



OFFICE OF THE PUBLIC AUDITOR
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
GUAM COMMUNITY IMPROVEMENT
FOUNDATION, INC.

Appellant

APPEAL NO: OPA-PA-09-005
DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on August 26, 2009, by GUAM COMMUNITY IMPROVEMENT FOUNDATION, INC., (Hereafter "GCIF") regarding the DEPARTMENT OF PUBLIC WORKS, Government of Guam's (Hereafter "DPW") August 11, 2009 and August 14, 2009, denial of GCIF's August 5, 2009, protest concerning DPW's solicitation of Request for Proposal for Project No. 700-5-1020-L-TAM (Construction of the New John F. Kennedy High School Finance, Demolition, Design, Build, Maintain, and Leaseback (FDDBML) Part I and Part II (Hereafter "RFP")). The Public Auditor holds that there is no merit to GCIF's allegations that Interested Party INTERNATIONAL BRIDGE CORPORATION (Hereafter "IBC") could not obtain financing, that DPW improperly amended the RFP, and that IBC's lease violated certain provisions of the RFP. Accordingly, GCIF's appeal is DENIED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, as well as all testimony and

1 arguments presented at the Hearing on the DPW's Motions for Protective Order and
2 Confirmation of Substantial Interest in this matter which was held on September 28-29, 2009,
3 and the Hearing in this matter which was held from October 26-28, 2009. Anthony R. Camacho,
4 Esq. served as the Office of Public Accountability's Hearing Officer at said hearings. Based on
5 the aforementioned record in this matter the Public Auditor makes the following findings of fact:
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7 1. JFK was closed on June 9, 2008 by the Health and Safety Task Force of the
8 Government of Guam because it was in the poorest condition of all of the Department of
9 Education (Hereafter "DOE") schools due to years of neglect caused by lack of funding to
10 maintain and repair it.¹
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12 2. On November 21, 2008, DPW issued the RFP.²

13 3. The RFP Scope of Work had two parts. Part I concerned the financing of the project
14 and included nine evaluation criteria with assigned weights that made up seventy-percent of the
15 overall score an offeror's proposal could obtain. Part II concerned the technical specifications
16 and included two evaluation criteria with assigned weights that made up thirty-percent of the
17 overall score an offeror's proposal could obtain.³
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19 4. The RFP stated that each proposal submitted would be graded and evaluated based on
20 the combined total weighted score of Parts I and II and that this evaluation would be conducted
21 using an evaluation form attached to the RFP. The evaluation form set forth the following
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24 ¹ Testimony of Lawrence P. Perez and testimony of Gayle F. Hendricks on
25 September 28, 2009.

26 ² DPW Request for Proposals, Excerpt from Pacific Daily News dated November
27 21, 2008, Procurement Record.

28 ³ Section III (Scope of Work) and Section VI (Technical Specifications), pages
2 and 6, respectively, RFP, Procurement Record.

1 evaluation criteria and the following assigned weights for Part I of the Scope of Work
2 (Financing):

<u>Evaluation Criteria</u>	<u>Percentage</u>
a. Term Sheet to include all interest charges, fee and expenses.	10%
b. Responsiveness of the proposal.	10%
c. Ability of Lessor to lease to Lessee the facilities described in the Technical Specification, Part II of the RFP.	15%
d. Ability of Lessor to structure municipal leases from \$10,000,000 to over \$300,000,000.	5%
e. Ability of Lessor to offer suggestions on various arrangements for services and maintenance contracts in support of the upkeep and service of the lease facility.	10%
f. Ability of Lessor to allow the purchase of the leased school facility by Lessee at any time during the lease period.	2%
g. Ability of Lessor to allow Lessee to cancel the lease obligation, without penalty, at the end of the current fiscal year in which appropriations were last budgeted, or otherwise made legally available, in the event budgetary funds become unavailable in future years (Event of Non-Appropriation).	5%
h. Ability of the Lessor to provide 100% financing for the facility, including demolition, design, construction, maintenance, and other related costs to complete the projects as required in the RFP.	10%
i. Ability of the Lessor to develop a payment schedule that can be structured on an annual basis.	3% ⁴

22 5. The RFP stated that DPW would establish a Proposal Evaluation Board or Committee
23 to review and evaluate all proposals submitted in response to the RFP. This Committee would
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27 ⁴ Section VIII (General Conditions), Paragraph 3.2, Page 13, and Evaluation
28 Form, Part I, Pages 25-27, RFP, Procurement Record filed on September 17,
2009.

