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PROCUREMENT APPEALS

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Attorneys for Appellant:
EONS ENTERPRISES CORPORATION

7 IN THE SUPERIOR COURT OF GUAM

8 In the Matter of Appeal of) Docket Number: OPA-PA-10-003
9 EONS ENTERPRISES CORPORATION,)
10 Appellant.) COMMENTS ON AGENCY REPORT
11) DATED JUNE 10, 2010
12)
13)
14)

15 Appellant Eons Enterprises Corp. ("Eons") hereby submits its comments on the
16 Agency Report issued by Appellee Guam Community College ("GCC") in connection
17 with this case.

18 Pursuant to 2 GAR § 12105, the Agency Report shall include the following information:

19 (a) A copy of the protest.

20 **Eons Comment:**

21 The Agency Report is incorrect that no protest was made. On May 3, 2010, Eons
22 delivered a letter requesting that the Government re-evaluate the bid award. The notice
23 and letter of protest delivered May 3, 2010 clearly rejects the award to another party
24 other than Eons; identifies Eons as the protestor; refers to the specific procurement at
25 issue; was authored by a non-lawyer contractor; and asks for re-evaluation. Eons was
26 not aware of the formal requirements of protest; that is, no form of formal protest
27 document was available online.
28

1
2 (b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer
3 that is being considered for award or whose bid or offer is being protested, if any had
4 been submitted prior to the protest:

4 **Eons Comment:**

5 The Agency Report correctly references the Procurement Record previously
6 submitted by GCC to OPA on June 3, 2010, and therefore complies with this
7 requirement.

8 (c) A copy of the solicitation, including the specifications or portions thereof relevant to
9 the protest:

10 **Eons Comment:**

11 The Agency Report correctly references the Procurement Record previously
12 submitted by GCC to OPA on June 3, 2010, and therefore complies with this
13 requirement

14 (d) A copy of the abstract of bids or offers, or relevant or portions thereof to the protest:

15 **Eons Comment:**

16 The Agency Report correctly references the Procurement Record previously
17 submitted by GCC to OPA on June 3, 2010, and therefore complies with this
18 requirement

19 (e) Any other documents which are relevant to the protest' including the contract, if one
20 has been awarded, pertinent amendments, and plans and drawings:

21 **Eons Comment:**

22 The Agency Report correctly references the Procurement Record previously
23 submitted by GCC to OPA on June 3, 2010, and therefore complies with this
24 requirement

25 (f) The decision from which the Appeal is taken, if different than the decision
26 submitted by Appellant.
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1
2 **Eons Comment:**

3 The Agency Report is technically correct that no formal decision was issued by
4 the GCC. The letter sent by Mary A.Y. Okada, dated May 10, 2010, but mailed and post-
5 marked May 21, 2010, could be viewed as a decision on the Eons protest.

6 (g) A statement answering the allegation of the Appeal and setting forth finding,
7 actions, and recommendations in the matter together with any additional evidence or
8 information deemed necessary in determining the validity of the Appeal. The
9 statement shall be fully responsive to the allegations of the Appeal:

10 **Eons Comment:**

11 Appellant notes at the outset that, while Appellee addressed the issue of this
12 court's jurisdiction in the attachment to the Agency Report, Appellant will reserve
13 comments on that issue for its Opposition to Appellee's Motion to Dismiss regarding
14 that topic.

15 It is undisputed that Eons had the lowest bid for this project during the IFB
16 process, as this was disclosed in the bidding sheet. No dispute exists that Eons was also
17 deemed a responsible bidder for other Government of Guam contracts for construction
18 this year. The only issues are whether Eons was a responsive bidder and whether they
19 are a responsible bidder. Appellant Eons was the lowest responsive, responsible bidder
20 for this procurement.

21 Appellee correctly points out that 5 G.C.A. § 5201(g) defines a "responsive
22 bidder" as one who submits a bid that conforms in all material respects with the IFB,
23 but Appellee's emphasis on the word "all" is misplaced. Emphasis should have instead
24 been placed on the word "material". Eons complied in all material respects to the IFB.

