



1 the February 21, 2012 hearing for INFRATECH's Appeal. Based on the aforementioned record  
2 in this matter, the Public Auditor makes the following findings of fact:  
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4 1. On or about July 11, 2011, DOE issued the IFBs which solicited bids for structural  
5 repairs and roof coating for DOE's Central A and B, and Southern School Districts.<sup>1</sup>

6 2. The IFBs stated in relevant part that:

7 a. The successful bidder will be responsible for project management, structural  
8 repairs, installation of roof coating, and insuring that the improvements are made according to  
9 the architectural and engineering plans attached to the IFBs.<sup>2</sup>

10 b. Bidders are presumed to have inspected the project site and to have read and  
11 be thoroughly familiar with the plans attached to the IFBs on DOE's Office of Supply  
12 Management webpage and that the failure or omission of any bidder to inspect the Project site, or  
13 examine any Project plans, instrument or document shall in no way relieve any bidder from any  
14 obligation with respect to their bid.<sup>3</sup>

15 c. The bidders would have to attend a mandatory Pre-Bid Conference on July 18,  
16 2011.<sup>4</sup>

17 d. Bidders may submit written questions concerning the IFB to the DOE no later  
18 than 5:00 p.m. on July 26, 2011 (For GDOE-IFB-037-2011), on July 27, 2011 (For GDOE-IFB-  
19 038-2011), and on July 28, 2011 (For GDOE-IFB-039-2011), and that questions after that time  
20 and date will not be considered nor will an answer to those questions be provided.<sup>5</sup>

21 e. That the following clause would be used as appropriate: "The contractor  
22 accepts the conditions at the construction site as they eventually may be found to exist and  
23 warrants and represents that the contract can and will be performed under such conditions, and

24 <sup>1</sup> Newspaper Publication dated July 11, 2011, Exhibit 13, DOE's Supplement to  
25 Submission of Procurement Record filed on February 8, 2012.

26 <sup>2</sup> Project Scope, Section 2.1.1., IFBs, Exhibit 14, DOE's Supplement to  
27 Submission of Procurement Record filed on February 8, 2012 (Note All IFBs  
28 contained the same language except the School District and the architectural  
and engineering plans attached to the IFBs for the building within the  
relevant school district the IFB was for).

<sup>3</sup> Project Site and Plans, Section 2.1.3, Id.

<sup>4</sup> Pre-Bid Conference/Site Visit, Section 2.3.1, Id.

<sup>5</sup> Written Questions, Section 2.3.2, Id.

1 that all materials, equipment, labor and other facilities required because of any unforeseen  
2 conditions (physical or otherwise) shall be wholly at the contractor's own cost and expense,  
3 anything in this contract notwithstanding."<sup>6</sup>

4 f. The DOE's Director, at any time, may issue a change order, ordering changes  
5 in the work within the scope of the contract, and changes in the time of performance of the  
6 contract that do not alter the scope of the contract.<sup>7</sup>

7 g. The successful bidder will be selected for award of contract based on the  
8 lowest most responsive and responsible bid following these evaluation factors:

- 9 (1) Competency of bidder and bidder's proposed subcontractors.  
10 (2) Price of overall performance and delivery of the construction services  
11 proposed.  
12 (3) Ability, capacity, and skill of the bidder to perform as required by the  
13 IFBs.  
14 (4) Ability capacity, and skill of the bidder to perform within the time  
15 required by the IFBs.  
16 (5) Character, integrity, reputation, judgment, experience, and efficiency  
17 of the bidder.  
18 (6) Quality of the bidder's performance on previous projects of similar  
19 size and scope to those outlined in the IFBs.  
20 (7) Sufficiency of the financial resources available to the bidder to  
21 perform or provide the goods or services required by the IFBs.<sup>8</sup>

22 h. The Deadline to submit bids in response to GDOE-IFB-037-2011 was 10:00  
23 a.m. on August 15, 2011.<sup>9</sup> The Deadline to submit bids in response to GDOE-IFB-038-2011 was  
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28 <sup>6</sup> Site Conditions Contractor's Responsibility, Section 4.3, Id.  
<sup>7</sup> Change Order Clause, Section 4.10, Id.

<sup>8</sup> Evaluation Factors for Award, Section 2.4.1., Id.

<sup>9</sup> Time and Date for Receipt of Bids, Section 2.2.3, Id.