1 conduct a preliminary evaluation of all proposals on the basis of the information and other
2 evaluation criteria set forth in the RFP.⁵

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4 6. DPW's Evaluation Committee members were DPW Deputy Director Andrew Leon
5 Guerrero, who served as the committee's chairperson, GPSS JFK Exit Strategy Task Force
6 Chairperson Gayle Hendricks Ed.D, GPSS JFK Exit Strategy Task Force Member Eunice
7 Aflague, then GPSS Deputy Superintendent of Finance and Administrative Services Doreen T.
8 Crisostomo Ph.D, DPW Engineer II Jeri C. Caloar, DPW Engineer III Dionisio M. De Leon,
9 then GPSS Deputy Superintendent for Curriculum and Instructional Improvement Geraldine
10 James, Ed.D., and Guam Economic and Development Authority (GEDA) Public Finance Officer
11 Antoinette Leon Guerrero.⁶

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13 7. Offerors submitted their proposals in response to the RFP on January 8, 2009.⁷

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15 8. The Evaluation Committee met on January 15, 2009 to hear presentations of the
16 Offerors who submitted proposals in response to the RFP, and to evaluate and score said
17 proposals.⁸ DPW subsequently compiled and tallied the evaluation scores.

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19 9. On or about January 16, 2009, the Evaluation Committee selected "IBC" as the best
20 qualified offeror for the RFP, and on March 4, 2009, DPW Director Larry Perez approved the
21 committee's recommendation.⁹

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23 ⁵ Section VIII (General Conditions), Paragraph 4 (Evaluation of Proposals),
24 page 14, RFP, Procurement Record filed on September 17, 2009.

25 ⁶ Memorandum to Evaluation Committee dated January 7, 2009 and Memorandum
26 dated January 15, 2009, Procurement Record filed on September 17, 2009.

27 ⁷ Addendum No. 2, RFP, Procurement Record filed on September 17, 2009.

28 ⁸ Addendum No. 4, RFP, dated January 9, 2009, Id.

⁹ Letter dated January 16, 2009 from DPW to IBC, Id.

1 10. On or about August 5, 2009, Appellant lodged a protest with DPW.

2 11. On or about August 11, 2009 and August 14, 2009, DPW denied Appellant's protest.

3 12. On August 26, 2009, Appellant filed this appeal.
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6 **III. ANALYSIS**

7 **A. GCIF's Motion to Reconsider the Protective Order is Denied.**

8 As a preliminary matter, the Public Auditor must consider whether to grant GCIF's
9 Motion to Reconsider the Public Auditor's October 21, 2009 Protective Order. GCIF's motion is
10 based on its argument that the provisions of 2 G.A.R., Div. 4, Chap. 3, §3114(h)(1) and (i)(2) do
11 not apply in this matter because the RFP was for the construction of a school building which is
12 outside the scope of the professional services covered by said regulation.¹⁰ DPW and IBC argue
13 that GCIF's motion should be denied because the statute authorizing the RFP specifically
14 required that it be issued as a request for proposals, and that the Competitive Selection
15 Procedures for Professional Services is the only procurement procedure that allows for the use of
16 a request for proposal.¹¹ Generally, proposals shall not be opened publicly nor disclosed to
17 unauthorized persons. 2 G.A.R., Div. 4, Chap. 3, §3114(h)(1). A Registrar of Proposals must be
18 established containing the name of each offeror, and this Registrar shall not be opened to public
19 inspection until after award of the contract. Id. Proposals of offerors not awarded the contract
20 shall not be opened to public inspection. Id. Further, the Purchasing Agency is prohibited from
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25 ¹⁰ Page 2, Appellant's Motion to Reconsider Protective Order filed on October
26 22, 2009.

27 ¹¹ Page 3, Opposition of IBC to Appellant's Motion to Reconsider Protective
28 Order, and DPW's Joinder in IBC's Opposition to Appellant's Motion to
Reconsider Protective Order filed on October 27, 2009.

1 disclosing any information contained in any of the proposals until after an award of the contract
2 is made and only the proposal of the offeror awarded the contract is opened to public inspection
3 unless otherwise required by the contract. 2 G.A.R., Div. 4, Chap. 3, §3114(i)(2). As stated in
4 the October 21, 2009 Decision granting the protective order, there was no award of the contract
5 in this matter so none of the proposals can be made public at this time.
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7 There is no merit to GCIF's argument that the provisions of 2 G.A.R., Div. 4, Chap. 3,
8 §3114(h)(1) and (i)(2) do not apply in this matter. The statute pertaining to the construction of
9 the school specifically requires that a request for proposals be used. 5 G.C.A. §58A105. The
10 Public Auditor agrees with DPW and IBC that only the solicitation method in Guam's
11 Procurement Laws and Regulations using a procedure involving request for proposals is the
12 Competitive Selection Procedure for Professional Services set forth in 5 G.C.A. §5216 and 2
13 G.A.R., Div. 4, Chap. 3, §3114. This procedure is normally used for procuring the services of
14 accountants, physicians, lawyers, dentists, licensed nurses, other licensed health professionals
15 and other professionals. 5 G.C.A. §5121(a), §5216(a) and 2 G.A.R., Div. 4, Chap. 3, §3114(a).
16 Despite this, the statute requiring the JFK reconstruction solicitation to be issued as a request for
17 proposal is not erroneous. For the purpose of acquiring the services of architects and engineers,
18 the Competitive Selection Procedure for Professional Services shall be followed. 2 G.A.R. Div.
19 4, Chap. 5, §5108(2)(c). Further, it is the policy of the Government of Guam to negotiate
20 contracts for the services of architects and engineers on the basis of demonstrated competence,
21 and qualification for the type of service required, and at fair and reasonable prices. 2 G.A.R.
22 Div. 4, Chap. 5, §5108(2)(b). Finally, the requirement that the Competitive Selection Procedure
23 for Professional Services be used to procure the services of architects and engineers and the
24 public policy it supports, applies to every procurement of services within the scope of the
25 practice of architecture and professional engineering as defined by the laws of Guam. 2 G.A.R.
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1 Div. 4, Chap. 5, §5108(1). The Public Auditor must decide whether the services required by the
2 RFP include the practice of architecture or engineering.

