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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

<p>IN THE APPEAL OF</p> <p>Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech,</p> <p style="text-align: center;">Appellant.</p> <hr style="width: 100%;"/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>APPEAL NO. OPA-PA-17-003</p> <p>PURCHASING AGENCY'S REPLY IN SUPPORT OF MOTION FOR EXPEDITIOUS DISMISSAL</p>
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Purchasing Agency Guam Community College ("GCC") submits this Reply in support of its Motion for Expeditious Dismissal ("Motion") filed on April 10, 2017. In its Motion, GCC explained that, based on the record and the law, the Hearing Officer should find there are no material facts in dispute regarding the merits of the instant Appeal; therefore expeditious disposition of this case is warranted. On April 17, Appellant Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech's ("J&B") filed its Opposition to the Motion ("Opposition"). Nothing in the Opposition precludes the conclusion that the J&B's Appeal should be expeditiously dismissed.

BACKGROUND SUMMARY¹

On October 3, 2016, GCC issued Bid Invitation No. GCC-FB-17-001 (“IFB” or “Solicitation”) for two connected items: (1) the design-build construction of a generator building and (2) the installation of back-up generator system. (*See generally* GCC’s Agency Report at Tab 10 [cited “GCC~Tab []~AR”].) The issue for the instant Appeal involves whether — for the first item — the IFB required the bidders to submit drawings of their proposed design-build structures in their bid packets.

In its “Special Reminder to Prospective Bidders,” the Solicitation stated that “DESCRIPTIVE LITERATURE” was to be “submitted in the bid envelope” (GCC~Tab 10~AR0002) and “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” (*Id.* at AR0009, No. 20). At the pre-bid conference, GCC advised the prospective bidders of “important requirements” for their bid packets including: “Descriptive Literature/Product Brochure: *the information regarding the housing. . .*” (GCC~Tab 9~AR0002 (emphasis added).)

In its “General Requirements & Scopes of Work,” the Solicitation directed:

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.

(GCC~Tab 10~AR0031-32.) GCC drafted Section 1.2.A with the intention that it required the bidders to submit drawings of their proposed buildings in their bid packets. (*See Decl.*

¹ Because GCC’s Motion provides a detailed background, only a summary is provided herein.

D. Perez (Apr. 24, 2017) at ¶¶ 4-9; Decl. F. Palacios (Apr. 24, 2017) at ¶¶ 4-9; Decl. R. Pritchard (Apr. 24, 2017) at ¶¶ 4-9.)

The IFB's "Instructions" directed that "[e]ach bidder shall furnish the information required by the Solicitation." (GCC~ Tab 10~AR0003.) Because no bidder met the IFB's requirement of submitting drawings for the design-build structure to house the generator, GCC decided to reject all the bids, "review the scope of work and specifications, and re-issue the bid." (GCC~Tab 6~AR001; see Decl. D. Perez at ¶ 12; Decl. F. Palacios at ¶ 12; Decl. R. Pritchard at ¶ 12.) GCC notified the three bidders that "no awards will be made" because "all bidders failed to provide GCC with shop drawings and submittals." (GCC~ Tab 5~AR001.) GCC also informed the bidders: "GCC wants to ensure that all issues and requirements are addressed and taken into consideration. . . . [T]he 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." (*Id.*)

J&B lodged a bid protest, complaining "shop drawings were not included in the requirements for bids on this project." (GCC~Tab 4~AR0001-02.) Noting the Solicitation's various references to the requirement of shop drawings, GCC "found that [the protest] is without merit." (GCC~Tab 3 ~AR0001-02.)

J&B filed the instant Appeal on March 21, 2017. On April 4, GCC filed its Agency Report, with a Statement Answering Allegations of the Appeal. J&B filed its Comments on the Statement on April 10. The same day, GCC filed its Motion to expeditiously dispose of the Appeal. On April 17, J&B filed its Opposition to the Motion and GCC filed its Rebuttal to J&B's Comments.

ARGUMENT

In its Appeal, J&B reiterates its allegation that GCC misinterpreted the Solicitation — which GCC drafted — to require shop drawings for the design-build structure to be submitted in a bid packet.² As explained below and in GCC's Motion, 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. J&B's Opposition proffers no reason to deny the Motion. Therefore, the Hearing Officer should expeditiously dismiss the Appeal.

