

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

FEB 17 2010

TIME: 3:20

BY: R

FILE No. OPA-PA 09-12

1 Department of Education
2 Laura J. Mooney
3 Legal Counsel
4 P.O. Box DE
5 Hagåtña, Guam 96932
6 Tel: (671) 300-1537 • Fax: (671) 472-5003

PROCUREMENT APPEAL

6 In the Appeal of)
7 Z4 Corporation,) **Docket No. OPA-PA-09-012**
8) **APPELLEE DEPARTMENT OF**
9 Appellant.) **EDUCATION'S HEARING BRIEF**

10 Appellees, Department of Education (DOE) and General Services Agency (GSA) are
11 before the Office of Public Accountability, (OPA), on the procurement appeal of Appellant, Z4
12 Corporation (Z4) filed on November 12, 2009 as to the procurement process involved in the
13 gymnasium repair of Oceanview Middle School, Agat, Guam. The purpose of the project is to
14 provide the school with a gym for the benefit of the students, teachers, administrators and the
15 community.

16 Work includes but is not limited to demolition, earthwork and site
17 improvement. Work also included roof work, metal fabrication, sheet metal,
18 insulation, gypsum board ceilings, ceramic tile, acoustical ceilings, resilient
19 flooring, custom cabinets and fixtures, carpentry, glass windows, painting,
20 metal doors, wood doors, metal frames, door hardware, toilet partitions an
21 accessories, classroom equipment, electrical, ventilation, air conditioning and
22 plumbing complete and ready for use. (See GSA/DOE's Agency Report, No. 5,
23 page GP-1, Guam Public School System Office of Supply Management IFB No.
24 008-2009 (Re-Bid) Oceanview Middle School Gymnasium Repair, General
25 Provisions 1. Scope of Work)

On the 4th of June, 2009 the IFB-008-2009 (Re-Bid) was issued by the Guam Public
School System (GPSS) which changed names to DOE, in August of 2009. The Contracting

1 Officer for the procurement initially was the GPSS Supply Management Administrator, and
2 then on August 12, 2009, became the GSA's Chief Procurement Officer, when the
3 Superintendent of the DOE, delegated all of the DOE's procurement to the GSA. The GPSS
4 contracted with H. Mark Ruth, FAIA, Taniguchi Ruth Makio Architects (TRMA) on the
5 project for the design of the technical specification.

6 GPSS' procurement forms are utilized in the IFB No. 008-2009 (Re-Bid) and the
7 IFB No. 008-2009 (Re-Bid) included all documents whether attached or incorporated by
8 reference, utilized in soliciting the bid. (See DOE Procurement Regulations 1.9 (30)). The
9 work requested as set forth above, is "construction" as defined in DOE Procurement
10 Regulations 1.9(7) and (11). Construction procurements for the government are pursued by the
11 Department of Public Works (DPW) as opposed to the GSA; but because the DOE has
12 independent authorization to pursue its own supply and construction projects, and the history
13 recited above the GSA/DOE Chief Procurement Officer is the contract officer for the IFB No.
14 008-2009 (Re-Bid) a construction project through inheritance and delegation.

15
16 The OPA pursuant to 2 GAR Division 4, Procurement Regulation Section 12103 has
17 jurisdiction to review and determine de novo this construction procurement matter.

18
19 There is a complicated history of events and communication documents in the
20 procurement file before the OPA to review. The Appeal by Z4 Corporation in OPA-PA-
21 09-012 focuses primarily on events in August, September and October of 2009 in the
22 procurement process; what follows is a list of dates and documents involved in that focus:

23 GSA/DOE – Z4 Corporation

- 24 • 8-6-2009 Notice to Proceed Issued to Z4
25 • 8-28-2009 A Stay of Procurement Issued to Z4

- 10-9-2009 Revised Bid Status (dated 10-9-2009, but signed dated 10-12-2009)
- 10-9-2009 Letter to Z4 Explaining the Reason for the Revised Bid Status
- 10-16-2009 Notice of Stay of Procurement Bid Protest Z4 issued.