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4 The practice of architecture and engineering is broadly defined. The term practice of
5 architecture, means in relevant part, any service, the adequate performance of which requires
6 architectural education, training and experience and the application of the mathematical and
7 physical sciences and the principals of architecture and architectural engineering to such
8 professional services as consultation, evaluation, planning, design, construction management or
9 supervision of construction for the purpose of assuring compliance with specifications and
10 design in connection with any building, including topographic work, grading and engineering
11 incidental to the performance of any architectural service or other services recognized by
12 educational authorities as architecture. 22 G.C.A. §32103(a)(4). The term practice of
13 engineering means, in relevant part, any service, the adequate performance of which requires
14 engineering education, training and experience in the application of special knowledge of the
15 mathematical, physical and engineering sciences to such services as consultation, evaluation,
16 planning, design, construction management of engineering works and systems, planning the use
17 of the land, engineering teaching of advanced engineering subjects or courses related thereto,
18 engineering surveys, and the inspection of construction for the purpose of assuring compliance
19 with drawings and specifications; any of which embraces such service or work either public or
20 private, in connection with any, structures, buildings, machines equipment, process, work
21 systems, or projects and including such architectural work as may be incidental to the practice of
22 engineering, industrial or consumer products or equipment of a control systems,
23 communications, mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they
24 involve safeguarding life, health or property, and including such other professional services as
25 may be necessary to the planning, progress and completion of any engineering services. 22
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1 G.C.A. §32103(b)(2). Here, the RFP includes the practice of architecture and engineering. The
2 RFP specifically requires a Design Team to provide architectural and engineering services to
3 complete the scope of work required by the RFP. RFP, Technical Specifications, General
4 Statement of Work, Section III, Scope of Work, page 2. Thus, the Public Auditor finds that the
5 RFP's scope of work requires the practice of architecture and engineering, and that Guam
6 Procurement Regulations require DPW to use the Competitive Selection Procedure for
7 Professional Services to acquire these services.
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10 Thus, based on the foregoing, GCIF's Motion to Reconsider is hereby denied because the
11 statute requires the use of a request for proposals and because the RFP is specifically soliciting
12 for architectural and engineering services.

13 **B. The Public Auditor has Subject Matter Jurisdiction and GCIF has Standing.**

14 DPW argues that the Public Auditor lacks subject matter jurisdiction because GCIF's
15 appeal is not properly before the Public Auditor. DPW initially found that the GCIF's protest
16 was untimely but it did not state the reasons for making this finding.¹² Additionally, DPW
17 argues that GCIF is not an aggrieved bidder and that its protest was defective because its
18 allegations were not substantiated with supporting exhibits, evidence, and documents and
19 because it does not state what phase of the solicitation or award it is protesting.¹³ These
20 arguments are not supported by law and the facts of this case.
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23 GCIF's protest was timely. Generally, a protest must be made in writing and filed with
24 the Chief Procurement Officer, the Director of DPW, or the head of a purchasing agency within
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27 ¹² Letter from Lawrence P. Perez dated August 14, 2009 to GCIF, Exhibit 2,
28 Notice of Appeal filed on August 26, 2009.

¹³ DPW's Agency Report filed on September 11, 2009.

1 14 days after a protestor either knows or should have known of the facts giving rise thereto. 5
2 G.C.A. 5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1). Here, although GCIF knew or
3 should have known that IBC was selected as the best qualified offeror on or about March 5,
4 2009, it did not know the facts giving rise to its protest until July 31, 2009, when it heard media
5 reports that the GEDA and IBC were seeking bond funds for the project in the United States.¹⁴
6 GCIF filed its protest six days later on August 5, 2009, after learning of the aforementioned
7 GEDA and IBC efforts to obtain bond financing. Thus, the Public Auditor finds that GCIF's
8 August 5, 2009 protest was timely.
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11 GCIF's appeal was timely. Generally, an appeal of a protest decision must be made to
12 the Public Auditor within 15 days after the protestant receives the purchasing agency's Notice of
13 Decision. 5 G.C.A. §5425(e) and 2 G.A.R., Div. 4, Chap. 12, §12201(a). Here, GCIF received
14 DPW's Notice of Decision on August 11, 2009 and DPW's Notice of Decision-Additional
15 Grounds on August 14, 2009.¹⁵ GCIF filed its appeal in this matter on August 26, 2009, which is
16 15 days after DPW's August 11, 2009 Notice of Decision, and which is 12 days after DPW's
17 August 14, 2009 Notice of Decision-Additional Grounds. Thus, the Public Auditor finds that
18 GCIF's appeal was timely.
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21 There is no merit to DPW's arguments that GCIF's was not an aggrieved bidder.
22 Generally, any actual or prospective bidder, offeror, or contractor who may be aggrieved in
23 connection with the method of source selection, solicitation, or award of the contract, may
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25 ¹⁴ DPW Letter to Anthony Sgro, GCIF President, dated January 16, 2009 and
26 received on March 5, 2009, Procurement Record filed on September 17, 2009 and
27 GCIF's August 5, 2009 Protest, Page 2, Exhibit A, DPW's Agency Report filed
28 on September 11, 2009.