A. J&B's Reliance on an Internet Definition of "Design-Build" Is Misplaced Because the Regulations Guide this Procurement Method

J&B relies heavily on a definition taken from the Internet to argue that a design-build solicitation does not require the bidders to submit drawings in their bid packets. (*See, e.g.,* Opp'n at 2, 5, 9.) J&B's reliance on this definition is misplaced. This is so because Guam's Procurement Regulations guide the design-build method of procurement. Chapter 5 of the Regulations provides the following description:

(d) Design Build or Turnkey. In a design-build or turnkey project, a business contracts directly with the territory to meet the territory's requirements as described in a set of performance specifications by constructing a facility to its own plans and specifications. Design responsibility and construction responsibility both rest with the design-build contractor. This method can include instances where the design-build contractor supplies the site as part of the package.

2 GAR, Div. 4, § 5102(3)(d). Further, the Regulations instruct how this procurement method is used to select a contractor for award.

(a) Use. The design-build or turnkey method gives the contractor maximum control of the construction project consistent with territory needs. The territory prepares a set of performance specifications including functional criteria, any life-cycle cost considerations, and other evaluation factors. *The*

² The parties agree that J&B's bid packet satisfied the IFB's requirement of shop drawings for the generator. (*See* Motion at 7; Opp'n at 5 n.1)

territory shall also specify the degree of detail necessary in a design proposal. The contractor is selected on the basis of its design proposal, proposed price, and other stated evaluation criteria. . . . In appropriate circumstances, it may be advantageous to provide in the solicitation for payment to all or any of the firms of proposal preparation costs or a stipulated stipend to ensure adequate continuing competition. After award, the contractor completes the design, subject to review by the territory or its architect-engineer as set forth in the contract, and constructs the project. . . .

2 GAR, Div. 4, § 5102(7)(a) (emphasis added).

Thus, under Guam's Procurement Regulations, when a solicitation is for a design-build project, the bidders are expected to submit drawings of the project that they propose to design and build. And the solicitation will "specify the degree of detail necessary" for the drawings that are expected to be submitted. *Id.* Moreover, the submission of drawings is a common expectation for design-build procurements. Indeed, a continuing education provider for professional engineers instructs that a design-build solicitation response includes "Presentation Drawings" and that: "The presentation drawings that are required are usually stipulated in the RFP."³

Here, there is no question that all the bidders — especially, J&B — were aware that this Solicitation was for a design-build, or turnkey, project. The IFB clearly stated that GCC was soliciting for "a design-build generator building." (GCC~Tab 10~AR0030.) Further, the IFB's "General Requirements and Scope of Work" stated that the bidders were to "[p]rovide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator set/system." (GCC~Tab 10~AR0030-31.) At the pre-bid conference, J&B asked: "[I]s the turnkey only applicable to the generator[?]." (GCC~Tab 9~AR0004.) GCC responded, "it is the whole, overall project." (*Id.*) And when

³ Engineer Educators, www.engineereducators.com/docs/designMaterials.pdf (last visited Apr. 22, 2017).

J&B submitted written questions about the specifics of the building, GCC four times answered: “As a design-build project, it is up to the contractor to determine” (GCC~Tab 10~AR0050-51.)

Moreover, J&B’s prior experience with procurement solicitations not requiring shop drawings until after award of the contract (*see* Opp’n at 4; Decl. G. Bangayan (Apr. 10, 2017) at ¶¶ 2-3) is irrelevant because *this IFB* — soliciting for, in part, a *design-build* project — required the bidders to provide “shop drawings and submittals” for the structure they proposed to design and build.⁴ And, as explained above, it is common that a solicitation for a design-build project will require bidders to submit drawings of their proposed design. *See, e.g., SPEC Inc. v. Dept. of Transport.*, No. 01-1169BID, 2001 WL 629842, at *7-8 (Fla. Div. Admin. Hrgs. June 5, 2001) (discussing the drawings submitted by bidders on a government solicitation for a design-build roof replacement project); *PCCP Constr., JV, Bechtel Infrastructure Corp.*, B-405036, 2011 WL 3510746, at *7-9 (U.S. Comp. Gen. Aug. 4, 2011) (discussing the drawings submitted by a bidder on a government solicitation for a design-build pump station); *Am. Physical Sec. Grp., LLC*, B-405059, 2011 WL 3097958, at *1 (U.S. Comp. Gen. July 25, 2011) (noting that a government solicitation for “the fabrication and installation of aluminum forced-entry/ballistic-resistant windows . . . required that offerors provide sample shop drawings”); *Medlin Constr. Grp.*, B-286166, 2000 WL 1745358, at *3-6 (U.S. Comp. Gen. Nov. 24, 2000) (discussing the drawings submitted by a bidder on a government solicitation for the “design and construction of physical fitness centers”). What