GSA/DOE – Eons Enterprise

- 9-9-2009 Request for Clarification of Eon’s bid submission
Attachments: 7-27-2009 Facilities Manager’s Memorandum to Administrator of Procurement and Supply; 7-16-2009 TRMA’s Bid Submittal Evaluation-catalog data for products the bidders propose
- 9-18-2009 Request for Additional Clarifications
Attachments: 9-16-2009 Facilities Manager’s note as to needing more clarification, especially items 1 & 2; 9-16-2009 TRMA’s A&E review; 9-11-2009 Eons Enterprise’s explanation of alternate bid material
- 9-22-2009 Eons Enterprise’s change of materials and further explanation
- 10-7-2009 (internal GSA/DOE memo Facilities Manager to Chief Procurement Officer, Concurrence “meets specification”; Specifically conditioned on requiring Eon’s Enterprise Corporation confirmation letters that all materials will comply with Tech Specs w/No additional cost as their price during Construction Stage of Project.
- 10-8-2009 Notice of Intent of Possible Award
- 10-16-2009 Notice of Stay of Procurement Bid Protest Z4

With regard to Z4’s Appeal; Appellees GSA/DOE position reiterates the procurement decisions of the Contracting Officer:

- GSA Chief Procurement Officer in keeping with her authority determined that Alternate Bid of Eons Enterprise, which was \$80,901.50 less than the Basic Bid of Z4’s was in the best interest of the Territory and Guam’s DOE and on 10-9-2009 issued a Revised Bid Status to Z4, nullifying and voiding the prior Notice to Proceed to Z4.
- The procurement process of a required Performance Bond submittal by Z4 and the physical delivery of a Purchase Order to Z4 were not in place, when a 8-6-2009 request for revaluation of bid award was received from Eons Enterprise, and the subsequent 8-28-2009 Notice of Appeal of Eons Enterprise (OPA-PA-09-006) was filed. On 9-14-2009, OPA-PA-09-006 was dismissed by Eons Enterprise, Attorney Daniel J. Berman noting: “Based on the representation of GSA/DOE that no award has been made of the above procurement contract and bidding process, we have decided to withdraw...as premature, effective immediately.

- GSA Chief Procurement Officer had permission to talk with Eon's in her capacity as Chief Procurement Officer (email to OPA for Permission to talk with Eons dated 9-6-2009).
- Z4's own-Catalogue Brochures and Literature Submitted in the bid as and as evaluated on 7-16-2009, TRMA's Oceanview Gymnasium Renovation Bid Submittal Evaluation- "was not acceptable- see proposed 11480 Scoreboard-Electro Mech-which was not acceptable. (same product proposed by Eon's Enterprise. The 7-27-2009 Facilities Manager's Memo to Administrator of Procurement of Supply with the 7-16-2009 TRMA comments attached; makes it clear on the catalogue or material brochures which contractors interned to use if awarded this project, neither Z4's or Eons Enterprises is sufficient for "construction submittal". Final construction submittal will be required once award is made.

In an IFB procurement the contract is to be awarded to the "the lowest responsible and responsive bidder" whose bid meets the requirements and criteria set forth in the Invitation to Bids. The Invitation for Bids shall set forth the requirements and criteria used to determine the lowest bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids. (DOE Regulations 3.9.14.1) "Responsive Bidder" is defined in DOE Regulation 3.9.14.2, as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

Both Z4 and Eons Enterprise were evaluated to be responsible, (see GPSS Procurement Record, Exhibit 3, 2 pages, 7-27-2009 Facilities Manager Memo to Supply Management Administrator that deferred to the contracting officers evaluation but contained information as to past performance history and other evaluation criteria set forth in the IFB, including technical evaluation of the Material/Brochures literature submitted by the Z4 and Eons Enterprise in their bids.

DOE/GSA's award to the lowest bidder, Eons Enterprise's Alternate Bid, in the amount of \$729,098.50 is challenged by the second lowest bidder Z4 Corporation, whose Basic Bid, was in the amount of \$810,000.00 questioning the Contracting Officer's determination of

1 responsiveness of the bid submittal to IFB. As previously stated in DOE/GSA's Motion to
2 Dismiss and Re-Bid, the procurement record in this matter has ambiguities and a lack of
3 clarity, as to some of the criteria in the IFB for determining responsiveness to the bid.

4 Since both Z4 and Eons Enterprise, provided the same literature and brochures, as to
5 the item, of the 11480 Scoreboard Electro-Mech. (product determined "unacceptable by
6 TRMA) See GPSS Procurement Record, Exhibit 3, 4 pages, 7-16-2009 TRMA; Z4's argument
7 appears to be "Eons Enterprise's, literature and brochures are more unacceptable than theirs.