1 August 16, 2011 at 10:00 a.m.<sup>10</sup> The Deadline to submit bids in response to GDOE-IFB-039-  
2 2011 was August 17, 2011 at 10:00 a.m.<sup>11</sup>

3 3. On July 13, 2011, DOE issued Amendment No. 1 to the IFBs changing the time of the  
4 mandatory Pre-Bid Conference from 11:00 a.m. (For GDOE-IFB-037-2011), 9:00 a.m. (For  
5 GDOE-IFB-038-2011), and 3:00 p.m. (For GDOE-IFB-039-2011) on July 18, 2011 to 2:00 p.m.  
6 on July 18, 2011.<sup>12</sup> INFRATECH acknowledged receipt of Amendment No. 1.<sup>13</sup>

7 4. On July 14, 2011, DOE issued Amendment No. 2 for the IFBs, which, in relevant part,  
8 amended the Project Scope by requiring the contractor to be responsible for: the removal of all  
9 debris and inoperable fixed assets from all roofs prior to structural repairs and roof coatings; the  
10 temporary, secured, on-site storage for inoperable fixed assets removed from the roofs, for up to  
11 thirty (30) calendar days; hauling such equipment off-site; and all disposal fees for the such  
12 equipment. The other sections of Amendment No. 2 concerned various amendments to IFB's  
13 timeline for DOE to respond to written questions (which remained five (5) business days), the  
14 competency of subcontractors, the delivery and performance schedule, bond requirements and  
15 performance guarantees, bid security requirements, surety bonds, and termination for default,  
16 nonperformance, or delay, damages for delay, and time extensions.<sup>14</sup>

17 5. INFRATECH did not acknowledge receipt of Amendment No. 2.<sup>15</sup>

18 6. That same day, DOE issued Amendment No. 3 to the IFBs, which replaced the IFBs'  
19 existing Bid Cost Form, with a Revised Bid Cost Form. Said form had blank spaces for the  
20 bidders to state their lump sum offers for Structural Repairs and Roof Repairs and Coatings for  
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22 <sup>10</sup> Invitation for Bid Timeline, Section 1.1, GDOE-IFB-038-2011, Exhibit 14,  
23 DOE's Supplement to Submission of Procurement Record, filed February 8, 2011  
in OPA-PA-11-020.

24 <sup>11</sup> Id., GDOE-IFB-039-2011, Exhibit 14, DOE's Supplement to Submission of  
Procurement Record, filed February 8, 2011 in OPA-PA-11-021.

25 <sup>12</sup> Amendment No. 1, dated July 13, 2011, IFB Amendments 1 Through 9, Exhibit  
21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id. DOE's  
26 Supplement to Submission of Procurement Record filed February 8, 2011 in OPA-  
PA-11-019, OPA-PA-11-020, and OPA-PA-11-021.

27 <sup>13</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.

28 <sup>14</sup> Amendment No. 2, dated July 14, 2011, IFB Amendments 1 Through 9, Exhibit 21  
(OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id.

<sup>15</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.

1 each school that was relevant to the School District the specific IFB applied to. Additionally, the  
2 Revised Bid Cost Form stated that Plans, drawings, and specifications will be the basis of all  
3 offers provided and that the bidders shall carefully review all plans and specifications of each  
4 respective school. Further the Revised Bid Cost Form, required bidders to breakdown their  
5 offers to support their Lump Sum Offers by stating their cost per square foot or linear foot for the  
6 categories of work, which included:

- 7 a. Roof Coating for Concrete.
- 8 b. Roof Coating for Metal.
- 9 c. Roof crack repair.
- 10 d. Ceiling crack repair.
- 11 e. Ceiling Spall Repair.
- 12 f. Beam to Roof/Ceiling crack repair.
- 13 g. Wall Crack Repair.<sup>16</sup>

14 7. INFRATECH did not acknowledge receipt of Amendment No. 5.<sup>17</sup>

15 8. The Pre-Bid Conference for the IFB's was held on July 18, 2011 as scheduled in the  
16 IFBs and Amendment No. 1. The potential bidders who attended the conference were advised to  
17 submit their questions, in writing, as per the IFB, and were given a project overview by DOE or  
18 its designees. Further, DOE advised the potential bidders of the site visits locations and times  
19 which would take place from July 19-26, 2011 at the following locations:

- 20 a. Central A Buildings: BP Carbullido Elementary School, Untalan Middle  
21 School, HB Price Elementary School, and George Washington High School.
- 22 b. Central B Buildings: Agana Heights Elementary School, C.L. Taitano  
23 Elementary School, Agueda Johnston Middle School, and Jose L.G. Rios Middle School.
- 24 c. Southern Buildings: Inarajan Middle School, Oceanview Middle School, J.P.  
25 Torres Alternative School, and H.S. Truman Elementary School.<sup>18</sup>

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28 <sup>16</sup> Amendment No. 3, dated July 14, 2011, IFB Amendments 1 Through 9, Exhibit  
21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id.

<sup>17</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.

