

the bid envelope, in duplicate, at the date and time for bid opening.” (GCC~Tab 10~AR0002.) And the IFB’s “General Terms and Conditions” directed:

. . . The literature furnished must clearly identify the item(s) in the Bid. The descriptive literature is required to establish, for the purpose of evaluation and award, details of the product(s) the bidder proposes to furnish including design, materials, components, performance characteristics, method of manufacture, construction, assembly or other characteristics which are considered appropriate. . . . Failure to furnish the descriptive literature(s) by the time specified in Solicitation will require rejection of the Bid.

(GCC~Tab 10~AR0009, No. 20.) At the pre-bid conference, GCC advised the prospective bidders of “important requirements” for their bid packets that “will be used in your evaluation,” including: “Descriptive Literature/Product Brochure: *the information regarding the housing, generator specification.*” (GCC~Tab 9~AR0002 (emphasis added).)

In its “General Requirements & Scopes of Work,” the Solicitation directed, in pertinent part:

1.2. DESCRIPTION:

A. Provide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator set/system.

1.4 SUBMITTALS (*refer to 1.2.A*)

C. Shop Drawings and Calculations: Submit for diesel generating unit and auxiliary equipment

(GCC~Tab 10~AR0031-32.)

The IFB’s “Instructions” directed that “[e]ach bidder shall furnish the information required by the Solicitation” and that “[a]ny explanation desired by a bidder regarding the meaning or interpretation of the Solicitation. . . must be submitted in writing. (GCC~Tab 10~AR0003.)

When GCC evaluated the bid packets, the evaluation sheets included the criterion: “Drawings were submitted with Bid Proposal.” (GCC~Tab 7~AR004, 026 & 048.) Because

no bidder met this material term of the Solicitation for the design-build structure to house the generator, GCC decided to reject all the bids, “review the scope of work and specifications, and re-issue the bid.” (GCC~Tab 6~AR001; *see id.* (“All bidders failed to provide GCC with shop drawings and submittals for the construction of the design-build generator to the generator set/system.”).) GCC then notified the three bidders that “no awards will be made” because “all bidders failed to provide GCC with shop drawings and submittals.” (GCC~Tab 5~AR001.) GCC also informed the bidders: “After reviewing the submission and all other documents submitted, GCC wants to ensure that all issues and requirements are addressed and taken into consideration. . . . [T]he GCC Planning & Development office will review the Scope of Work and requirements of this project and a new bid will be issued. All bidders above will be advised when a new bid is issued so that you may have another opportunity to participate.” (*Id.*)

J&B lodged a bid protest (“Protest”), complaining that “shop drawings were not included in the requirements for bids on this project.” (GCC~Tab 4~AR0001-02.) Noting the Solicitation’s various references to the requirement of shop drawings, GCC “found that [the Protest] is without merit.” (GCC~Tab 3 ~AR0001-02.)

J&B filed the instant Appeal on March 21, 2017. (*See* Appeal (Mar. 21, 2017).) On April 4, GCC filed its Agency Report, with a Statement Answering Allegations of the Appeal. (*See* GCC~Tab 1~AR [cited “Statement”].) On April 10, J&B filed its Comments on the Statement. (*See* Appellant’s Cmts. on Statement [cited “Comments”] (Apr. 10, 2017).) The same day, GCC filed a motion for an expeditious dismissal of the Appeal. (*See* Purch’g Agency’s Mot. for Exped. Dispos. (Dismissal) (Apr. 10, 2017).)

In its Appeal, J&B reiterates its allegation that GCC misinterpreted the Solicitation — which GCC drafted — to require shop drawings to be submitted in a bid packet.

REBUTTAL TO J&B’S COMMENTS

In its Statement, GCC explained, with ample record and legal citations, why J&B’s ground for Appeal fails. (*See* Statement at 5-12.) With its Comments, J&B attempts to resuscitate its Appeal under a misguided view of both the record and the law. (*See* Comments at 2-6.) J&B’s Comments provide no reason for its Appeal to prevail.

A. J&B Has Already Received the Only Remedy Available

At the outset and most importantly, J&B received the only available remedy when GCC announced that it was cancelling the IFB for the purpose of re-solicitation (*see* GCC~Tab 5~AR001). J&B wisely “admits that it overstated the relief in its Notice of Appeal” and “concede[s]” that the remedy of an award of the contract is not available. (*See* Comments at 6.) Nonetheless, relying on two decisions of the Public Auditor, J&B posits that ordering reconsideration of the bid packets is an available remedy. (*See id.* at 6-7.) The decisions that J&B relies upon are inapposite for the matter at hand.

