



OFFICE OF THE PUBLIC AUDITOR

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PROCUREMENT APPEALS

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5 IN THE APPEAL OF) Appeal No. OPA-PA-07-007
6 DICK PACIFIC CONSTRUCTION)
7 COMPANY, LTD.) **DECISION**
8)
9 Appellant.)
_____)

I. INTRODUCTION

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12 This is the Public Auditor's Decision on an appeal filed on August 2, 2007, by Dick Pacific
13 Construction Co., LTD., (Hereafter "DPC") regarding the Guam International Airport Authority's
14 (Hereafter "GIAA") June 19, 2007, Bid Status Notice to DPC rejecting DPC's bid for Invitation For
15 Bid (Hereafter "IFB") No. GIAA-C09-FY07 and GIAA's July 18, 2007, letter to DPC denying
16 DPC's protest of June 29, 2007, concerning GIAA's rejection of DPC's bid.

17 The Public Auditor finds that DPC was not a responsive bidder for IFB No. GIAA-C09-FY07
18 because DPC's bid did not conform in all material respects to the IFB. The Public Auditor holds that
19 GIAA's June 19, 2007, Bid Status Notice to DPC and GIAA's July 18, 2007, denial of DPC's June
20 29, 2007, protest is in accordance with Guam Procurement Laws and Regulations, and the terms and
21 conditions of IFB No. GIAA-C09-FY07. Accordingly, DPC's August 2, 2007 appeal is hereby
22 denied.

II. FINDINGS OF FACT

24 The Public Auditor in reaching this Decision, has considered and incorporates herein the
25 Findings of the Hearing Officer issued on January 18, 2008. In addition, this Decision is based
26 on the Procurement Record and all documents submitted by the parties in the appeal pursuant to
27 DPC's and GIAA's November, 2007 Stipulation to Withdraw Requests for Hearing and for a
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COMPANY, LTD.) **DECISION**
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I. INTRODUCTION

This is the Public Auditor's Decision on an appeal filed on August 2, 2007, by Dick Pacific Construction Co., LTD., (Hereafter "DPC") regarding the Guam International Airport Authority's (Hereafter "GIAA") June 19, 2007, Bid Status Notice to DPC rejecting DPC's bid for Invitation For Bid (Hereafter "IFB") No. GIAA-C09-FY07 and GIAA's July 18, 2007, letter to DPC denying DPC's protest of June 29, 2007, concerning GIAA's rejection of DPC's bid.

The Public Auditor finds that DPC was not a responsive bidder for IFB No. GIAA-C09-FY07 because DPC's bid did not conform in all material respects to the IFB. The Public Auditor holds that GIAA's June 19, 2007, Bid Status Notice to DPC and GIAA's July 18, 2007, denial of DPC's June 29, 2007, protest is in accordance with Guam Procurement Laws and Regulations, and the terms and conditions of IFB No. GIAA-C09-FY07. Accordingly, DPC's August 2, 2007 appeal is hereby denied.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision, has considered and incorporates herein the Findings of the Hearing Officer issued on January 18, 2008. In addition, this Decision is based on the Procurement Record and all documents submitted by the parties in the appeal pursuant to DPC's and GIAA's November, 2007 Stipulation to Withdraw Requests for Hearing and for a

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7 Decision on Submitted Materials.

8 1. IFB No. GIAA-C09-FY07 solicited bids from contractors to improve airport utilities
9 infrastructure (Water System) Phase 2 - Reservoir & Support Building and Granular Activated
10 Carbon (GAC) Water Treatment System (the "Project").

