

OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
Z4 CORPORATION
Appellant

APPEAL NO: OPA-PA-09-012
DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on November 12, 2009, by Z4 Corporation, (Hereafter “Z4”) regarding the GENERAL SERVICES AGENCY, Government of Guam’s (Hereafter “GSA”), denial of Z4’s October 15, 2009, protest concerning the DEPARTMENT OF EDUCATION, Government of Guam’s (Hereafter “DOE”) solicitation of Invitation for Bid GPSS IFB-008-2009 (Re-Bid) (Oceanview Middle School Gymnasium Repairs) (Hereafter “IFB”). The Public Auditor holds that: (1) DOE awarded the IFB to Z4; (2) GSA did not have the authority to rescind the award of the IFB to Z4 and issue GSA’s Notice of Intent of Possible Award to Eons; (3) DOE’s solicitation of the IFB was unlawful because of DOE’s failure to include the construction project’s specifications and drawings in the IFB; and (4) Z4’s award of the IFB and any resulting contract must be terminated. Accordingly, Z4’s appeal is DENIED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the

1 procurement record and all documents submitted by the parties, as well as all testimony and
2 arguments presented at the Hearing on DOE's Motion to Dismiss in this matter which was held
3 on February 22 and 23, and April 5, 2010. Based on the aforementioned record in this matter the
4 Public Auditor makes the following findings of fact:
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6 1. The Oceanview Middle School Gymnasium is in need of extensive repairs to its roof,
7 floor, and bleachers to make it a viable gym facility.¹

8 2. On or about June 4, 2009, DOE issued the IFB which was a re-bid of a previous IFB.²

9 3. The specifications for the IFB erroneously excluded the technical specifications and
10 the drawings, both prepared by DOE's Architecture/Engineering consultant, Taniguchi Ruth
11 Makio Architects (Hereafter "TRMA"), which were part of the original bid for the Oceanview
12 Middle School Gymnasium repairs.³

13 4. The IFB's General Terms and Conditions stated that:
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15 The Government will consider not more than two (2) (Basic and Alternate) item
16 prices and the Bidder shall explain fully each price if supplies, materials, equipment
17 and/or specified services offered comply with specifications and the product's origin.
18 Where basic or alternate bid meets the minimum required specification, cost and
19 other factors will be considered.⁴
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21 ¹ February 23, 2010 Testimony of Mark Ruth.

22 ² Bid Package Set, Exhibit 1, Procurement Record filed on November 20, 2009.

23 ³ February 23, 2010 Testimony of Mark Ruth, Submission of DOE's Supplemental
24 Documents filed on February 24, 2010, and Line 17, Page 5, DOE's Brief on
25 Remedies filed on April 7, 2010.

26 ⁴ February 22, 2010 Testimony of Roque Alcantara and Albert Garcia, Paragraph
27 9, General Terms and Conditions, IFB, Exhibit 11, 24's Exhibit List filed on
28 February 17, 2010.

1 5. The IFB's General Terms and Conditions - Item 20. Descriptive Literature also stated
2 that:

3 Descriptive literature(s) as specified in this solicitation must be furnished as a
4 part of the bid and must be received at the date and time set for opening Bids.
5 The literature furnished must clearly identify the item(s) in the Bid. The
6 descriptive literature is required to establish, for the purpose of evaluation and
7 award, details of the product(s) the bidder proposes to furnish including design,
8 materials, components, performance characteristics, methods of manufacture,
9 construction, assembly, or other characteristics which are considered appropriate.
10 Rejection of the Bid will be required if the descriptive literature(s) do not show
11 the product(s) offered conform(s) to the specifications and other requirements
12 of this solicitation. Failure to furnish the descriptive literature(s) by the time
13 specified in the Solicitation will require rejection of the Bid.⁵

14 6. The deadline to submit bids in response to the IFB was June 24, 2009 at 10:00 AM
15 and, despite the lack of technical specifications and drawings described above, DOE received
16 four (4) bids in response to the IFB from Loyal Pacific Corporation, Z4 Corporation, Eons
17 Enterprises Corporation (Hereafter "Eons"), and Hubtec International Corporation.⁶

18 7. Z4 submitted the lowest basic bid for the amount of \$810,000, and Eons submitted
19 the highest basic bid for the amount of \$998,578.10. Eons submitted the only alternate bid for
20 the amount of \$729,098.50.⁷

21 8. DOE submitted Z4's basic bid, and Eons' alternate bid to TRMA for technical review
22 because DOE did not have any personnel who were qualified to determine whether said bids
23 complied with the technical specifications.⁸

24 ⁵ Paragraph 20, General Terms and Conditions, IFB, Exhibit 18, Z4's Exhibit
25 List filed on February 17, 2010.