1 9. Ravinda Gogineni represented INFRATECH at the Pre-Bid Conference.<sup>19</sup>

2 10. On August 5, 2011, INFRATECH sent DOE an e-mail requesting to postpone the bid  
3 due date at least two (2) to three (3) weeks because INFRATECH had been checking DOE's  
4 website regularly and did not see any amendments and clarifications, that they have questions  
5 concerning the project because the legends given in the sheets are not matching the abbreviations  
6 used in the drawings and that the drawings are confusing because they are not to scale. Further,  
7 INFRATECH stated that if they were to go and take measurements they need to be accompanied  
8 by a representative from DOE who is familiar with the room numbers and they must have access  
9 to every room to make sure that they are not missing any detail.<sup>20</sup>

10 11. On August 8, 2011, DOE issued Amendment No. 4 which extended the deadline to  
11 submit bids in response to GDOE-IFB-037-2011 from August 15, 2011 at 10:00 a.m. to  
12 September 21, 2011 at 10:00 a.m., and from August 16, 2011 at 10:00 a.m. to September 22,  
13 2011 at 10:00 a.m. for GDOE-IFB-038-2011, and from August 17, 2011 at 10:00 a.m. to  
14 September 23, 2011 for GDOE-IFB-039-2011.<sup>21</sup>

15 12. INFRATECH did not acknowledge receipt of Amendment No. 4.<sup>22</sup>

16 13. On August 8, 2011, INFRATECH sent DOE an e-mail stating that DOE did not  
17 respond to INFRATECH's prior e-mails and that INFRATECH was still awaiting DOE's bid  
18 amendments to be posted online and DOE's responses to INFRATECH's questions.<sup>23</sup>

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21 <sup>18</sup> Pre-Bid Conference Agenda, Exhibit 16 (OPA-PA-11-019) and Exhibit 15 (OPA-  
PA-11-020 & OPA-PA-11-021), Id.

22 <sup>19</sup> Pre-Bid Conference Attendees Sign In Sheet, Exhibit 17 (OPA-PA-11-019) and  
Exhibit 15 (OPA-PA-11-020 & OPA-PA-11-021), Id.

23 <sup>20</sup> E-mail from Ravindra B. Gogineni, Vice-President, INFRATECH International,  
LLC., to Marcus Pido, DOE Supply Management Administrator, dated August 5,  
2011, Attached to INFRATECH's Notice of Appeal filed on December 14, 2011.

24 <sup>21</sup> Amendment No. 4, dated August 8, 2011, IFB Amendments 1 Through 9, Exhibit  
21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), DOE's  
25 Supplement to Submission of Procurement Record in OPA-PA-11-019, OPA-PA-11-  
020, and OPA-PA-11-021, filed on February 8, 2012.

26 <sup>22</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.

27 <sup>23</sup> E-mail from Ravindra B. Gogineni, Vice President, INFRATECH International,  
28 LLC., to Marcus Pido, DOE Supply Management Administrator, dated August 8,  
2011, Bates Stamp No. GDOE00172, Exhibit 18 (OPA-PA-11-019), Bates Stamp No.  
GDOE00295, Exhibit 19 (OPA-PA-11-020), and Bates Stamp No. GDOE00316, Exhibit  
18 (OPA-PA-11-021), Id.

1 14. On September 13, 2011, DOE issued Amendment No. 5 extending the deadline to  
2 submit bids in response to the IFBs from September 21, 2011 to September 28, 2011 at 10:00  
3 a.m.(For GDOE-IFB-037-2011), from September 22, 2011 to September 29, 2011 at 10:00 a.m.  
4 (For GDOE-IFB-038-2011), and from September 23, 2011 to September 30, 2011 at 10:00 a.m.  
5 (For GDCO-IFB-039-2011).<sup>24</sup>

6 15. INFRATECH did not acknowledge receipt of Amendment No. 5.<sup>25</sup>

7 16. On September 16, 2011, DOE issued Amendment No. 6 to the IFBs, which were  
8 DOE's answers to written questions submitted by potential bidders.<sup>26</sup>

9 17. INFRATECH did not acknowledge receipt of Amendment No. 6.<sup>27</sup>

10 18. On September 20, 2011, DOE issued Amendment No. 7 to the IFBs wherein the  
11 DOE amended the IFBs' provisions by stating that the project shall be completed within one  
12 hundred sixty (160) calendar days, that the contractor would be paid based on a monthly  
13 payment application and percentage of work completed according to a Schedule of Values  
14 approved by DOE's project manager, and amending Appendix H of the IFBs with the Revised  
15 Bid Cost Form set forth in Amendment No. 3.<sup>28</sup>