11 2. IFB No. GIAA-C09-FY07 contained a Special Reminder to Prospective Bidders which
12 stated, in relevant part:

13 a. The Bidders must complete, sign, and submit in the bid envelope with the Bid a
14 Statement of Experience of the Bidders along with the resumes of identified personnel.¹

15 b. Each Bidder must submit a copy of a valid Contractor's License, including C41
16 (Reinforcing Steel) Classification, or, if the scope of work for reinforcing steel was to be sub-
17 contracted, a Bidder was to submit a copy of the sub-contractor's C41 License.²

18 c. The Special Reminder also stated that failure to comply with requirements of the
19 Special Reminder would be a basis for disqualification and rejection of the bid.³

20 3. GIAA held a Pre-Bid Conference on May 17, 2007, at 10:00 A.M., at GIAA's Conference
21 Room 2. The agenda for the conference included the bid submittal documents, and the form marked
22 "Special Reminder to Prospective Bidders." During the pre-bid conference, Alma Javier, GIAA's
23 Supply Management Administrator, explained that the Special Reminder was a checklist for bidders
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26 ¹Addendum A to IFB No. GIAA-C09-FY07, Special Reminder to Prospective Bidders, Paragraph 7.

27 ²*Id.*, Paragraph 13.

28 ³*Id.*, Page 2.

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6 to ensure submission of certain documents together with their bids.⁴ Javier also strongly cautioned
7 those attending the pre-bid conference that failure to comply with the requirements indicated in the
8 Special Reminder would subject a bid to disqualification and rejection.⁵ Javier also explained that
9 The Statement of Experience of Bidders required the bidders to name their key personnel and that
10 the Bidders must submit the resumes of their key personnel.⁶ Finally, Javier explained that a bidder
11 must have a C41 License or that if a Bidder planned to subcontract the Reinforcing Steel Work, then
12 the Bidder had to submit the sub-contractor's C41 License.⁷

13 4. Willie Griva and Dads L. Pineda attended the pre-bid conference on behalf of DPC. They
14 did not ask any questions about the licensing or resume requirements.⁸

15 5. The deadline for potential bidders to submit bid inquiries was May 21, 2007.⁹ DPC
16 submitted two (2) written requests for clarification regarding certain items on Package B and D of
17 the IFB. Prior to May 21, 2007, DPC also requested that the deadline to submit bids be extended.
18 However, none of DPC's inquiries concerned the C41 Licensing requirement or the requirement that
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21 ⁴See Agency Report of Antonio B. Won Pat International Airport Authority, Guam (Hereafter "GIAA")
22 Filed on August 16, 2007 (Hereafter "Agency Report"), Tab 4, Section I.A.1., Page 1.

23 ⁵*Id.*

24 ⁶*Id.*

25 ⁷*Id.*, Page 2.

26 ⁸*Id.*

27 ⁹Paragraph 3, Explanation to Bidders, IFB No. GIAA-C09-FY07.
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6 the resumes of key personnel must be submitted with the Statement of Experience of Bidders.¹⁰

7 6. On June 12, 2007, which was the deadline to submit bids in response to IFB No. GIAA-
8 C09-FY07, DPC timely submitted its bid for said solicitation.¹¹ DPC submitted copies of its General
9 Engineering License (A License) and its General Building License (B License).¹² DPC did not
10 submit a C41 License because it does not hold one.¹³ Further, DPC did not submit the resumes of
11 its key personnel with its bid.¹⁴

12 7. GIAA also received bids for IFB No. GIAA-C09-FY07 from Rex International, Inc.,
13 Leighton Contractors, Inc., Maeda Pacific Corporation, each of which submitted either their or their
14 sub-contractor's C41 Licenses, and they all submitted the resumes of their key personnel.¹⁵

15 8. On June 12, 2007, GIAA publicly opened all bids for IFB No. GIAA-C09-FY07 and
16 evaluated said bids.¹⁶

17 9. On June 18, 2007, GIAA rejected DPC's bid for IFB No. GIAA-C09-FY07 because GIAA
18 determined DPC's bid was non-responsive and that DPC was not a responsible bidder. Specifically,

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20 ¹⁰Agency Report of Antonio B. Won Pat International Airport Authority, Guam (Hereafter "GIAA")
21 Filed on August 16, 2007 (Hereafter "Agency Report"), Tab 4, Section I.A.2., Page 3.

22 ¹¹Background, DPC's Notice of Appeal, Page 2.