⁴ Tellingly, the “Statement of Experience” attached to Mr. Bangayan’s Declaration does not mention any design-build projects. (*See* Decl. G. Bangayan at Ex. A.) And this list of experience includes several non-government projects and numerous projects that apparently involved air conditioning units. (*See id.*) Thus, it is questionable whether J&B has ever bid on a design-build structure like the one solicited by this IFB.

is more, the fact that this IFB's requirements differed from J&B's prior experience was all the more reason for J&B to seek clarification before submitting its bid packet. (See Motion at 10-13 (explaining J&B's duty to seek clarification on a "patent ambiguity" and its failure to do so).)

B. J&B's Interpretation of the IFB Does Not Aid Its Cause

J&B insists that the Solicitation's requirement to provide "shop drawings" could only be interpreted to mean that this requirement became effective after award of the contract. (See Opp'n at 3-7.) J&B is mistaken.

While J&B's interpretation of the IFB's shop drawings requirement bears on whether the Solicitation was ambiguous, J&B's interpretation alone is not enough for its Appeal to prevail. Rather, as the drafter of the Solicitation, GCC's intent for the IFB's submission requirements must be afforded considerable weight. See, e.g., *Gov't & Military Certification Sys., Inc.*, B-413875, 2016 WL 7425332, at *2-4 (U.S. Comp. Gen. Dec. 22, 2016) (discussing the agency's intention for the solicitation requirements); *Ashe Facility Servs., Inc.*, B-292218.3, 2004 WL 901404, at *8-9 (U.S. Comp. Gen. Mar. 31, 2004) (same); *Mobile Dredging & Pumping Co.*, B-278725, 1998 WL 98732, at *2-3 (U.S. Comp. Gen. Mar. 6, 1998) (same); *MLC Fed., Inc.*, B-254696, 1994 WL 8658 (U.S. Comp. Gen. Jan. 10, 1994) (same).⁵

Here, there is no question that GCC intended for the bidders to provide something that illustrated the structure they proposed to design and build. It is indisputable that GCC

⁵ Notably, all the cases that J&B cites in support of its position on whether a document is ambiguous (see Opp'n at 4) involved the interpretation of agreements that had been negotiated and drafted by the parties. See *Curry Rd. Ltd. v. K Mart Corp.*, 893 F.2d 509 (2d Cir. 1990) (commercial lease agreement); *Niehaus v. Cowles Bus. Media, Inc.*, 819 A.2d 765 (Conn. 2003) (agreement regarding the sale of stock); *Steiner v. Lewmar, Inc.*, 816 F.3d 26 (2d Cir. 2016) (settlement agreement). Here, J&B obviously played no role whatsoever in preparing the Solicitation. Thus, J&B's cited cases have little, if any, bearing on the instant matter.

drafted the IFB, which solicited for a design-build structure to house the generator and directed that the bidders were to provide drawings of their proposed structures (*see* (GCC~Tab 10~AR0030-31). Also, the procurement record clearly reveals that evaluation sheets for the bid packets included the criterion: “Drawings were submitted with Bid Proposal.” (GCC~Tab 7~AR0004, 26 & 48.) Furthermore, it is axiomatic that these evaluation sheets were based on the Solicitation and prepared in advance of the bid packets’ evaluations.

