



Bidders are reminded to read the Sealed Bid Solicitation and Instructions, and General Terms and Conditions attached to the IFB to ascertain that all of the following requirements checked below are submitted in the bid envelope, in duplicate, at the date and time for bid opening.

[X] DESCRIPTIVE LITERATURE/PRODUCT BROCHURE

(GCC~Tab 10~AR0002.) The Solicitation's "General Terms and Conditions" provide:

20. DESCRIPTIVE LITERATURE:

Descriptive literature(s) as specified in this solicitation must be furnished as a part of the bid and must be received at the date and time set for opening Bids. *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.* Rejection of the Bid will be required if the descriptive literature(s) do not show that the product(s) offered conform(s) to the specifications and other requirements of this solicitation. *Failure to furnish the descriptive literature(s) by the time specified in Solicitation will require rejection of the Bid.*

(GCC~Tab 10~AR0009 (emphasis added).) At the pre-bid conference, which included a site visit, 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, in pertinent part:

2. PREPARATION OF BIDS:

(b) Each bidder shall furnish the information required by the Solicitation.

3. EXPLANATION TO BIDDERS:

*Any explanation desired by a bidder regarding the meaning or interpretation of the Solicitation, drawings, specifications, etc., must be submitted in writing and with sufficient time allowed for a written reply to reach all bidders before submission on their bids.*

(GCC~Tab 10~AR0003 (emphasis added).)

The prospective bidders desired and sought several explanations regarding the meaning and interpretation of the Solicitation — including its General Requirements & Scopes of Work. These queries resulted in: five amendments to the IFB, two additional site visits and an extension of the submission deadline. (*See* GCC~Tab 10~AR0044-53.)

At the bid opening on November 8, 2016, three bid packets were submitted in response to the IFB. (*See* GCC~Tab 7~AR001.) All the bid packets provided "Descriptive Literature" for one item in the IFB: the generator. (*See generally* Procurement Record at Tab 11.) Indeed, J&B submitted nearly 100 pages of literature, with numerous drawings and schematics, for the generator it offered. (*See* GCC~Tab 8~AR0007-102.) However, no bidder submitted even an illustration of the IFB's other item: the design-build structure to house the generator. (*See generally* Procurement Record at Tab 11.) And although J&B was the only bidder to describe the structure that it planned to design-build and noted "(see attached sketch)" (*see* GCC~Tab 8~AR0006), J&B failed to include the denoted "sketch" in its bid packet (*see generally id.*).

When GCC evaluated the bid packets, the evaluation sheets included the criterion: "Drawings were submitted with Bid Proposal." (GCC~Tab 7~AR004, 26 & 48.) Because no bidder met this material term of the Solicitation, GCC decided to reject all the bids, "review the scope of work and specifications, and re-issue the bid." (GCC~Tab 6~AR001; *see also id.* at AR002-03.)

On January 27, 2017, GCC notified the three bidders that "no awards will be made":

It is in the best interest of the college to cancel the above bid due to the following:

- All bidders failed to provide GCC with shop drawings and submittals

After reviewing the submission and all other documents submitted, GCC wants to ensure that all issues and requirements are addressed and taken into consideration. In view of the above, the 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.

(GCC~Tab 5~AR001.)

J&B lodged a bid protest ("Protest") on February 6, complaining:

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. This can be seen from the Bid Abstract, a copy of which is attached hereto as "Exhibit 2", where shop drawings are not included on that checklist. As shown on the checklist, J&B submitted all required items with its bid, including a Project Narrative. A copy of J&B's Project Narrative is attached as "Exhibit 3".<sup>1</sup> As a practical matter, shop drawings usually are not and cannot be prepared until after a bid has been awarded.

(GCC~Tab 4~AR0001-02 (alteration in original; footnote added).)

On March 9, GCC responded to the Protest. (*See* GCC~Tab 3~AR0001-02.) Noting the Solicitation's various references to the requirement of shop drawings, GCC "found that [the Protest] is without merit." (*Id.* at AR0002.) And, GCC again advised J&B that: "An

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<sup>1</sup> Exhibit 3 for J&B's Protest was actually a page from its CPM Chart. (*See* GCC~Tab 4~AR007-08.)

opportunity will be given to compete on any solicitation or any future procurement of similar services.” (*Id.*)

In its Appeal, J&B reiterates its allegation that the Solicitation did not require shop drawings to be submitted in a bid packet. In light of both the undisputed facts in the record and the law, J&B’s allegation is unavailing. Therefore, this matter should be expeditiously dismissed.