Contrary to J&B’s insistence, neither *JMI Edison*, OPA-PA-13-010, Dec. (Sept. 25, 2013)) nor *Phil Gets (Guam) International Trading Corp. dba J&B Modern Tech*, OPA-PA-13-002 & -003, Consol. Dec. (June 14, 2013), can be likened to the instant Appeal. In *JMI Edison*, the purchasing agency found that only the protestor’s bid was non-responsive and the agency stipulated to facts that rendered that bid to be responsive. *See* OPA-PA-13-010, Dec. at 2-3. *J&B Modern Tech* involved an appeal from the purchasing agency’s suspension of the protesting bidder and subsequent rejection of that protestor’s bid packet because of the suspension. *See* OPA-PA-13-002 & -003, Consol. Dec. at 1.

Here, in stark contrast to *JMI Edison* and *J&B Modern Tech*, GCC found that *all* bid packets were non-responsive to the IFB's requirement to include drawings and submittals for the design-build structure (*see* GCC~Tab 6~AR001) — which GCC clearly intended for the bidders to do (*see id.* at Tab 7~AR0004, 26 & 48 (evaluation sheets' criteria included: "Drawings were submitted with Bid Proposal").) GCC therefore properly cancelled the Solicitation in order to review its requirements and re-solicit the IFB. *See, e.g., Bade Roofing & Sheet Metal Co.*, B-243496, 1991 WL 126507 (U.S. Comp. Gen. Jun. 25, 1991) ("[W]here a solicitation contains a latent ambiguity that has the effect of misleading one or more bidders into submitting nonresponsive bids, the appropriate remedy is cancellation and resolicitation rather than award to the low bidder; it is not appropriate to make award to a bidder, which did not comply with a material invitation for bids requirement."); *MLC Fed., Inc.*, B-254696, 1994 WL 8658 (U.S. Comp. Gen. Jan. 10, 1994) ("Where a solicitation has a latent ambiguity that misleads one or more offerors, the appropriate remedy is cancellation and resolicitation."); *Bosco Contracting, Inc.*, B-244659, 1991 WL 182206 (U.S. Comp. Gen. Aug. 27, 1991) ("Where, as here, a solicitation contains a latent ambiguity that misleads bidders into submitting nonresponsive bids, the appropriate remedy is cancellation and resolicitation; contrary to [the protestor's] contention, award could not be made to it because its bid was nonresponsive[.]").

Accordingly, even assuming that J&B is entitled to any remedy for its Appeal — which it is not — J&B has already received the only possible remedy available.

B. J&B's Interpretation of the IFB and Its Declaration Do Not Aid Its Cause

In its Comments, J&B argues that the Solicitation's requirement to provide "shop drawings" could only be interpreted to mean that this requirement became effective after

award of the contract. (See Comments at 2-6.) J&B also filed a Declaration from its president to support its argument. (See Decl. G. Bangayan (Apr. 10, 2017).) Neither its argument nor its president's Declaration assists J&B's Appeal. Indeed, both J&B's argument and its Declaration reinforce why its Appeal fails.

First, J&B's prior experience with procurement solicitations not requiring shop drawings until after award of the contract (see Comments at 3; Decl. G. Bangayan at ¶¶ 2-3) is irrelevant because *this IFB* — soliciting for, in part, a design-build project — required the bidders to provide “shop drawings and submittals” for the structure they proposed to design and build (see Statement at 5-7).² And it is not uncommon that a solicitation for a design-build project will require bidders to submit drawings of their proposed design. See, e.g., *SPEC Inc. v. Dept. of Transport.*, No. 01-1169BID, 2001 WL 629842, at *7-8 (Fla. Div. Admin. Hrgs. June 5, 2001) (discussing the drawings submitted by bidders on a government solicitation for a design-build roof replacement project); *PCCP Constr., JV, Bechtel Infrastructure Corp.*, B-405036, 2011 WL 3510746, at *7-9 (U.S. Comp. Gen. Aug. 4, 2011) (discussing the drawings submitted by a bidder on a government solicitation for a design-build pump station); *Am. Physical Sec. Grp., LLC*, B-405059, 2011 WL 3097958, at *1 (U.S. Comp. Gen. July 25, 2011) (noting that a government solicitation for “the fabrication and installation of aluminum forced-entry/ballistic-resistant windows . . . required that offerors provide sample shop drawings”); *Medlin Constr. Grp.*, B-286166, 2000 WL 1745358, at *3-6 (U.S. Comp. Gen. Nov. 24, 2000) (discussing the drawings submitted by a bidder on a government solicitation for the “design and construction of physical fitness

² Tellingly, the “Statement of Experience” attached to Mr. Bangayan's Declaration does mention any design-build projects. (See Decl. G. Bangayan at Ex. A.) And this list experience includes several non-government projects and numerous projects that apparently involved air conditioning units. (See *id.*) Thus, it is questionable whether J&B has ever bid on a design-build structure like the one solicited by this IFB.

centers”). Moreover, the fact that this IFB’s requirements differed from J&B’s prior experience was all the more reason for J&B to seek clarification before submitting its bid packet. (See Statement at 8-11 (explaining J&B’s duty to seek clarification on a “patent ambiguity” and its failure to do so³.)