¹⁵ Exhibits 1 and 2, GCIF's Notice of Appeal dated August 26, 2009.

1 protest to the Chief Procurement Officer, the Director of the Department of Public Works, or the
2 head of a purchasing agency. 5 G.C.A. §5425(a). An actual bidder is a bidder who submits a
3 bid. *ITI Power Savers v. Guam Waterworks Authority*, CV2120-03, Line 10, Page 4, Decision
4 and Order dated July 26, 2004 (Superior Court of Guam). Further, a losing bidder is an
5 aggrieved bidder. *Tumon Corporation v. Guam Memorial Hospital Authority*, CV1420-01, Line
6 13, Page 3, Decision and Order dated October 22, 2001 (Superior Court of Guam). Here, GCIF
7 is an actual offeror because there is no dispute that it submitted a proposal in response to the
8 RFP. Further, GCIF is an aggrieved offeror because it was not selected as the best qualified
9 offeror. Finally, GCIF's protest and its appeal of the denial of its protest alleges violations of
10 Guam's Procurement Laws and Regulations relating to DPW's selection of IBC as the most
11 qualified offeror. Thus, the Public Auditor finds that GCIF is an aggrieved offeror, and that it
12 has proper standing to file its protest and this appeal.
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16 There is no merit to DPW's argument that GCIF's protest was not in the proper form.
17 Generally, a protest shall include a statement of reasons for the protest and supporting exhibits,
18 evidence, or documents to substantiate any claims unless not available within the filing time in
19 which case the expected availability date shall be indicated. 2 G.A.R., Div. 4, Chap. 9,
20 §9101(3)(c) and (d). Here, GCIF's August 5, 2009 protest alleges that IBC did not comply and
21 cannot comply with the RFP's financing requirements and that DPW has improperly amended
22 the RFP to exclude the provisions requiring the successful offeror to provide one-hundred
23 percent of the financing for the project.¹⁶ However, it does not include any supporting exhibits,
24 evidence, or documents to substantiate these allegations. The Public Auditor notes that GCIF did
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28 ¹⁶ GCIF's August 5, 2009 Protest, Page 2, Exhibit A, DPW's Agency Report filed
on September 11, 2009.

1 not have access to IBC's proposal at the time it filed its protest, and that it will only have access
2 to said document if and when DPW awards the contract to IBC. Thus, the Public Auditor finds
3 that GCIF's protest could not contain supporting exhibits or documents because it had no access
4 to IBC's proposal.
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6 The Public Auditor will now review GCIF's specific allegations to determine whether
7 any specific allegation is not properly before the Public Auditor.
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9 **C. GCIF's Lease Allegations are Not Properly Before the Public Auditor.**

10 GCIF alleges that the lease or leaseback agreement offered by IBC does not comply with
11 the requirements of the RFP. GCIF alleges that a lease was entered into on August 1, 2009.¹⁷
12 However, the only evidence of this lease that the Appellant produced is an unsigned draft lease.
13 The Public Auditor finds that no lease or leaseback agreement has been entered into between
14 IBC and the Government of Guam concerning the RFP. GCIF further alleges that IBC violated
15 certain RFP requirements because the lease agreement has CaPFA as the Lessor, the lease does
16 not include a provision that the lease could be cancelled without penalty, and that CaPFA is not
17 properly licensed to lease real property on Guam.¹⁸ The Public Auditor's jurisdiction is limited
18 to reviewing DPW's August 11, 2009 and August 14, 2009 Decisions denying GCIF's August 5,
19 2009 Protest. 5 G.C.A. §5425(e). The issue of whether the lease or lease back agreements
20 violated any of the RFP requirements or whether CaPFA was properly licensed was not raised in
21 GCIF's August 5, 2009 protest or DPW's August 11, 2009 and August 14, 2009 decisions
22 denying the protest. As a result, there is simply no decision concerning the issue of whether the
23 lease or leaseback agreements violated the RFP requirements or whether CaPFA was properly
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28 ¹⁷ Appellant's Argument, page 2, Notice of Appeal filed on August 26, 2009.

¹⁸ Id., and Appellant's Trial Brief dated October 16, 2009, pages 1 thru 3.

1 licensed for the Public Auditor to review. Thus, the Public Auditor finds that she does not have
2 the jurisdiction to hear these issues because they are not properly before her.

