



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant

APPEAL NO: OPA-PA-10-007

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on October 28, 2010, by JRN AIR CONDITIONING & REFRIGERATION, INC. (Hereafter referred to as "JRN") regarding the Department of Education, Government of Guam's (Hereafter referred to as "DOE") denial of JRN's September 10, 2010 protest concerning DOE's solicitation of Invitation for Bid No. IFB-007-2010 (Preventive Maintenance and Repair of Central Air Conditioning Equipment for all GDOE Public Schools and Support Facilities) (Hereafter referred to as "IFB"). The Public Auditor holds that she does not have the jurisdiction to decide issues regarding a contractor's alleged violation 5 G.C.A. §5801 and §5802, and the Public Auditor holds that DOE violated Guam Procurement Law and Regulations by failing to include a recitation, reference, or copy of the most recent U.S. Department of Labor Wage Determination for Guam in the IFB, and by failing to identify which occupational codes in said wage determination applied to the technicians and helpers the IFB required. Accordingly, JRN's appeal is DENIED in part and GRANTED in part.

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II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, as well as all testimony and arguments presented at the Hearing on this matter held on January 13, 2011. Anthony R. Camacho, Esq. served as the Office of Public Accountability's Hearing Officer at said Hearing. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. On or about July 9, 2010, DOE issued the IFB.¹

2. The IFB required the bidders to submit a U.S. Department of Labor (Hereafter referred to as "U.S. DOL") Affidavit (Hereafter referred to as "Wage Compliance Declaration").² The IFB included Form E – Declaration Re Compliance with U.S. DOL Wage Determination which the bidders were to fill out and which stated, in relevant part, that: (1) The bidder read and understands the provisions of 5 G.C.A. §5801 and §5802. The Declaration form included the language of both statutes in the Affidavit; (2) The bidder is in full compliance with 5 G.C.A. §5801 and §5802, as may be applicable to the procurement referenced herein; and (3) That the bidder attached the most recent wage determination applicable to Guam issued by the U.S. DOL, and the declaration instructed the bidder to attach said document to the declaration.³ The IFB did include Form E – Wage Compliance Declaration, however, DOE did not attach the Wage Determination issued by the U.S. DOL as

¹ Page 1, Bid Invitation and Award, IFB, Exhibit 1, Procurement Record filed on November 8, 2010.

² Special Reminder to Prospective Bidders, Id.

³ Page 10, Bid Invitation Form E, Declaration Re Compliance with U.S. DOL Wage Determination, Id.

1 of July 9, 2010, the date DOE publicly announced the IFB.

2 3. The IFB stated that bidders awarded a contract from the IFB shall comply with the
3 applicable standard, provisions, and stipulations of all pertinent Federal or local laws, rules, and
4 regulations relative to the performance of the contract and furnishing of goods.⁴
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6 4. The IFB required the bidders to provide labor cost requirements for: (1) Preventative
7 Maintenance of Air-Conditioning Equipment; (2) Minor Repairs of Air-Conditioning
8 Equipment; and (3) Major Repairs, Installation, Relocation, and Replacement of Central Air-
9 Conditioning Equipment.⁵ Further, the charges for the aforementioned services were to be
10 based on a fixed-hourly rate to include labor, transportation, insurance, parts, and for any other
11 reasonable expenses related to the scope of work.⁶
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13 5. The bidder, awarded the contract for the IFB, would provide a minimum of two (2)
14 crews for installation, and three (3) crews for repair and preventative maintenance per district
15 one (1) technician and one (1) helper per crew, or a total of ten (10) persons per district. The IFB
16 did not provide job position descriptions or job classification codes that correspond with the U.
17 S. DOL Wage Determination for each crew.⁷
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19 6. The deadline for bidders to submit their bids in response to the IFB was set for 2:00
20 p.m. on August 2, 2010.⁸
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22 7. A pre-bid conference for the IFB was scheduled for July 27, 2010.⁹
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24 ⁴ Paragraph 34, Compliance with Laws, General Terms and Conditions, Id.

25 ⁵ Paragraph 1, General Specifications, Id.

