

DEC 2 2011

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FILE NO. OPA-PA-11-017

1 **GUAM DEPARTMENT OF EDUCATION**
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8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **PROCUREMENT APPEAL**

10 IN THE APPEAL OF

11 APPEAL NO. OPA-PA-11-017

12 KIM BROS. CONSTRUCTION CORP.,

13 **REBUTTAL TO COMMENTS
14 ON AGENCY REPORT**

15 Appellant.

16 Comes now the Guam Department of Education (“GDOE”) by and through its counsel
17 and makes the following rebuttal to Appellant’s Comments to GDOE’s Agency Report.

18 In its comments, Appellant states, “[t]he Government can ‘cancel’ a solicitation only prior
19 to opening of bids, and then only in special circumstances. 2 GAR§3115(d)(1)(B).” (Appellant’s
20 Comments on Agency Report, p.2, ll. 6-7.) Appellant further states, “DOE’s Answer seems to
21 indicate that it may believe a ‘rejection of all bids’ under 2 GAR§3115(d)(2)(A) is the same thing
22 as a cancellation of a solicitation.” (Appellant’s Comments, p. 2, ll. 12-14.).

23 GDOE’s September 13, 2011 notice of the cancellation or rejection of the bid in this
24 matter is found at Exhibit 13 of GDOE’s Agency Report. This notice contains the heading
25 “Cancellation of Solicitation; Rejection of All Bids.” The bid that is the subject of this appeal
26 was a Multi-Step Bid, and the termination of the bid occurred after the opening and evaluation of
27 the technical and price offers but before an award was made. Therefore, 2 GAR §3115(d)(2)(A)
28 applies. §3115(d)(2)(A) states:

“After opening, but prior to award, all bids or proposals may be
rejected in whole or in part when the Chief Procurement Officer,
the Director of Public Works, or the head of a Purchasing Agency

1 determines in writing that such action is in the territory's best
2 interest ...”

3 As noted above, the heading of the September 13, 2011 notice from GDOE reads
4 “Cancellation of Solicitation, Rejection of All Bids.” Both of the terms “cancellation” and
5 “rejection” were used. Assuming the argument that the two words cannot be used
6 interchangeably, it still cannot be denied that both terms were used to describe the action made by
7 the notice. Use of the phrase “Rejection of All Bids” brings the notice squarely in compliance
8 with the requirements of §3115(d)(2)(A). The use of the phrase “Cancellation of Solicitation”,
9 though unnecessary, does not dilute the effect of the document as a notice that all bids were being
10 rejected for the reasons stated in the notice.

11 In the notice of September 13, 2011, GDOE's Supply Management Administrator advised
12 all bidders that the reason for the cancellation or rejection is “the extension of completion date
13 from December 2011 to September 2012 may produce significant variations in estimated costs for
14 the project.” Appellant argues “[i]t is common knowledge that the costs of things generally go up
15 not down over time. This is not different in the construction business. It strains credibility to
16 think that postponing a project a year down the road will render costs savings on this project.”
17 (Appellants Comments, p. 3, ll. 14-18.) Appellant's thinking on this matter is unfortunately too
18 narrow to accept that there are a wide variety of factors that can come into play when a deadline
19 for a construction project is extended by almost a year. For example, almost every item needed to
20 complete a construction project is imported onto our island. When pricing a project that has to be
21 completed in a short timeline, it is quite possible that a bidder would factor in the cost for air
22 freight, as opposed to ocean freight, in order to complete the project on time. If the deadline was
23 extended by a significant period, a bidder might be able to lower the cost for the project by using
24 ocean freight. Lower transport cost on a product may produce lower total costs on a project.
25 Additionally, the addition or deletion of available ocean freight or air freight companies over the
26 course of just a couple of months may have an impact on the cost of obtaining product necessary
27 for the project. Given these examples of changes that may occur when the timeline for a project

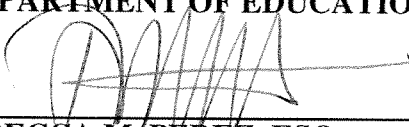
1 is significantly extended, it is quite reasonable that GDOE made the determination that the
2 extension for the completion date on this bid may produce significant variations, and possibly
3 decreases, in the estimated cost for the work that was solicited.

4 For the reasons above, the assertions contained in Appellant's Comments are without
5 merit and GDOE's actions during this procurement should be determined to be proper.

6 Dated this 22nd day of December, 2011.

7 Respectfully submitted,

8 **GUAM DEPARTMENT OF EDUCATION**

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10 By: _____
11 **REBECCA M. PEREZ, ESQ.**
12 *Legal Counsel*

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