3 **D. Standard of Review.**

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5 DPW argues that the Public Auditor should affirm its decisions denying GCIF's protest if
6 those decisions had a rational basis and if they are not arbitrary, and that the Public Auditor
7 should accord considerable weight to DPW's decisions.¹⁹ DPW relies on the rulings in *Pacific*
8 *Data Systems, Inc., v. Superior Court of Guam*, Civ. No. 90-00029, page 2, (1990 WL 320357)
9 (D.Guam A.D., October 24, 1990), *TRC Environmental Corporation v. Office of the Public*
10 *Auditor*, SP160-07, Decision and Order on Petition for Writ of Mandate (Guam Super. Ct., Nov.
11 21, 2008), and *Fleet Services, Inc. v. Department of Administration and Kloppenburg*
12 *Enterprises, Inc.*, 2006 Guam 6 (Supreme Court of Guam). The Public Auditor finds that the
13 ruling in the *Pacific Data Systems, Inc.*, does not apply to the OPA because it pre-dates the
14 OPA's statutory authority to review decisions on protests *de novo*. 5 G.C.A. §5425(g) (3) and
15 §5703. Further, the rulings *TRC Environmental Corporation* and *Fleet Services* merely state the
16 standard of the Court's review of agency decisions concerning procurement protests. Thus, the
17 Public Auditor shall review DPW's August 11, 2009 and August 14, 2009 decisions *de novo*.
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21 **E. IBC's Project Financing.**

22 GCIF alleges that IBC did not or could not comply with the RFP's financial
23 requirements.²⁰ Specifically, GCIF alleges that GEDA's involvement indicated IBC could not
24 obtain financing on its own and that IBC used a bait and switch scheme in which IBC initially
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27 ¹⁹ DPW's Hearing Brief filed on October 16, 2009.

28 ²⁰ GCIF's Protest dated August 5, 2009, Page 2, Exhibit A, DPW's Agency Report
filed on September 11, 2009.

1 offered AAA rated 2009 Series Trust Certificates in the amount of \$45,680,000 for the project so
2 that IBC could be selected as the best qualified offeror, and, as a result of not being able to
3 obtain such financing, IBC could only obtain Certificates of Participation in the amount of
4 \$69,930,000 which are significantly more expensive than the financing they initially offered.²¹
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6 The Public Auditor will review each of these allegations to determine whether they have merit.

7 There is no merit to IBC's allegation that GEDA's efforts to assist IBC in obtaining
8 financing indicates that IBC was unable to obtain financing. GEDA shall act as a central
9 financial manager and consultant for those agencies or instrumentalities of the Government
10 requiring financial guidance and assistance and such technical assistance shall include, in
11 relevant part, but not be limited to, structuring such bond issuances, preparation and
12 dissemination of financial and investment information, including bond prospectuses,
13 development of interest among investment bankers and bond brokers, and the maintenance of
14 relationships with bond rating agencies and brokerage houses. 12 G.C.A. §50103(k). Here, the
15 evidence indicates that GEDA did assist IBC in obtaining financing for the project. GEDA
16 became involved in IBC's financing efforts in June, 2009 and lasted for a period of
17 approximately five weeks in which GEDA supplied information concerning the Government of
18 Guam's finances to IBC's financing team.²² GEDA's involvement was required for the tax
19 exempt financing that IBC was trying to obtain and GEDA would have been involved with such
20 financing if any of the other offerors were trying to obtain tax exempt financing.²³ Further,
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25 ²¹ GCIF's Protest dated August 5, 2009, Procurement Record filed on September
26 17, 2009 and GCIF's Argument, page 3, Notice of Appeal filed on August 26,
27 2009.

28 ²² Testimony of Aulii T. Limtiaco on October 27, 2009.

²³ Id.

1 GEDA sent representatives to New York to meet with potential investors to assure them that the
2 Government of Guam was involved with IBC's financing and to encouraging them to invest in
3 Guam.²⁴ The Public Auditor finds that such activities are consistent with GEDA's statutory
4 responsibilities to prepare and disseminate financial and investment information concerning the
5 Government of Guam, and to develop investor interest and such activities do not indicate that
6 IBC was unable to obtain financing.
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8 There is no merit to GCIF's allegation that IBC was selected as the best qualified offeror
9 through an improper bait and switch scheme. After inspecting IBC's proposal *in camera*, the
10 Public Auditor finds that GCIF's allegations have no merit and the bait and switch scheme
11 alleged by GCIF did not take place.²⁵ Further, other evidence indicates that IBC was merely a
12 day away from obtaining financing on the bond market when its effort was halted as a result of
13 GCIF's protest. Thus, the Public Auditor finds that IBC was capable of obtaining financing as
14 required by the RFP.
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17 GCIF's allegations that the Certificates of Participation IBC was about to sell for
18 \$69,030,000 were substantially higher than what IBC initially offered have merit. The
19 substantial increase in the par amount of IBC's Certificates of Participation forces the question as
20 to how and why this dramatic price increase occurred. The Public Auditor will determine how
21 this price increase occurred. The RFP was intended to procure the best possible financing and
22 construction package and the weighted score of seventy percent for the project's financing was
23 meant to allow DPW's evaluation committee to conduct a comparison analysis outlining the
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27 ²⁴ Testimony of Anthony C. Blas on September 28, 2009.