26 ⁶ Paragraph 4, Allowable Cost, Id.

27 ⁷ Paragraph 4.C., Crew Requirements Per District, Id.

28 ⁸ Page 1, Bid Invitation and Award, Id.

⁹ Amendment No. 1 dated July 20, 2010, Exhibit 2, Id.

1 8. At the pre-bid conference, DOE took questions from the prospective bidders regarding,
2 in relevant part, the number of school districts, the number of air conditioning units for the
3 schools, whether the IFB's experience requirement for the contractor's technicians and helpers
4 should be reduced from five (5) years to two (2) years of experience.¹⁰ However, the issue of
5 wage determination compliance was not discussed at the pre-bid conference.¹¹
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7 9. On July 30, 2010, DOE postponed further solicitation of the IFB indefinitely.¹²
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9 10. However, on August 18, 2010, DOE re-instated the IFB and made the following
10 relevant changes as a result of the issues brought up at the pre-bid conference: (1) Contractor
11 Qualifications were reduced from five (5) years per employee to a minimum of two (2) years of
12 experience per employee; (2) The minimum qualification per technician-Contractor was
13 clarified to be two (2) years experience on Preventative Maintenance, Minor Repairs, Major
14 Repairs, Installation, and Relocation and Replacement of Central Air-Conditioning; (3) DOE
15 clarified that it had four (4) school districts. Further, DOE rescheduled the bid opening date for
16 the IFB to September 1, 2010 at 2:00 p.m.¹³
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18 11. On September 1, 2010, JRN, Global Food Services, LLC dba GFS Group (Hereafter
19 referred to as "GFS"), and Phil-Gets (Guam) International Trading Corp., dba J&B Modern Tech
20 (Hereafter referred to as "J&B") submitted bids in response to the IFB.¹⁴
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22 ¹⁰ Notes from July 27, 2010 Pre-Bid Conference, Exhibit 2, Id.
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24 ¹¹ Declaration of Martin Mercado dated November 24, 2010, Appellant's Comments
25 in Response to the Agency Report filed on November 24, 2010.

26 ¹² Amendment No. 2 dated July 30, 2010, Exhibit 3, Procurement Record Filed on
27 November 8, 2010.

28 ¹³ Amendment No. 3 dated August 18, 2010, Exhibit 3, Id.

¹⁴ Bidder's Register, Exhibit 3, Id.

1 12. JRN submitted a Wage Compliance Declaration with its bid and attached a copy of
2 U.S. DOL Wage Determination No. 2005-2147, Revision No. 11, dated June 15, 2010.¹⁵
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4 13. GFS submitted a Wage Compliance Declaration with its bid and attached a copy of
5 U.S. DOL Wage Determination No. 2005-2147, Revision No. 12, dated August 19, 2010.¹⁶
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7 14. J&B submitted a Wage Compliance Declaration with its bid and attached a copy of
8 U.S. DOL Wage Determination No. 2005-2147, Revision No. 10, dated May 5, 2010.¹⁷
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10 15. DOE deemed JRN, GFS, and J&B to be compliant with the wage determination
11 requirements set forth in the IFB and 5 G.C.A. §5801 and §5802 solely on the Wage Compliance
12 Declarations, despite the fact that each bidder submitted a different revision of Wage
13 Determination No. 2005-2147 with their respective bids. In his witness testimony obtained at the
14 January 13, 2011 hearing on this appeal, Albert Garcia, DOE Acting Supply Management
15 Administrator stated that DOE conducted no further analysis or comparative computations
16 relative to this issue.¹⁸ Mr. Garcia's testimony at hearing is consistent with DOE's October 13,
17 2010 denial of JRN's protest, wherein Mr. Garcia, wrote "by acknowledging/signing the Form E
18 Declaration Re Compliance with U. S. DOL Wage Determination, the bidder is responsible for
19 the aforementioned sections (5 GCA § 5801 and §5802)..."¹⁹
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21 16. JRN bid: (1) Twenty-dollars-and-sixty-cents per hour (\$20.60) for the Minor and
22 Major Repairs, respectively, for a total of thirty-thousand-nine-hundred dollars (\$30,900) for the
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24 ¹⁵ Exhibit 3, Wage Compliance Declaration, JRN Bid, Id.

