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**OFFICE OF PUBLIC ACCOUNTABILITY**  
**PROCUREMENT APPEAL**

In the Appeal of	)	<b>APPELLANT'S APPEAL BRIEF;</b>
	)	<b>CERTIFICATE OF SERVICE</b>
Phil-Gets (Guam) International Trading Corp.	)	
dba J & B Modern Tech,	)	Docket No. OPA-PA-17-003
	)	
Appellant.	)	
	)	
And	)	
	)	
Guam Community College,	)	
	)	
Purchasing Agency.	)	
_____	)	

**I. INTRODUCTION**

Pursuant to the Order issued May 5, 2017, appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech (“J&B”) submits the following Appeal Brief. J&B is challenging the denial of its protest against the purchasing agency’s determination that J&B’s bid on a project was nonresponsive and the resulting cancellation of the procurement. J&B notes that its legal argument below addresses two different sets of arguments advanced by the purchasing agency, Guam Community College (“GCC”), over the course of this dispute. First, J&B will address the position taken by GCC in its initial rejection of J&B’s bid and subsequent denial of J&B’s protest, a position that GCC largely adhered to up until the hearing on May 1, 2017, its motion to dismiss. This

section of J&B's argument will mostly be repetition of material set forth by J&B in its Notice of Appeal, its Comments on Purchasing Agency's Statement, and its Opposition to GCC's Motion for Expeditious Dismissal. Second, J&B will address the new position taken by GCC at that hearing. Regardless of which position GCC now takes in this appeal, GCC's cancellation of the procurement and rejection of J&B's bid as nonresponsive was erroneous.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. The invitation for bids.**

On October 3, 2016, GCC issued Bid Invitation No. GCC-FB-17-00 for two connected items: (1) the design-build construction of a generator building and (2) the installation of a back-up generator system. The IFB issued to prospective bidders included a "Special Reminder to Prospective Bidders" that was a de facto list of what was required to be included in their bids. *See* Agency Report at GCC~Tab 10~AR0002. The list included standard items required for nearly all procurements, such as an affidavit of disclosure of major shareholders and a copy of the bidder's current business or contractor's license. The list also included "Project Narrative: Describe how you will complete this project from beginning to end" and "Descriptive Literature/Product Brochure." There is no mention of a requirement for "shop drawings" or a "sketch" or any other type of unwritten pictorial material in this list.

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The only mention of drawings pertaining to the generator building in the IFB<sup>1</sup> that has been identified to date by GCC is near the end of the IFB in a document entitled "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". After a "Background" section, this document has a Section entitled "General Requirements & Scopes of Work". Agency Report at GCC~Tab 10~AR0030. From the context, it is clear that this section sets forth the work to be done after an award of the contract.

Subsection 1. of the General Requirements & Scopes of Work is entitled "Cost Proposal". Agency Report at GCC~Tab 10~AR0030. Part 1.1 of this subsection requires bidders to provide their "lump-sum, firm-fixed price cost proposal" for the work to be done under the contract. *Id.* It states, "Contractor's cost proposal shall include (and not be limited to) ..." *Id.* at GCC~Tab 10~AR0031. The items to be included in the cost proposal are then listed in Part 1.2:

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.

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<sup>1</sup> There is also a reference to "shop drawings" in Section 1.4.C. in the Scope of Work. Agency Report at GCC~Tab 10~AR0032. However, that subsection, which also concerns work to be included in the cost proposal and done after an award, refers to drawings for the generator and auxiliary unit. GCC concedes that J&B submitted extensive and sufficient information for the generator. Purchasing Agency's Statement at 6 (citing GCC~Tab 8~AR0008-102); Purchasing Agency's Reply in Support of Motion for Expeditious Dismissal at 4 n.2 (filed Apr. 24, 2017).

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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.

*Id.*

**B. J&B's bid.**

J&B submitted a bid for this project. J&B's bid included over 90 pages of documentation, including some pictures and diagrams, pertaining to the generator. Agency Report at GCC~Tab 8~AR0008-102. Generators are usually manufactured to set standards in large numbers, rather than being designed one at a time for a particular buyer and location. Therefore, descriptive literature for generators is available and is provided free of charge by the manufacturer to prospective customers. See Declaration of Generoso M. Bangayan, filed Apr. 10, 2017, at ¶4.

There is however no pre-printed descriptive literature or brochure available for a design-built building since, by definition, it has not been designed yet. To state the obvious, even if one ignores the oxymoron, there is no manufacturer making pre-fabricated design-built buildings especially designed for GCC. Bangayan Decl. at ¶15. J&B and other bidders could not get shop drawings, descriptive literature, or brochures for the generator building free of charge from some manufacturer. *Id.* J&B did however submit a detailed project narrative, entitled "Executive Summary of Construction/Installation Work to be performed". Agency Report at GCC~Tab 8~AR0005-07. This summary included a detailed description of the building, including dimensions, materials to be used, size of the exterior and interior doors, and ventilation. *Id.* at GCC~Tab 8~AR0006. Thus J&B created and submitted its own "descriptive literature", describing the building. J&B's description did have a parenthetical reference to an attached sketch, but no sketch was attached.

**C. GCC's rejection of all bids.**

There were three bids submitted. J&B's bid was the lowest. GCC rejected all of the bids as nonresponsive. GCC issued a Notice of Cancellation claiming that the bid was cancelled because "[a]ll bidders failed to provide GCC with shop drawings and submittals." Agency Report at GCC~Tab 5~AR0001. No other reasons were given for the rejection of J&B's bid.

**D. J&B's protest and GCC's denial of the protest.**

J&B filed a timely protest, contending that shop drawings were not required with the bid. Agency Report at GCC~Tab 4~AR0001-02. Other bidders did not protest, presumably because there would be no point in doing so if one were not the lowest bidder.