28 ²⁵ Paragraph 3.1.3.b, IBC Proposal, Procurement Record, and Preliminary Official Statement dated July 29, 2009, attached to Argument, Notice of Appeal, filed on August 26, 2009.

1 greatest benefit to the Government.²⁶ However, DPW states that although it preferred the best
2 value overall, it was not seeking the lowest bid in this procurement.²⁷ The cost of the complex
3 lease-leaseback financing required by the RFP is inherently uncertain until such investments are
4 sold.²⁸ Rating Agencies usually rate such investments one level below the rating of the
5 Government of Guam's General Obligation Bonds which is currently rated at B+.²⁹ The cost of
6 the financing is usually tied to such rating and, generally, the lower rated financing is more
7 expensive. Thus, an achievable and realistic financing proposal should have been based on B or
8 lower rated financial instrument. Unfortunately, the RFP's open ended evaluation criteria did
9 not require the offerors to submit proposals based on B or lower ratings.
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12 The RFP's evaluation criteria do not require any evaluation of whether the financing
13 proposed by the offerors was achievable or realistic. As stated above, the evaluation criteria
14 required the evaluators to determine whether the offerors had term sheets listing interest charges,
15 fees, and expenses, and to determine whether the offerors had the ability to structure municipal
16 leases from \$10,000,000 to \$300,000,000 and the ability to provide one hundred percent of the
17 financing for the facility. An offeror could submit a term sheet based on a higher than B rated
18 financing and if the offeror had the ability to structure the lease and finance one-hundred percent
19 of the project, the offeror would have complied with the criteria. Thus, the Public Auditor finds
20 that these broad evaluation criteria are insufficient to determine whether any of the financing
21 proposals were realistic or achievable and that the RFP evaluation criteria allowed the offerors to
22 submit proposals offering lower financing costs based on unrealistic or unachievable high
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26 ²⁶ Addendum 2, page 2, RFP, Procurement Record filed on September 17, 2009.

27 ²⁷ Testimony of Lawrence P. Perez on October 26, 2009.

28 ²⁸ Testimony of Aulii T. Limtiaco on October 27, 2009.

29 ²⁹ Id.

1 financing ratings assumptions. The Public Auditor will now determine what effect if any, this
2 had on the evaluation of the proposals.

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4 The Evaluation Committee was given little if any guidance concerning the evaluation
5 criteria by DPW or GEDA. Although Andrew Leon Guerrero, Evaluation Committee
6 Chairperson, stated that the committee members were briefed by DPW and GEDA concerning
7 their responsibilities, this was not corroborated by other testimony or evidence.³⁰ Geraldine James
8 did not review the RFP or the proposals until the day of the evaluation and she only had a half an
9 hour to conduct such a review.³¹ Gayle Hendricks stated that no one briefed her about the RFP
10 or the proposals until the day of the evaluation; that DPW representatives answered some
11 questions concerning the RFP and the proposals; and that she understood that the financing was
12 seventy percent of the evaluation.³² Eunice Aflague testified that DPW told her to rate the
13 proposals in accordance with the RFP's evaluation criteria.³³ Doreen Crisostomo stated that she
14 did not receive the RFP or the proposals until the day of the evaluation and that she had the
15 opportunity to ask questions about these documents.³⁴ The Public Auditor finds that the
16 Evaluation Committee members relied on the RFP's evaluation criteria to make their selection of
17 the best qualified offeror and that they received little to no guidance by DPW or GEDA as to
18 how to make their evaluation.
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22 The Evaluation Committee's selection of IBC as the best qualified offeror was in
23 accordance with Guam Procurement Law and Regulations. DPW gave the Evaluation
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25 ³⁰ Testimony of Andrew Leon Guerrero on October 26, 2009.

26 ³¹ Testimony of Geraldine James on October 26, 2009.

27 ³² Testimony of Gayle Hendricks on October 26, 2009.

28 ³³ Testimony of Eunice Aflague on October 27, 2009.

³⁴ Testimony of Doreen Crisostomo on October 27, 2009.

1 Committee only one day to conduct the review and submit its scores. In contrast, DPW took
2 over 48 days to approve the Evaluation Committee's recommendations.³⁵ The Public Auditor
3 finds that DPW should have given the Evaluation Committee more time to conduct the
4 evaluation, considering the magnitude and importance of the JFK reconstruction project. Despite
5 this, the Evaluation Committee did its job. The Evaluation Committee reviewed the RFP and the
6 proposals, the members asked questions, and they heard presentations by all the offerors
7 concerning the offerors' respective proposals, and the committee scored all the proposals after
8 the presentations.³⁶ Geraldine James testified that she rated the proposals as best as she could.³⁷
9
10 Gayle Hendricks testified that she was given adequate time to evaluate the proposals and that she
11 was confident of the scores she gave each of the proposals.³⁸ Eunice Aflague testified that she
12 was ready to score the proposals after the presentations.³⁹ Antoinette Leon Guerrero testified
13 that she had sufficient time to review the RFP and the proposals prior to scoring the proposals.⁴⁰
14
15 Only Doreen Crisostomo testified that the Evaluation Committee did not have sufficient time to
16 review the RFP or the proposals and that she had difficulty understanding the financing aspect of
17 the proposals.⁴¹ However, the Public Auditor finds that Doreen Crisostomo's testimony is not
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21 ³⁵ Letter dated January 16, 2009 from DPW to IBC, Procurement Record filed on
22 September 17, 2009.