26 ⁶ Bid Submission Log, Exhibit 2, DOE's Hearing Exhibits filed on February 22,
27 2010.

28 ⁷ February 22, 2010 Testimony of Roque Alcantara, and Abstract of Bids,
Exhibit 3, Procurement Record filed on November 20, 2009.

1 9. TRMA evaluated Z4's basic bid and Eon's alternate bid using the technical
2 specifications and drawings that TRMA had originally prepared for the original invitation for
3 bids, but which were erroneously excluded from the IFB which, as stated above, was a re-bid of
4 the original invitation for bids.⁹
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6 10. Based on this review which used technical specifications and drawings that were
7 erroneously excluded from the IFB, TRMA determined that one (1) item offered in Z4's basic
8 bid, and five (5) items offered in Eons Alternate Bid did not meet the technical specifications and
9 drawings and TRMA recorded its findings in a report that it submitted to DOE.¹⁰
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11 11. DOE reviewed TRMA's report and accepted TRMA's findings. DOE additionally
12 found that Eons failed to provide an adequate explanation of Eons' alternate bid with its bid
13 package as required by the IFB.¹¹
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15 12. On or about August 6, 2009, DOE issued a Bid Status to Z4 stating that: "After
16 further review of the bid documents, the award is made to the lowest most responsive and
17 responsible bidder," and that Z4 received DOE's recommendation for award for its basic bid of
18 \$810,000. DOE also instructed Z4 to submit a Performance Guarantee Bond in the amount of
19 \$810,000 on or before 5:00 p.m. on August 14, 2009.¹² On that same day, DOE issued a Notice
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21 ⁸ February 22, 2010 Testimony of Roque Alcantara.

22 ⁹ February 23, 2010 Testimony of Mark Ruth.

23 ¹⁰ February 23, 2010 Testimony of Mark Ruth and July 16, 2009 Memorandum from
24 Mark Ruth to Rod Traya, Exhibit 12, Z4's Exhibit List filed on February 17,
25 2010.

26 ¹¹ February 22, 2010 Testimony of Roque Alcantara and Albert Garcia.

27 ¹² Bid Status dated August 6, 2009, Exhibit 3, Z4's Exhibit List filed on
28 February 17, 2010.

1 To Proceed to Z4 authorizing Z4 to commence work on the renovation of the Oceanview Middle
2 School Gymnasium on August 10, 2009 and instructing Z4 to complete the work by February 5,
3 2010 or be assessed Liquidated Damages of \$400 per calendar day for work not completed after
4 that date.¹³

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6 13. On August 6, 2009, Eons submitted a request that DOE re-evaluate the bids arguing
7 that Eons' \$729,098.50 alternate bid was the lowest bid.¹⁴

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9 14. On or about August 10, 2009, DOE Superintendent of Education, Dr. Nerissa
10 Bretania-Shafer Ph.D., requested that the Governor of Guam authorize GSA to oversee DOE's
11 Procurement Section and supervise DOE's procurement personnel.¹⁵

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13 15. On or about August 14, 2009, Z4 Corporation requested that DOE give Z4 additional
14 time for Z4 to provide a performance bond to DOE.¹⁶

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16 16. On or about August 14, 2009, DOE denied Eons' August 6, 2010 request to re-
17 evaluate the bids and stated that Eons' alternate bid was rejected because Eons failed to explain
18 the reasoning behind the submission of Eons' alternate bid as required by the IFB.¹⁷

19 ¹³ Notice to Proceed dated August 6, 2009, Exhibit 4, Z4's Exhibit List filed
20 on February 17, 2010.

21 ¹⁴ Letter from Frank F.C. Wu to Nerissa Bretania-Shafer dated August 6, 2009,
22 Exhibit 2, Notice of Appeal filed on August 28, 2009 in *In the Appeal of Eons*
23 *Enterprises Corporation*, OPA-PA-09-006.

