

CIVILLE & TANG, PLLC
 330 HERNAN CORTEZ AVENUE, SUITE 200
 HAGÁTÑA, GUAM 96910
 TELEPHONE: (671) 472-8868/69
 FACSIMILE: (671) 477-2511

Attorneys for International Bridge Corporation

RECEIVED
 OFFICE OF THE PUBLIC AUDITOR
 PROCUREMENT APPEALS

DEC 10 2009

TIME: 4:45 PM
 BY: Rjm
 FILE No. OPA-PA 09-007

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF: GUAM EDUCATION FINANCING FOUNDATION, INC. Appellant.) DOCKET NO. OPA-PA 09-007))) INTERESTED PARTY) INTERNATIONAL BRIDGE) CORPORATION'S STATEMENT) RE REMEDIES)))
--	---

The Office of the Public Auditor has asked the parties to submit memoranda concerning remedies. International Bridge Corporation ("IBC") submits that the only appropriate remedies would be to uphold the Department of Public Work's denial of Guam Education Financing Foundation, Inc.'s ("GEFF") protest and allow the procurement to proceed, or to dismiss the Appeal in its entirety.

A. GEFF HAS FAILED TO MEET ITS BURDEN OF PROOF

GEFF's Protest filed August 13, 2009 alleged three bases for challenging the selection of IBC as the most qualified offeror: (1) That GEFF's proposal is cheaper than IBC's proposal (based on the July 29, 2009 Preliminary Official Statement for the SERIES 2009A Certificates

COPY

of Participation by \$11 million; (2) The Preliminary Official Statement¹ (“POS”) indicates that IBC will need \$69 million to build and finance 120,000 square feet of new space and renovate 24,000 square feet of existing space” and that GEF is providing a “total usable area of 236,000” at a lower price; and (3) That IBC did not meet the financing requirements of the RFP because “the RFP required all bidders to provide financing In fact, IBC’s proposal, as we understand did not even include a financing source or underwriting commitment.”

At the December 7th hearing on the merits of GEF’s Protest, GEF attempted to elicit testimony from Dr. Larry Kasperbauer about the financial woes of the GPSS. The OPA properly limited Dr. Kasperbauer’s testimony after GEF failed to to produce testimony relating to the Protest, when requested by Mr. Anthony Camacho, the Hearing Officer. GEF rested without presenting any evidence to support the allegations in its Protest, and has therefore failed to meet its burden of proof.

Ultimately however, the OPA is not charged with substituting its judgment for DPW’s purchasing decisions.

Notably, GEF has not, and indeed *cannot*, point to any specific procurement irregularities on the part of DPW in this procurement process. GEF has instead generated controversy and delayed procurement based entirely upon information it obtained from the POS (a document that has been deemed privilege and confidential), and incorrectly interpreted by GEF.

¹ GEF incorrectly refers to the Preliminary Official Statement as the “Official Statement” which was determined by the OPA to be privileged and confidential and therefore subject to the Protective Order. The Preliminary Official Statement indicates clearly on the front page margin that “the information contained herein are subject to completion or amendment.”

B. PROJECT COSTS.

GEFF first objects to the project costs as described in the POS. GEFF believes IBC's costs to be significantly higher than GEFF's proposed costs by \$11 million based on its proposal and the \$69 million reflected in the POS. As DPW explains in its Agency Report, and as is readily ascertainable by the OPA from the protected documents submitted for its consideration, IBC's proposal, which conformed in all aspects with the project requirements established in the RFP, was lower than GEFF's proposal. Further, price is not in and of itself determinative of this procurement evaluation. Rather, as the Agency Report describes, price is one of a number of factors analyzed in the procurement of professional services.

Although GEFF failed to present any evidence during its case in chief, and the OPA has determined that the POS is subject to the protective order, testimony was requested by the OPA to satisfy the OPA's concerns regarding pricing. Ms. Aulii Limtiaco, a financial consultant for GEDA, testified that the increase in cost was attributable to three factors: (1) the debt service requirement called for under 5 GCA § 58A referred to as the *Mana'afte* Act of 2008 (the "Act"); (2) the additional cost to capitalize interest for a period of 30 to 32 months as a result of the requirements of Section 58A109 of the Act; and (3) the additional construction cost, which includes cost of additional collateral equipment and construction requirements of the GPSS. It was clear from Ms. Aulii's testimony that all of three factors drove up the price for the Project and would have increased the price of the other offerors if these offerors had negotiated with DPW. This was also supported by Ms. Tina Garcia, a financial officer with GEDA, who worked with Ms. Limtiaco and others involved in the JFK Project.