25 ¹⁶ Exhibit 3, Wage Compliance Declaration, GFS Bid, Id.

26 ¹⁷ Exhibit 3, Wage Compliance Declaration, J&B Bid, Id.

27 ¹⁸ January 13, 2011 Hearing: Testimony of Albert G. Garcia, DOE Buyer
28 Supervisor II.

¹⁹ Exhibit 6, JRN Appeal to OPA - Exhibit 0, Id.

1 fifteen hundred (1,500) man hours the contract would require for each of the aforementioned
2 repairs, respectively; and (2) Fifteen-dollars and seventy-five-cents (\$15.75) for the Preventative
3 Maintenance for a total of twenty-three-thousand-six-hundred-and twenty-five dollars (\$23,625)
4 for the fifteen hundred (1,500) man hours the contract would require for such services. JRN's
5 total bid was for eighty-five-thousand-four-hundred-twenty-five-dollars (\$85,425) when the
6 aforementioned prices were added up.²⁰

8 17. GFS bid thirty-two-dollars (\$32) per hour, respectively for the Minor and Major
9 Repairs and the Preventive Maintenance for a total of forty-eight-thousand-dollars (\$48,000),
10 respectively, for the fifteen hundred (1,500) man hours the contract would require for such
11 services. GFS' total bid was for one-hundred-forty-four-thousand-dollars (\$144,000) when the
12 aforementioned prices were added up.²¹

14 18. J&B bid: (1) Seventeen-dollars-and forty-five-cents per hour (\$17.45) for the Minor
15 and Major Repairs for a total of twenty-six-thousand-one-hundred-and-seventy-five-dollars
16 (\$26,175) for the fifteen hundred (1,500) man hours the contract would require for each of the
17 aforementioned repairs, respectively; and (2) Sixteen-dollars (\$16) for the Preventative
18 Maintenance for a total of twenty-four-thousand-dollars (\$24,000) for the fifteen hundred (1,500)
19 man hours the contract would require for such services. J&B's total bid was for seventy-six-
20 thousand-three-hundred-fifty (\$76,350) when the aforementioned prices were added up.²²

23 19. DOE determined that J&B's seventy-six-thousand-three-hundred-fifty-dollar
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26 ²⁰ JRN Bid, Exhibit 3, Procurement Record filed on November 8, 2010.

27 ²¹ GFS Bid, Id.

28 ²² J&B Bid, Id.

1 (\$76,350) bid was the lowest responsive and responsible bid.²³ Further, JRN's eighty-five-
2 thousand-four-hundred-twenty-five-dollar (\$85,425) bid was the second lowest, and GFS' one-
3 hundred-forty-four-thousand-dollar (\$144,000) bid was the highest bid.²⁴
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5 20. On September 3, 2010, DOE issued a notice of its intent to award the contract to
6 J&B.²⁵

7 21. That same day, DOE issued a bid status to JRN informing JRN that DOE rejected
8 JRN's bid due to the bid's high price and that DOE recommended that the contract be awarded to
9 J&B.²⁶ JRN received the aforementioned bid status on September 7, 2010.²⁷
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11 22. On September 11, 2010, four (4) days after receiving the bid status, JRN filed a
12 protest with DOE alleging that J&B's seventy-six-thousand-three-hundred-fifty-dollar (\$76,350)
13 bid were based on unfair wage and labor calculations that violate 5 G.C.A. §5801 and §5802.
14 JRN further alleged that J&B's bid was too low to comply with the current U.S. DOL wage
15 determination for occupation code #23410 (Heating, Ventilation, and Air-Conditioning
16 Mechanic), which includes the necessary base rate, and health and welfare benefits.²⁸
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18 23. On September 27, 2010, J&B responded to JRN's protest by advising DOE that J&B
19 employees assigned to local projects were paid U.S. DOL wage determination rates and fully
20 covered under J&B's health insurance, life insurance, 401K Retirement Plans, and two (2) weeks
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22 ²³ DOE Office of Supply Management Memorandum dated September 3, 2010, Exhibit
23 4, Id.