24 ¹⁵ April 5, 2010 Testimony of Claudia Acfalle and Letter from Nerissa
25 Bretania-Shafer to Felix P. Camacho dated August 10, 2009, DOE Exhibit 24.

26 ¹⁶ Letter from Armando Aragon to Roque Alcantara dated August 14, 2009,
27 Exhibit 6, Z4's Exhibit List filed on February 17, 2010.

28 ¹⁷ Letter from Roque Alcantara to Frank F.C. Wu dated August 14, 2009, Exhibit
7, Notice of Appeal filed on November 12, 2009.

1 17. On or about August 20, 2009, a Pre-Construction Meeting was held between TRMA,
2 DOE, and Z4 Corporation. After that meeting, Z4 began the preliminary paperwork to obtain
3 permits for the project from the Department of Public Works, Government of Guam, the Guam
4 Fire Department, and other government agencies.¹⁸

6 18. On or about August 28, 2009, Eons appealed DOE's August 14, 2009 denial of their
7 request to re-evaluate the bids to the OPA and the appeal was filed as *In the Appeal of Eons*
8 *Enterprises Corporation*, OPA-PA-09-006.

10 19. On or about September 1, 2009, the Governor of Guam approved DOE's August 10,
11 2009 request for GSA to oversee DOE's Procurement section and to supervise DOE's
12 procurement personnel.¹⁹ GSA then took over DOE's procurement activities and DOE
13 procurement personnel were transferred to GSA where they worked under the direct supervision
14 of GSA personnel.²⁰

16 20. On or about September 14, 2009, Eons withdrew its appeal to the OPA in exchange
17 for GSA agreeing to cancel the IFB and Eons appeal was dismissed without prejudice on
18 September 16, 2009.²¹

21 ¹⁸ Minutes of Meeting dated August 20, 2009, Exhibit 5, Z4's Exhibit List
22 filed on February 17, 2010 and February 22, 2010 testimony of Pete Valencia.

23 ¹⁹ Letter from Nerissa Bretania-Shafer to Felix P. Camacho dated August 10,
24 2009, DOE Exhibit No. 24.

25 ²⁰ April 5, 2010 Testimony of Claudia Acfalle.

26 ²¹ Order of Dismissal dated September 16, 2009, *In the Appeal of Eons*
27 *Enterprises Corporation*, OPA-PA-09-006, Exhibit 19, Z4's Exhibit List filed
28 on February 17, 2010.

1 21. Instead of canceling the IFB, on October 8, 2009, GSA issued a Notice of Intent of
2 Possible Award to Eons of their \$729,098.90 alternate bid, and requested that Eons confirm that
3 all materials shall comply with the Technical Specifications at no additional cost, and required
4 Eons to submit a \$729,098.90 Performance Bond by October 23, 2009.²² The next day, October
5 9, 2009, GSA issued a bid status rejecting Z4's \$810,000 basic bid due to the bid's high price,
6 and stated that upon its review of the procurement record, there was an error in disqualifying the
7 bid submitted by Eons, and GSA was taking corrective action. In a letter accompanying the bid
8 status, GSA gave notice that DOE's August 6, 2009 Notice to Proceed was null and void; that
9 neither a purchase order had been issued to Z4; nor had Z4 provided DOE a performance bond
10 by August 28, 2009, the date the procurement was stayed, due to Eons' appeal to the OPA in
11 OPA-09-006.²³

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14 22. On or about October 15, 2009, Z4 lodged a protest with GSA alleging that DOE
15 awarded the bid to Z4; that Z4 began performing the contract; that Eons' bid was properly
16 rejected; that GSA improperly rescinded the award to Z4; and that even if a violation of law took
17 place; that it was in the best interests of DOE to affirm the award to Z4.²⁴

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²² Notice of Intent of Possible Award dated October 8, 2009, Exhibit 28, Z4's
List of Exhibit filed on February 17, 2010.

²³ Letter from Claudia S. Acfalle to Armando Aragon dated October 9, 2009,
Exhibit 29, Id.

²⁴ Bid Protest dated October 15, 2009, Exhibit 11, Notice of Appeal filed on
November 12, 2009.