### LEGAL STANDARDS

Under 2 GAR, Div. 4, § 12109(a), the Hearing Officer has the authority “to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.” And Hearing Officers have used “such authority to find that there are no genuine issues of material fact concerning an issue when the facts are clear from the record and the parties do not dispute them.” *In re Appeal of Korando Corp.*, No. OPA-PA-15009, Dec. & Order re Appellant’s Mot. for Summ. J. (Dec. 3, 2015); *In re Appeal of Korando Corp.*, No. OPA-PA-15009, Dec. & Order re Purch. Agency’s Mot. for Summ. J. (Dec. 3, 2015).

Guam’s procurement law provides that a bid packet can be rejected when: “(ii) the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids,” or “(iii) the supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications.” 2 GAR, Div. 4, §§ 3115(e)(3)(ii)-(iii). And when all bids are rejected for non-responsiveness, the purchasing agency is entitled to cancel and re-issue the solicitation. *See id.* at § 3115(d)(2); *see also* 5 GCA § 5225; *accord, e.g., Jarrett S. Blankenship Co.*, B-213294, 1984 WL 44046 (U.S. Comp. Gen. Apr. 2, 1984) (“Since all bids received were nonresponsive, the Navy

properly canceled IFB–A200 and resolicited the requirement.”); *Gulf & W. Healthcare, Inc.*, B-209684, 1983 WL 27277 (U.S. Comp. Gen. Aug. 25, 1983) (“the Army’s cancellation of the solicitation was proper because it received no bid which was completely responsive”).

As explained below, there are no disputed material facts in the record regarding the issue presented by J&B’s Appeal and this issue is also unavailing as a matter of law. Therefore, the Hearing Officer should expeditiously dismiss the Appeal.

### **ARGUMENT**

J&B complains that the IFB did not require shop drawings to be submitted as part of a bidder’s bid packet because the requirement of shop drawings appeared in “General Requirements & Scope of Work.” (Appeal at 4-7.) A de novo review of the record and the law, *see* 5 GCA § 5703, reveals that J&B’s complaint fails for several reasons.

Contrary to J&B’s argument, the Solicitation’s General Requirements and Scopes of Work undoubtedly contained requirements for bid packets. And J&B’s suggestion that shop drawings are cost-prohibitive for a bidder’s response is flawed. Further, even assuming *arguendo* — as J&B posits — that the IFB’s requirement of shop drawings was ambiguous, J&B should have sought clarification before submitting its bid packet and, in any event, GCC properly cancelled the Solicitation so that it could be re-issued. Accordingly, the instant matter should be expeditiously dismissed.

#### **A. The “General Requirements & Scope of Work” Included Requirements for Submission in the Bid Packet**

J&B argues that the Solicitation’s “Scope of Work” did not include “things to be included in a bid” but “is a list of work that must be done as part of the project after a contract is awarded.” (Appeal at 3-4.) This argument is flawed.

First, this portion of the IFB is clearly titled “*General Requirements & Scopes of Work.*” (GCC~Tab 10~AR0030 (emphasis added).) And, in this portion, the Solicitation clearly directed that bidders “shall provide their lump-sum, firm-fixed price, cost proposal.” (*Id.*) Applying J&B’s reasoning that this portion did not include requirements for the bid packets means that the bidders were not required to submit their prices in their bid packets — which all of the bidders clearly did (*see* GCC~Tab 7~AR0001).

Second, J&B and the other bidders provided items in the “*General Requirements & Scopes of Work,*” such as the Solicitation’s requirement of “Shop Drawings and Calculations . . . for diesel generating unit and auxiliary equipment.” (GCC~Tab 10~ AR0032.) Indeed, J&B submitted nearly 100 pages of drawings, schematics, data and information on the generator that it offered. (*See* GCC~Tab 8~AR0008-102.)

Third, the authorities cited by J&B do not support its position that a “scope of work” merely “provides bidders with the information upon which they may base their bid.” (Appeal at 4.) J&B noticeably neglects part of its chosen section from the Federal Acquisition Regulation Desk Reference. (*See id.*) In its entirety, that section provides:

§ 36.302. Scope of work.

The agency shall develop, either in-house or by contract, a scope of work that defines the project and states the Government’s requirements. *The scope of work may include criteria* and preliminary design, budget parameters, and schedule or delivery requirements. If the agency contracts for development of the scope of work, the procedures in Subpart 36.6 shall be used.

2 Ann. Fed. Acquisition Reg. Desk Ref. § 36.302 (emphasis added). And the Ohio Jurisprudence Third section cited by J&B (*see* Appeal at 4) actually states: “In lieu of the requirement for plans, the county engineer must prepare and distribute a *scope of work document upon which bidders will base their bids.*” 54 Ohio Jur. 3d, *Highways, Streets, and*

*Bridges*, § 197 (emphasis added). Thus, neither of J&B's cited authorities provides that a "scope of work" cannot contain requirements for submission in a bid packet.