23 ¹²*Id.*, Page 3.

24 ¹³*Id.*, Grounds for Appeal, Page 5

25 ¹⁴*Id.*, Grounds for Appeal, Page 10.

26 ¹⁵Agency Report, Tab 4, Background, Pages 3-4.

27 ¹⁶*Id.*, Page 4.

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6 GIAA determined the following:

7 ***Dick Pacific Construction Co., Ltd. Db: Bishman Continental Services:***

8 The firm's bid of \$5,391,942.00 is 22% more than the government estimate.
9 The bidder submitted a list of projects consisting of two project in the period
10 of 2004 and 2007 and failed to provide the names and resumes of their key
11 personnel. The firm indicated "Eureka Construction" as its sub-contractor
12 for the civil works, "Gozum Construction" for painting and "Urethane Services"
13 for waterproofing. Submitted copies of the bidder's C17, C19, C20, C25, C40,
14 C44, and C51 classifications. Hence, the bidder does not possess the required
15 contractor's license for C41 (Reinforcing Steel) classification and there was no
16 indication in their bid that this scope of work will be subcontracted. Therefore,
17 the firm is not licensed to perform Reinforcing Steel work which is required for
18 this project. These requirements were made part of the bid package and was
19 clarified and emphasized during the pre-bid meeting. Also, the "Special Reminder
20 to Prospective Bidders" form referenced such requirements and indicated that
21 failure to submit such requirements will mean disqualification and rejection of
22 the bid. As a result of the bidder's non-submittal of the required documents,
23 Dick Pacific Construction Co., Ltd., is deemed to be a non-responsive and a
24 non-responsible bidder. Therefore, the bid is rejected.¹⁷

10. On June 19, 2007, GIAA informed DPC via a Bid Status Notice of the same date from
25 Jesse Q. Torres, Executive Manager of GIAA, that DPC's bid for IFB No. GIAA-C09-FY07 was
26 rejected due to non-conformance with the specifications/bid requirements because DPC failed to
27 comply with license requirements (C41 Classification) and DPC failed to submit resumes of its key
28 personnel as required by Special Reminder to Prospective Bidders, item 7 and 13.¹⁸ Further, said
Bid Status Notice informed DPC that GIAA IFB No. GIAA-C09-FY07 had recommended Rex
International, Inc., for award of the contract for IFB No. GIAA-C09-FY07 and that Rex International

26 ¹⁷*Id.*, Page 4-5.

27 ¹⁸Notice of Appeal, Exhibit A, Enclosure 1.

6 Inc.'s bid was for \$5,768,588.40, which is approximately \$376,646.40 higher than DPC's bid.¹⁹

7 11. On June 20, 2007, DPC sent a letter to GIAA stating DPC's intent to protest the award
8 of the contract for IFB No. GIAA-C09-FY07 to Rex International and DPC argued that GIAA should
9 award DPC the contract because DPC claims it was the lowest bidder and because DPC's A and B
10 Licenses are sufficient to install the steel reinforcing in the concrete structures required by IFB No.
11 GIAA-C09-FY07.²⁰ DPC enclosed with its letter the resumes of its key personnel.²¹

12 12. On June 29, 2007, DPC filed its formal protest with GIAA demanding that GIAA rescind
13 its rejection of DPC's bid for IFB No. GIAA-C09-FY07, arguing: (1) The Scope of IFB No. GIAA-
14 C09-FY07 does not require a C41 Specialty Contractor's License; (2) The bid solicitation material
15 and the procurement law contemplate material conformity to the solicitation and waiver of mere
16 informalities when waiver is in the best interest of the owner; (3) Rejection of DPC's bid, which was
17 significantly lower than the next lowest bidder, is contrary to the best interests of GIAA and is not
18 in accordance with the procurement laws and regulations.²²

19 13. On July 18, 2007, GIAA denied DPC's June 29, 2007, protest finding that DPC's
20 arguments had no merit and that DPC's bid was non-responsive.²³
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23 ¹⁹*Id.*

24 ²⁰*Id.*, Exhibit A, Enclosure 2.

