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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
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FILE NO OPA-PA: 14-001

5 Interested Party

6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

8 In the Appeal of J & B Modern Tech,  
9  
10 Appellant.

OPA-PA-14-001  
**MOTION TO DISMISS AND  
MEMORANDUM OF POINTS  
AUTHORITIES IN SUPPORT OF  
THIS MOTION TO DISMISS**

13  
14 **COMES NOW** JRN Air Conditioning & Refrigeration, Inc. (“JRN” herein), an  
15 Interested Party in this Appeal as the current contractor in the relevant bid, and pursuant to 2  
16 GAR § 12104(c)(9), moves the Office of Public Accountability (“OPA” herein) to dismiss the  
17 matter in its entirety. JRN makes its objection to the jurisdiction of the OPA to adjudicate on the  
18 grounds that Appellant J & B Modern Tech (“Appellant” herein), in filing this Appeal, requests  
19 relief that is barred by 20 GCA § 3226, 20 GCA § 3227, and 20 GCA § 3240.

21 **STATEMENT OF FACTS**

22 On Monday, November 25, 2013, an invitation for bid identified as GDOE IFB 005-2014  
23 was issued by the Purchasing Agency in this matter, the Guam Department of Education  
24 (“GDOE” herein), for the Air Conditioning Systems Exterior Duct Restoration Project (“Project”  
25 herein). Government certification for this project was set at \$300,000. A pre-bid conference and  
26 site inspections organized by GDOE occurred on December 6, 2013 and December 10, 2013.  
27 JRN conducted prior site inspections on September 20, 2013, September 23, 2013, September  
28 24, 2013 and attended the December 6, 2013 pre-bid conference and site inspections organized

1 by GDOE. By the amended deadline for submission on December 17, 2013, only Appellant and  
2 JRN submitted bids for GDOE's consideration. Appellant's bid presented a total cost of  
3 \$350,000. JRN's bid presented a total cost of \$254,501.90.

4 On February 5, 2014, GDOE issued a Bid Status notification to both bidders relating its  
5 award to JRN. On that same day, Purchase Order No. 20140367-00 was issued by GDOE to  
6 JRN reflecting the award. On February 6, 2014, Appellant submitted its Protest of the award to  
7 GDOE. As its immediate response to Appellant's Protest, GDOE issued a Notice of Stay of  
8 Procurement on February 7, 2014. On March 7, 2014, GDOE issued a Notice to Lift the Stay of  
9 Procurement following its determination that the stay was improperly imposed as Appellant's  
10 Protest was submitted after the award had already been issued. GDOE also denied Appellant's  
11 Protest in its entirety on March 7, 2014. Immediately following the lift of the stay, JRN  
12 commenced work to meet the 120-day turnaround called for in the Project.

13 On March 13, 2014, Appellant commenced this Appeal with the OPA by filing its Notice  
14 of Appeal. In hearing the matter, the OPA is to determine these issues of fact: (1) whether  
15 attending the GDOE-organized site inspections on December 6, 2013 and December 10, 2013  
16 was the only way to comply with Section 2.1.2 of the invitation for bid and (2), if so, whether  
17 JRN's attendance on December 6, 2013 only, after having conducted its own site inspections  
18 prior, disqualify it as a responsive bidder and, inter alia, was awarded the bid unjustly.<sup>1</sup> And  
19

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20 <sup>1</sup> Section 2.1.2 of GDOE IFB 005-2014 states, in pertinent part, "[t]he Contractor must conduct pre site  
21 inspections to determine existing conditions and any special needs/requirements for execution of project. **Site**  
22 **Inspection and field verification of existing layout and conditions is mandatory.**" The remainder of this section  
23 does not discuss whether GDOE shall schedule site inspections, and if so, whether attendance of such is mandatory.

24 Section 2.3.1 provides that a pre-bid conference may be held at GDOE's discretion when a potential bidder  
25 submits a written request for one. Section 2.3.1 further requires GDOE to inform all potential bidders of the date,  
26 time, and location of the pre-bid conference should GDOE oblige. Yet, there is no further language within this  
27 section that discusses whether attendance at a pre-bid conference is mandatory. No other part of GDOE IFB 005-  
28 2014 speaks on the matter of attendance at either a site inspection or a pre-bid conference scheduled by GDOE.