1 23. On or about October 22, 2009, GSA denied Z4's protest and Z4 received this denial
2 on October 29, 2009.²⁵

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4 24. On October 29, 2009, Z4 submitted a statement by Roque Alcantara to GSA in
5 which Alcantara stated that DOE rejected Eons alternate bid due to Eons failure to submit an
6 explanation for it as required by the IFB.²⁶ However, GSA responded to Z4 that same day
7 advising Z4 that the allegations that Eons failed to submit an explanation of their alternate bid at
8 the time of the bid opening were not true and GSA denied Z4's protest a second time.²⁷

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10 25. On November 12, 2009, Appellant filed this appeal.

11 26. Sometime in March 2010, GSA's authorization to manage DOE's procurement and
12 supervise DOE's procurement personnel was terminated.²⁸

14 III. ANALYSIS

15 **A. DOE's Motion to Dismiss the Appeal is Denied.**

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17 As a preliminary matter, the Public Auditor must decide whether to grant DOE's Motion to
18 Dismiss the Appeal. In its motion DOE argues there must be a re-bid of the IFB because: (1)
19 The IFB allowed basic and alternate bids; and (2) DOE failed to answer timely potential bidder
20 inquiries; and (3) Neither Z4's basic and Eons' alternate bids met the IFB's technical
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24 ²⁵ Letter from Claudia S. Acfalle to Aaron R. Jackson, Esq., dated October 22,
2009, Exhibit 1, Id.

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26 ²⁶ Statement by Roque Alcantara dated October 29, 2009, Exhibit 12, Id.

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28 ²⁷ Letter from Claudia S. Acfalle to Aaron R. Jackson, Esq., dated October 29,
2009, Exhibit 2, Id.

²⁸ April 5, 2010 testimony of Claudia S. Acfalle.

1 specifications.²⁹ The Public Auditor's jurisdiction is limited to reviewing GSA's October 22,
2 2009 and October 29, 2009 Decisions denying Z4's October 15, 2009 Protest. 5 G.C.A.
3 §5425(e). DOE makes its first two (2) arguments for the first time on this appeal, and thus, the
4 Public Auditor finds that she does not have the jurisdiction to hear these issues because they are
5 not properly before her.
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7 The Public Auditor now examines DOE's remaining argument that a re-bid is necessary
8 because neither Z4's basic bid nor Eons' alternate bid met the IFB's technical specifications.
9 The DOE's argument reverses GSA's argument, made on behalf of DOE, that Eons' bid was
10 erroneously disqualified by DOE. It is a well-settled general rule that the existence of an actual
11 controversy is an essential requisite to appellate jurisdiction, and that a claim becomes moot only
12 when the issues are no longer live, or the parties lack a cognizable interest in the outcome.
13 *Tumon Partners, LLC and Hee K. Cho v. Kevin Shin*, 2008 Guam 15 ¶37 (Supreme Court of
14 Guam, 2008). The test for mootness is whether the issues involved no longer exist because
15 intervening events have rendered it impossible for the reviewing court to grant the complaining
16 party effectual relief. *Id.* An appeal is considered moot when it presents or involves no actual
17 controversy, interests or rights of the parties, or where the issues have ceased to exist. *Id.* Thus,
18 an appeal is dismissed as moot when by virtue of an intervening event, the appellate court cannot
19 grant effectual relief whatever in favor of the appellant. *Id.*
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23 The reversal of DOE's position concerning Eons' alternate bid does not extinguish all of
24 the issues in this matter. The controversy concerning the validity of Z4's basic and Eons'
25 alternate bid remain. The validity of Z4's basic bid was raised by GSA when it claimed that
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27 ²⁹ Pages 3 and 5, Memorandum In Support of Appellee's Motion to Dismiss filed
28 on February 12, 2010.

