsible bid(s) as factors in determining the award, because GDOE was  
12 required to consider those factors.

13 The IFB in its entirety lists all the requirements of bidders in order for them to be  
14 responsive. All necessary forms and affidavits were included in submissions and therefore it  
15 was determined that all bidders' were responsive. *See* Inter-Office Memorandum from GDOE  
16 Facilities Maintenance Manager, GDOE p. 0641. Therefore, Appellant is wrong in claiming  
17 that none of the criteria was met to demonstrate a responsive bidder.

18 Title 5 GCA Section 5212 Bid Security and Performance Bond Requirement for  
19 Contractors, states a bid security **shall** be required for all competitive sealed bidding for the  
20 procurement of supplies or services when the total price is estimated by the Chief Procurement  
21 Officer to exceed Twenty-Five Thousand Dollars (\$25,000.00). In other words, despite  
22 Appellant's incorrect claims that the Agency should not be looking at bid bonds, **it is required**  
23 **by Guam Law**. 5 GCA §5212. If Appellant had reviewed GDOE's Agency Statement,  
24 Appellant would have seen that responsiveness mandates bidders conform in all material

1 respects to the IFB<sup>1</sup>, and therefore section 3.1.16 of the IFB<sup>2</sup> the Bid Bond, is a material aspect  
2 that was necessary for a bidder to be responsive. Appellant's ridiculous assertion only further  
3 lends credit to the fact that the Appellant is unfamiliar with procurement laws and regulations,  
4 and that the Appellant disregarded GDOE's Agency Statement altogether.

5 **c. Appellant's arguments concerning responsibility have no merit.**

6 As explained numerous times, the evaluation factors for past performance are outright  
7 stated, "a satisfactory record of performance." 2 GAR Div. 4 §3116(b)(2)(A)(ii). This is the  
8 law. GDOE reviewed Lucky's documents and as such determined that their submission of past  
9 performance was responsible in accordance with Guam Procurement Law, Rules and  
10 Regulations. GDOE p. 0644. Therefore, Appellant is wrong to assert that there were no  
11 evaluation factors in the IFB to determine an offeror's past performance. *Id.* p. 5.

12 To be clear, **Guam Procurement laws, rules and regulations do not support the**  
13 **Appellant's position on financial responsibility.** 5 GCA §5201(f). *See also* 2 GAR Div. 4  
14 §§ 3101(1) & 3116(b)(2). GDOE complied with and applied all applicable Guam Procurement  
15 Laws, Rules and Regulations in its determination of Lucky's financial responsibility. *See*  
16 Agency Statement, GDOE pp. 0822-0825. Therefore, Appellant is wrong to assert that the  
17 GDOE procurement officer "should" have made a determination of Lucky's financial statement  
18 proving the borrower has the financial capacity to perform this project, and that GDOE "must"  
19 prove they (Lucky) have evidence that is verifiable. *See* Appellant's Comments p. 7. This is  
20 not supported by the law.

21 As already discussed, based on Guam Procurement Law, Rules and Regulations,  
22 financial capability can be determined by a bidder's apparent ability to obtain and capacity to

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23 <sup>1</sup> *See* Agency Statement, GDOE p. 0821. *See also* 5 GCA §5201(g)

24 <sup>2</sup> *See* Section 3.1.16 Bond Requirements, Performance, and Payment Guarantees, which states in relevant part,  
pursuant to 5 GCA §5212, "**A Bid Security is REQUIRED for this IFB.**" GDOE p. 0012. *See also* Bid Bond  
Form, GDOE p. 0020.

1 perform. 2 GAR §§3101(1) and 3116(b)(2)(A)(i). Again, based on Lucky's submission of  
2 their qualifications, list of past and ongoing contracts, their specific business implementation  
3 plans for the IFB, their financial status, balance sheets, and recent approval and line of credit,  
4 Lucky provided GDOE with sufficient information to confirm their financial responsibility in  
5 accordance with the law. GDOE pp. 0646-0664. Therefore, despite Appellant's questioning of  
6 Lucky's financial capability, GDOE in compliance with Guam Procurement Law in fact made a  
7 proper determination.

8 **d. Appellant's other arguments, including ex parte arguments should be  
9 excluded from consideration.**

9 As stated several times before, once the protest took place all actions are stayed by law.  
10 5 GCA §5425(g). This means Lucky's letter regarding a possible withdrawal because of a  
11 prolonged protest that would hurt the schoolchildren is not valid, irrelevant to the protest at  
12 hand, and the winning bid still stands. GDOE pp. 0084-0085. Furthermore, based on this law,  
13 Appellant's several assumptions as to why Lucky wrote the letter is irrelevant to the protest at  
14 hand.<sup>3</sup>

15 Ex parte submissions by Appellant are in direct violation of Guam Procurement Law. 2  
16 GAR Div. 4 §12104. On September 5, 2018, Guam Cleaning Masters President Alex Thomas  
17 presented to the Office of the Public Auditor (OPA) an ex parte twenty-eight (28) page  
18 document titled, "Supporting Explanation and Analysis for the Appeal re: Protest Letter  
19 Submitted to GDOE for IFB 013-2018." See GCM bate stamp pages GCM\_T118.1-001-028.  
20 This is the first time GDOE has been made aware of this one-sided document being submitted  
21 to the OPA. These supporting documents were required to have been filed with the original

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22 <sup>3</sup> See Lucky's Notice to Withdraw, GDOE pp. 0084-0085. Despite Appellant's attempt to insert their negative  
23 reasoning, Lucky states outright the intention to withdraw on September 4, 2018, was because of the dragged  
24 out prolonged protest.



1 appeal and served to GDOE **thirty-five (35) days ago**. Therefore, they violate the law and  
2 should be stricken from the record.

3 In conclusion, GDOE objects to all of Appellant's arguments, because IFB 013-2018  
4 has been conducted correctly pursuant to actual laws and facts. GDOE has properly issued its  
5 IFB and intent to award to Lucky in accordance with Guam Procurement Law, Rules and  
6 Regulations. Therefore, GDOE respectfully requests the OPA affirm GDOE's decision  
7 regarding the IFB and deny Appellant's appeal and protest.

8  
9 Dated this 18<sup>th</sup> day of October, 2018.

10 Respectfully submitted,

11 **GUAM DEPARTMENT OF EDUCATION**

12 By:   
13 **JAMES L.G. STAKE**  
*Legal Counsel*