16 19. INFRATECH did not acknowledge receipt of Amendment No. 7.<sup>29</sup>

17 20. On September 23, 2011, DOE issued Amendment No. 8, which extended the time to  
18 submit bids in response to the IFBs from September 28, 2011 to October 5, 2011 at 10:00 a.m.,  
19 for GDOE-IFB-037-2011, from September 29, 2011 to October 6, 2011 at 10:00 a.m. for GDOE-  
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24 <sup>24</sup> Amendment No. 5, dated September 13, 2011, IFB Amendments 1 Through 9,  
25 Exhibit 21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id.  
26 <sup>25</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
27 Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.  
28 <sup>26</sup> Amendment No. 6, dated September 16, 2011, IFB Amendments 1 Through 9,  
Exhibit 21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id.  
<sup>27</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.  
<sup>28</sup> Amendment No. 7, dated September 20, 2011, IFB Amendments 1 Through 9,  
Exhibit 21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id.  
<sup>29</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.

1 IFB-038-2011, from September 30, 2011 to October 7, 2011 at 10:00 a.m., for GDOE-IFB-039-  
2 2011.<sup>30</sup>

3 21. INFRATECH did not acknowledge receipt of Amendment No. 8.<sup>31</sup>

4 22. On September 27, 2011, INFRATECH sent an e-mail to DOE wherein INFRATECH  
5 requested that DOE move a wall painting requirement under force account, INFRATECH  
6 requested that DOE classify the repairs as a unit price lump sum and assign them under an  
7 Alternate Bid, keeping the Roof Coating as a Base Bid, and informing DOE that it did not  
8 respond to INFRATECH's August 5, 2011 request for clarifications.<sup>32</sup>

9 23. On September 28, 2011, DOE issued Amendment No. 9 to the IFBs, which amended  
10 the IFBs' bond requirements and performance guarantees, included a Labor and Material  
11 Payment Bond Form for the IFBs, detailed DOE's responses to potential bidder WILCO  
12 Strategic Partners DV, LLC's written questions, and amended the project's specifications by  
13 prohibiting the applicator from applying any material when environmental conditions will not  
14 permit a set before rain and requiring a minimum of five (5) years experience for Fluid-Applied  
15 Roofing Material Manufacturer Companies, Applicator Companies, Manufacturers, and that  
16 Applicators be approved and certified by Manufacturers. The Amendment also required the  
17 contractor to have a Pre-Roofing Conference prior to starting application of fluid-applied roofing  
18 systems, and to have a manufacturer's warranty for the entire roofing system, including flashings  
19 and accessories.<sup>33</sup>

20 24. On September 28, 2011, INFRATECH acknowledged receipt of Amendment No. 9  
21 and requested removal of Amendment No. 9's requirement that the Applicator Company have a  
22 minimum of five (5) years experience and be approved as an authorized applicator in writing by  
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25 <sup>30</sup> Amendment No. 8, dated September 23, 2011, IFB Amendments 1 Through 9,  
Exhibit 21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), Id.

26 <sup>31</sup> Amendments 1 through 9, Acknowledgement Roster, Exhibit 21 (OPA-PA-11-019),  
Exhibit 18 (OPA-PA-11-020), and Exhibit 17 (OPA-PA-11-021), Id.

27 <sup>32</sup> E-mail from Ravindra B. Gogineni, Vice-President, INFRATECH International  
LLC, to Marcus Pido, DOE Supply Management Administrator, dated September 27,  
2011, attached to INFRATECH's Notice of Appeal filed on December 14, 2011.

28 <sup>33</sup> Amendment No. 9, dated September 28, 2011, IFB Amendments 1 Through 9,  
Exhibit 21 (OPA-PA-11-019), Exhibit 17 (OPA-PA-11-020 & OPA-PA-11-021), DOE's  
Supplement to Submission of Procurement Record filed on February 8, 2012.



1 the manufacturer because the Manufacturer's warranty makes this requirement unnecessary.  
2 Further, INFRATECH requested that DOE provide the following information so that  
3 INFRATECH could submit the most economical and competitive bid package: (1) the length,  
4 width, and depth of the ceiling spalls, the pay item for the beam spalls, additional information to  
5 compute the volume of concrete necessary to address water ponding, the length, width, and depth  
6 of wall cracks to compute the volume of epoxy needed, more information on the unidentified  
7 cracks shown in the plans. Additionally, INFRATECH instructed DOE to treat its letter as a  
8 protest if DOE did not comply with INFRATECH's bid amendment and clarification requests.<sup>34</sup>

9 25. On or about September 30, 2011, DOE responded to INFRATECH's September 28,  
10 2011 letter by stating that the IFBs' amendments adequately address INFRATECH's questions  
11 and concerns, and DOE asserted that it is the contractor's responsibility to field verify the  
12 existing conditions. DOE also advised INFRATECH that their questions were submitted after  
13 the deadline for potential bidders to submit questions had passed.<sup>35</sup>