Moreover, assuming *arguendo* that the procurement record itself is unclear regarding GCC’s intention, the contemporaneously-filed declarations of the GCC team (“Team”) who both prepared the General Requirements and Scopes of Work and evaluated the bid packets unequivocally establish that GCC — the drafter of the IFB — intended for the bidders to submit drawings of the structure that they proposed to design and build. (*See* Decl. D. Perez at ¶¶ 4-8; Decl. F. Palacios at ¶¶ 4-8; Decl. R. Pritchard at ¶¶ 4-8.) As articulated in the Team’s declarations, GCC had several reasons for requiring the bidders to submit drawings of their proposed design-build structures, such as:

- a. to ensure that the proposed design-build structure
 - i. is constructed of materials capable of properly housing a generator — e.g., concrete or steel;
 - ii. is large enough to house the generator;
 - iii. provides for adequate ventilation of the generator;
 - iv. allows for adequate access to perform maintenance on the generator;
 - v. completely encloses the generator;
 - vi. adequately fits between Building A, the Anthony A. Leon Guerrero Allied Health Center Building and the parking lot nearby;
 - vii. does not obstruct the elevator for Building A;
 - viii. integrates with the current architecture of the campus;

- ix. does not impair the overall safety of the campus community;
- b. to visualize the footprint of the proposed structure;
- c. to ascertain the reasonableness of the price for the proposed structure; and
- d. to view the structure in which GCC will be making a significant investment.

(*See id.* at ¶¶ 7-8.) And in sharp contrast to J&B’s overblown reading of this section (*see* Opp’n at 6-7), GCC drafted Section 1.2.A with the intention that the bidders would provide shop drawings of their proposed design-build structures in their bid packets; then, after a bidder was selected, that bidder “would finalize its design with the necessary certifications.” (*Id.* at ¶ 9.) What is more, as explained in GCC’s Motion, “shop drawings” include drawings, diagrams, schematics and illustrations.⁶ (*See* Motion at 12.) Indeed, if J&B had not failed to provide the “attached sketch” of the design-build structure it proposed (*see* GCC~Tab 8~AR0006, No. 6; Motion at 12), that sketch might have met the Solicitation’s requirement of shop drawings for the building to house the generator (*see* Decl. D. Perez at ¶ 13; Decl. F. Palacios at ¶ 13; Decl. R. Pritchard at ¶ 13).

In short, contrary to J&B’s assertion that GCC “concoct[ed] bizarre interpretations . . . after the bids [were] submitted” (*see* Opp’n at 7), the record unequivocally shows GCC always intended for the IFB to require bidders to submit drawings of their proposed design-build structure in their bid packets. Given that no bidder satisfied this requirement, the Solicitation — at best — contained a latent ambiguity. (*See* Motion at 13.) And, as explained below, because this latent ambiguity resulted in all the bid packets being non-responsive,

⁶ The term “shop drawings” does not necessarily mean engineer-certified drawings but, rather, means simply drawings, diagrams, illustrations, schematics, layouts, etc. (*See* Motion at 9.) Thus, J&B’s hyperbole about obtaining certified shop drawings to submit with its bid packet is wholly irrelevant for the matter at issue. (*See* Opp’n at 8-9.) That being said, GCC agrees with J&B’s statement that the actual cost of engineer-certified shop drawings is a non-issue for this Appeal. (*See id.*)

GCC properly cancelled the Solicitation so that it could re-solicit the IFB. (*See also* Purch'g Agency's Rebuttal to Appellant's Comments (Apr. 17, 2017) at 4-5.)

C. Cancellation and Re-solicitation Is the Only Remedy

J&B complains that cancellation and re-solicitation of the IFB is "unfair" because its "competitors have had the opportunity to see [its] previous low bid." (Opp'n at 10.) Such a complaint misses the mark. Cancellation for the purpose of re-solicitation is the only remedy for the instant matter — which is exactly what GCC already did (*see* GCC~ Tab 5~AR001).

