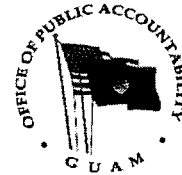


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FAX

To:	Mary A.Y. Okada, Ed.D President Guam Community College P.O. Box 23069 GMF, Guam 96921	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
Phone:	(671) 735-5542 / 5540	Pages:	11 (including cover page)
Fax:	(671) 734- 5238	Date:	March 21, 2017
		Phone:	(671) 475-0390 x. 208
		Fax:	(671) 472-7951
CC:	Seth Forman Dooley Roberts Fowler & Visosky LLP (Attorney for Appellant J &B Modern Tech)		
Phone:	(671) 646-1222		
Fax:	(671) 646-1223		

Re: OPA-PA-17-003 Notice of Receipt of Appeal

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Jerrick Hernandez

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

March 21, 2017

Mary A.Y. Okada, Ed.D.
President
Guam Community College
P.O. Box 23069
GMF, Guam 96921

VIA FACSIMILE: (671) 734-1004

Re: Notice of Receipt of Appeal – OPA-PA-17-003

Dear Dr. Okada,

Please be advised that Phil-Gets (Guam) International trading Corp. dba J & B Modern Tech (J & B) filed an appeal with the Office of Public Accountability (OPA) on March 20, 2017 regarding the Guam Community College's (GCC) response to J & B's protest relative to Invitation for Bid No.: GCC-FB-17-001; a procurement solicitation for Construction of a Generator Building and Installation of a Back-up Generator System to Service GCC Allied Health Center and Building A. OPA has assigned this appeal case number OPA-PA-17-003.

Immediate action is required of GCC pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Tuesday, March 28, 2017**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Tuesday, April 4, 2017**, ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to J & B. In addition, OPA respectfully asks that GCC provide one original and two copies of the procurement record and agency report as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208, or jhernandez@guamopa.com, should you have any questions regarding this notice.

Sincerely,



Llewelyn Terlaje
Audit Supervisor

Enclosure: First Eight Pages of Notice of Appeal – OPA-PA-17-003

Cc: Seth Forman, Dooley Roberts Fowler & Visosky LLP, Attorneys for J & B Modern Tech.

Seth Forman
DOOLEY ROBERTS FOWLER & VISOSKY LLP
865 South Marine Corps Drive, Suite 201
Tamuning, Guam 96913
Telephone No. (671) 646-1222
Facsimile No. (671) 646-1223
E-mail: Forman@guamlawoffice.com

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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 17.003

Appellant Information:

For purposes of this appeal, appellant can be contracted through counsel, whose contact information is set forth above. Appellant's address, telephone number, facsimile number, and e-mail address are as follows:

Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech
153 Unit B
East Harmon Industrial Park
Harmon, Guam 96931

Telephone No. (671) 646-0588/3346
Facsimile No. (671) 646-0589
E-mail GeneBangayan@jbmoderntech.com

Appeal Information:

A) Purchasing Agency: Guam Community College ("GCC")

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
Notice of Appeal

B) Invitation for Bid No.: GCC-FB-17-001, Construction of a Generator Building and Installation of a Back-up Generator System to Service GCC Allied Health Center and Building A.

C) The denial of protest being appealed was made on March 9, 2017, by the Procurement and Inventory Administrator of GCC and the President of GCC.

D) Appeal is made from a denial of a protest. This appeal is brought pursuant to 5 GCA §5425(e).

E) Name of competing bidders known to appellant: Talion Construction; Propacific Builder Corporation.

Form and Filing:

1. Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech (“J&B”) is appealing the denial of a protest it made regarding GCC-FB-17-001.

This procurement, GCC-FB-17-001, was for construction of a generator building and installation of a back-up generator system to service the GCC Allied Health Center and Building A.

There were three bidders for this project: J&B; Talion Construction (“Talion”); and Propacific Builder Corporation (“Propacific”). J&B was the low bidder. The bids were as follows:

J&B \$426,850.00

Talion \$705,390.00

Propacific \$444,000.00

See Bid Abstract (attached as “Exhibit A”).