14 26. On October 4, 2011, INFRATECH filed a protest alleging that: (1) DOE failed to  
15 provide the information requested in INFRATECH's August 5, 2011 e-mail; (2) DOE was not  
16 adequately prepared for the mandatory site visits as the rooms that require the repairs were not  
17 shown; (3) Amendment No. 9 added Section 1.6.B to the IFBs requiring Applicator Companies  
18 specializing in performing the work to have a minimum of five (5) years experience and be  
19 approved as an authorized applicator in writing by the Manufacturer; (4) DOE identified a corner  
20 to corner paint requirement without describing the area to be painted after the deadline to submit  
21 questions expired; (5) The IFBs did not identify how DOE will choose the responsive and  
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26 <sup>34</sup> Letter from Ravindra B. Gogineni, Vice President, INFRATECH International  
27 LLC, to Marcus Pido, DOE Supply Management Administrator, dated September 28,  
2011, attached to INFRATECH's Notice of Appeal filed on December 14, 2011.

28 <sup>35</sup> Letter from Marcus Y. Pido, DOE Supply Management Administrator, to  
INFRATECH International, LLC., dated September 23, 2011 (NOTE: This date is a  
clerical error as DOE was responding to INFRATECH's September 28, 2011 letter  
and because INFRATECH received DOE's Letter on September 30, 2011), Id.

1 responsible bidder because the plans are inconsistent and an overwhelming amount of work is  
2 dependent upon the interpretation of each bidder.<sup>36</sup>

3 27. Fifty-Six (56) days after receiving INFRATECH's October 4, 2011 protest, DOE  
4 denied the protest because: (1) There is no merit to INFRATECH's allegation that DOE failed  
5 to respond to INFRATECH's August 5, 2011 request for additional information because all  
6 prospective bidders were advised that the mandatory site visits were not the only opportunities to  
7 visit the sites and DOE encouraged prospective bidders to return to each site to verify existing  
8 conditions, and that they could sign in and out at the schools' offices during the additional site  
9 visits and that school maintenance or janitorial staff could assist them with access to the areas  
10 that the prospective bidders wanted to visit; (2) There is no merit to INFRATECH's allegation  
11 that DOE was not prepared for the mandatory site visits because prospective bidders were  
12 advised that they could conduct additional inspections and the mandatory site visits were not  
13 intended to substitute each bidder's independent research; (3) There is no merit to  
14 INFRATECH's allegation that the added requirement for Applicator Companies to have five (5)  
15 years experience and be manufacturer authorized applicators because these requirements were  
16 standard industry practice; (4) There is no merit to INFRATECH's allegation that the IFBs  
17 were inadequate because the corner to corner paint requirement was identified after the deadline  
18 to submit questions had passed as the painting requirement for each site were contained in the  
19 IFBs, the amendment only advised prospective bidders that the requirement was to paint corner  
20 to corner where repairs were done, and there was ample time between the amendment and the  
21 deadline to submit bids for the prospective bidders to verify existing site conditions and calculate  
22 the areas where painting was required; and (5) There was no merit to INFRATECH's allegation  
23 that the IFBs did not identify how the responsive and responsible bidder would be chosen  
24 because this was set forth in Section 2.4.1 of the IFBs.<sup>37</sup>

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26 <sup>36</sup> Letter from Ravindra B. Gogineni, Vice President, INFRATECH International,  
27 LLC, to Marcus Y. Pido, DOE Supply Management Administrator, dated October 4,  
2011, Id.

28 <sup>37</sup> Letter from Marcus Y. Pido, DOE Supply Management Administrator, to  
Ravindra B. Gogineni, Vice President, INFRATECH International, LLC, dated  
November 30, 2011, Exhibit 10, DOE's Agency Report filed on December 29,  
2011.

1 28. Fourteen (14) days later, on December 14, 2011, INFRATECH filed this appeal.  
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### 4 III. ANALYSIS

5 Pursuant to 5 G.C.A. 5703, the Public Auditor shall review DOE's November 30, 2011  
6 Decision denying INFRATECH's October 4, 2011 protest *de novo*.  
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#### 8 **A. DOE's Motion to Dismiss Parts of INFRATECH's Appeal is GRANTED in part.**

