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 PROCUREMENT APPEALS

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 FILE No. OPA-PA 09-007

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-007
)	
)	
)	
GUAM EDUCATION FINANCING)	PURCHASING AGENCY'S REPLY TO
FOUNDATION, INC.,)	APPELLANT'S RESPON TO
)	AGENCY REPORT
Appellant.)	
_____)	

The Purchasing Authority relies generally on the 2 October 2009 letter from GEDA to the OPA relating to Appellant's appeal and the Agency Report filed herein, in this reply.

The Decision and Order entered herein today, granting the Purchasing Agency's Motion for a Protective Order restricts Appellant from including in his Reply any sealed portion of the Procurement Record. For example, argument relating to IBC's cost of finance, amortization, expanded requirements by DOE, additional rent would all be improper as these matters are intrinsic to the procurement record and have yet to be finalized.

As for Appellant's assertion that *the Government of Guam should have no concern or input into these [IBC's Financing] figures*, GEDA has a statutory mandate under Guam law to participate, monitor and facilitate IBC's funding arrangements. Per the Guam Code Annotated Title 12, Chapter 50, Section 50103(k), GEDA acts as a Central Financial Manager and Consultant for the Government of Guam and those Agencies or Instrumentalities of the Government requiring financial guidance and assistance. Such technical assistance by GEDA shall include, but is not limited to obtaining funds through bond or other obligations, structuring such bond issuance's, preparation and dissemination of financial and investment information, including bond

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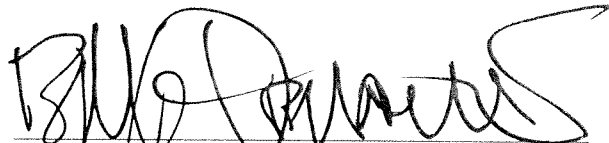
prospectuses, development of interest among investment bankers and bond brokers, maintenance of relationships with bond rating agencies and brokerage houses and, generally, acting as the centralized and exclusive financial planner and investment banker for all the Agencies and Instrumentalities of the Government of Guam. The government Agencies and Instrumentalities shall issue bonds and other obligations only by means of and through the agency of GEDA, and each such Agency or Instrumentality shall furnish GEDA with long-term estimates of financial needs so GEDA can coordinate a long-term plan for obtaining necessary funds for all such Agencies and Instrumentalities on a rational noncompetitive and efficient basis.

The 10 August 2009 letter to Senator Pangelinan from Deputy Attorney General Patrick Mason underscores GEDA's role in IBC's project finance and is marked Exhibit "A", attached hereto and made a part hereof.

Dated: 21 October 2009

OFFICE OF THE ATTORNEY GENERAL
Alicia G. Limtiaco, Attorney General

By:



BENJAMIN M. ABRAMS
Assistant Attorney General

Alicia G. Limtiaco
Attorney General

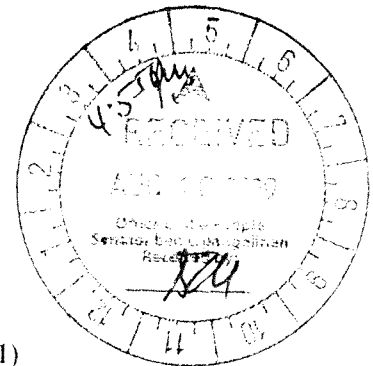


Phillip J. Tydingco
Chief Deputy Attorney General

Office of the Attorney General

August 10, 2009

The Honorable Vicente C. Pangelinan
Senator, Thirtieth Guam Legislature
324 W. Soledad Avenue, Suite 100
Hagatna, Guam 96910



Re: **New John F. Kennedy High School Project**
(Information and Guidance; AG Ref: LEG 09-0721)

Dear Senator Pangelinan:

Your letter dated July 30, 2009 asked us to answer two questions regarding the request for proposals (RFP) issued by the Department of Public Works (DPW) for the project entitled the "Construction of the New John F. Kennedy High School - Finance, Demolition, Design, Build, Maintain and Leaseback (FDDBML) Part I and Part II (Project No. 700-5-1020-L-TAM)" (the "Project"). The "Part I" referred to in the title concerns the financing component of the Project. "Part II" concerns the technical component, namely the construction specifications of the new high school. International Bridge Corporation (IBC), whose financing partner for the Project is Capital Project Finance Authority (CaPFA), was rated the best qualified offeror.