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
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In a Notice of Cancellation dated January 27, 2017 (attached as “Exhibit B”), GCC stated that it was cancelling the bid in whole and not making an award because “[a]ll bidders failed to provide GCC with shop drawings and submittals”. The cancellation notice did not state any other reason for rejecting J&B’s bid or any other contractor’s bid.

On February 7, 2017, J&B, through its attorney, submitted a timely protest, attached as “Exhibit C” (attachments to protest omitted as not relevant to this appeal now that GCC has explained its position). J&B contended:

The cancellation notice states that the bid was cancelled because “[a]ll bidders failed to provide GCC with shop drawings and submittals.” However, shop drawings were not included in the requirements for bids on this project. . . As a practical matter, shop drawings usually are not and cannot be prepared until after a bid has been awarded.

Because the bid was improperly cancelled, and because J&B had the lowest bid, J&B should be awarded the contract for this matter.

In a letter (attached as “Exhibit D”) dated March 9, 2017 and delivered on March 10, 2017, GCC denied J&B’s protest. GCC contended “shop drawings were required and stated *in the Scope of Work.*” (Emphasis added.) The first three pages from the Scope of Work are attached as “Exhibit E”. GCC referred to two sub-subsections of the Scope of Work, 1.2.A. and 1.4.C, and quoted or paraphrased very limited portions of each out of context as justification for its position.

A more complete reading of the relevant pages of the Scope of Work makes it clear that the Scope of Work is not a list of things to be included in a bid. Rather it is a list of work that must be

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
Notice of Appeal

done as part of the project after a contract is awarded, the cost of which must be included in the contractor's cost proposal.

This is consistent with the standard and apparently universal use of a "scope of work" in bid solicitations. To date, J&B' counsel has been unable to find any precedent where an agency has taken the position, now taken by GCC, that items is a "Scope of Work" in a bid solicitation must be completed as part of a bid rather than after an award. A "scope of work" defines the project and states the government's requirements. 2 Ann. Fed. Acquisition Reg. Desk Ref. §36.02 (WestLaw 2016). A "scope of work" is a document prepared by the agency to provide bidders with the information upon which they may base their bid. See 54 Ohio Jur. 3d Highways, Streets, and Bridges §§197, 357 (WestLaw 2017). The scope of work is distinct from any instructions that list items bidders must include in their bids.

On page 1 of the Scope of Work for this project, under the heading of "General Requirements & Scope of Work", the first section is "1. Cost Proposal". Subsection 1.1 of this "cost proposal" section states the following:

CONTRACTOR shall provide their lump-sum, firm-fixed-price, *cost proposal* for the construction of a design-build generator building and for the comprehensive assessment, installation, proper testing, operation and commissioning of a turn-key, 600 kilowatt Generator Set/System to provide back-up emergency power for the Allied Health Center and Building A:

...

Contractor's cost proposal shall include (and not be limited to) ...

(Italics added, boldface and underlining in original deleted.)

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
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In other words, items listed in subsequent subsections of section 1 of the Scope of Work are items that are to be priced into the cost proposal, not items that are to be completed as part of the bid submittal process. This becomes obvious once one reads the entirety of subsection 1.2. Subsection 1.2 was cited, but not quoted in full, by GCC in its denial of the protest. Subsection 1.2 lists items to be included in the cost proposal, and reads as follows:

1.2 DESCRIPTION

Construct a design-build generator building and provide diesel electric generating unit with accessories, auxiliary equipment, and associated work as specified.

- A. Provide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator/set system.
 - 1. Ensure drawings, shop drawings, and submittals provided are certified by master electricians and electrical contractors and subcontractors.
 - 2. Ensure civil and structural engineers certify drawings, shop drawings, and submittals.
 - 3. Submit certified drawings, shop drawings, and submittals to GCC for review and acceptance.
 - 4. Ensure shop drawings and submittals are provided for feeder cables to the Allied Health Building and Building A.
- B. Construct design-build building.
- C. Install generator set/system sanctioned under the Buy America Act.
- D. Connect generator set/system to buildings A and Allied Health Center.
- E. Test to ensure a functionality of system.