JRN submits that a bidder fails to comply with the provisions of Section 2.1.2 by not at all conducting the  
mandatory site inspections and field verifications. Noncompliance thereto would then qualify that bidder as  
nonresponsive. However, the issues in this Appeal concern how a potential bidder sufficiently complies with Section  
2.1.2. JRN, relying on the plain language of Section 2.1.2 and GDOE's written responses to the pre-bid questions,  
contends that what is mandatory are the site inspections and field verifications themselves and that such are  
conducted prior to the submission of a bid. In fact, GDOE previously stated that though a pre-bid conference and  
site inspection was scheduled at the request of potential bidders, attendance was not made mandatory and potential  
bidders were welcomed to satisfy Section 2.1.2 on their own initiative through separate site visits. Bid Status,

1 thus, within its Notice of Appeal, Appellant submitted the following:

2 **RELIEF REQUESTED**

3 This appeal is brought in the context of a post award protest. The bids have been  
4 opened and submitted. J & B Modern Tech believes it has met all the  
5 requirements to be the only responsive and lowest bidder upon opening of the bid  
and as thus should be awarded the bid as per the context of the proposal.

6 No further stays have been issued and JRN continues its work during the pendency of this  
7 Appeal. To date, JRN has completed approximately 45% of the work called for in the Project  
8 and the first application for payment was submitted to GDOE on April 7, 2014.

9  
10 **ARGUMENT**

11 **THE OPA SHOULD DISMISS THIS APPEAL BECAUSE APPELLANT REQUESTS  
12 RELIEF THAT CANNOT BE GRANTED.**

13 **A. The OPA's Authority And Jurisdiction To Hear Procurement Appeals  
14 Confers Upon It The Power To Grant Relief. Yet, As To The Kinds And  
Scope Of Relief, The OPA Is Limited.**

15 The OPA's function as an administrative law forum likens it to a judicial court of first  
16 instance, such as a trial court. Title 5 of the Guam Code Annotated confers upon the OPA the  
17 authority and jurisdiction to provide for the efficient resolution of procurement disputes. 5 GCA  
18 §§ 5701 and 5703. For that purpose, the Legislature has enabled the OPA, through and by the  
19 capacity of the Public Auditor, various adjudicative abilities, including the ability to adopt rules  
20 of procedure, conduct hearings, appoint hearing officers to take testimony and evidence, and  
21 issue decisions that carry the force of law. 5 GCA §§ 5701-5702. Furthermore, the standard of  
22 review for issues presented to the OPA is *de novo* and shall be final unless the Superior Court  
23 deems the OPA's determination to be arbitrary, capricious, fraudulent, clearly erroneous, or  
24

25 \_\_\_\_\_  
February 5, 2014; Submission of Agency Report, Exhibit 18.

26 This Appeal rests on questions of technicalities. Appellant claims that (1) attendance at the pre-bid  
27 conference and site inspection scheduled by GDOE was mandatory despite no indication from GDOE as such and  
28 despite further confirmation from GDOE of the same and (2) attendance at the pre-bid conference and site inspection  
scheduled by GDOE was the only manner in which a potential bidder could sufficiently comply with Section 2.1.2  
and, therefore, qualify as a responsive bidder.

1 contrary to law. 5 GCA § 5704. By these features alone, there is not much distinction between  
2 the OPA and the Superior Court.

3 The authority to hear matters and issue decisions would be meaningless without the  
4 authority to mandate conduct that would conform parties to those decisions. 20 GCA § 15114.  
5 As a necessary authority of the Superior Court, this extends to the OPA. In fact, 5 GCA § 5002  
6 provides that the principles of law and equity, unless excepted expressly, shall supplement the  
7 Guam Procurement Law. To that end, the rules of procedure adopted by the OPA require that all  
8 appeals include a statement specifying the ruling requested. 2 GAR § 12104(b)(4). A survey of  
9 the appeals heard by the OPA show that the most common rulings requested by appellants are  
10 relief in the form of revoking an award, rescinding or cancelling a contract, ordering an award,  
11 maintaining an award, ordering compensation, and ordering specific performance. Such forms of  
12 specific relief are within the range of actions permitted to the Superior Court, and thus, the OPA.  
13 20 GCA §§ 1101 and 3101-3102.