25 ²¹*Id.*

26 ²²*Id.*, Exhibit A.

27 ²³*Id.*, Exhibit B.

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6 14. On July 19, 2007, DPC received GIAA's denial of DPC's protest.²⁴

7 15. On August 2, 2007, fourteen (14) days after receiving GIAA's denial of its protest, DPC
8 filed this appeal arguing that GIAA's rejection of DPC's protest and bid submission is contrary to
9 law and the best interests of GIAA and to applicable procurement regulations and bids. DPC
10 requested the Public Auditor rescind GIAA's rejection of DPC's protest and bid submission and
11 award the contract for IFB No. GIAA-C09-FY07 to DPC.²⁵

12 16. On August 16, 2007, GIAA filed its Agency Report arguing that GIAA properly rejected
13 DPC's bid because DPC failed to submit key documents identified in the IFB. GIAA requested the
14 Public Auditor to dismiss DPC's appeal.²⁶

15 III. ANALYSIS

16 A. GIAA properly rejected DPC's bid because it was non-responsive.

17 DPC's bid was non-responsive to IFB No. GIAA-C09-FY07. In competitive sealed bidding,
18 contracts shall be awarded to the lowest responsible and responsive bidder whose bid meets the
19 requirements and criteria set forth in the invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R. Div.
20 4, Chap. 3, §3109(n)(1). The term "responsive bidder" is defined as a bidder who has submitted a
21 bid which conforms in all material respects to the invitation for bids. 5 G.C.A. §5201(g) and 2
22 G.A.R. Div. 4, Chap. 3, §3109(n)(2). Here, the plain language of IFB No. GIAA-C09-FY07 required
23 all bidders to submit their own or their subcontractor's C41 Licenses and the resumes of their key

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25 ²⁴*Id.*, Page 4.

26 ²⁵*Id.*, Pages 13-14.

27 ²⁶Agency Report, Page 12.
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6 personnel with their bids.²⁷ The C41 License and the resumes of key personnel were material
7 requirements because their omission would result in the disqualification and rejection of the bid.²⁸
8 Therefore, based on the plain language of IFB No. GIAA-C09-FY07, the Public Auditor finds that
9 the C41 License and the resumes of key personnel were material requirements of IFB No. GIAA-
10 C09-FY07.

11 Here there is no dispute that DPC did not submit a C41 License and the resumes of its key
12 personnel with its bid for IFB No. GIAA-C09-FY07 on the June 12, 2007, bid submission deadline.
13 DPC seeks to justify the omission of its C41 License from its bid by arguing that DPC does not
14 require such a license because DPC's A and B Licenses authorize DPC to perform reinforcing steel
15 work so long as that work does not exceed 35% of the total project. DPC estimates that the
16 reinforcing steel work required by the project is only 4.49% of the total project.²⁹ The Public
17 Auditor finds that this justification does not excuse DPC from IFB No. GIAA-C09-FY07's material
18 requirement that all bidders submit their or their subcontractor's C41 Licenses. Nor does the Public
19 Auditor find that this justification makes DPC a responsive bidder because without the C41 License,
20 DPC's bid did not conform in all material respects to the invitation for bids as required by 5 G.C.A.
21 §5201(g) and 2 G.A.R. Div. 4, Chap. 3, §3109(n)(2). Further the Public Auditor finds that the fact
22 that DPC may have been the lowest bidder does not entitle DPC to award of the contract because
23 Guam Procurement Laws and Regulations require that a successful bidder be the lowest bidder and

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25 ²⁷Special Reminder to Prospective Bidders, IFB No. GIAA-C09-FY07, Paragraphs 7 and 13.

26 ²⁸*Id.*

27 ²⁹Notice of Appeal, Page 6.

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6 be a responsive bidder and DPC was not a responsive bidder. 5 G.C.A. §5211(g) and 2 G.A.R. Div.
7 4, Chap. 3, §3109(n)(1).