9 As a preliminary matter, the Public Auditor must decide whether DOE's February 22,  
10 2011 motion to dismiss portions of INFRATECH's Appeal because they are not properly before  
11 the Public Auditor has merit. The DOE alleges that the only issue properly before the Public  
12 Auditor is whether DOE was properly prepared for site visit.<sup>38</sup> The Public Auditor's jurisdiction  
13 is limited to reviewing DOE's November 30, 2011 Decision denying INFRATECH's October 4,  
14 2011 Protest. 5 G.C.A. §5425(e). Therefore, if an issue on appeal was not raised in  
15 INFRATECH's October 4, 2011 protest or DOE's November 30, 2011 decision denying the  
16 protest, the issue is not properly before the Public Auditor because it is appearing for the first  
17 time on appeal and there is no decision from the DOE concerning such issue for the Public  
18 Auditor to review. INFRATECH's December 14, 2011 appeal alleged, in relevant part, that (1)  
19 the lump sum bids submitted by each bidder did not identify the total quantities of respective  
20 works that are needed to be done under the contract, that (2) the unit prices submitted by each  
21 bidder are not corresponding to their lump sum bids, that (3) DOE failed to give equal  
22 opportunity to all the prospective bidders, that (4) DOE failed to identify reasons for requiring  
23 separate unit prices as the bids are calling for a lump sum, and that (5) the unit prices submitted  
24 by the bidders are inconsistent given the fact that the scope of work for all the bids is similar.<sup>39</sup>  
25 The Public Auditor finds that these issues were not raised in INFRATECH's October 4, 2011  
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27 <sup>38</sup> DOE's Objection to Public Auditor's Jurisdiction at start of Opening  
28 Statements, Hearing Re INFRATECH's Appeal, February 21, 2012, and DOE's  
Continued Objection Public Auditor's Jurisdiction during DOE's Closing  
Statement, Hearing Re INFRATECH's Appeal, February 22, 2012.

<sup>39</sup> Page 2, INFRATECH's Untitled Statement of Grounds for Appeal attached to  
INFRATECH's Notice of Appeal filed on December 14, 2011.

1 protest or DOE's November 30, 2011 Decision denying said protest and appear for the first time  
2 in this appeal. Thus, these issues are not properly before the Public Auditor and the Public  
3 Auditor does not have the jurisdiction to hear them. DOE's aforementioned verbal motions are  
4 hereby GRANTED for these five (5) issues only.

5 The Public Auditor finds that the remaining issues in INFRATECH's appeal, whether  
6 DOE's requirement that the bidders verify the ceiling spalls, ceiling cracks, and beam cracks is  
7 practical, whether DOE was not prepared for the site visits, whether the IFB drawings contained  
8 errors, and whether the DOE failed to provide the representative's name for each school to  
9 verify questionable areas, are properly before the Public Auditor because they were raised in  
10 INFRATECH's October 4, 2011 protest and DOE's November 30, 2011 denial of said protest.

11  
12 **B. The IFBs' Requirement that the Bidders Verify Site Conditions is Proper.**

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14 INFRATECH's main issue with the IFBs is their requirement that the bidders verify the  
15 site conditions. Specifically, INFRATECH argues that verifying the ceiling spalls, ceiling  
16 cracks, and beam cracks is not practical because the bidder would incur unreasonable expenses  
17 doing so.<sup>40</sup> This project is a sequential design and construction project.<sup>41</sup> Generally, in a  
18 sequential design and construction project, comprehensive plans and specifications that are  
19 precise enough to allow prospective prime contractors to submit a competitive sealed bid should  
20 be prepared, Section 5.1.5.1., Chapter V, DOE Procurement Regulations. Here, the Public  
21 Auditor finds that the IFBs's project scope, specifications, and drawings are precise enough to  
22 allow prospective prime contractors to submit a competitive sealed bid. After reviewing the IFB,  
23 the Public Auditor finds that there are three (3) primary construction tasks required by the project  
24 scope which are generally stated as repair of cracks and spalls, roofing, and painting. Further,  
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27 <sup>40</sup> Untitled Statement of Grounds for Appeal, attached to Notice of Appeal  
filed on December 14, 2011.

28 <sup>41</sup> Paragraph 85, Page 3, End-User Review Memorandum For Invitation for Bid,  
Exhibit 26 (OPA-PA-11-019 & OPA-PA-11-020), and Exhibit 25 (OPA-PA-11-021),  
DOE's Supplement to Submission of Procurement Record, filed on February 8,  
2012.