14 However, if the authority of the OPA to grant relief reflects that of the Superior Court, the  
15 former shall also reflect the scope of the latter. Where the Superior Court is limited, so too shall  
16 the OPA. What the Superior Court may not, the OPA may not.

17  
18 **B. Even If The OPA Determines The Issues In Favor Of Appellant, That**  
19 **Appellant Requests The Bid To Be Awarded To Appellant Post-contract Is**  
20 **Barred By Law.**

21 Assuming, in arguendo, that the issues submitted in this Appeal are determined in the  
22 favor of Appellant and the OPA finds that (1) attending the GDOE-organized site inspections on  
23 December 6, 2013 and December 10, 2013 was the only way to comply with Section 2.1.2 of the  
24 invitation for bid and (2) because JRN did not attend on December 10, 2013, JRN is a  
25 nonresponsive bidder for that reason only, Appellant should have had the winning bid over JRN.<sup>2</sup>  
26 Consequently, the OPA grants Appellant's request that it "be awarded the bid as per the context  
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28 <sup>2</sup> This motion also assumes, in arguendo, that despite submitting a bid with a price well over the known  
government-certified amount, Appellant may still be considered a responsive bidder.

1 of the proposal,” which presumably seeks to replace the current contract between GDOE and  
2 JRN with Appellant’s bid in the same form in which it was submitted to GDOE on December 17,  
3 2013. Notice of Appeal, p. 4. Essentially, the award to JRN is revoked. The current contract  
4 between GDOE and JRN is rescinded. Appellant is awarded the bid by the OPA, and  
5 accordingly, GDOE and Appellant are bound to a contract between them. The OPA  
6 constructively binds GDOE to pay Appellant Appellant’s bid price of \$350,000, and Appellant  
7 is, in turn, contractually bound to complete and deliver the Project. Notice of Appeal, pp. 51-53  
8 and 56-59. This outcome runs afoul of the law in multiple and significant ways.

9  
10 **1. The Resulting Contract Between GDOE and Appellant Should The**  
11 **OPA Grant Appellant’s Request Is Unenforceable As It Is Unjust And**  
12 **Unreasonable Against Both GDOE And The Public Interest.**

13 Contractual liability for GDOE would compel the specific performance of the resulting  
14 contract. Here, specific performance on the part of GDOE is pecuniary. Appellant is either paid  
15 a total amount of \$350,000 upon completion or, in the event of breach by GDOE, appropriate  
16 monetary damages. However, when the specific performance of a contract is barred by law, such  
17 a contract is inherently unenforceable.

18 Enforcement of the resulting contract is barred by 20 GCA § 3226, which provides that a  
19 party to a contract cannot be compelled to specifically perform when, as to that party,  
20 enforcement is not just and reasonable. The government-certified amount for the Project was set  
21 at \$300,000, to be paid solely from local funding. Submission of Agency Report, Exhibit 18;  
22 Pre-Hearing Conference Audio, April 4, 2014. Should the OPA order an award and contract for  
23 Appellant, the OPA would be mandating GDOE to pay \$50,000 more than what had been  
24 approved and budgeted for the Project. Because GDOE disclosed the certified amount prior to  
25 the submission of bids and Appellant was fully aware of the same prior to submitting its bid,  
26 enforcement against GDOE is unjust and unreasonable.

27 Additionally, the injustice and unreasonableness of this outcome goes much further,  
28 negatively affecting the public interest. GDOE, as the purchasing government agency in this  
case, stands as representative of the public interest. As such, there is great interest in both

1 minimizing costs and the expenditure of public funds and ensuring fiscal sense and logistical  
2 efficiency in the procurement process as much as possible. Enforcement of a contract between  
3 GDOE and Appellant goes directly against the public interest because by not maintaining the  
4 current contract between GDOE and JRN entails spending \$95,498.10 more than what would  
5 have been spent on the Project.<sup>3</sup> As the representative of the public interest in this case, GDOE  
6 has the responsibility of acting in accordance with the public interest and did so in its selection of  
7 JRN's bid. Should the OPA rule in the manner requested by Appellant, doing so would  
8 accomplish the reverse.