1 DOE incorrectly notified Z4 that Z4 submitted the lowest responsive and responsible bid.³⁰ This
2 controversy is still live because Z4 continues to argue that its basic bid is valid; that DOE found
3 it to be in substantial compliance with the IFB's technical specifications; and that DOE waived
4 any minor informalities in Z4's basic bid.³¹ Thus, DOE's Motion to Dismiss does not extinguish
5 the issue of the validity of Z4's bid. Further, there is still a controversy regarding whether Eons
6 submitted a valid alternate bid. DOE makes the alternate argument that if its Motion to Dismiss
7 is not granted, DOE and GSA request the OPA to find that the IFB was properly awarded to
8 Eons.³² Thus, even if there was a finding that issues relating to Eon's alternate bid were made
9 moot due to the Motion to Dismiss, this issue would survive because the Motion to Dismiss can
10 not be granted in its entirety due to the remaining controversies in this matter.
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13 Thus, based on the foregoing, DOE's Motion to Dismiss the Appeal is hereby DENIED.
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16 **B. GSA Lacked Authority to Conduct Procurement Activities Concerning the IFB**

17 As a threshold issue, the Public Auditor must determine whether GSA properly exercised
18 its statutory and regulatory authority by conducting procurement activities for the IFB which was
19 issued by DOE. As stated above, GSA became involved with the IFB after GSA took over
20 DOE's procurement activities and procurement personnel pursuant to the request of DOE
21 Superintendent of Education, Dr. Nerissa Bretania-Shafer, Ph.D. (now Dr. Nerissa Bretania-
22 Underwood, Ph.D.). We must review DOE's procurement regulations. DOE is authorized to
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24 ³⁰ Page 4, Letter from Claudia S. Acfalle to Aaron R. Jackson dated October
25 22, 2009, Exhibit 1, Notice of Appeal filed on November 12, 2009.

26 ³¹ Page 2-3, Opposition to Appellee's Motion to Dismiss filed on February 19,
27 2010.

28 ³² Line 4, Page 6, DOE's Hearing Brief filed on February 17, 2010.

1 promulgate its own procurement regulations. 5 G.C.A. §5131. According to these regulations,
2 the Director of Education shall serve as the Procurement Officer of DOE with respect to
3 supplies, services, and construction. Chapter II, §2.4.1 DOE Procurement Regulations. Further,
4 the Director of Education may delegate procurement authority to designees or to any
5 governmental body or official. Chapter II, §2.5.1, DOE Procurement Regulations. The term
6 “Director of Education” means the person holding the position created by 4 G.C.A. §6206.1, and
7 nominated by the Board of Education, appointed by the Governor, and confirmed by the
8 Legislature. Chapter I, §1.9.17 DOE Procurement Regulations. The statute cited in the
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10 aforementioned regulation governs the salaries of directors and deputy directors of departments
11 and agencies of the Government of Guam. 4 G.C.A. §6206.1. Guam law establishes the
12 Superintendent of Education as the Director of DOE. 17 G.C.A. §3103. The term
13 “governmental body” as used in the aforementioned regulation means any department,
14 commission, council, board, bureau, committee, institution, agency, government corporation,
15 authority or other establishment or official of the Executive, Legislative, or Judicial branches of
16 the Government of Guam. Chapter I, §1.9.26 DOE Procurement Regulations. GSA is part of the
17 Department of Administration of the Government of Guam (Hereafter “DOA”). 5 G.C.A.
18 §5110. DOA is part of the Executive Branch of the Government of Guam. 5 G.C.A. §3101.
19 Thus, the Public Auditor finds that DOE’s Superintendent of Education may lawfully delegate
20 her procurement authority to GSA because GSA is part of a department of the Executive Branch
21 of the Government of Guam.
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25 GSA did not exercise the authority DOE delegated to GSA in accordance with Guam
26 Procurement Law. Any designee of the Director of Education shall exercise delegated authority
27 in accordance with the Guam Procurement Act and DOE’s Procurement Regulations. Chapter II,
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1 §2.5.3 DOE Procurement Regulations. As stated above, the Superintendent of DOE can act as
2 DOE's procurement officer with respect to supplies, services, and construction. Chapter II,
3 §2.4.1 DOE Procurement Regulations. However, Guam Procurement Law restricts the Chief
4 Procurement Officer of GSA to only serving as the procurement officer for the Government of
5 Guam with respect to supplies and services and allows only the Director of the Department of
6 Public Works, Government of Guam (DPW), to act as the procurement officer for construction.
7 5 G.C.A. §5113(a). The IFB states that the contract it was soliciting for is a construction
8 contract. Paragraph II, General Conditions, page GC-2, IFB, Exhibit 1, Procurement Record
9 filed on November 20, 2009. This was corroborated by testimony at the hearing in this matter.
10 Roque Alcantara, DOE's Supply Management Administrator, at the time the IFB was issued and
11 the bids were opened, testified that DOE used TRMA for this project because it was a
12 construction project and no one at DOE was qualified to evaluate the bids because they
13 concerned construction.³³ Mark Ruth, one of the principals of TRMA, testified that the repairs to
14 the Oceanview Middle School Gymnasium is a construction project and that the IFB was for
15 construction.³⁴ Claudia S. Acfalle, GSA's Chief Procurement Officer, testified that GSA did not
16 normally handle the procurement of construction services, and that they became involved in the
17 IFB after GSA closed down DOE's procurement office and transferred the DOE procurement
18 personnel to GSA.³⁵ The Public Auditor finds that GSA did not exercise the delegation of
19 DOE's procurement authority in accordance with Guam Procurement Law because said law does
20 not authorize GSA to handle the procurement of construction. Thus, GSA did not have the
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26 ³³ February 22, 2010 Testimony of Roque Alcantara.