24 ²⁴ Abstract of Bidders, Exhibit 2, Id.

25 ²⁵ Letter of Intent dated September 3, 2010, Exhibit 4, Id.

26 ²⁶ Bid Status dated September 3, 2010, Id.

27 ²⁷ Facsimile Confirmation Report dated September 7, 2010, Id.

28 ²⁸ JRN Protest Letter dated September 11, 2010, Exhibit 5, Id.

1 paid vacation, and that such employees were paid a Christmas Bonus, and that J&B's wage rates
2 plus the aforementioned benefits were more than enough to meet and satisfy the wage rate
3 requirements.²⁹
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5 24. On October 13, 2010, DOE denied JRN's September 11, 2010 protest for two main
6 reasons: (1) J&B's wage rate plus it's insurance, vacation, and Christmas Bonus benefits were
7 more than enough to meet the U.S. DOL wage determination requirements; and (2) J&B had
8 the lowest and most responsive and responsible bid - J&B complied with 5 G.C.A. §5801 and
9 §5802 as evidenced by J&B's Wage Determination Compliance Declaration, and that J&B is
10 obligated to honor all sections of the U.S. DOL wage determination even if it becomes an out of
11 pocket expense for J&B.³⁰
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13 25. On October 18, 2010, DOE issued Purchase Order No. 201190017 to J&B for
14 seventy-six-thousand-three-hundred-fifty-dollar (\$76,350) for the IFB's contract.³¹
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16 26. On October 28, 2010, ten (10) work days after DOE denied their September 11, 2010
17 Protest, JRN filed this appeal.³²
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24 ²⁹ January 13, 2010 Testimony of Gene Bangayan, J&B President, and E-Mail
25 dated September 27, 2010 from Gene Bangayan to Albert Garcia, Exhibit 5,
26 Procurement Record filed on November 8, 2010.

27 ³⁰ DOE's October 13, 2010 Letter Denying JRN's September 11, 2010 Protest, Id.

28 ³¹ DOE Purchase Order No. 201190017 dated October 18, 2010, Id.

³² Procurement Appeal filed on October 28, 2010.

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3 **III. ANALYSIS**

4 **A. The Issues Regarding J&B's Alleged Violations of 5 G.C.A. §5801 and §5802**
5 **Are Not Properly Before the Public Auditor.**

6 As a preliminary matter, the Public Auditor must address the issue of whether she has the
7 jurisdiction to decide whether J&B violated the wage and benefit determination provisions of 5
8 G.C.A. §5801 and §5802. The Public Auditor has the power to review and determine *de novo*
9 any matter properly submitted to her. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12,
10 §12103(a). The Public Auditor has the jurisdiction to hear an appeal of a purchasing agency's
11 written decision on a protest concerning the purchasing agency's method of source selection,
12 solicitation, or award of a contract. 5 G.C.A. §5425(e), and 2 G.A.R., Div. 4, Chap. 12,
13 §12201(a). Here, as stated above, the main issue underlying JRN's September 11, 2010 protest
14 was JRN's allegation that J&B's seventy-six-thousand-three-hundred-fifty-dollar (\$76,350) bid
15 was based on unfair wage and labor calculations that violate 5 G.C.A. §5801 and §5802. This
16 issue is now before the Public Auditor on appeal as JRN's allegations that the bid award was
17 defective because: (1) J&B failed to be a responsive bidder by not complying with 5 G.C.A.
18 §5801 and §5802; and (2) DOE had reason to suspect J&B's bid submission did not comply
19 with 5 G.C.A. §5801 and §5802 and DOE failed to conduct a responsibility inquiry prior to
20 awarding the contract.³³ Due to the fact that DOE awarded J&B the contract on October 18,
21 2010, the Public Auditor would have to determine whether J&B complied with 5 G.C.A. §5801
22 and §5802 to determine these issues.
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26 The aforementioned statutes dictate that Government of Guam Contractors must comply
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³³ Paragraphs 4d and e, Page 7, Procurement Appeal filed on October 28, 2010.