Fourth, J&B's insistence that "[t]he scope of work is distinct from any instructions that list items bidder must include in their bids" (Appeal at 4) is belied by the record. The Solicitation's "Special Reminder to Prospective Bidders" directed that "Descriptive Literature" was to be included in the bid packets. (GCC~Tab 10~AR0002.) And the IFB plainly stated:

Descriptive literature(s) as specified in this solicitation must be furnished as a part of the bid and must be received at the date and time set for opening Bids. *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.*

(GCC~Tab 10~AR0009 (emphasis added).) It is axiomatic that the only way to determine the literature required for a bid packet is to look at the "General Requirements & Scopes of Work" — which J&B obviously did because it provided extensive information for the generator it proposed (*see* GCC~Tab 8~AR0008-102).

Fifth, J&B's strained scenario of Section 1.2 of the "General Requirements & Scopes of Work" directing every item denoted as a requirement for the bid packet (*see* Appeal at 6-7) does not aid its cause. Section 1.2.A clearly directed that the prospective bidders were to: "Provide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator set/system." (GCC~Tab 10~AR0031.) Thus, this Section specified the "Descriptive Literature" to be submitted in the bid packet regarding the Solicitation's item of a design-build structure to house the generator.



A solicitation must be read “as a whole and in a manner which gives reasonable meaning to all its parts and avoids conflict or surplusage of its provisions.” *Linc Gov’t Servs., LLC v. United States*, 96 Fed. Cl. 672, 708 (2010) (internal quotation marks and citation omitted). “Context thus defines the meaning of any given term or provision in a government solicitation.” *Id.* (citations omitted). Reading this IFB as a whole, it is clear that the bidders were directed to provide items denoted in the “General Requirements & Scopes of Work,” such as a cost proposal and shop drawings for *both* the proposed generator *and* the design-build structure that would house the generator.

**B. The Requirement of Submitting Shop Drawings with a Bid Packet Is Not Cost-Prohibitive**

In its Protest and Appeal, J&B suggests that requiring a bidder to provide shop drawings with its bid packet would cause responding to a solicitation to be cost-prohibitive. (See Appeal at 7; GCC~Tab 4~AR0002.) Such a suggestion is flawed.

As defined by professional engineers, “Shop Drawings” are: “All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for Contractor and submitted by Contractor to illustrate some portion of the Work.” Eng’rs Joint Contract Documents Comm., *ECJCDC C-700 Standard General Conditions of the Construction Contract*, 4 at No. 40 (2007).<sup>2</sup> Similarly, the Federal Acquisition Regulations provide that “Shop drawings . . . includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract.” FAR § 52.236-21(d). J&B undoubtedly provided “shop drawings” for the generator it offered because its bid packet included nearly

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<sup>2</sup> Available at [www.govbids.com/StoredDoc/MITN/Documents/Bid/123155\\_0\\_2.PDF](http://www.govbids.com/StoredDoc/MITN/Documents/Bid/123155_0_2.PDF)

100 pages of information on this generator, which contained drawings, diagrams, schematics, illustrations, etc. (*See generally* GCC~Tab 8~AR0008-102.) And, if J&B had not failed to provide the “attached sketch” of the design-build structure it proposed (*id.* at AR0006, No. 6), that sketch might have met the Solicitation’s requirement of shop drawings for the design-build structure to house the generator.

Furthermore, even if the shop drawings requirement resulted in an up-front cost to the bidders, such an expense is warranted. As shown by the bid packets, this project’s price tag hovers around the half-million-dollar mark. (*See* GCC~Tab 7~AR0001.) For that amount of money, GCC should be provided with something that, at the very least, illustrates the structure that the bidders proposed to design and build for housing the generator.

**C. Assuming Arguendo that the Solicitation’s Requirement to Submit Shop Drawings was Ambiguous, J&B Should Have Requested Clarification and, In Any Event, GCC Properly Cancelled the IFB for Re-Issuance**

J&B contends that the Section 1.2.A of General Requirements & Scopes of Work “could only be [ ] correctly interpreted as requiring that all of the listed work be priced but not done for a bid submission.” (Appeal at 7.) J&B is wrong. GCC intended — and correctly interpreted — the Solicitation to require a bid packet to include shop drawings for *both* items solicited in the IFB, not just the generator. (*See* GCC~Tab 7~AR0004, 26 & 48 (evaluation sheets’ criteria included: “Drawings were submitted with Bid Proposal”).) As discussed above, the Solicitation — which includes the General Requirements & Scopes of Work — required that the bidders provide shop drawings in their bid packets. But even assuming arguendo that this requirement was ambiguous, J&B had a duty to seek clarification from GCC regarding this issue. And, in the event of such an ambiguity in the IFB, the proper course of action is cancellation to re-solicit — i.e., exactly what GCC did.