8 DOE Regulation 3.9.14.3 makes it clear, that "the acceptable evaluation is not
9 conducted for the purpose of determining whether one bidder's item is superior to another, but
10 only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids.

11 Determinations of Responsiveness belong with the Contracting Officer. The record
12 makes it clear, that the Contracting Officer evaluated in keeping with the terms of the IFP,
13 whether Eons Enterprise's Alternate Bid, was explained as required by the terms of the IFP,
14 and if Eons Enterprise, submitted brochures and literature of catalogues of materials proposed
15 to be used. Although initially, the procurement record was not clear, a correction entered by
16 DOE Buyer clarified what had been submit as part of the bid, which was determined to be
17 acceptable and that Eons Enterprise was "Responsive".

18 Both Z4 and Eons Enterprise are either responsive or non-responsive with regard to the
19 brochures-literature of material in keeping with technical specification as clarified above, in
20 (Motion to Dismiss, positions previously stated).

21 Both Z4 and Eons Enterprise, brochures – literature of material were determined non-
22 acceptable as to technical specification and the issue(s) apparently deferred to "construction
23 meeting" after award.

1 The Contracting Officer determined that they were both responsive; but sought
2 additional clarification and submittals from Eons Enterprise as part of her resolution of
3 disputes process in OPA-PA-006, and correction of the procurement history record process.

4 Based on the preceding, in the event the OPA does not provide a dismissal of the within
5 action and permit DOE/GSA to Re-Bid the construction project for the gymnasium, for the
6 grounds set forth in the Motion to Dismiss; then DOE/GSA in the alternate request the OPA to
7 find the GSA/DOE properly awarded the IFB-008-2009 (Re-Bid) to the lowest responsible and
8 responsive bidder, Eons Enterprise.

9 Respectfully submitted this 17th day of February, 2010.

10 **APPELLEE DEPARTMENT OF EDUCATION**

11 

12 **By: LAURA J. MOONEY**
13 Counsel for Department of Education

Section

1.9. DEFINITIONS (GSA Section 1-106).

Terms used in these Regulations have the following meaning ascribed to them unless the context in which they are used requires a different meaning, or unless a different definition is prescribed for a particular chapter in the Regulations.

1. Architect-Engineer and Land Surveying Services - are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of Guam.
2. Blind Trust - means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or dispositions of, the property subject to the trust.
3. Business - means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity, established for profit or non-profit purposes.
4. Change Order - means a written order signed by the Director of Education or such officer's designee directing the contractor to make changes which are authorized by the changes clause of the contract. The changes clause of the contract authorizes the Director of Education or such officer's designee to make such order without the consent of the contractor.
5. Confidential Information - means any information which is available to an employee only because of the employee's status as an employee of the Department of Education and is not a matter of public knowledge nor available to the public on request.
6. Conspicuously - means written in such special or distinctive format, print or manner that a reasonable person against whom it is to operate ought to have noticed it.
7. Construction - means the process of building, altering, repairing, improving, or demolishing any structure or building of the Department of Education or other improvements of any kind to any real property of DOE. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property of DOE.

Section

8. Contract - means all types of agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or construction.
9. Contract Modification - means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity or other provisions of any contract, accomplished by mutual action of the parties to the contract.
10. Contractor - means any person having a contract with the Department of Education.
11. Construction - means the process of building, altering, repairing, improving, or demolishing any public structure or characteristic.
12. Cost-Reimbursement Contract - means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of the Guam Procurement Act, and a fee, if any.
13. Data - means recorded information, regardless of form or characteristic.
14. Department - means the Department of Education.
15. Designee - means a duly authorized representative of a person holding a related supervisory position.
16. Direct or Indirect Participation - means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or any other advisory capacity.
17. Director of Education - means the person holding the position created by Title 4 GCA 6206.1., and nominated by the Territorial Board of Education, appointed by the Governor, and confirmed by the Legislature.
18. DOE - means the Department of Education.
19. Emergency - means a condition posing an imminent threat to public health, welfare, or safety which could not have been foreseen through the use of reasonable and prudent management procedures, and which cannot be addressed by other procurement methods of source selection.