1 the Public Auditor finds that the project scope's structural repairs to slabs, walls, columns,  
2 beams, ceilings, and roofs requires the repair of cracks, spalls, and joint separation in concrete,  
3 precast concrete, and masonry . Further, the IFBs' drawings clearly describe the location, type  
4 and extent of structural repairs to be done and the details provide information as to recommended  
5 methods for correction of the deficiencies. The drawings are specific as to locations, crack  
6 lengths, spall sizes, etc. The Public Auditor finds that by using the drawings and specifications  
7 along with verification by field inspections of the sites, prospective bidders should be able to  
8 develop a reasonable estimate of repair quantities and costs to develop their bids. As stated  
9 above, the IFB requires the bidders to verify and accept site conditions and makes them  
10 responsible for costs caused by unforeseen conditions. Generally, a requirement that the  
11 contractor accepts the conditions at the construction site as they may eventually be found to exist  
12 and that the contractor warrant and represent that the contract can and will be performed under  
13 such conditions and that all materials, equipment, labor, and other facilities required because of  
14 any unforeseen conditions shall be wholly at the contractor's cost and expense are authorized by  
15 DOE's Procurement Regulations. Section 5.4.6., Alternative B, Chapter 5, DOE Procurement  
16 Regulations. Further, such a clause ensures that unforeseen conditions do not eliminate the main  
17 advantage of the sequential design and construction contract which is accepting a fixed price for  
18 the project before construction has begun. Section 5.1.9.2, Chapter V, DOE Procurement  
19 Regulations. Although sequential design and construction projects solicited by the IFBs placed a  
20 heavy burden on the prospective bidders to develop their bid price, they were authorized by  
21 DOE's Procurement Regulations. The Public Auditor finds no merit in INFRATECH's  
22 allegations that verifying the ceiling spalls, ceiling cracks, and beam cracks is impractical  
23 because the bidder would incur unreasonable expenses doing so.

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27 **C. DOE's Site Visits were Adequate.**  
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1 INFRATECH alleges that DOE's site visits were inadequate because DOE was not  
2 prepared to show all the areas that needed repair.<sup>42</sup> Specifically, INFRATECH argued that the  
3 site visits only offered prospective bidders a minimal opportunity to view building roofs and the  
4 site inspections did not include the classroom areas that needed repair. However, this is not  
5 supported by the evidence presented in this matter. In addition to the site visits scheduled after  
6 the mandatory pre-bid conference, the prospective bidders who attended the pre-bid conference  
7 were advised that they could schedule additional site visits, including classroom inspections, by  
8 arranging them with the respective school's office.<sup>43</sup> INFRATECH could have arranged such  
9 visits to inspect any additional sites it desired, including classrooms. Additionally,  
10 INFRATECH argued that, such additional inspections would not be informative because the  
11 school officials at the sites were not familiar with the projects' scope of work or the repairs that  
12 were needed. However, as stated above, the IFB placed the burden of verifying site conditions  
13 on the prospective bidders and not DOE. Thus, the Public Auditor finds that the scheduled site  
14 visits and the opportunity for the prospective bidders to schedule additional site visits to include  
15 classrooms, gave the prospective bidders an adequate opportunity to verify site conditions.  
16

17 **D. There is No Evidence that the IFBs' Drawings were Erroneous.**

18 INFRATECH alleged that the IFBs' drawings contained errors, however, no evidence  
19 was presented to support this allegation. The IFBs' drawings were prepared by DOE's engineers  
20 and architects.<sup>44</sup> Further, the drawings identified areas where roof coatings would be applied and  
21 where known cracks would be repaired at the various project sites.<sup>45</sup> Further, if there was scale  
22 stated in the drawing, the scale and drawing were accurate if you printed the drawing to the size  
23 indicated by the scale.<sup>46</sup> The DOE also stated that the drawings showed sufficient detail and  
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26 <sup>42</sup> Page 2, Untitled Statement of Grounds for Appeal, Notice of Appeal filed on  
December 14, 2011.

27 <sup>43</sup> Testimony of Tracy Higuera, Sodexo Project Manager, and Marcus Y. Pido,  
Hearing Re INFRATECH's Appeal, February 21, 2012.

28 <sup>44</sup> Testimony of Tracy Higuera, Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

1 were accurate enough for the prospective bidders to determine quantities and the scope of work  
2 required to complete the project.<sup>47</sup> The Public Auditor has reviewed the drawings and they  
3 corroborate DOE's testamentary evidence. Each plan shown on the drawings indicates a scale  
4 (for example 1/8" = 1'-0"). Scales as appropriate are also shown for the details. It is reasonable  
5 to assume, based on these scales, that if they were printed to the scale indicated, a prospective  
6 bidder could make accurate estimates of the quantities and scope of work necessary to complete  
7 the projects. The Public Auditor finds that there is no merit to INFRATECH's arguments that  
8 the IFBs' drawings and plans were erroneous or confusing.