1 with U.S. DOL's Wage Determination for Guam regarding the wages and benefits they pay their
2 employees who are directly providing contractual services to the Government of Guam.

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4 Generally, where the Government of Guam enters contracts with sole proprietors, partnerships,
5 or corporations for the provision of services and such contractors employ persons to directly
6 provide those services, then the contractors shall pay such employees in accordance with the
7 most recently issued U.S. DOL Wage Determination for Guam at the time the contract is
8 awarded. 5 G.C.A. §5801. Further, in addition to the wage determination, any such contract
9 shall also contain provisions mandating health and similar benefits for their employees providing
10 direct services to the Government of Guam under the contract and such benefits shall have the
11 minimum value as detailed in the U.S. DOL Wage Determination and such contract shall include
12 provisions guaranteeing a minimum of ten (10) paid holidays per annum, per employee. 5
13 G.C.A. §5802. As will be discussed below, the enforcement of these statutory provisions is not
14 through the procurement protest and appeal process but an entirely separate administrative
15 adjudicatory process.
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18 The enforcement of 5 G.C.A. §5801 and §5802 is entrusted to the Department of Labor
19 of the Government of Guam (Hereafter referred to as "Guam DOL"). The Guam DOL or its
20 successor shall monitor compliance with Wage and Benefit Determination compliance and the
21 Director of the Guam DOL shall investigate possible or reported violations of Wage and Benefit
22 Determination compliance. 5 G.C.A. §5803. The Guam DOL shall promulgate rules and
23 regulations, pursuant to the Administrative Adjudication Law, as needed to ensure the equitable
24 investigation of violations and the maintenance of due process, as well as the assessment of
25 monetary penalties in the event of a violation. 5 G.C.A. §5803. In addition to the monetary
26 penalties, a contractor who is found, via the Guam DOL's administrative adjudication process
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1 described above, to have violated the wage and benefit determination provisions may be placed
2 on a probationary status by the Chief Procurement Officer of the General Services Agency of the
3 Government of Guam for a period of one (1) year and during such probationary period, a
4 contractor shall not be awarded any contract by any instrumentality of the Government of Guam.
5 5 G.C.A. §5804. A contractor who has been placed on probationary status by the Chief
6 Procurement Officer or assessed monetary fines by the Guam DOL as set forth above, may
7 appeal such penalty or probationary status to the Superior Court of Guam. 5 G.C.A. §5804.
8 Finally, the Guam DOL does in fact investigate wage determination violations and if it finds a
9 violation, Guam DOL usually makes the contractor pay the correct wage and back-pay to the
10 contractor's employees.³⁴ However, such investigations are usually begun by a contractor's
11 employees making a complaint or the very rare occurrence of a Guam DOL random inspection.³⁵
12 Thus, the Public Auditor finds that she does not have the jurisdiction to enforce the provisions of
13 5 G.C.A. §5801 and §5802 or investigate violations of said statutes and that such jurisdiction
14 rests with the Guam DOL. Therefore, the issues regarding whether J&B failed to comply with 5
15 G.C.A. §5801 and §5802 are not properly before the Public Auditor. The Public Auditor will
16 now explore *de novo*, whether DOE's October 13, 2010 determination that J&B's bid was
17 responsive, as described above, was correct.
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22 **B. The IFB Did Not Include the U.S. DOL's Most Recent Wage Determination.**

23 An invitation for bids must include a recitation of the wage determination most recently
24 issued by the U.S. DOL. 5 G.C.A. §5211(b). Here, as stated above, the IFB required the bidders
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27 ³⁴ January 13, 2011 Testimony of Roman Quinata, Guam DOL Investigator and
28 Supervisor.

³⁵ Id.