9  
10 **2. The Resulting Contract Between GDOE and Appellant Should The**  
11 **OPA Grant Appellant's Request Is Unenforceable Because Appellant**  
12 **Is Denied Specific Performance By Law.**

13 Again, contractual liability for GDOE would compel the specific performance of the  
14 resulting contract. GDOE must either pay Appellant a total amount of \$350,000 upon  
15 completion or, in the event of breach by GDOE, appropriate monetary damages. For purposes of  
16 analysis, the best-case scenario is assumed and the work called for in the Project is completed  
17 and delivered, triggering GDOE to complete and deliver its performance, i.e. payment.

18 Enforcement, even in a best-case scenario, is also barred by 20 GCA § 3227, which  
19 denies specific performance to a party who has not fully and fairly performed the conditions  
20 precedent that would entitle that party to the specific performance of the other party. At this  
21 juncture, an award and contract for Appellant would directly result in unjust enrichment and a  
22 windfall for Appellant. Appellant would undeservingly benefit from the progress and the volume  
23 of work already completed by JRN, which is almost half of the total work.<sup>4</sup> As Appellant's  
24 request stands, Appellant seeks 100% of its bid price while realistically completing only half of

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25 <sup>3</sup> JRN's bid presented a total cost \$95,498.10 less than that of the only other bidder, Appellant.

26 <sup>4</sup> There is currently no stay in effect, and thus, the current contract between GDOE and JRN is active.  
27 JRN, as the winning bidder, promised to deliver within 120 days of the award and fully intends to do so. While no  
28 stay is in effect, JRN will continue the work to minimize its contractual liability. Furthermore, JRN is of the belief  
that delays in work will increase costs overall and unnecessarily burden the four public schools intended to benefit  
directly from the Project. JRN anticipates to complete and deliver the Project in no more than four weeks.

1 the Project.

2 While Appellant may argue that 20 GCA § 3227 considers compensation made for  
3 defaults in performance of the party seeking enforcement, there is no language in Appellant's  
4 Notice of Appeal indicating whether and how an award and contract in its favor would be  
5 appropriately adjusted to reflect the current state of the Project. Even then, replacing the current  
6 contract with an award and contract for Appellant insists on GDOE spending an amount half of  
7 the difference of JRN's bid price and Appellant's bid price more than what GDOE would  
8 otherwise spend by maintaining the current contract.

9 Furthermore, whether the appropriate adjustments to Appellant's bid can even be made is  
10 uncertain, giving rise to impracticability. The mere size of the Project and the complexity of the  
11 of the work, which requires extensive removal, fabrication, and installation, would necessitate a  
12 complete stay to accommodate further site inspections and planning to assess what components  
13 of the Project remain undone. Delays of this sort, while understandable, lead to overall increases  
14 in cost and promotes waste. They should be avoided. An OPA ruling in the manner requested by  
15 Appellant would not only fail to avoid undesirable delay and cost increase but actually give rise  
16 to them.

17  
18 **3. Should The OPA Grant Appellant's Request, It Would Impermissibly**  
19 **Rescind The Current Contract Between GDOE and JRN.**

20 While the OPA will constructively bind GDOE and Appellant in a contract between them  
21 by granting Appellant's request, the OPA will also constructively rescind the current contract  
22 between GDOE and JRN. Rescission of a written contract is permissible only in cases of a  
23 stipulation, an unlawful contract, or when the public interest would be prejudiced by permitting it  
24 to stand. 20 GCA § 3240.<sup>5</sup> This matter does not concern a stipulation or an unlawful contract,  
25

26  
27 <sup>5</sup> Whether the current contract between GDOE and JRN is a written contract subject to the operation of 20  
28 GCA § 3240 is a non-issue. Customary to the procurement process, the bid documents, purchase order, and  
application for payment(s) are taken together and incorporated to comprise a written contract. Similarly, whether the  
current contract is a valid and properly executed contract is a non-issue.