9  
10 **E. DOE Correctly Denied INFRATECH's August 5, 2011 Request for Clarification.**  
11

12 DOE correctly found that INFRATECH's August 5, 2011 Request for Clarification had  
13 no merit.<sup>48</sup> Here, as stated above, on August 5, 2011, INFRATECH requested to extend the bid  
14 submission deadline an additional two (2) to three (3) weeks and INFRATECH alleged that the  
15 drawings are confusing because they are not to scale, the legend in the sheets is not matching in  
16 the abbreviations used in the drawings, and that the DOE provide the representative's name for  
17 each school to verify questionable areas.<sup>49</sup> Further, INFRATECH states that the September 27,  
18 2011 request for clarification was a follow-up on its April 5, 2011 request for clarification.<sup>50</sup> The  
19 Public Auditor finds that with reasonable diligence, INFRATECH should have discovered these  
20 issues and submitted its questions concerning the issues raised in the September 27, 2011 prior to  
21 the September 15, 2011 deadline. Further, INFRATECH's August 5, 2011 request to extend the  
22 deadline to submit bids in response to the IFBs is moot as said deadline was extended to the first  
23 week of October, 2011 as set forth above. In addition, as discussed above, the Public Auditor  
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26 <sup>47</sup> Id.

27 <sup>48</sup> Page 2, DOE's Denial of INFRATECH's October 4, 2011 Protest, Exhibit 10,  
Agency Report filed on December 29, 2011.

28 <sup>49</sup> E-mail dated April 5, 2011, from Ravindra B. Gogineni, Vice President,  
INFRATECH International, LLC, to Marcus Y. Pido, DOE Supply Management  
Administrator, Attached to Notice of Appeal filed on December 14, 2011.

<sup>50</sup> Page 1, INFRATECH's October 4, 2011 Protest, attached to Notice of Appeal  
filed on December 14, 2011.

1 finds that the IFBs's project scope, specifications, and drawings are precise enough to allow  
2 prospective prime contractors to submit a competitive sealed bid. Evidence presented in this  
3 matter show that during the mandatory site visits, the prospective bidders were advised that they  
4 could schedule additional site visits, including classroom inspections, by arranging them with the  
5 respective school's office and that school maintenance or janitorial staff could assist them with  
6 access to the areas they wanted to visit.<sup>51</sup> The Public Auditor finds that there is no merit to  
7 INFRATECH's arguments that the DOE failed to provide the information requested in the email  
8 dated August 5, 2011.

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11 **F. DOE's Request for Attorney Fees are Denied.**

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13 DOE requests that the Public Auditor award DOE its costs and attorney fees.<sup>52</sup> The  
14 Public Auditor has the authority to assess reasonable costs, including reasonable attorney fees  
15 incurred by the government, against a protester upon her finding that the protest was made  
16 fraudulently, frivolously, or solely to disrupt the procurement process. 5 G.C.A. §5425(h)(2).  
17 However, no evidence was presented indicating that INFRATECH's October 4, 2011 protest was  
18 fraudulent, frivolous, or meant solely to disrupt the procurement process. Therefore, DOE's  
19 request for its costs and attorney's fees is hereby DENIED.

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23 **IV. CONCLUSION**

24 Based on the foregoing the Public Auditor hereby determines the following:  
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28 <sup>51</sup> Testimony of Tracy Higuera, Sodexo Project Manager, and Marcus Y. Pido, Hearing Re INFRATECH's Appeal, February 21, 2012.

<sup>52</sup> Line 10, Page 3, Agency Statement, Exhibit 11, Agency Report filed on December 29, 2011.



1           1. DOE's February 22, 2011 motion to dismiss portions of INFRATECH's Appeal  
2 because they are not properly before the Public Auditor is hereby GRANTED in part.

3           2. The Public Auditor finds no merit in INFRATECH's allegations that verifying the  
4 ceiling spalls, ceiling cracks, and beam cracks is impractical because the bidder would incur  
5 unreasonable expenses doing so.

6           3. The Public Auditor finds that the scheduled site visits and the opportunity for the  
7 prospective bidders to schedule additional site visits to include classrooms, gave the prospective  
8 bidders an adequate opportunity to verify site conditions to prepare their bids.

9           4. The Public Auditor finds that there is no merit to INFRATECH's arguments that the  
10 IFBs' drawings and plans were erroneous or confusing.

11           5. The Public Auditor finds that INFRATECH's August 5, 2011 request for clarification  
12 was moot or answered by DOE and the Public Auditor finds that INFRATECH's September 27,  
13 2011 follow-up requests for clarification were untimely.

14           6. There is no evidence that INFRATECH's October 4, 2011 protest was fraudulent,  
15 frivolous, or meant solely to disrupt the procurement process, and DOE's request that it be  
16 awarded its costs and attorney's fees pursuant to 5 G.C.A. §5425(h)(2) is hereby DENIED.

17           7. INFRATECH's Appeal is hereby DENIED.  
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2 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
3 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
4 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
5 Decision. 5 G.C.A. §5481(a).

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

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10 **DATED** this 29<sup>th</sup> day of March, 2012.

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DORIS FLORES BROOKS, CPA, CGFM  
17 PUBLIC AUDITOR  
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