

Seth Forman  
 Kevin J. Fowler  
 DOOLEY ROBERTS & FOWLER LLP  
 Suite 201, Orlean Pacific Plaza  
 865 South Marine Corps Drive  
 Tamuning, Guam 96913  
 Telephone No. (671) 646-1222  
 Facsimile No. (671) 646-1223  
 E-mail: [Forman@guamlawoffice.com](mailto:Forman@guamlawoffice.com)  
[Fowler@guamlawoffice.com](mailto:Fowler@guamlawoffice.com)

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 PROCUREMENT APPEALS

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Attorneys for Appellant  
 Phil-Gets (Guam) International Trading Corp.  
 dba J&B Modern Tech

**OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

In the Appeal of )  
 )  
 Phil-Gets (Guam) International Trading Corp. )  
 dba J&B Modern Tech, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

**NOTICE OF APPEAL**

Docket No. OPA-PA \_\_\_\_\_

**Appellant Information:**

Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech ("J&B")  
 P.O. Box 9788  
 Tamuning, Guam 96931

Telephone No. (671) 646-4435  
 Facsimile No. (671) 646-0589

**Appeal Information:**

- A) Purchasing Agency: Guam Department of Education ("GDOE")
- B) Invitation for Bid No.: GDOE IFB 008-2013
- C) The denial of protests being appealed was made on April 3, 2013 by the Supply Management Administrator of GDOE. The letter denying the protests was received by J&B's counsel on April 3, 2013.

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D) Appeal is made from a denial of two protests, both of which were denied in the same letter. This appeal is brought pursuant to 5 GCA §5425(e).

E) Names of competing bidders: Johnson Control; JMI Edison; Dck Pacific

Names are taken from the “Abstract of Bidders”, and thus may be “dba’s” rather than the full legal names.

**Form and Filing:**

1. J&B is appealing the denial of two protests it made regarding GDOE IFB 008-2013. A related appeal is already pending before the Office of Public Accountability as OPA-PA 13-002.

On March 21, 2013, shortly before the scheduled bid opening for GDOE IFB 008-2013, the head of the purchasing agency issued a Determination and Notice of Suspension (“the Determination”) suspending J&B. Notwithstanding J&B’s disagreement with the Determination and some of the specific allegations therein, many of the underlying facts are set forth in the Determination and the exhibits thereto. Many of the documents upon which J&B relies are attached as exhibits to the Determination. The Determination is attached hereto as “Exhibit A” to J&B’s March 27, 2013 protest, which protest is attached hereto as “Exhibit 1”. Exhibits to the Determination are referenced below as A-1, A-2, etc. The discussion below focuses on those allegations and conclusions in the Determination with which J&B disagrees.

GDOE awarded J&B a contract for the purchase of air conditioner units. *See* Exhibit A-2 (purchase order). Section 7119(c) of Title 17 of the Guam Code Annotated provides that any air conditioning system purchased by the Guam Public School System shall “[b]e the subject of a warranty and maintenance agreement that guarantees the system’s working life for not less than five (5) years.” GDOE violated the statute by awarding separate contracts, to different companies, for the purchase of the units and for the maintenance agreement. *See* Exhibit A (the Determination) at page 2. Thus J&B was put in the position of being asked to provide a warranty for units that it could not maintain, and that a third party was working on.

J&B provided a warranty that stated as follows:

**WARRANTY:** The equipment shall be guaranteed to be free from defects in materials and workmanship. The warranty period is five (5) years for compressors only from initial start up date or when first DOE school used. Under no circumstances shall supplier and dealer, J&B Modern Tech be liable for incidental or consequential damages resulting without the Preventive Maintenance that should prevent further deterioration, breakdown and inefficient operation and cooling condition of the A/C units. Consumable related to the accessories are not covered. And further more, the warranty is NULL & VOID if damages is caused by Mother Nature or Force Majeure, Thunder & Lightning, Power Fluctuation, Disturbed, Tampered, Adjusted and/or Repaired by other Entities Technicians

Exhibit A-3 (Aug. 27, 2012 letter from J&B to GDOE). GDOE made no objection to this warranty.

Subsequently GDOE contacted to J&B to request that repairs be done on a handful of the units pursuant to the warranty. J&B inspected the units in question and determined that the problems resulted from lack of required maintenance and/or work done on the units by persons other than J&B technicians. J&B noted the extremely dirty condition of the coils. While GDOE has taken the position that the units were less than a year old and thus had not yet required any preventive maintenance whatsoever, anyone who has owned even a window unit air conditioner knows that regular cleaning is necessary. Therefore, J&B took the position that the repairs in question were not covered by the warranty and that the warranty had been voided by the actions of GDOE and/or third parties. *See* Exhibits A-5, A-6, A-7, A-8, A-9, A-10, A-11 (correspondence between GDOE and J&B and its counsel concerning the situation, inclusive of photographs in Exhibits A-5 and A-9 documenting the condition of the units.) GDOE responded by suspending J&B for alleged failure to honor the warranty and breach of the terms of the IFB. Exhibit A (the Determination).

J&B filed a Notice of Appeal to the OPA on March 27, 2013. J&B's position is that GDOE's action is wrongful on both factual and legal grounds. The evidence will establish that the particular problems with the units in question resulted, as J&B asserts, from lack of routine maintenance and/or tampering or repairs done by third parties. As noted above, GDOE wrongfully severed the purchase and maintenance contracts in violation of 17 GCA §7119(c). Separation of the warranty from the maintenance not only violates the statute, but makes no sense. A vendor cannot be expected to warrant maintenance done by his competitor. Anyone who has ever bought a motor vehicle or an appliance knows that the warranty will not remain in effect if one takes the item to the original vendor's competitor for maintenance and repairs.