27 ³⁴ February 23, 2010 Testimony of Mark Ruth.

28 ³⁵ April 5, 2010 Testimony of Claudia S. Acfalle.

1 authority to issue its October 8, 2009 Notice of Intent of Possible Award to Eons; or the
2 authority to issue its October 9, 2009 rejection Z4's bid due to high price; and its rescission of
3 DOE's August 6, 2009 Notice to Proceed. The aforementioned acts are null, void, and of no
4 force or effect.
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6 Z4 argues that Eons's alternate bid failed to comply with the IFB because GSA denied
7 Z4's October 15, 2009 protest after GSA found that Eons' alternate bid contained an explanation
8 at the time the bids were opened.³⁶ However, this argument is now moot as the Public Auditor
9 found that GSA did not have the authority to issue the October 8, 2009 Notice of Intent of
10 Possible Award to Eons. Likewise, Z4's argument that Eons cannot enforce its award is moot,
11 as a result of the aforementioned finding, and that GSA had no authority to issue the Notice of
12 Intent of Possible Award to Eons. The Public Auditor will now determine whether DOE
13 awarded the IFB to Z4.
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17 **C. DOE Awarded the IFB to Z4.**

18 DOE awarded the IFB to Z4. Generally, a contract solicited under competitive sealed
19 bidding is to be awarded to the lowest responsible and responsive bidder whose bid meets the
20 requirements and criteria set forth in the invitation for bids. Chapter III, §3.9.14.1. Following an
21 award, a record showing the basis for determining the successful bidder shall be made a part of
22 the procurement file. Chapter III, §3.9.16 DOE Procurement Regulations. Written notice of
23 award shall be sent to the successful bidder, and in procurements over twenty-five thousand
24 dollars (\$25,000), each unsuccessful bidder shall be notified of the award and notice of the award
25 shall be made available to the public. Chapter III, §3.9.17 DOE Procurement Regulations. Here,
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28 ³⁶ Page 4, Notice of Appeal filed on November 12, 2009.

1 the IFB stated that award issued to the lowest responsible bidder within the specified time for
2 acceptance as indicated in the solicitation results in a binding contract without further action by
3 either party. ³⁷ DOE's August 6, 2009 bid status clearly states that the award is made to the
4 lowest most responsive and responsible bidder and that the recommendation for award was for
5 Z4.³⁸ DOE complied with its regulations by notifying Z4 and each of the other bidders of the bid
6 status and by DOE making the bid status notices part of the public procurement record. Roque
7 Alcantara, then DOE's Supply Management Administrator, clearly testified that Z4 had the
8 lowest response bid and that DOE's August 6, 2009 Bid Status was the award of the contract to
9 Z4.³⁹ This testimony was corroborated by DOE's issuance of its August 6, 2009 Notice to
10 Proceed and DOE's issuance of a purchase order number to Z4.⁴⁰ Further, Z4, relying on DOE's
11 August 6, 2009 Bid Status and Notice to Proceed, began the process of obtaining a performance
12 bond, held a pre-construction meeting with DOE, and began the permitting process for the
13 project.⁴¹ Thus, the Public Auditor finds that DOE awarded the IFB to Z4 on August 6, 2009.
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21 ³⁷ Paragraph 23, General Terms and Conditions, IFB, Exhibit 1, Procurement
22 Record filed on November 20, 2009.