1 to attach a copy of the most recent U.S. DOL Wage Determination for Guam to their Wage
2 Determination Compliance Declarations and submit the declaration with their bids. DOE did
3 not include a copy of U.S. DOL's most recent Wage Determination with the IFB when the IFB
4 was publicly announced on July 9, 2010. DOE's omission of the most recently issued U. S.
5 DOL Wage Determination resulted in prospective bidders not having a baseline wage
6 determination reference point to prepare their bid submissions. Further, said omission resulted in
7 DOE not having a computation wage floor or minimum comparative benchmark to evaluate bid
8 submissions against. Additionally, the IFB lacks any recitation, reference, or copy of the U.S.
9 DOL Wage Determination for Guam that was in effect on July 9, 2010, the date the IFB was
10 issued.
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13 The natural consequence of this fatal omission was that the bidders were forced to
14 research or guess which version of the U.S. DOL Wage Determination for Guam they would
15 base their bid prices on and attach to their Wage Determination Compliance Declarations to
16 submit with their bids. In fact, as described above, the three (3) bidders who submitted bids in
17 response to the IFB each attached a different version of U.S. DOL's Wage Determination for
18 Guam to their Wage Determination Compliance Affidavits.
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21 The bidder determined by DOE to have the lowest bid and awarded the IFB had
22 submitted the oldest revision of the U. S. DOL Wage Determination of the three bidders who
23 submitted bid responses to the IFB to DOE on September 1, 2010. J & B's bid included a
24 revision as of May 5, 2010, JRN's bid included a revision as of June 15, 2010, and GFS' bid
25 included a revision as of August 19, 2010. The GFS bid, determined by DOE to be the highest
26 bid had the most recent wage compliance declaration. DOE finally identified which U.S. Wage
27 Determination for Guam it believed was applicable to the IFB in its October 13, 2010
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1 Memorandum denying JRN's protest, wherein DOE stated that JRN's bid complied with U.S.
2 DOL Wage Determination No. 2005-2147, Revision No. 12, dated August 19, 2010.³⁶ However,
3 as JRN points out, this version of the wage determination had already been superseded by U.S.
4 DOL Wage Determination No. 2005-2148, Revision No. 14, dated August 19, 2010.³⁷
5 Furthermore, DOE's identification of U. S. DOL Wage Determination No. 2005-2147, Revision
6 No. 12, dated August 19, 2010, in its October 13, 2010 Memorandum denying JRN's protest,
7 and its use of this revision to determine its award decision of the IFB, was not appropriate
8 because U. S. DOL Wage Determination, Revision No. 12, dated August 19, 2010, was not in
9 effect when the IFB was publicly announced on July 9, 2010. These facts clearly show DOE did
10 not know or seek to know which wage determination applied to the services required by the IFB
11 when it issued the IFB on July 9, 2010, when it opened and evaluated the bids on September 1,
12 2010, and when it awarded the contract to J&B on October 18, 2010. The Public Auditor finds
13 that 5 G.C.A. §5211(b) required DOE to determine which U.S. DOL Wage Determination
14 applied to the services required by the IFB and include a recitation, reference, or copy of the
15 wage determination with the IFB when it was issued on July 9, 2010. The severe consequences
16 of DOE's omission to comply with this requirement will be discussed next.
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24 ³⁶ DOE's October 13, 2010 Denial of JRN's September 11, 2010 Protest, Exhibit
25 5, Procurement Record filed on November 8, 2010.

26 ³⁷ Paragraph 4f, Page 8, and U.S. DOL Wage Determination No. 2005-2148,
27 Revision No. 14, dated August 19, 2010, Exhibit G, Procurement Appeal filed
28 on October 28, 2010.