8 **B. GIAA's requirement for a C41 License in IFB No. GIAA-C09-FY07 was not arbitrary or**
9 **a clear and prejudicial violation of applicable laws, regulations, or statutes.**

10 DPC also argues that IFB No. GIAA-C09-FY07's requirement for a C41 License is arbitrary
11 and without legal cause or justification, and that such requirement is contrary to Guam's licensing
12 and procurement laws.³⁰ This argument is untimely. The jurisdiction of the Public Auditor to review
13 and decide matters is limited to matters that are properly submitted to her. 5 G.C.A. §5703.
14 Generally, a procurement protest must be filed no later than fourteen (14) days after an aggrieved
15 person knows or should know of the facts giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R., Div.
16 4, Chap. 9, §9101(c)(1). A person who believes that the actual invitation to bid was itself improper
17 or illegal should seek to enjoin the bid process. A protestor who submits a bid pursuant to the IFB
18 cannot claim after its bid has been submitted and the deadline for submission has passed that the
19 invitation for bid was contrary to law. *L.P. Ganacias Enterprises dba Radiocom, vs. Guam*
20 *International Airport Authority and Guam Cell Communications*, Civil Case No. CV1787-00,
21 Decision and Order dated November 13, 2000, Page 19 (Superior Court of Guam).

22 The Public Auditor finds that on May 17, 2007, DPC knew or should have known of IFB No.
23 GIAA-C09-FY07's material requirement that each bidder must submit its or its sub-contractor's C41
24 License with its bid because DPC representatives Willie Griva and Dads L. Pineda attended the pre-
25 bid conference on behalf of DPC. DPC had until May 31, 2007, to file a protest if it believed that

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27 ³⁰*Id.*, Page 8.

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6 IFB No. GIAA-C09-FY07's requirement for a C41 License was arbitrary or illegal. Instead, DPC
7 simply submitted its bid without a C41 License. Therefore, Public Auditor finds that she does not
8 have the jurisdiction to review or decide this issue because it is not properly before the Public
9 Auditor because it is untimely due to DPC's failure to file a protest on this issue by May 31, 2007.

10 Assuming *Aruguendo*, or in the alternative should it be later found that the Public Auditor
11 has the jurisdiction to review this matter, the Public Auditor is not convinced that IFB No. GIAA-
12 C09-FY07's requirement for a C41 License is arbitrary and without legal cause or justification, or
13 that such requirement is contrary to Guam's licensing and procurement laws. Generally a
14 disappointed bidder can find relief from a government agency's procurement decision if it can show
15 either the government's decision lacked a rational basis or there was a clear and prejudicial violation
16 of applicable laws, regulations, or statutes. *Tumon Corporation vs. Guam Memorial Hospital*
17 *Authority*, CV1420-01, Line 9, Page 9 of Decision and Order (Superior Court of Guam, November
18 28, 2001). This requires a two-part analysis.

19 The first part of this analysis is to determine whether there was a rational basis for GIAA's
20 requirement of the C41 License in IFB No. GIAA-C09-FY07. The Public Auditor is not convinced
21 that GIAA's requirement for a C41 License in IFB No. GIAA-C09-FY07 was arbitrary or without
22 legal cause or justification. GIAA asserts that its reason for requiring the C41 License is that the
23 Guam Contractors Licensing Board (GCLB), which is the government agency responsible for
24 supervising the licensing of contractors on Guam, had advised GIAA in 2005 that contractors who
25 perform specialty trades on a job must have the specialty classification for that trade.³¹ The C41

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27 ³¹Agency Report, Page 7.
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6 License is the specialty classification for reinforcing steel contractors. 29 G.A.R., Chap. 1, Article
7 4, §1421(4). Further, it is undisputed that reinforcing steel is part of the services required by the IFB.
8 The Public Auditor finds that GIAA's compliance with GCLB's 2005 advisement by requiring the
9 C41 License for the project's reinforcing steel work was reasonable and rational.