23 ³⁶ Testimony of Andrew Leon Guerrero, Geraldine James, Gayle Hendricks, Eunice
24 Aflague, Doreen Crisostomo and Antoinette Leon Guerrero.

25 ³⁷ Testimony of Geraldine James on October 27, 2009.

26 ³⁸ Testimony of Gayle Hendricks on October 27, 2009.

27 ³⁹ Testimony of Eunice Aflague on October 27, 2009.

28 ⁴⁰ Testimony of Antoinette Leon Guerrero on October 27, 2009.

⁴¹ Testimony of Doreen Crisostomo on October 27, 2009.

1 credible and the Public Auditor will disregard it.⁴² Generally, proposals shall be evaluated only
2 on the basis of the evaluation factors stated in the request for proposals. 5 G.C.A. §5216(e) and
3 2 G.A.R., Div. 4, Chap. 3, §3114(f2). The evidence described above indicates that the
4 Evaluation Committee reviewed the proposals and selected IBC as the most qualified offeror
5 based on the evaluation factors stated in the RFP. Thus, the Public Auditor finds that the
6 Evaluation Committee, in its judgment, selected IBC as the best qualified offeror based on IBC's
7 proposal and the RFP's evaluation criteria. The Public Auditor will now determine whether the
8 increase in IBC's financing costs is in accordance with Guam's Procurement Laws and
9 Regulations.
10

11
12 The RFP method of solicitation allows for a potential increase in financing costs.
13 Generally, award shall be made to the offeror determined to be the best qualified based on
14 evaluation factors stated in the request for proposals and negotiation of compensation determined
15 to be fair and reasonable. 5 G.C.A. §5216(e) and 2 G.A.R., Div. 4, Chap. 3, §3114(11). Further,
16 if compensation, contract requirements, or contract documents cannot be agreed upon with the
17 most qualified offeror, then the purchasing agency must terminate the negotiations and begin
18 negotiations with the next most qualified offeror. 5 G.C.A. §5216(e) and 2 G.A.R., Div. 4,
19 Chap. 3, §3114(14). The request for proposal procedure was suitable for this procurement
20 because negotiation would be required to minimize uncertainty.⁴³ As stated above, the cost of
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23
24 ⁴² Doreen Crisostomo's subsequent testimony indicates she has a personal
25 relationship with Joshua Tenorio, who is employed with Core-Tech which is
26 part of GCIF's construction team for the JFK re-construction project, and
27 that she did not accurately testify as to the extent of her contact with Mr.
28 Tenorio.

⁴³ Id.

1 financing is inherently uncertain and the true cost of IBC's Certificates of Participation will not
2 be known until they are sold. If the sale of IBC's Certificates of Participation results in an
3 increase in IBC's financing cost, such increased financing cost is part of IBC's overall
4 compensation. Thus, if DPW determines that the increased price of IBC's Certificates of
5 Participation is fair and reasonable, then DPW can award the contract to IBC. However, if DPW
6 does not believe the increased price is fair and reasonable, or if DPW and IBC are unable to
7 agree on contract requirements or contract documents, DPW must terminate negotiations with
8 IBC and begin negotiations with the next most qualified offeror. The Public Auditor finds that
9 DPW can accept increases in IBC's financing costs if DPW determines that such increases are
10 fair and reasonable.
11
12

13 However, DPW may not determine that IBC's increased financing costs are fair and
14 reasonable if they result from an unachievable or unrealistically low cost financing proposal that
15 was submitted in bad faith. All parties involved in the negotiation, performance, or
16 administration of Government of Guam contracts must act in good faith. 5 G.C.A. §5003 and 2
17 G.A.R., Div. 4, Chap. 1, §1105. If the sale of IBC's Certificates of Participation results in
18 financing costs that are dramatically higher than the financing costs initially proposed by IBC,
19 DPW must determine whether IBC's proposal was made in good faith. Indeed, considering the
20 large cost increase, DPW should at least be highly suspicious of whether IBC took advantage of
21 the open ended evaluation criteria described above and DPW must conduct an analysis of why
22 the financing cost increased from what IBC initially proposed. Currently, the procurement
23 record is devoid of any analysis justifying the increase in IBC's financing cost. DPW is
24 reminded that the cost of JFK's re-construction is ultimately paid for by Guam's taxpayers and
25 that these are not the best financial times for them. Thus, the Public Auditor finds that DPW
26 must determine whether IBC's proposal was made in good faith by conducting an analysis as to
27
28

1 why IBC's financing costs are now estimated to be \$69,030,000 and this analysis and finding
2 must be made part of the procurement record.