GDOE's action was also erroneous on procedural grounds. As can be seen from the exchange of correspondence between J&B and GDOE, this dispute was clearly a breach of contract controversy covered by 5 GCA §5427. GDOE never issued a decision complying with that statute. Therefore, it was improper for GDOE to suspend J&B over a breach of contract controversy when GDOE failed to first comply with the statute governing such controversies. After failing to comply with any of the procedures required by 5 GCA §5427, GDOE then also failed to observe due process requirements by providing J&B with a hearing before the suspension. *See ATL, Inc. v. United States*, 3 Cl. Ct. 259, 274 (1983) (even where government has discretion to debar or suspend, this discretion must be exercised after fair investigation, with such notice, hearing and opportunity to answer as would constitute due process).

J&B notes the especially suspicious timing of GDOE's action. The bid opening was scheduled for March 28, 2013, at 10:00 a.m. for Guam Department of Education Invitation for Bid No. 008-2013, Indefinite Quantity Bid for purchase of Air Conditioning Equipment. *See* Exhibits 2 (GDOE IFB 008-2013) and 3 (deadline for submission). J&B planned to submit a bid for that matter. GDOE threatened action pursuant to 5 GCA §5426 in letters dated November 30, 2012 and February 6, 2013. Exhibits A-6, A-8. If GDOE had taken action on or close to either of those dates, questions concerning the suspension and J&B's status might have been addressed in a timely

manner prior to the opening of the bids for GDOE IFB 008-2013. Instead, GDOE waited until March 21, 2013 to issue the Determination, which was not received by J&B until late afternoon on the following day. *See Exhibit A* at p.3 (received stamp on bottom of page). The Determination provides, "Bids or proposals will not be solicited from J&B, and if they are received, they will not be considered during the period of suspension . . . ." GDOE's apparent intent was to time the suspension so as to disqualify J&B from bidding IFB 008-2013 while precluding any meaningful opportunity for review of the suspension before the bids are opened.

In addition to filing an appeal of the suspension with OPA, on March 27, 2013, J&B served a protest directed towards GDOE IFB 008-2014 on GDOE. This protest attached hereto as "Exhibit 1". J&B protested GDOE's determination that (a) J&B is not a responsible bidder and (b) that a bid for J&B on IFB 008-2013 will not be considered.

Also on March 27, 2013, J&B served a Request for Hearing on GDOE. A copy of this request is attached hereto as "Exhibit 2". As noted therein, the request was made to avoid the possibility of debarment by default during the pendency of the appeal of the suspension. As of the date of this Notice of Appeal, no such hearing has been scheduled.

The bid opening for GDOE IFB 008-2013 took place on the morning of March 28, 2013. J&B submitted a bid, a copy of which is attached hereto as "Exhibit 3". A copy of the Abstract of Bids prepared by GDOE is attached hereto as "Exhibit 4". Based on J&B's calculations, J&B submitted the lowest bid, several hundred thousand dollars lower than the next lowest bid.

On the afternoon of March 28, 2013, GDOE transmitted a "Notice of Non-Consideration, GDOE IFB 008-2013" to J&B, stating that "J&B's bid for the IFB will not be considered for award." A copy of this Notice of Non-Consideration is attached hereto as "Exhibit 5".

On April 1, 2013, J&B served a Second Protest in connection with GDOE IFB 008-2013 on GDOE. A copy of this second protest is attached hereto as "Exhibit 6". In this second protest, J&B protested (a) the conduct of the bid award in violation of the 5 GCA §5415(g) procurement stay; (b) the Notice of Non-Consideration, GDOE IFB 008-2013; and (c) any potential award to another bidder because such award would entail both a violation of the statutory stay and because J&B was the low bidder.

On April 3, 2013, the Supply Management Administrator of GDOE denied the protests. The letter denying the protests is attached hereto as "Exhibit 7".

While this matter may have become procedurally somewhat complicated, it still comes down to the same issues raised in J&B's appeal of the suspension. Did GDOE act properly when it suspended J&B for J&B's refusal to "warrant" a competitor's work and to perform "warranty" work to repair problems caused by lack of routine cleaning and maintenance and/or someone else's tampering with the units? Can GDOE use a suspiciously timed improper suspension to eliminate a potential low bidder from competition for a government contract?

2. J&B requests that the Office of Public Accountability overrule GDOE's denial of J&B's protests and rule that J&B's bid for GDOE IFB 008-2013 must be considered.

3. Supporting documents are attached hereto as exhibits.

**Declaration regarding court action:**

J&B confirms that an action in court has not been commenced.

Dated this 4 day of April, 2013.

DOOLEY ROBERTS & FOWLER LLP

By: Seth Forman  
**SETH FORMAN**  
**KEVIN J. FOWLER**  
Attorneys for Appellant J&B Modern Tech

**VERIFICATION**

Tamuning, Guam ) ss:

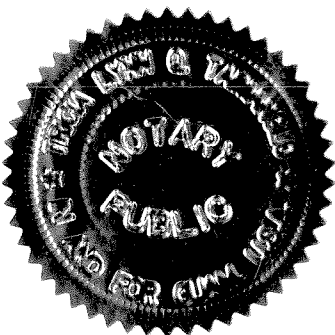
I, Generoso M. Bangayan, being first duly sworn, do hereby depose and state that I am the President for Appellant Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech and that I have read the foregoing Notice of Appeal and it is true of my own knowledge except as to those matters alleged upon information and belief and as to those matters, I believe them to be true.

Dated this 4 day of April, 2013.

Generoso M. Bangayan  
**GENEROSO M. BANGAYAN**

SUBSCRIBED AND SWORN to before me this 4 day of April, 2013.

Tricia Lynn Q. Taimanglo  
Notary Public



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