Second, while J&B’s interpretation of the IFB’s shop drawings requirement bears on whether the Solicitation was ambiguous, J&B’s interpretation alone is not enough for its Appeal to prevail. Rather, as the drafter of the Solicitation, GCC’s intent for the IFB’s submission requirements must be taken into account. See, e.g., *MLC Fed., Inc.*, B-254696, 1994 WL 8658 (U.S. Comp. Gen. Jan. 10, 1994) (discussing the agency’s intention for the solicitation requirements). Here, there is no question that GCC intended for the bidders to provide something that illustrated the structure they proposed to design and build. It is indisputable the GCC drafted the IFB. Also, the record clearly reveals that evaluation sheets for the bid packets included the criterion: “Drawings were submitted with Bid Proposal.” (GCC~Tab 7~AR0004, 26 & 48.) Further, it is axiomatic that these evaluation sheets were based on the IFB’s terms and prepared in advance of the bid packets’ evaluations. Thus, GCC clearly intended for the IFB to require bidders to submit drawings of their proposed design-build structure in their bid packets. Given that no bidder satisfied this requirement, the Solicitation — at best — contained a latent ambiguity. (See Statement at 9.) And because this latent ambiguity resulted in the bid packets being non-responsive, GCC properly cancelled the Solicitation so that it could re-solicit the IFB. See *supra* at Section A.

Third, J&B’s distinction between the availability of free information for the generator and the cost of shop drawings is beside the point. (See Decl. G. Bangayan at ¶¶ 4-

³ Noticeably, J&B wholly neglects discussing its duty to seek clarification. (See *generally* Comments.)

7; *see also* Comments at 2-3.) Simply because descriptive literature for one of the IFB's items can be obtained free of charge but may come at an expense for the other item does not mean that GCC intended for the bidders to submit *only* illustrative information about the generator. Moreover, as explained in GCC's Statement, "shop drawings" include drawings, diagrams and illustrations. (*See* Statement at 7-8.) Indeed, if J&B had not failed to provide the "attached sketch" of the design-build structure it proposed (*see* GCC~Tab 8~AR0006, No. 6; Statement at 8), that sketch might have met the Solicitation's requirement of shop drawings for the building to house the generator.

Fourth, even assuming *arguendo* that J&B did not exaggerate its cost estimate for obtaining shop drawings of the design-build structure (*see* Comments at 3; Decl. G. Bangayan at ¶ 7), this estimated cost is only about 5% of the total price that J&B proposed for entire project. Given that GCC will be paying around \$500,000 for this project, an IFB requirement that causes a small percentage of the project price to be borne up-front by the bidders is not unwarranted. Moreover, to the extent that J&B claims the requirement to provide shop drawings created too much of burden at this stage, it should have challenged that requirement before submitting its bid packet. *See e.g., Rochester City Lines, Co. v. City of Rochester*, No. 55-CV-12-1003, 2013 WL 9593880, at *16 (D. Minn. June 7, 2013) ("If RCL thought the requirement was too burdensome, it could have filed a pre-bid protest. It did not. Instead, RCL failed to comply with the clear terms of the RFP, claiming that it 'does not see the need to incur the costs.' Notably, RCL does *not* state that it *could not* comply with the RFP, but only that it saw no need to comply with it. The RFP reasonably created that need.") (emphasis in original).

Accordingly, J&B's Comments and accompanying Declaration provide no reason for its Appeal to prevail.

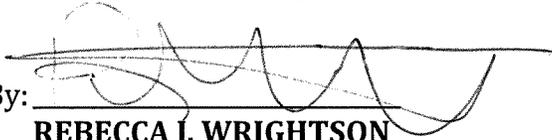
RECOMMENDATIONS

For the foregoing reasons and those articulated in its Statement, GCC recommends that the Public Auditor:

- (1) Find that J&B's Appeal lacks merit;
- (2) Deny all relief requested by J&B; and
- (3) Dismiss the instant matter so that GCC may proceed with issuing a revised solicitation for Construction of a Generator Building and Installation of a Back-Up Generator System to Service GCC Allied Health Center and Building A.

Respectfully submitted this 17th day of April 2017.

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