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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DEC 15 2011
TIME 2:10 PM BY Rjm
FILE NO OPA-PA-11-017

11 **OFFICE OF THE PUBLIC AUDITOR**

12 IN THE APPEAL OF

Docket No. OPA-PA-11-017

13 KIM BROS. CONSTRUCTION CORP.,

**APPELLANT'S COMMENTS ON
AGENCY REPORT AND REQUEST
FOR HEARING**

14 Appellant.

15 **A. The Department of Education Cannot Cancel a Solicitation After Bid Opening.**

16 As stated in the IFB attached as Exhibit 2 to appellant's
17 supplementation of appeal documents filed with the OPA on November 17,
18 2011, the original date and time for the receipt of bids was 10:00 AM, April
19 25, 2011. This was later amended to 3:00 PM, June 10, 2011. *Agency Report*
20 *page 137*. The bids were not to be opened publicly, "but shall be opened in
21 front of two or more procurement officials." *IFB page 5*. The Invitation For
22 Bid stated that all bids "remain firm and irrevocable within 60 calendar days
23 from the date opening (sic) to supply any or all the items which prices

1 quoted." *Agency Report page 37.* Under 5 GCA §5211(d) DOE was to open
2 the bids "at the time and place designated in the Invitation for Bids."

3 The Agency Report acknowledges that more than 60 days thereafter, on
4 September 13, 2011, DOE issued the "Cancellation Solicitation." *Agency*
5 *Report pages 104-105, and 141.*

6 The Government can "cancel" a solicitation only prior to opening of
7 bids, and then in only special circumstances. 2 GAR § 3115(d)(1)(B). In
8 interpreting a similar GMH regulation the OPA has held that "[a] cancellation
9 of an IFB can only occur prior to the opening of bids." In the Appeal of Pacific
10 Security Alarm, Inc., OPA-PA-07-009 at 6. Thus, DOE's cancellation of the
11 solicitation on September 13, 2011 was illegal.

12 DOE's Answer seems to indicate that it may believe a "rejection of all
13 bids" under 2 GAR § 3115(d)(2)(A) is the same thing as a cancellation of a
14 solicitation. *Agency Report page 146.* It is not, as the OPA acknowledged In
15 the Appeal of Pacific Security Alarm, Inc., supra. Since a cancellation can
16 occur only prior to opening, a "rejection of all bids" after opening does not
17 cancel a solicitation. Yet that is what DOE did here. Appellant acknowledges
18 that Exhibit 13 of the Agency Report is a document with the heading:
19 "CANCELLATION OF SOLICITATION; REJECTION OF ALL BIDS", but the
20 letter only states that "this letter notifies that the solicitation is hereby
21 **canceled.**" (Emphasis in original) In Marcus Y. Pido's declaration there is no
22 mention of "rejection of all bids", only that he decided "to cancel the IFP."
23 *Agency Report page 105.*

1 **B. There is no "Cogent and Compelling Reason" to have Canceled the**
2 **Solicitation.**

3 Even if we overlook the illegality of the cancellation of the solicitation
4 after opening the bids, the preparing and distributing a solicitation requires
5 the expenditure of Government time and funds and businesses likewise incur
6 expenses in examining and responding to solicitations; therefore a solicitation
7 is to be canceled only when there are **cogent and compelling reasons** to
8 believe that the cancellation of the solicitation is in the Territory's best
9 interest. 2 GAR § 3115(b). The reason given is that because the funding no
10 longer has a December 2011 deadline for completion of construction, and
11 therefore extending the completion deadline to September 2012 "may produce
12 significant variations in estimated costs for the project." *Agency Report page*
13 *147*. Yes, it most likely will make it more expensive! DOE certainly has not
14 provided any explanation as to why extending the project for a year will make
15 it any cheaper. It is common knowledge that the costs of things generally go
16 up not down over time. This is no different in the construction business. *See*
17 *Declaration of Won Sik Kim filed contemporaneously herewith*. It strains
18 credibility to think that postponing a project a year down the road will render
19 cost savings on this project. There simply are no "cogent and compelling
20 reasons" why this decision was in the best interest of the Territory.

21 **C. Appellant's Letter of September 26, 2011 Met the Criteria of a**
22 **Protest thus the OPA has Jurisdiction Over this Appeal.**

23 The letter of September 26, 2011 memorializes several previous
complaints appellant made to DOE that "it is illegal to do a rebid when the

1 bid packages were opened" and "once the bids are opened, it must be
2 awarded and not go through another bid." Generally, complainants should
3 seek resolution of their complaints initially with the procurement officer and
4 such complaints may be made verbally or in writing. 2 GAR §9101. However,
5 the September 26 letter was a more formal next step beyond the initial
6 complaints. Although it is not labeled a "protest", it is not mandatory to do so
7 to make it a protest. See In the Appeal of Eons Enterprises Corp. OPA-PA-10-
8 003. The statute gives no definition of a "protest" other than it be in writing,
9 include the name and address of the protester, identification of the
10 procurement, and a statement of reasons for the protest. Protest is defined in
11 the American Heritage Dictionary of the English Language, Third Ed. as "to
12 object to, especially in a formal statement"; "to express strong objection"; and
13 "a formal declaration of disapproval or objection issued by a concerned
14 person, group, or organization." The February 26 letter certainly did these
15 things.

16 While the protest contained objections to a lack of knowledge of the
17 cancellation, it also very clearly objected to the fact that the cancellation
18 occurred after bid opening to which Mr. Kim correctly stated was not allowed.
19 DOE's Answer tries to make some significance of the fact that the letter
20 concludes by stating that if the letter is ignored "we will have no other
21 recourse but to seek legal assistance and claim expenses incurred to include,
22 among others, cost of estimating, bid bond fee, attorney fees and other
23 miscellaneous costs." So the appellant had not yet hired a lawyer, so what?