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
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The other subsection of the Scope of Work referenced in GCC's denial of the protest is subsection 1.4. Subsection 1.4 has the heading "1.4. SUBMITTALS (refer to 1.2.A)". Thus subsection 1.4 merely sets out the details of the submittals that must be priced, not completed, pursuant to subsections 1.1 and 1.2.

All three contractors who submitted bids understood that the items listed in subsection 1.2, including shop drawings and submittals, were to be included in their cost proposals, rather than be completed and included in their bid submissions. GCC's position in its denial of the protest that items listed in Section 1.2 of the Scope of Work actually had to be done and physically submitted with a bid, would not only mean that bidders have to include shop drawings and submittals with their bids. Bidders would also have to complete and submit the following with their bids: a fully constructed building (1.2.B.); an installed generator/set system (1.2.C.), and connections for the generator set/system to the two designated buildings (1.2.D.) If all three bidders had actually submitted bids in accordance with GCC's strange interpretation, it is not known if there is room on the GCC site for three generator buildings. Perhaps the three buildings from three bidders would have to be stacked one on top of the other. Then once the three contractors had each spent hundreds of thousands of dollars to complete the project as part of their respective bids, GCC would award the contract to the low bidder. The other two bidders' completed buildings and installed generators would have to be demolished. It clearly makes no sense to require a contractor to complete some or

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
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all of the Scope of Work as part of its bid submission. J&B and the other two bidders construed the Scope of Work and Sections 1.1 through 1.4 correctly; GCC did not.

Even if one looks only at Subsection 1.2.A., if bidders had to complete that work as part of their bids, they would have to hire all of their electrical contractors and sub-contractors and civil and structural engineers before a bid was awarded. This is not the practice in construction and government projects, and again it makes no sense. The cost of submitting a bid would be prohibitive. However, Subsection 1.2.A. does not exist in a vacuum. Section 1.2.A. is part of a Scope of Work that could only (1) be correctly interpreted as requiring that all of the listed work be priced but not done for a bid submission, or (2) incorrectly interpreted as requiring that all of the listed work be somehow submitted as part of a bid. Once the Scope of Work is correctly interpreted, the reasons given for GCC's denial of J&B's protest are plainly erroneous.

2. J&B requests that the Office of Public Accountability (1) overrule GCC's denial of J&B's protest, (2) rule that J&B was not required to submit shop drawings and submittals with its bid, and (3) rule that J&B shall be awarded this procurement in the amount of \$426,850.00.

3. Supporting documents are attached hereto as exhibits which correspond with the Exhibit letters A through E as set forth above.

Declaration regarding court action:

J&B does hereby confirm that to the best of its knowledge, and the undersigned counsel does hereby confirm that to the best of his knowledge, no case or action concerning the subject of this Appeal has been commenced in court.

In re Appeal of Phil-Gets (Guam) Int'l Trading Corp.
Notice of Appeal

Dated this 17 day of March, 2017.

DOOLEY ROBERTS FOWLER & VISOSKY LLP

By: Seth Forman
SETH FORMAN
Attorneys for Appellant Phil-Gets (Guam)
International Trading Corp. dba J&B Modern
Tech

VERIFICATION

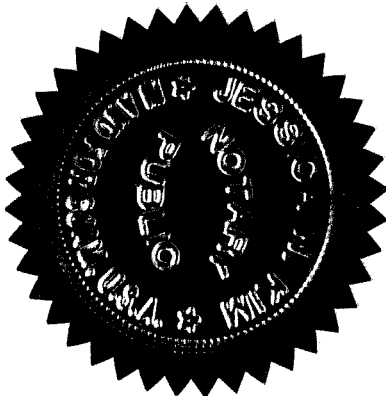
Tamuning, Guam) ss:

I, Generoso M. Bangayan, being first duly sworn, do hereby depose and state that I am the President of 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 17th day of March, 2017.

[Signature]
GENEROSO M. BANGAYAN

SUBSCRIBED AND SWORN to before me this 17th day of March, 2017.



[Signature]
Notary Public

JESSICA N. KIM
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: **JAN. 11, 2020**
865 S. Marine Corps Dr. Ste. 201, Tamuning, GU 96913

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