To answer your questions, we reviewed the RFP and other documents provided by DPW, the Guam Department of Education (DOE), and the Guam Economic Development Authority (GEDA); and we spoke with the Superintendent and legal counsel of DOE, the GEDA Administrator, GEDA's bond counsel, and GEDA staff members, Ms. Tina Garcia and Mr. Lester Carlson. We also communicated with Mr. Philip Maestri from the United States Department of Education.

1. If the government provides its own financing as the source to fund the construction and not use the IBC provided financing, can the government proceed with the award and the contract with IBC pursuant to the RFP?

Undisputedly, the RFP stated that the contractor was "to provide 100% financing for the facility, including demolition, design, construction, maintenance and other related costs to complete the projects." RFP page 3 of 28 (AD-2). The Project's scope as stated in the RFP was in line with the authorizing law, 5 GCA §§ 58A101- 58A113 (P.L. 29-114:2 (Oct. 10, 2008)). The RFP also made two points very clear: (1) that the general arrangement contemplated was for the

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EXHIBIT "A"

government to lease the facilities to the contractor who would finance, design and build a new high school which the contractor would then lease back to the government; and (2) that the government's only payment would be an annual base rental on the lease of the new high school back to the government. RFP page 2 and 3 of 28 (AD-2).

It is our assessment that the resulting arrangement with IBC is in line with the RFP's requirement that the contractor fully fund the construction, and that the government is not "providing its own financing" as we believe such term is used in your question to us. The process authorized by law as stated in the RFP, and as proposed by IBC, is a highly complex one. The government's recent visible activities reported in the news are but a small part of the Project's financing mechanism. Focusing on these activities without an understanding of the overall financing scheme can be misleading.

The arrangement with IBC calls for the government to make an annual payment of base rental on the lease from IBC back to the government. No other payments by the government are contemplated, nor does the arrangement call for the government to issue any bonds.

Instead, certificates of participation will be issued by IBC's financing partner, through its trustee, for sale to investors. Investors who purchase the certificates will be participating in the lease payments made by the government.

However, in order for the certificates to be attractive, the government of necessity must provide information to potential investors on the credit quality of the Project and the credit worthiness of the government, because it is the government who will be making the lease payments in which investors are going to be participating. The lease payments are an obligation of the government, and the object being sold under the certificates of participation. Hence, the government must be involved intimately in the marketing of the certificates. However, it is CaPFA, through its corporate arm CapFA Corporation, actually issuing and selling the certificates, and ultimately providing the funding for the Project, not the government.

GEDA who is assisting DPW with the financing component of the Project, essentially has two roles. First, it must coordinate all information that the government needs to provide in order for the certificates to be marketable. Second, GEDA must oversee the marketing and sale process so that the best price on the certificates can be obtained. The resulting price will reflect on how much the government will pay as annual base rent. Therefore, to absent the government from these roles is not in the best interest of the government. However, to engage in these roles does not by any means equate to the government "providing its own financing."

The government's roles were outlined to you in detail in a letter dated July 27, 2009 by GEDA Administrator, Tony Blaz. The letter notes that Speaker Judith Won Pat participated in the presentation made to the rating agency, Standard & Poor's, in San Francisco as part of the financing process.

Since IBC, through its financing partner, is funding the Project in full as contemplated by law and by the RFP, the government may proceed with the Project if the protest filed on August 5, 2009 is resolved in a manner which would authorize the government to proceed.

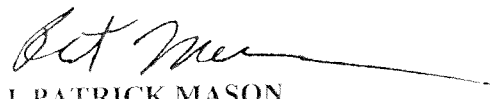
2. If a respondent's financing is not used as the source to fund the construction, then can the contract be awarded based only on the scoring of technical specifications as noted on page six of the RFP?

Since we have concluded that the contractor's financing was used, and not the government's, the second question is not applicable.

However, if your assumption in the second question were accurate, then the government may not award the construction portion of the RFP to IBC. If the solicitation had been put out only as a design-build project without the financing component, other construction and design companies on Guam may have been interested, as interest in government construction projects is always high. Also, if the financing component were to be removed in the present solicitation, the complexion of the Project would be changed so greatly that the government would not be ensuring the "fair and equitable treatment of all persons who deal with the procurement system of this Territory." 5 GCA 5001(b)(4).

Furthermore, the law authorizing the procurement for the Project states that the RFP "shall be issued within thirty (30) days of enactment of this Act" on October 10, 2008, and provides for a specific scheme for financing and building the Project by one offeror. DPW has followed the course of action mandated by law, and can do no less.

Very truly yours,


J. PATRICK MASON
Deputy Attorney General
Civil and Solicitors Division