When construing the entirety of a solicitation, a “[d]ivergence between the parties’ subjective interpretations does not, by itself, render a solicitation ambiguous.” *Linc Gov’t Servs.*, 96 Fed. Cl. at 708 (citation omitted). However, if an ambiguity exists in the solicitation’s terms, then the tribunal must “determine whether the ambiguity is latent or patent.” *Id.* (citation omitted). “An ambiguity is latent if it is not apparent on the face of the solicitation and *is not discoverable through reasonable or customary care.*” *Id.* (citations omitted; emphasis added). “Under the rule of *contra proferentem*, a latent ambiguity is resolved against the government as drafter of the solicitation. *Contra proferentem*, however, is a ‘rule of last resort,’” which “applies only if there is a genuine ambiguity that remains unresolved” after “examin[ing] the entire solicitation and all contemporaneous circumstances.” *Id.* (citations omitted).

On the other hand, “a patent ambiguity in a solicitation is one that is ‘obvious, gross, [or] glaring’” and “may take the form of ‘facially inconsistent provisions’ that would ‘place a reasonable [offeror] on notice’ of a conflict or discrepancy.” *Id.* (alterations in original; citations omitted). “When a solicitation contains a patent ambiguity, the offeror has ‘a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation’ in a subsequent court action.” *Id.* (citations omitted). Thus, a patent ambiguity requires resolution of “the ambiguity against the offeror.” *Id.* (citations omitted). The “patent ambiguity doctrine” is applied to prevent a bidder from challenging an ambiguity in the solicitation *after* learning that it would not be awarded the contract, which thereby provides that bidder “with increased knowledge of its competitors” when the solicitation is re-issued. *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1314 (Fed. Cir. 2007).

Here, even if the Solicitation could be subject to two interpretations regarding the requirement of shop drawings thereby rendering the IFB ambiguous, any such ambiguity was patent. J&B clearly had no problem reading the Solicitation's General Requirements & Scopes of Work as requiring a submission of shop drawings for the generator with the bid packet. (See GCC~Tab 8~AR0008-102.) And J&B, like the other bidders, submitted numerous questions regarding the Solicitation's requirements. (See GCC~Tab 10~AR0045-53.) Indeed, J&B submitted questions specifically on the design-build structure to house the generator. (See *id.* at AR0050-51.) Moreover, J&B obviously interpreted the Solicitation to require the submission of shop drawings for the design-build structure because it intended, but neglected, to include a "sketch" of the building in its bid packet. (See GCC~Tab 8~AR0006 at No. 6 (describing the building in a narrative and denoting "(see attached sketch)").) Thus, J&B had a duty to seek clarification on the submission requirements for the design-build structure, rather than argue for an after-the-fact interpretation when GCC announced that it was cancelling and planning to re-issue the IFB. See, e.g., *CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 738-39 (2014) ("[E]ven if the court were to perceive an ambiguity within the solicitation's terms, any such ambiguity would be patent . . . . [T]he provisions of the solicitation upon which plaintiff relies in support of its interpretation of CPRS were clearly apparent to CliniComp before it submitted its quotation. . . . CliniComp submitted inquiries regarding other technical requirements before the September 25, 2013 deadline for the submission of quotations, thus demonstrating that CliniComp had ample time to discern and object to any ambiguity in the RFQ before that date. CliniComp therefore had a duty to seek clarification regarding any such ambiguity prior to the close of bidding.") (citations omitted).

Accordingly, given J&B's several inquiries about the IFB's requirements for the design-build structure and its obvious intention to provide more than a just a narrative description of the structure, J&B was "on notice" of any ambiguity and should have sought clarification before submitting its bid packet.

Moreover, even if the requirement of shop drawings for the design-build structure was a latent ambiguity that resulted in bid packets being non-responsive, GCC appropriately cancelled the Solicitation so that it could re-issue 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[.]"). Thus, even assuming that J&B is entitled to any remedy for its Appeal — which it is not — it has already received the *only* possible remedy available.<sup>3</sup>

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<sup>3</sup> As explained in GCC's Statement Answering Allegations of Appeal, the law does not provide for J&B's requested remedy of a contract award. (GCC~Tab 1~AR at 11-12.)

In short, even if J&B could interpret the shop drawings requirement differently than GCC did, J&B's Appeal still fails because either (1) J&B had a duty to seek clarification on this issue before submitting its bid packet, which it did not, or (2) GCC already cancelled the IFB to re-issue the Solicitation, which is the only remedy available to J&B.

**CONCLUSION**

For the foregoing reasons, GCC requests that the Hearing Officer find an expeditious dismissal of the instant Appeal is warranted because the record reveals that there are no material disputed facts and in light of the record's undisputed facts, and as a matter of law, J&B's Appeal clearly is unavailing.

Respectfully submitted this 10th day of April 2017.

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