23 ³⁸ Bid Status dated August 6, 2009, Exhibit 3, Procurement Record filed on
24 November 20, 2009.

25 ³⁹ February 22, 2010 Testimony of Roque Alcantara.

26 ⁴⁰ Notice to Proceed dated August 6, 2009, Exhibit 5, Procurement Record filed
27 on November 20, 2009.

28 ⁴¹ February 22, 2010 testimony of Pete Valencia.

1 **D. DOE's Solicitation of the IFB Was Unlawful.**

2 DOE's solicitation of the IFB was unlawful because the specifications and drawings were
3 not part of the IFB. As stated above, this IFB was for construction services. Generally, for the
4 purposes of acquiring construction contracts, the Competitive Selection Procedures for Services
5 of the DOE Procurement Regulations shall be followed. Chapter III, §3.14.2 and Chapter V,
6 §5.6.3 DOE Procurement Regulations. However, competitive sealed bidding is the preferred
7 method for the procurement of supplies, services, or construction. Chapter III, §3.9.2 DOE
8 Procurement Regulations. Here, DOE chose the preferred method of soliciting the project by
9 issuing an invitation for bids. This solicitation procedure required DOE to set forth any
10 evaluation criteria DOE would use to evaluate whether the bids were acceptable in the IFB.
11 Chapter III, §3.9.14.3. Further, said evaluation criteria had to be objectively measurable.
12 Chapter III, §3.9.14.4. One of the IFB's major evaluation criteria was bidder compliance with
13 the specifications.⁴² TRMA conducted this evaluation on behalf of DOE and evaluated Z4's
14 Basic Bid and Eons Alternative Bid.⁴³ TRMA's evaluation was necessary because no one at
15 DOE was qualified to ensure the bids met the specifications.⁴⁴ As stated above, as a result of
16 TRMA's evaluation of the bids, TRMA determined that one (1) item offered in Z4's basic bid,
17 and five (5) items offered in Eons Alternate Bid did not meet the technical specifications and
18 drawings. The specifications and drawing for the project were drafted by TRMA and these
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25 ⁴² Paragraph 6, General Terms and Conditions, IFB, Exhibit 1, Procurement
26 Record filed on November 20, 2009.

27 ⁴³ February 22, 2010 Testimony of Mark Ruth.

28 ⁴⁴ February 22, 2010 Testimony of Roque Alcantara.

1 documents are what TRMA used to evaluate Z4's basic and Eons' alternate bids.⁴⁵
2 Unfortunately, DOE failed to include the actual specifications and drawings for the project in the
3 IFB.⁴⁶ The exclusion of the specifications and drawings from the IFB is fatal to DOE's
4 evaluation of the bids. Without the specifications and drawings, the bidders had no notice of
5 what DOE's technical requirements were and DOE had no objectively measurable criteria to
6 evaluate the bids submitted. The Public Auditor finds the exclusion of the specifications and
7 drawings from the IFB created fundamental unfairness between bidders. Specifically, the
8 bidders such as Z4 and Eons, who participated in the original solicitation, had enhanced
9 knowledge of the project because the specifications and drawings were included in the
10 solicitation. Whereas, new bidders, submitting bids for the project for the first time in this
11 solicitation, were at a disadvantage without the specifications and drawings. Thus, DOE's
12 failure to include the specifications and drawings did not result in fair competition between
13 bidders who submitted bids in the original solicitation and bidders submitting their bids for the
14 project for the first time in this solicitation. Further, DOE's failure to submit the specifications
15 and drawings creates an unacceptable risk of public harm. The Public Auditor notes that this
16 construction project involves extensive repairs to the roof, electrical system, ventilation system,
17 and bleachers of the Oceanview Middle School Gymnasium. Catastrophic failure of the repair
18 work would likely result in severe physical injury to students, their families, and school faculty.
19 Thus, the Public Auditor finds that to submit a valid bid; to objectively measure the bids
20 submitted; and to ensure that the construction project is done efficiently, correctly, and safely,
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26 ⁴⁵ February 23, 2010 Testimony of Mark Ruth.