Section

26. Governmental Body - means any department, commission, council, board, bureau, committee, institution, agency, government corporation, authority or other establishment or official of the Executive, Legislative or Judicial branches of the Government of Guam.
27. Grant - means the furnishing by the Department of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services or construction. A contract resulting from such an award is not a grant but a procurement contract.
28. Gratuity - means a payment, loan, subscription, advance, deposit of money, service, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
29. Immediate Family - means a spouse, children, parents, brothers and sisters.
30. Invitation for Bids - means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
31. May - denotes the permissive.
32. Non-Expendable Supplies - means all tangible supplies having an original acquisition cost of over One Hundred Dollars (\$100) per unit and a probable useful life of more than one (1) year. (A Fixed Asset Code (FAC) must be provided on each order.)
33. Official Responsibility - means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct Department action.
34. Person - means any business, individual, union, committee, club, other organization or group of individuals.
35. Procurement - means buying, purchasing, renting, leasing or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

the head of a Purchasing Agency, as the case may be.

(g) In computing any period of *time* prescribed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, a Sunday, a legal holiday or when the Office of the Public Auditor is closed by order of the Governor, in which event a period extends until the end of the next day which is not a Saturday, a Sunday, a legal holiday or when the Office is closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, legal holidays and days that government offices are closed by order of the Governor shall be excluded in the computation.

12103. Jurisdiction of the Public Auditor; Exhaustion of Remedies.

(a) The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him. The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam. No prior determination shall be final or conclusive on the Public Auditor. The Public Auditor shall have the power to compel attendance and testimony of, and production of documents by, any employee of the government of Guam, including any employee of any autonomous agency, public corporation or board or commission. The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the Appellant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5. (Source: 5 GCA §5703)

(b) Effect of Judicial Proceedings. If an action concerning the procurement under Appeal has commenced in court, the Public Auditor shall not act on the Appeal except to notify the parties and decline the matter due to Judicial involvement. This Section shall not apply where a court requests the decision of the Public Auditor. Parties are required to notify and provide copies to the Public Auditor within 24 hours of any action in court concerning the procurement under Appeal.

Section

3.9.14.3. **PRODUCT ACCEPTABILITY (GSA Section 3-202.14.3).**

The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

1. Inspection or testing of a product prior to award for such characteristics as quality or workmanship;
2. Examination of such elements as appearance, finish, taste, or feel; or
3. Other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

3.9.14.4. **DETERMINATION OF LOWEST BIDDER (GSA Section 3-202.14.4).**

Following determination of product acceptability as set forth in Subsection 3.9.14.3 (Product Acceptability) of this Section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the Department in accordance with the evaluation criteria set forth in the Invitation for Bids.

Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation and cost and ownership of life cycle cost formulas. Refer to Subsections 3.9.14.5. (Local Procurement Preference) through 3.9.14.7. (Biodegradable, Reusable, Recyclable, or Recycled Products) for additional evaluation factors.

Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

1. Be reasonable estimates based upon information the Department has available concerning future use; and
2. Treat all bids equitably.

Section

3. Mistakes Where Intended Correct Bid Is Not Evident. A bidder may be permitted to withdraw a low bid if:
 - (a) A mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident; or
 - (b) The bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

3.9.13.5. MISTAKES DISCOVERED AFTER AWARD (GSA Section 3-202.13.5).

Mistakes shall not be corrected after award of the contract except where the Director of Education makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

3.9.13.6. DETERMINATION REQUIRED (GSA Section 3-202.13.6).

When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsections 3.9.13.4. (Mistakes Discovered After Opening but Before Award) and 3.9.13.5. (Mistakes Discovered After Award) of this Section, the Director of Education shall prepare a written determination showing that the relief was granted or denied in accordance with these Regulations.

3.9.14. BID EVALUATION AND AWARD (GSA Section 3-202.14).

3.9.14.1. GENERAL (GSA Section 3-202.14.1).

The contract is to be awarded "to the lowest responsible and responsive bidder" whose bid meets the requirements and criteria set forth in the Invitation for Bids. See Section 5211(g) (Competitive Sealed Bidding, Award) of the Guam Procurement Act. The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

3.9.14.2. RESPONSIBILITY AND RESPONSIVENESS (GSA Section 3-202.14.2).

Responsibility of prospective contractors is covered by Section 3.16. (Responsibility of Bidders and Offerors) of this Chapter. Responsiveness of bids is covered by Section 5201(g) (Definitions, Responsive Bidder) of the Guam Procurement Act, which defines "responsive bidder" as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.