IBC, with the highest ranked proposal, earned the right to negotiate with the government for the award of the contract, and these negotiations determined the final costs

associated with the services sought. As explained by Ms. Limtiaco and Ms. Garcia, the increase in cost was, in part, due to the subordination of Section 30 Revenue for the JFK Project bonds “to the existing lien securing the government of Guam’s Series 2001A Bonds.” Ms. Limtiaco confirmed that the term of the Series 2001A Bonds ends in 2012 and would be limited to \$9,825,000 per year (all of which is being applied to the 2001A Bonds), which means that the Section 30 Funds, as a secondary source of repayment after the lease rents, will not be available until 2012. Ms. Limtiaco also testified that in meetings with BBMR, it was clear that the Government of Guam would not have the money from its budget to cover the lease rents until 2012, when the Section 30 funds are available. This resulted in the increases of the Debt Service Reserve Fund and Interest Capitalization Reserve. These increases were requirements of the Act and would have applied to all offerors. To the extent that the negotiations resulted in an increased cost for the project, this was a result of the requirements of the Act and GPSS, GEF’s claim that IBC’s price was inflated is unsupported by any evidence in the record.

B. THE POS PROPERLY DESCRIBED THE PROJECT.

Again, GEF failed to present any evidence during its case in chief regarding the area of IBC’s design. GEF’s “price per square footage” argument is equally lacking in merit. As stated by Ms. Limtiaco, who has extensive background in bond financing for the Guam schools, the POS did not need to provide detailed information regarding the school. In fact, GEF’s 2006A Official Statement for the Ukkudu Schools, merely mentions the names of the five schools that would be built. No description regarding buildings, area or type of construction is mentioned in GEF’s 2006 Official Statement. See, GEF’s 2006A Official Statement, IBC Ex. 1 at 18. Ms. Limtiaco confirmed that she reviewed the POS and believed

that it was accurate in all respects. In particular, referring to the description of the Project, she believed the statement that the “Construction of the facility will consist of a series of two-story buildings comprised of fully reinforced concrete structural system, including 120,000 square feet of new construction and 24,000 square feet of renovation” is accurate. POS at 29. The other facilities, e.g., gymnasium, walkways, etc. were described in subsequent paragraphs, and although specific area calculations were not provided for the other facilities, they were part of the Project. There is nothing in the POS that represents the school designed by IBC is a total of 144,000 square feet.

The size and design criteria for the JFK School defined in the Technical Requirements (Attachment B to the RFP) were met by IBC. The information relating to the area of the facilities and the types of facilities to be provided were disclosed to the evaluators during the presentation of the Proposals to the evaluators. Mr. Leon Guerrero, the Deputy Director of DPW, confirmed that, at two of the three presentations to the evaluators during which he was present, the presenters did provide, among other things, the area and the facilities to be constructed. Mr. Leon Guerrero also confirmed that he requested and received a breakdown of the area of the facilities proposed by IBC which was memorialized in a document entitled “Negotiation Meeting” dated February 24, 2009, and in a letter addressed to Mr. Leon Guerrero from IBC dated February 25, 2009. Both documents are part of the IBC procurement records. Mr. Leon Guerrero testified that the difference in area between GEF’s design and IBC’s design was about 3,000 square feet, which he considered “nominal.”

GEFF’s allegations regarding IBC’s design is completely without merit and spurious.

C. FINANCING REQUIREMENTS OF THE RFP.

GEFF incorrectly states that “IBC’s original proposal required GovGuam to provide a AAA Guarantee in order for IBC to provide financing.” See GEFF’s Protest at 2. The OPA can easily verify the inaccuracy of this statement by reviewing IBC’s Proposal.

GEFF also alleges that IBC’s Proposal “did not even include a financing source or underwriting commitment.” The RFP did not require proposers to provide a financing source or underwriting commitment in their proposals. See, RFP (III Scope of Work for Part 1) at 2. GEFF claims that it provided some type of commitment to finance the project and should have been ranked higher than IBC. It is impossible to imagine any financing company, or underwriter, providing an unqualified and unconditional commitment to fund a \$50 million project on Guam, without any lender disclaimers or conditions. Any purported commitment presented by GEFF undoubtedly contains numerous escape clauses, which in effect is no commitment at all.

D. CONCLUSION.

GEFF has utterly failed to produce any evidence to support its claims; it has failed to meet its burden in this appeal. Its request for an independent assessment by the OPA regarding who the best offeror demonstrates that its real intention in this appeals process is not to protest perceived violations of the procurement process, but, rather to obtain a second bite at the procurement apple. GEFF is asking the OPA to provide a second opinion regarding the purchasing agency’s determination rather than ensure the integrity of the procurement process. The standard of review in this matter is not whether the OPA would have chosen IBC’s proposal, but rather whether DPW and evaluators had a rational basis for choosing IBC.

GEFF's objections involve apples-to-oranges comparisons between its costs and IBC's costs based upon incomplete information and general criticism of DPW's discretionary determinations. GEFF has simply not demonstrated a violation of procurement law. For these reasons, the OPA should deny GEFF's appeal.

Respectfully submitted this 10th day of December, 2009.

CIVILLE & TANG, PLLC

By: _____

JOYCE C.H. TANG

*Attorneys for International Bridge
Corporation*