1 does not need a lawyer to file a protest, although he may well need one to file
2 an appeal. This language does not exclude the letter from being a protest. As
3 the Hearing Officer determined In the Appeal of Eons Enterprises Corp.,
4 supra, if DOE was confused as to whether the Appellant's February 26, 2011
5 letter "was a protest or a complaint, it should have acted in good faith by
6 seeking clarification from the Appellant instead of speciously treating the
7 Appellant's Letter as a complaint."

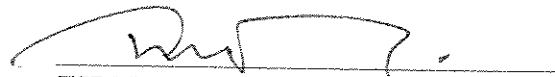
8 **D. Request for Hearing**

9 Appellant requests a hearing on this appeal per its Hearing Request
10 filed with the OPA on November 14, 2011.

11 **E. Request for Information on Appeal**

12 Pursuant to 2 GAR § 12106, Appellant requests information from DOE
13 as to whether Appellant's \$3,075,476.29 base bid was the lowest bid in the
14 solicitation, and whether appellant was deemed a qualified bidder in Phase I
15 of the RFB.

16 Dated this th 15 day of December, 2011.

17 
18 **THOMAS M. TARPLEY, JR.**
19 Attorney for Appellant
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FILE NO. 11-017

9 11ZP0266
10 Attorney for Appellant Kim Bros Construction Corp.

11 **OFFICE OF THE PUBLIC AUDITOR**

12 IN THE APPEAL OF

Docket No. OPA-PA-11-017

13 KIM BROS. CONSTRUCTION CORP.,

DECLARATION OF WON SIK KIM

14 Appellant.

15 I, Won Sik Kim, hereby declare and state as follows:

- 16 1. I am the President and owner of Kim Bros. Construction Corp.
- 17 2. Our Company has been in the construction business for more
18 than four decades in Guam.
- 19 3. Kim Bros. Construction is not just a fly by night Company, we
20 are one of the multi awarded company in Guam. We build numerous
21 government and military projects.
- 22 4. Kim Bros. Construction bid for Southern High School
23 Gymnasium renovation project was submitted June 10, 2011 and after three
24 months of evaluation the bid was cancelled.
- 25 5. This is the first time of my lifetime experience that bidding was
cancelled after three months of evaluation without any valid reason.

1 6. Mr. Marcus Y. Pido's first alibi is about time extension because
2 ARRA money will expire September 30, 2011. The Bid was submitted June
3 10, 2011, if they awarded the project before September 30, the project has no
4 problem for extension because ARRA money once it was allocated for the
5 certain project time extension is not a problem like what University of Guam
6 did, all ARRA project in UOG is still ongoing.

7 7. Mr. Pido's second alibi is Re-Bidding of this project will drop the
8 cost dramatically, I think Mr. Pido is not doing his homework. How can he
9 think that it will drop the cost of the project during re-bidding---if you get
10 quotation from the supplier, there is always note at the bottom that it says,
11 "this quote is good only for one month" means after one month price will be
12 higher.

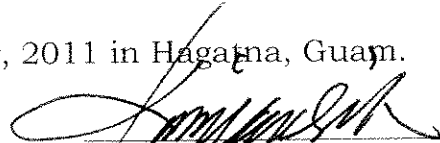
13 8. Second example, our first inspection in the Gymnasium last
14 April, some benches of the basketball court need to be replaced, maybe 4 to
15 10 benches, because of termite problem. Now during the inspection last
16 November for the supposed re-bidding all benches need to replace because of
17 termites, how Mr. Pido can believe that during re-bidding process he can drop
18 the price dramatically, except if they selected the contractor and used our
19 price for bargaining tools to drop the price dramatically. I even wonder why
20 they adopt this concept of design build in this renovation project, which they
21 do not even need a designer for this project. If they want to save money, they
22 can just print the as-built drawing and reflect the scope of work is to remove
23 and replace, that way they can bid the uniform scope of work to the bidder.

24 9. We contractors are like gamblers: we bid, we spend money for bid
25

1 preparation, win or lose is part of our business, but in this situation we can't
2 accept that after three months of evaluation the Bid was cancelled. The
3 services of our Engineers are not free, so they have to get paid even if they
4 can't award the project to us.

5 I, the undersigned, declare, under the penalty of perjury, that the
6 foregoing statements are true and correct.

7 Dated this 15th day of December, 2011 in Hagatna, Guam.

8 
9 _____
10 WON SIK KIM

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2 A Professional Corporation
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7 *Kim Bros Construction Corp.*

8 **OFFICE OF THE PUBLIC AUDITOR**

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12
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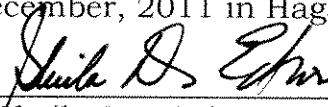
DECLARATION OF SERVICE

14 I, Sheila D. Edwin, hereby declare that I am above the age of 18. I cause to be
15 served on December 15, 2011, a true and correct copy of (1) APPELLANT'S
16 COMMENTS ON AGENCY REPORT AND REQUEST FOR HEARING and (2)
17 DECLARATION OF WON SIK KIM on the following:

18 Department of Education, Government of Guam
19 c/o Rebecca Perez, Esq.
20 Legal Counsel
21 GDOE Office of the Superintendent
22 312 Aspinall Avenue
23 Hagatna, Guam 96910

22 I declare under penalty of perjury that the foregoing is true and correct.

23 Dated this 15th day of December, 2011 in Hagatna, Guam.

24 
25 _____
Sheila D. Edwin