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3 **C. The IFB Lacked Objectively Measurable Pricing Criteria.**

4 DOE did not conduct a bid evaluation using objectively measurable criteria. Generally,
5 an invitation for bids shall set forth the requirements and evaluation criteria to be used to
6 determine the lowest responsive bidder and those criteria that will affect the bid price and be
7 considered in evaluation for award shall be objectively measurable. 5 G.C.A. §5211(e) and 2
8 G.A.R., Div. 4, Chap. 3, §3109(n)(1). As stated above, the IFB contained very specific
9 requirements for a minimum of two (2) crews for installation and three (3) crews for repair and
10 preventative maintenance for each of DOE's four (4) districts and that each crew would contain
11 at least one (1) technician and one (1) helper per crew or a total of ten (10) persons per each of
12 DOE's four (4) districts. Further, as stated above, the IFB had specific requirements for
13 technicians with a minimum of two (2) years experience on Preventative Maintenance, Minor
14 Repairs, Major Repairs, Installation, and Relocation and Replacement of Central Air-
15 Conditioning. Also, as stated above, the IFB's pricing criteria was based on a fixed-hourly rate,
16 inclusive of labor, transportation, insurance, parts, and any other reasonable expenses related to
17 the scope of work. The total price for each type of service required by the IFB was based on
18 one-thousand-five-hundred (1,500) man hours. These requirements made it essential for DOE to
19 determine which U.S. DOL Wage Determination applied to the IFB, and which occupational
20 codes applied to the experienced technicians and helpers, the IFB required, to objectively
21 measure each bidder's hourly rates to ensure compliance with the applicable wage determination.
22 These requirements create an inherent pricing floor that prevents the bidders from submitting
23 hourly wages that were less than the floor. Due to DOE's omission of the recitation of the wage
24 determination applied to the IFB as required by 5 G.C.A. §5211(b), and due to DOE's omission
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1 of which occupation codes in the wage determination applied to the experienced technicians and
2 helpers required by the IFB, the bidders were left to choose which version of the wage
3 determination they desired to use and which occupational codes in such wage determinations
4 they believed applied. DOE aggravated this problem by merely assuming that the hourly prices
5 submitted by the bidders complied with the wage determination because each bidder submitted a
6 Wage Determination Compliance Declaration with their bid. DOE had not established for its
7 own guidance, analysis, and computations, the minimum requirements to compare and evaluate
8 the bids DOE received in response to the IFB to determine which of the three was the lowest bid
9 and make an award decision based solely on the IFB's criteria.
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12 The Public Auditor's *de novo* review of the DOE's procurement record revealed that
13 DOE prepared the Analysis and Recommendation on September 3, 2010 based solely on the
14 lowest price offered. The procurement record is devoid of any kind of comparative analysis of
15 the three bids received by DOE relative to the U. S. DOL Wage Determination. DOE's award
16 recommendation to J & B was solely based on the fact that J & B's bid offer was the lowest of
17 the three bids received by DOE. Thus, the Public Auditor finds that DOE could not have
18 objectively measured the bidders' prices and that DOE could not have determined which bid met
19 the criteria and evaluation factors set forth in the IFB without identifying the applicable wage
20 determination or such wage determination's occupational codes that applied to the experienced
21 technicians and helpers the IFB required.
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24 **D. DOE's Award of the Contract to J&B Is Void.**

25 The Public Auditor finds that DOE's award of the contract to J&B is void. If after an
26 award, it is determined that a solicitation or award of a contract is in violation of law, and the
27 person awarded the contract has not acted fraudulently or in bad faith, the contract may be: (1)
28 Ratified or affirmed if doing so is in the best interests of Guam; or (2) The contract may be

1 terminated and the person awarded the contract shall be compensated for the actual expenses
2 reasonably incurred under the contract plus a reasonable profit, prior to the termination. 5
3 G.C.A. §5452(a)(1). Here, as set forth above, the Public Auditor finds that the award of the
4 contract to J&B violated Guam's Procurement Laws and Regulations because DOE failed to
5 include a recitation, reference, or copy of the applicable wage determination as required by
6 5 G.C.A. §5211(b), and DOE's omission of which wage determination and occupational codes
7 applied to the IFB prevented DOE from objectively measuring the bids as required by 5 G.C.A.
8 §5211(e) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1). Further, the Public Auditor finds that there
9 is nothing in the record indicating that J&B acted fraudulently or in bad faith in procuring the
10 contract. The Public Auditor finds that ratifying or affirming J&B's contract with DOE is not in
11 the best interests of the Government because the IFB's hourly pricing methodology and DOE's
12 non-existent evaluation of whether such hourly wages were compliant with at least the minimum
13 requirements of the U.S. DOL Wage Determination for Guam are serious threats to the integrity
14 of the procurement system and must not be condoned by contract ratification. The Public
15 Auditor finds that the contract awarded to J&B shall be terminated within thirty (30) days of the
16 date of this Decision. The Public Auditor further finds that J&B shall be compensated for the
17 actual expenses it reasonably incurred under the contract plus a reasonable profit, which the
18 Public Auditor finds to be the prices J&B submitted in its bid, prior to the termination.
19