1 thus the pertinent part of 20 GCA § 3240 is subsection (3). The OPA can effectuate a rescission  
2 of the current contract only upon a finding that maintaining it prejudices the public interest.

3 In measuring the current contract's advantage to the public interest, simply assess how its  
4 terms are balanced with the public need. As stated before, the government's approved budget for  
5 the Project was set at \$300,000, which is presumably intended to be the maximum allowance  
6 from local funds. The current contract saves GDOE, and ultimately the public, \$45,4982.10 from  
7 anticipated costs, a significant amount that can go back into local funds and later displaced to  
8 address other public needs. From a financial standpoint alone, the current contract does not  
9 prejudice the public interest, but instead, enhances it.

10 Furthermore, the urgency of the Project is served well by maintaining the current  
11 contract. The invitation for bid initially called for completion and delivery within 90 days of an  
12 award but was later changed to 120 days. Procurement Record, Exhibit 6. However, need for  
13 the work was apparent much earlier, in September 2013. Interested Party JRN Air Conditioning  
14 & Refrigeration, Inc.'s Comments to Submitted Agency Report, p. 1. JRN, having been  
15 approached by GDOE to provide a cost proposal, understood the urgency of the work needed.  
16 GDOE indicated its desire for expedient completion, and thus, JRN completed site inspections  
17 for three of the four schools in the same month. *Id.; Id.*, Exhibits A, B, C, and D. Now, after  
18 having won the bid and commencing work, JRN expects to complete and deliver in no more than  
19 four weeks. That the public need shall be served ahead of schedule only furthers the public  
20 interest.

21 Contrastingly, the same comments cannot be made with regard to an award and contract  
22 for Appellant, and granting relief to effectuate an award and contract for Appellant amounts to  
23 irresponsibility with public funds. Appellant's bid price is more than what the government had  
24 anticipated in spending for the Project. Thus, instead of relieving some of the budget,  
25 Appellant's bid forces GDOE, and the public, to further burden the public interest to address this  
26 one public need.

27 Relatedly, the urgency of the Project is less served by an award and contract for  
28 Appellant. The delay caused by implementing a change in the contractor to perform any work



1 that remains, as discussed above, is alone enough to frustrate the purpose of the Project.  
2 Granting Appellant's request would burden the public with a senseless wait, with the four public  
3 schools bearing that burden the most.

4 Lastly, should the OPA rescind the current contract between GDOE and JRN, the  
5 principles of equity trigger even more liability for GDOE and the public interests it serves.  
6 When a contract is rescinded, the party to whom such relief was granted may be required to make  
7 any compensation to the other party which justice may require. 20 GCA § 3242. Considering  
8 JRN's progress toward completion of the Project and its diligence in performing all of its  
9 contractual obligations, compensation to JRN is proper and warranted. Equity simply demands  
10 it.

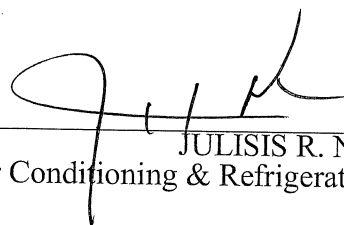
11 Restitution due to JRN if work was stopped today would amount to more than \$100,000  
12 for the completed 45% or so of the Project, and GDOE's susceptibility does not end there. If  
13 strained by the more expensive and above-budget bid of Appellant, GDOE is subject to legal  
14 recourse in any inability to pay on the rescission and make JRN whole. The toll on resources  
15 brought on in managing a lawsuit is something neither GDOE nor JRN desires, but pursuing  
16 rights to which a party is entitled in court is a real potential that follows should the OPA grant  
17 Appellant's request in this Appeal.

18  
19 **CONCLUSION**

20 For the foregoing reasons, JRN respectfully requests that the OPA dismiss this Appeal in  
21 its entirety.

22  
23 Submitted on April 11, 2014

24  
25 By

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27   
28 \_\_\_\_\_  
JULISIS R. NUCUM  
JRN Air Conditioning & Refrigeration, Inc.

**SERVICE LIST**

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