25 Eons did submit a C68 license with their bid package. Appellee notes that in
26 Eons's bid package, "Eons has a C68 (epoxy injection) license but does not have a C68
27 (typhoon shutters) license." The notice and published invitation to bid for the project
28 specified that it was open to all contractors.

 No specific request was made in the invitation for any other specialty contractor
license. Eons is a licensed general contractor and is licensed in over 11 contractor
specialties. GCC knew or should have known that these licenses complied with the
requirements for this contract.

 Notably, a pre-bidding conference was never held in this IFB, contrary to usual
custom and practice in prior bidding processes. Eons submits that the lack of a C68

1 (typhoon shutters) license is not a material breach of the IFB requirements. This is
2 especially true given the ease with which Eons was able to immediately obtain such a
3 license after it was brought to their attention. See Attached Exhibit "A", C68 typhoon
4 shutters license issued to Eons.

5 According to paragraph 23 of the bid procurement package, GCC is able to waive
6 any minor irregularity in the bids received. Under paragraph 17 of the package, there
7 are 8 factors which should guide the Chief Procurement Officer in determining the
8 lowest responsible offer. A non-material omission, a small part of 1 of these factors, is
9 not enough to deny Eons's bid, given that it was the lowest bid, and that all material
10 requirements were met. An agency can waive deficiencies if the omission or
11 irregularity is not significant. See MCM Construction Inc. v. City and County of San
12 Francisco, 65 Cal.App.4th 359 (1998).

13 With regards to whether Eons is a responsible bidder, Appellee quotes 2 G.A.R. §
14 3116(b)(2), which lists standards of responsibility. Appellee argues that by failing to
15 provide the required business and contractors licenses, they violated part (iv) and part
16 (v) of this section. Eons is not in fact in violation of part (iv), because they are legally
17 qualified to contract with Guam. Eons argues that the information which they failed to
18 provide was not "necessary" information under that provision, because it was not
19 material. To the extent that any missing information was deemed necessary by the
20 Procurement Officer, Eons could have provided that information, but it was never
21 requested of them. Instead their bid was denied, and their protest letter requesting
22 reconsideration was met with a form response.

23 Eons submits that its qualifications as a licensed general and specialty contractor
24 are proven in its bid submission

25 Appellant Eons still asserts, in the alternative, that only the Department of Public
26 Works ("DPW") has the authority to procure government construction contracts. See In
27 the Appeal of Z4 Corporation, OPA Opinion filed on May 5, 2010. OPA-PA-09-012.
28 Because of this, all present bids should be cancelled, and the project should be rebid
using proper procedure.

While the facts of Z4's appeal may be different from the facts of the instant case,
the legal reasoning applies equally to both cases. In that case, neither the Department of
Education ("DOE"), nor the Generalized Services Agency ("GSA") (who was eventually
delegated the procurement, once the DOE procurement office was disassembled) had
the construction expertise to handle a construction procurement. GSA was not even
statutorily authorized to conduct such a procurement. It was for this reason that the
project was later rebid using proper procedures. In the instant case, GCC should have
delegated the procurement to DPW, and not attempted to do the procurement process

1 themselves. As in Z4, GCC does not have the necessary expertise to conduct a
2 construction procurement.

3
4 (h) If the award was made after the receipt of the protest, the report will include the
determination required under 2 G.A.R. §9101(e).

5 **Eons Comment:**

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7 The Agency Report does not comply with this requirement, as they did not make
8 a determination required under 2 G.A.R. 9101(e) in response to the protest of Eons
delivered May 3, 2010.

9 (i) A statement in substantially the same format as Appendix B to this Chapter,
10 indicating whether the matter is the subject of a court proceeding:

11 **Eons Comment:**

12 The Agency Report complies with this requirement.

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14 Dated this 2nd day of July, 2010

15
16 Respectfully submitted,

17 **BERMAN O'CONNOR & MANN**
18 Attorneys for Appellant
Eons Enterprises Corporation

19
20 Dated: July 2, 2010

By:


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28 DANIEL J. BERMAN