



GUAM COMMUNITY COLLEGE

Kulehon Kumunidat Guahan

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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

JUN 10 2010

TIME: 4:50 BY: JMK
FILE NO. OPA-PA: 10-003

June 10, 2010

Doris Flores Brooks, CPA, CGFM
Public Auditor

Lourdes R. Perez
Audit Supervisor

Office of Public Accountability
Suite 401, DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

VIA: HAND DELIVERY

Re: Agency Report for IFB No: GCC-FB-10-009 Install Typhoon Shutters for Student Services and Administration Building (Building 2000)

Master File No: OPA-PA-10-003

Dear Mrs. Doris Flores Brooks and Ms. Lourdes Perez,

As per your request, I am submitting an original and two complete copies of the Agency Report within the ten working days following the receipt of the notice of appeal.

Should you need further information or have additional questions, please feel free to contact Joleen M. Evangelista, Procurement and Inventory Administrator at 735-5540.

Sincerely,

Mary A. Y. Okada, Ed.D.
President
Guam Community College

**CABOT
MANTANONA LLP**
Edge Building, Second Floor
929 South Marine Corps Drive
Tamuning, Guam 96913
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Attorney for Appellee, Guam Community College

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Matter of Appeal of)	Docket Number: OPA-PA-10-003
EONS ENTERPRISES CORP.,)	
)	
Appellant)	
)	AGENCY REPORT
)	
)	
)	
)	
)	

Appellee Guam Community College, (hereinafter "GCC"), by and through its attorney, Sarah A. Strock, of Cabot Mantanona LLP, respectfully submits this Agency Report in the form required under 2 G.A.R. § 12105:

(a) A copy of the protest:

Eons did not file a protest with GCC. Please see Memorandum of Points and Authorities in Support of Motion to Dismiss and Declaration of Joleen Evangelista.

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

Please see the Procurement Record previously submitted by GCC to OPA on June 3, 2010.

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

Please see the Procurement Record previously submitted by GCC to OPA on June 3, 2010.

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

Please see the Procurement Record previously submitted by GCC to OPA on June 3, 2010.

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

Please see the Procurement Record previously submitted by GCC to OPA on June 3, 2010.

(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant:

GCC did not issue a decision because Eons did not file a protest.

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

Please see attached Exhibit "A."

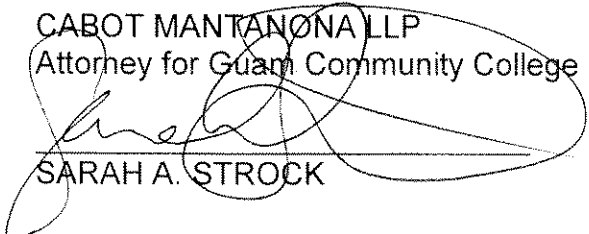
(h) If the award was made after the receipt of the protest, the report will include the determination required under 2 G.A.R. § 9101(e):

The award was issued to Alliance Metal Specialties on April 26, 2010 and acknowledged on April 27, 2010. No formal protest was filed by Eons.

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

The undersigned party does hereby confirm to the best of her knowledge that no case or action concerning the subject of this appeal has commenced in court. All parties are required to, and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this appeal or the underlying procurement action.

Respectfully submitted this 10th day of June, 2010.

CABOT MANTANONA LLP
Attorney for Guam Community College
By: 
SARAH A. STROCK

STATEMENT ANSWERING ALLEGATIONS OF APPEAL
Pursuant to 2 G.A.R. § 12105(g)

Appellant Eons filed this Appeal, arguing that Eons should have been awarded the bid to install typhoon shutters at GCC because Eons was the lowest bidder. Alternatively, Eons argues that the "IFB is null, void, and of no effect because the Department of Public Works has sole authority for the procurement of construction service contracts for new improvements of public property." See "Grounds for Appeal" in Appellant's Notice of Appeal filed May 26, 2010.

ANALYSIS

GCC defends this appeal on three grounds. First, this appeal should be dismissed because OPA lacks jurisdiction to hear this appeal. Second, even though Eons submitted the lowest bid, they were not a responsive nor responsible bidder because they did not submit a copy of their business license, and they are not licensed to install typhoon shutters. Third, GCC has the authority for procurement of construction contracts on public property and GCC's IFB in this case was valid.

1. OPA lacks jurisdiction to hear this Appeal.

Please refer to GCC's Motion to Dismiss, Memorandum of Points and Authorities in Support of Motion to Dismiss, and Declaration of Joleen Evangelista, all filed June 2, 2010.

2. Appellant Eons was not the lowest responsive, responsible bidder.

The government agency must award the contract to the lowest responsive, responsible bidder whose bid meets the requirements and criteria set forth in the IFB. 5 G.C.A. § 5211(g); see also 2 G.A.R. § 3109(n)(1).

A “responsive bidder” is one who submits a bid that conforms in all material respects to the IFB. 5 G.C.A. § 5201(g) (emphasis added). A bid that fails to meet the acceptability requirements shall be rejected as nonresponsive. 2 G.A.R. § 3109(n)(3). Whether or not a bid is responsive is determined only on the basis of information submitted with the bid. In the Appeal of J&G Construction, OPA-PA-07-005.