27 ⁴⁶ Letter dated February 24, 2010 from Anita Cruz to OPA, attached to
28 Submission of DOE's Supplemental Documents filed on February 24, 2010.

1 the bidders and DOE must have the same set of specifications and drawings, which must be part
2 of the IFB. Therefore, as the specifications and drawings were not part of the IFB and DOE's
3 solicitation, the project was unlawful.
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6 **F. Z4's Award and Any Resulting Contract Must Be Terminated.**

7 As stated above, DOE awarded the contract to Z4 and DOE's solicitation of the project
8 was unlawful. Generally, if after an award of a contract, it is determined that a solicitation or
9 award of a contract is in violation of law, then, if the person awarded the contract has not acted
10 fraudulently or in bad faith, the contract may be ratified or affirmed, provided that doing so is in
11 the best interests of the territory; or the contract may be terminated, and the person awarded the
12 contract shall be compensated for the actual expenses reasonably incurred under the contract,
13 plus, a reasonable profit, prior to the termination. 5 G.C.A. §5452(a)(1) and Chapter IX,
14 §9.7.1.1., and 3 DOE Procurement Regulations. Here, it is not in the best interests of the
15 Government of Guam to ratify or affirm the contract because, as stated above, DOE's failure to
16 include the construction project's specifications and drawings in the IFB creates an unacceptable
17 risk of public harm. Further, there is no evidence indicating that Z4 acted fraudulently or in bad
18 faith. Thus, DOE's award to Z4, and any resulting contract, must be terminated, and Z4 is
19 entitled to be compensated for its actual expenses reasonably incurred under the contract, plus, a
20 reasonable profit for the services it rendered prior to the termination of its award and any
21 resulting contract.
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IV. CONCLUSION

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

1. The Public Auditor hereby DENIES DOE's Motion to Dismiss the Appeal.

2. Z4's allegations that Eons' Alternate Bid failed to comply with the IFB or that Eons cannot enforce its award are moot because GSA did not have the authority to issue its October 8, 2009 Notice of Intent of Possible Award to Eons; or the authority to issue its October 9, 2009 rejection Z4's bid due to high price; or its rescission of DOE's August 6, 2009 Notice to Proceed. The aforementioned acts are null, void, and of no force or effect.

3. DOE awarded the IFB to Z4 on August 6, 2009.

4. DOE's solicitation of the project was unlawful because the project's specifications and drawings were not part of the IFB.

5. There is no merit to Z4's allegation that its award should be ratified or affirmed. Z4's award of the IFB and any resulting contract is hereby TERMINATED, because it is not in the best interests of the Government of Guam to ratify or affirm the contract because DOE's failure to include the project's specifications and drawings in the bid creates an unacceptable risk of public harm.

6. Z4 did not act fraudulently or in bad faith and Z4 is entitled to its reasonable costs incurred under any resulting contract, plus, a reasonable profit for the services it rendered prior to the termination of its award and any resulting contract pursuant to 5 G.C.A. §5452(a)(1)(ii) and Chapter IX, §9.7.1.3 DOE Procurement Regulations. DOE shall pay the same to Z4 no later than sixty (60) days after it receives this decision.


1 7. If DOE re-solicits the renovation of the Oceanview Gymnasium project, DOE shall
2 include the specifications and drawings for said project in the solicitation.

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4 8. Z4's appeal is hereby DENIED as set forth above.

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

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

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14 **DATED** this 5th day of May, 2010.

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17 _____
18 DORIS FLORES BROOKS, CPA, CGFM
19 PUBLIC AUDITOR
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To: Aaron R. Jackson, Esq., MMST, Attorney
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Laura J. Mooney, Esq., GDOE, Attorney
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Education and General Services
Agency

From: Doris Flores Brooks, CPA, CGFM
Public Auditor

Agency: **Pages** 20 (includes this cover page)

CC: All Media **Date:** May 5, 2010

Fax: 477-5206 (MMST); 472-5003 (DOE); **Phone:** 475-0390 x 219 (Anne Camacho)
Or x 205 (Franklin Cooper-nurse)

Re: DECISION – Appeal No. OPA-PA-09-012

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Anne Camacho, acamacho@guamopa.org

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