10 The second part of the analysis is to determine whether GIAA's requirement for a C41
11 License in IFB No. GIAA-C09-FY07 was a clear and prejudicial violation of applicable laws,
12 regulations, or statutes. DPC is correct in asserting that it can perform reinforcing steel work
13 pursuant to its A & B Licenses so long as that work does not exceed 35% of the total project. 29
14 G.A.R., Chap. 1, Article 4, §1421(3) and §1422 (d) and (e). However, these regulations, by
15 themselves, do not expressly prohibit GIAA from requiring a C41 License for the project in IFB No.
16 GIAA-C09-FY07.

17 The Public Auditor must also consider Guam procurement laws and regulations to complete
18 this analysis. All parties involved in the negotiation, performance, or administration of Government
19 of Guam Contracts must act in good faith. 5 G.C.A. §5003 and 2 G.A.R., Div. 4, Chap. 1, §1105.
20 Also, one of the main purposes of Guam's procurement laws and regulations is to foster effective
21 broad-based competition in the free enterprise system. 5 G.C.A. §5001(b)(6) and 2 G.A.R., Div. 4,
22 Chap. 1, §1102(5). Thus, Guam procurement laws and regulations require that GIAA's requirement
23 for a C41 License in IFB No. GIAA-C09-FY07 be made in good faith and not unduly restrict
24 competition. The Public Auditor finds that the C41 License requirement was made in good faith
25 because, as set forth above, GIAA was following GCLB's 2005 advice. The Public Auditor also
26 finds that the C41 License requirement did not unduly restrict competition because all the other
27 bidders submitted their or their sub-contractor's C41 License in compliance with the provisions of
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6 IFB No. GIAA-C09-FY07.

7 Based on the foregoing, the Public Auditor finds that GIAA's requirement for a C41 License
8 in IFB No. GIAA-C09-FY07 was not arbitrary or a clear and prejudicial violation of applicable laws,
9 regulations, or statutes.

10 **C. DPC's Omission of the Resumes of its Key Personnel was not a Minor Informality that**
11 **could be waived by GIAA.**

12 GIAA could not waive DPC's omission of the resumes of DPC's key personnel from DPC's
13 bid as a minor informality. A minor informality is a matter of form, rather than substance evident
14 from the bid document, or insignificant mistakes that can be waived or corrected without prejudice
15 to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is
16 negligible. 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(B). IFB No. GIAA-C09-FY07 specifically
17 required the bidders to submit the resumes of their key personnel and stated that failure to do so
18 would mean disqualification and rejection of the bid.³² Thus, the Public Auditor finds that failure
19 to submit the resumes was not an insignificant mistake because the terms of IFB No. GIAA-C09-
20 FY07 mandate the rejection and disqualification of bids without such resumes. Further, as the other
21 bidders submitted the resumes of their key personnel with their bids in compliance with the mandates
22 of IFB No. GIAA-C09-FY07, the Public Auditor finds that the other bidders would be prejudiced
23 if the requirement for the resumes were waived.

24 **IV. CONCLUSION**

25 Based on the foregoing, the Public Auditor hereby determines the following:
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27 ³²Special Reminder, IFB No. GIAA-C09-FY07.
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6 1. DPC was a not a responsive bidder for IFB No. GIAA-C09-FY07 because DPC's bid did
7 not conform in all material respects to the invitation for bids due to DPC's failure to submit a C41
8 License and the resumes of DPC's key personnel.

9 2. GIAA properly rejected DPC's bid for IFB No. GIAA-C09-FY07 because DPC was not
10 a responsive bidder.

11 3. DPC's Appeal is hereby denied and GIAA's July 18, 2007 Decision denying DPC's June
12 29, 2007 Protest is hereby sustained.

13 This is a Final Administrative Decision. The Parties are hereby informed of their right to
14 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part
15 D of Article 9, of 5 G.C.A. Chapter 5, within fourteen days after receipt of a Final Administrative
16 Decision.

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

20 **DATED** this 18th day of January, 2008.

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23 for 
24 DORIS FLORES BROOKS, CPA, CGFM
25 PUBLIC AUDITOR
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