3 **F. DPW Did Not Amend the RFP to Exclude the Financing Requirement.**

4
5 GCIF alleges that DPW has changed the RFP to exclude the financing which was an
6 integral part of the initial proposals.⁴⁴ DPW issued four RFP amendments which DPW titled
7 "Addendums." Addendum No. 1 extended the date for proposal submissions from December 16,
8 2008 to December 31, 2008.⁴⁵ Addendum No. 2 recorded the questions of the potential offerors
9 and DPW's answers to the same.⁴⁶ Addendum No. 3 made minor amendments to the number of
10 copies of the proposal the offerors had to submit and gave notice that the proposal presentation
11 would be held on January 14, 2009 at 9:00 a.m. at the GEDA Conference Room.⁴⁷ Addendum
12 No. 4 extended the date of the proposal evaluations to January 15, 2009 and scheduled the
13 individual proposal presentations for the offerors.⁴⁸ Thus, none of these amendments excluded
14 the RFP's financing requirements. Further, there is no evidence that the RFP was amended after
15 IBC was selected as the best qualified offeror. The evidence does indicate that IBC was about to
16 obtain the financing required by the RFP at the time of GCIF's protest. Thus, the Public Auditor
17 finds that DPW did not amend the RFP before or after IBC was selected as the best qualified
18 offeror.
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23 ⁴⁴ GCIF's Protest dated August 5, 2009, Page 2, Exhibit A, DPW's Agency Report
24 filed on September 11, 2009.

25 ⁴⁵ Addendum No. 1 dated December 12, 2008, RFP Procurement Record filed on
26 September 17, 2009.

27 ⁴⁶ Addendum No. 2, dated December 19, 2008, Id.

28 ⁴⁷ Addendum No. 3, dated December 31, 2009, Id.

⁴⁸ Addendum No. 4, dated January 9, 2009, Id.

1 **IV. CONCLUSION**

2 Based on the foregoing, the Public Auditor hereby determines the following:

3 1. The Public Auditor hereby DENIES GCIF's Motion to Reconsider the Protective
4 Order issued in this matter on October 21, 2009.

5
6 2. The Public Auditor has subject matter jurisdiction over this appeal and GCIF had
7 standing to file its appeal on August 26, 2009.

8 3. The issues concerning IBC's lease or leaseback agreements and CaPFA's licensing are
9 not properly before the Public Auditor and the Public Auditor does not have the jurisdiction to
10 hear these issues because they were raised for the first time on appeal.

11
12 4. The Public Auditor reviews DPW's August 11, 2009 and August 14, 2009 decisions
13 denying GCIF's August 5, 2009 Protest *de novo*.

14 5. There is no merit to GCIF's allegations that IBC could not finance the project as
15 required by the RFP.

16
17 6. There is no merit to GCIF's allegations that DPW amended the RFP to exclude the
18 financing requirement after it selected IBC as the most qualified offeror.

19 7. There is merit to GCIF's allegations that IBC's Certificates of Participation cost
20 substantially more than what IBC initially offered. Although DPW's Evaluation Committee
21 correctly selected IBC as the best qualified offeror in accordance with the RFP's evaluation
22 criteria, the evaluation criteria did not require analysis as to whether the offerors' financing
23 proposals were realistic or achievable. DPW must ensure that IBC's proposal was submitted in
24 good faith by conducting an analysis as to why there is such a dramatic increase between IBC's
25 proposal and the cost of their Certificates of Participation and said analysis must be made a part
26 of the procurement record. If DPW determines that IBC's proposal was submitted in good faith,
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28

1 DPW can award the contract to IBC if DPW finds that IBC's increased financing costs are fair
2 and reasonable.

3 8. GCIF's appeal is hereby DENIED.

4 This is a Final Administrative Decision. The Parties are hereby informed of their right to
5 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
6 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
7 Decision. 5 G.C.A. §5481(a).
8

9 A copy of this Decision shall be provided to the parties and their respective attorneys, in
10 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
11 www.guamopa.org.
12

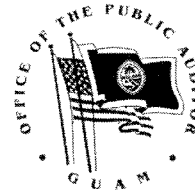
13
14 **DATED** this 27th day of November, 2009.
15

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17 

18 DORIS FLORES BROOKS, CPA, CGFM
19 PUBLIC AUDITOR
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Ms. Joyce C. H. Tang, Attorney for
Interested Party - IBC

From: Doris Flores Brooks, Public Auditor
OPA Procurement Appeals

Agency: Office of the Attorney General;
Law Office of Cunliffe and Cook;
Law Office of Civile and Tang, PLLC

Pages: 23 (includes this cover page)

CC: Guam Media

Date: Friday, November 27, 2009

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Re: OPA-PA-09-005: Decision

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Anne Camacho, x 219, acamacho@guamopa.org

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