As explained above, GCC drafted Section 1.2.A with the intention that the bidders would submit drawings of their proposed design-build structures in their bid packets and that the prevailing bidder would finalize its design, with the necessary certifications, after award of the contract. Apparently, GCC's intention was unclear in the IFB because no bidder submitted drawings of its proposed design-build structure. The Solicitation therefore contained a material ambiguity — be it patent or latent — for which the only remedy is cancellation and re-solicitation. Although indeed unfortunate that this IFB must be redone, cancellation and re-solicitation is the only appropriate course of action for GCC.⁷

⁷ J&B's suggestion (*see* Opp'n at 10) that GCC acted with anything other than good faith is unwarranted and groundless, and therefore should not be well taken. *See e.g., Pratt & Lambert, Inc.*, B-245537, 1991 WL 303205, at *3 (U.S. Comp. Gen. Jan. 9, 1991) ("To show bad faith, a protester must submit virtually irrefutable evidence that the contracting agency directed its actions with the specific and malicious intent to injure the protester. The protester has made no such showing here, since it is clear that the agency took appropriate corrective action[.]") (citation omitted); *accord* 2 GAR, Div. 4, § 9104(3) ("Bad faith . . . shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith."). Furthermore, while complaining about its competitors' ability to see its bid price, J&B neglects its role in providing ready access to its bid price. (*See* Opp'n at 10). Although the entire procurement record has been available for review at GCC since the bid opening, J&B's Notice of Appeal — denoting the prices offered by all the bidders (*see* Appeal at 2) — made its bid price handily accessible to its competitors. By filing its Notice of Appeal, J&B caused its bid price to become effortlessly discoverable via OPA's website and also triggered GCC's obligation to inform the other bidders of the Appeal.

As J&B notes (*see* Opp'n at 10), Guam's procurement laws are designed to place all bidders on an even footing when responding to a solicitation. Here, unfortunately, *all* bid packets were non-responsive to the IFB's requirement to include drawings of the design-build structure — which GCC, as the drafter of the Solicitation, undoubtedly intended for the bidders to do (*see* GCC~Tab 7~AR004, 026 & 048 (evaluation sheets' criteria included: "Drawings were submitted with Bid Proposal"); *see also* Decl. D. Perez at ¶¶ 5-9 (explaining the intention when the Team drafted the Section 1.2.A of the IFB's General Requirements and Scopes of Work); Decl. F. Palacios at ¶¶ 5-9 (same); Decl. R. Pritchard at ¶¶ 6-9 (same).) In such a situation, all bidders must be provided an opportunity to submit a responsive bid packet that would allow GCC to award the contract in accordance with the procurement law. *See, e.g., Brickwood Contractors, Inc.*, B-292171, 2003 WL 21276279, at *4 (U.S. Comp. Gen. June 3, 2003) ("Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis.") (citation omitted); *Ashe Facility Servs., Inc.*, B-292218.3, 2004 WL 901404, at *9 (U.S. Comp. Gen. Mar. 31, 2004) ("the appropriate course of action is to clarify the RFP and afford offerors an opportunity to submit proposals based on the clarified solicitation") (citation omitted).

Accordingly, GCC properly cancelled the Solicitation in order to review its requirements and re-solicit the IFB. *See, e.g., 2 GAR*, Div. 4, § 3115(2)(A)(ii) (providing that "[a]fter opening, but prior to award, all bids or proposals may be rejected in whole or in part . . . for reasons including, but not limited to: . . . (ii) ambiguous or otherwise inadequate specifications were part of the solicitation"); *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[.]”).

In short, the only possible remedy available to J&B is the one that it has already received: cancellation and re-solicitation.⁸

CONCLUSION

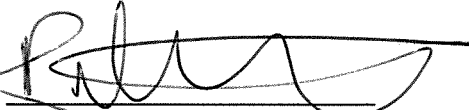
For the foregoing reasons and those articulated in its Motion, GCC respectfully requests that the Hearing Officer find an expeditious dismissal of the instant Appeal is warranted because the record reveals that there are no material disputed facts and in light of the record’s undisputed facts, and as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

⁸ As explained in GCC’s Statement Answering Allegations of Appeal and conceded by J&B in its Comments, the law does not provide for J&B’s initially requested remedy of a contract award. (See Statement at 11-12; Comments at 6.)

Respectfully submitted this 24th day of April 2017.

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By:

A handwritten signature in black ink, appearing to read 'R. Wrightson', written over a horizontal line.

REBECCA J. WRIGHTSON