20 **IV. CONCLUSION**

21 Based on the foregoing, the Public Auditor hereby determines the following:

- 22 1. The Public Auditor does not have the jurisdiction to decide the issues regarding
23 whether J&B violated 5 G.C.A. §5801 and §5802 and said issues are not properly before the
24 Public Auditor.
- 25 2. DOE did not include a recitation, reference, or copy of the most recent U.S. DOL
26 Wage Determination for Guam in the IFB as publicly announced on July 9, 2010 and DOE's
27 omission to do so is in violation of 5 G.C.A. §5211(b).
- 28 3. DOE's omission of which wage determination and which wage determination

1 occupational codes applied to the technicians and helpers the IFB required, which prevented
2 DOE from objectively measuring whether any of the bids could be the lowest responsive bid, is
3 in violation of 5 G.C.A. §5211(e) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1).

4 4. DOE's award of the contract to J&B is void because DOE could not objectively
5 measure and properly evaluate the bids to determine whether any of the bids were the lowest
6 responsive bid.

7 5. JRN's Appeal is DENIED in part and GRANTED in part.

8 6. DOE's contract with J&B, arising from the IFB, is hereby terminated, and said
9 contract termination shall be effective thirty (30) days from the date of this decision and J&B
10 shall be compensated for its actual expenses it reasonably incurred under the contract plus a
11 reasonable profit for the period prior to the contract termination date which the Public Auditor
12 finds are the prices J&B submitted with its bid.

13 7. JRN is hereby awarded its reasonable costs, pursuant to 5 G.C.A. §5425(h) (2),
14 excluding attorney's fees, incurred in connection with the solicitation and its September 11, 2010
15 protest, including JRN's reasonable bid preparation costs, excluding JRN's attorney's fees,
16 because, as JRN was the second lowest bidder, there is a reasonable likelihood that JRN could
17 have been awarded the contract but for DOE's omission of which wage determination and
18 occupational codes applied to the IFB in violation of Guam Procurement Laws and Regulations
19 as set forth above. JRN shall submit its reasonable costs, excluding attorney's fees to DOE,
20 within thirty (30) days of the date of this Decision. DOE may object to JRN's cost demand by
21 filing the appropriate motion with the Public Auditor no later than fifteen (15) days after JRN
22 submits such cost demand to DOE.

23 This is a Final Administrative Decision. The Parties are hereby informed of their right to
24 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
25 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
26 Decision. 5 G.C.A. §5481(a).

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

4
5 **DATED** this 11th day of February, 2011.

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DORIS FLORES BROOKS, CPA, CGFM
10 PUBLIC AUDITOR
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FAX

To: **Laura J. Mooney, Esq.**
Legal Counsel, GDOE (Appellee)

Vincent C. Camacho, Esq.
Legal Counsel for JRN Air Conditioning and
Refrigeration, Inc. (Appellant)

From: **Doris Flores Brooks, CPA, CGFM**
Public Auditor
OPA Procurement Appeals
Suite 401 DNA Bldg.
238 Archbishop Flores St.
Hagatna, Guam 96910

Agency: All Media Pages 19 (Including cover)

CC: Date: February 11, 2011

Fax: GDOE: 472-5001 and 472-5003 Point of Contact **Tel: 475-0390 x 219 (Anne Camacho)**
Carlsmith Ball LLP / JRN: 477-4375 Nos. **Fax: 472-7951**

Re: **Appeal No. OPA-PA-10-007 DECISION**

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Anne Camacho -- acamacho@guamopa.org

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