In the Appeal of Dick Pacific, the Public Auditor held that a bid was not responsive where the IFB required a valid contracting license, including a C41 (reinforcing steel classification) license and resumes of key personnel. OPA-PA 07-007. Dick Pacific only included in the bid envelope copies of its General Engineering License and General Building License, but failed to provide the specialty C41 license and resumes of key personnel. Id. Similarly, in this case, the IFB required that all bidding companies provide copies of their business license and applicable contracting licenses to perform the work. This IFB was specifically for the installation of typhoon shutters. All bidding companies, except for Eons, supplied copies of their business license and contractor’s license C68 (typhoon shutters) in their respective bid envelopes. Eons has a C68 (epoxy injection) license but does not have a C68 (typhoon shutters) license. Since Eons bid failed to conform in all material elements to the IFB, its bid was nonresponsive and the Public Auditor should follow the reasoning in the Appeal of Dick Pacific.

Additionally, Eons was not a responsible bidder. A “responsible bidder” is one who is capable in all respects to fully perform the contract requirements, and the integrity and reliability which will assure good faith performance.” 5 G.C.A. § 5201(f). Capability is determined at the time of award. 2 G.A.R. § 3101(1). Responsibility relates to whether the contractor can perform as promised. In the Appeal of J&G Construction, OPA-PA-07-005. 2 G.A.R. § 3116 (b)(2) states the standards of responsibility:

Standards of Responsibility.

(A) Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

- (i) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (ii) a satisfactory record of performance;
- (iii) a satisfactory record of integrity;
- (iv) qualified legally to contract with the territory; and**
- (v) supplied all necessary information in connection with the inquiry concerning responsibility.** 2 G.A.R. § 3116 (b)(2) (emphasis added.)

By failing to provide their business license and contractor’s license to install typhoon shutters, Eons was not able to legally contract with the territory to install the typhoon shutters and it did not supply all of the relevant information concerning its ability to install the typhoon shutters. 2 G.A.R. § 3116 (b)(4) states that: “[b]efore awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.” In this case, GCC’s Procurement Officer was not satisfied that Eons was responsible because it did not submit a business license or a contractor’s license to install typhoon shutters. Therefore Eons was not the lowest, responsive, responsible bidder and is disqualified from being awarded the contract.

3. GCC has the authority for procurement of construction contracts on public property and the IFB is valid.

Appellant Eons asserts that only the Department of Public Works (hereinafter DPW) has the authority to procure government construction contracts, citing In the Appeal of the Z4 OPA Opinion filed on May 5, 2010. OPA-PA-09-012. Appellant Eon's reliance on this opinion is misguided because the facts in the Z4 opinion are distinguishable from the facts in this case. In Z4, the Department of Education (hereinafter "DOE") delegated all of its procurement authority to Guam's General Services Agency (hereinafter "GSA"). The Public Auditor found, inter alia, that DOE is authorized to promulgate its own procurement regulations as well as delegate its procurement authority to another agency. Id. at 10-11. The Public Auditor held that "Guam Procurement Law restricts the Chief Procurement Officer of GSA to only serving as the procurement officer for the Government of Guam with respect to supplies and services and allows only the Director of DPW to act as the procurement officer for construction." Id. at 12.

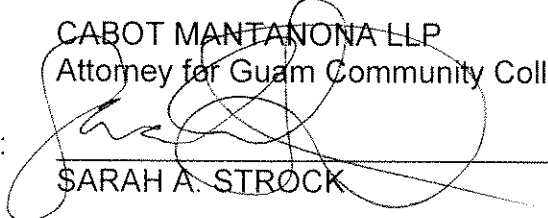
This holding implies that if a government agency is authorized to promulgate its own procurement regulations, and that government agency decides to delegate its procurement authority, then GSA is the appropriate delegatee for government service and supply contracts, and that DPW is the appropriate delegatee for construction contracts. The Public Auditor did not hold that DPW is the only agency that can handle all government construction procurement contracts on Guam.

Similar to DOE, GCC is authorized to promulgate its own procurement regulations. 5 G.C.A. §§ 5125 and 5131. However, in this case, GCC did not delegate any of its procurement authority to another agency. Since GCC did not delegate its procurement authority, the holding in Z4 is inapplicable. Accordingly, GCC has the authority for procurement of its own construction contracts and the IFB for typhoon shutters is valid.

CONCLUSION

This Appeal should be dismissed because OPA lacks jurisdiction to hear this appeal. If the Public Auditor decides she has jurisdiction over this Appeal, Eon's Appeal should be denied because Eon's was not the lowest, responsive, responsible bidder because they lacked the licensing requirements to install the typhoon shutters as required by the IFB. GCC has the authority for procurement of construction contracts on public property and GCC's IFB in this case was valid. Therefore, GCC respectfully requests that the Public Auditor dismiss this Appeal and award all legal and equitable remedies that GCC may be entitled to as a result.

Respectfully submitted this 10th day of June, 2010.

CABOT MANTANONA LLP
Attorney for Guam Community College
By: 
SARAH A. STROCK