GCC denied the protest. Agency Report at GCC~Tab 3~AR0001-02. In the denial of the protest, GCC cited to five provisions in the solicitation. Three concerned general provisions simply requiring bidders to comply with all requirements of the solicitation. *Id.* (items a. – c. in paragraph headed “GCC Response”). The remaining two referred specifically to provisions in the “Scope of Work” requiring “Shop Drawings”. *Id.* at GCC~Tab3~AR00002 (items c. and d.). Thus according to the denial of the protest, GCC’s sole reason for rejection of the J&B bid and cancellation of the bid was the failure of J&B and other bidders to include the “shop drawings” referenced in the “scope of work” in their bids. GCC did not claim that there was any ambiguity in the bid requirements or that there was any other provision in the bid requirements concerning a “sketch” of the generator building. J&B filed a timely appeal of the denial of its protest on May 20, 2017.

## **II. LEGAL ARGUMENT**

### **A. Legal argument in response to GCC’s original position.**

In its cancellation of the IFB, its denial of J&B’s protest, and all of its written submissions in this appeal up to the date of the hearing on its motion to dismiss, GCC has maintained that the reason for cancellation of the IFB and denial of the protest was failure to include the certified shop drawings referenced in the “Scope of Work” in the bid submittals. While GCC appeared to

abandon that position at the hearing on its motion to dismiss, since that is the position GCC has taken in writing to date, J&B will respond to it again in this brief.

**1. Bidders were not required to submit shop drawings with their bids.**

Bidders such as J&B simply were not required to submit shop drawings for the generator building with their bids. GCC indisputably sought bids for a “design-built generator building.” *See, e.g.,* Agency Report at GCC~Tab 10~AR0030-31 (description of scope of work as including “[c]onstruct a design-build generator building”). A contract for a design-built project provides for a single contractor to provide the design and construction. The cost of the design work is included in the contractor’s bid and the design work for a design-built building is done by design professionals pursuant to the awarded contract; the “design” in “design”-build is not done for free before there ever is a contract.<sup>2</sup>

In prior briefing, GCC has attempted to string together various sentences, phrases, and subsections from divergent parts of the IFB, combined with ungrammatical or unusual interpretations of some of those excerpts, in an attempt to show after the fact that there was at least some ambiguity about whether or not bidders had to provide expensive, certified shop drawings to GCC for free with their bids. GCC has identified no reference to “shop drawings” for the design-built generator building in the IFB other than in Section 1.2 in the Scope of Work, which identified items that are to be included in the cost proposal, not items that are to be completed and submitted

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with the bid. "Shop drawings" prepared and certified for a fee by design professionals, such as architects and engineers, and are different from "descriptive literature" offered as free advertising from merchants ranging from those who manufacture generators to those who market, for example, attire or cereal.

Obviously the items on the list in Section 1.2 of the Scope of Work could not be completed before an award, given both financial and physical limitations. For example, the bidders could not all "[c]onstruct design-build building" as part of their bids unless the fully constructed buildings were stacked on top of each other. GCC's position was that bidders were somehow supposed to determine through telepathy or some similar means that some of the items in this single subsection of the Scope of Work were to be completed before submitting a bid, while others in the same subsection were to be done after an award. GCC further took the position that bidders were supposed to figure this out even though Section 1.2 is in Part 1 of the document is entitled "Cost Proposal", leading to the obvious conclusion that items in the following sections of Part 1 are to be included in the cost proposal in a bid, not completed before submitting a bid. GCC further took the position that bidders were supposed to figure out that a "design-built" contract somehow required the design to be completed and submitted before there was a contract. It is clear now, as it was clear to all the bidders when they submitted their bids, that the only reference to "shop drawings" for the

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<sup>2</sup> See, e.g., 2 GAR §5102(7) (in design-build, "[a]fter award, the contractor completes the design . . ."); Design Build Institute of America definition, <https://www.dbia.org/about/Pages/What-is-Design-Build.asp>.



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design-built building in the entire bid package referred to shop drawings (1) to be included in the bid price, and (2) to be done as part of the project after an award, not as part of the bid submission.

GCC attempted to argue that the bid requirements were somehow ambiguous as to whether or not the certified shop drawings mentioned in the Scope of Work had to be submitted with bids. There was nothing "ambiguous" about the fact that bidders did not have to submit shop drawings with this bid. None of the bidders on this project submitted shop drawings with their bids, presumably because none of them saw any reason to suspect that on this one bid such drawings were somehow required. It would have been impossible for the bidders to submit all the items listed in part 1.2 of the Scope of Work, including not only the shop drawings but also the actual building and generator, with their bids. While GCC now says J&B and the other bidders should have requested "clarification", the bidders obviously saw no need to "clarify" matters that were clear already to anyone who read the IFB materials and who knew the definition of "design-build".

A document is only "ambiguous" if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has viewed the entire document and who is cognizant of the customs, practices, usages, and terminology as generally understood in the field. *See Curry Road Ltd. v. K Mart Corp.*, 893 F.2d 509, 511 (2<sup>nd</sup> Cir. 1990). Under this standard, part 1.2 of the Scope of Work could not have a second meaning requiring bidders to submit certified shop drawings with their bids.

In its reply brief in support of its motion to dismiss, GCC cited four cases (out of the thousands in the WestLaw database which may concern procurement<sup>3</sup>), in which shop drawings or other drawings either were required or were gratuitously submitted by bidders in response to invitations to bid or requests for proposals. Without getting into the minutiae of those precedents, the issue is not whether shop drawings were ever required or submitted at any time in any jurisdiction. The issue is whether the IFB in the current instance can be construed as, however ambiguously, requiring shop drawings. It cannot.

**2. A requirement for submitting shop drawings with a bid would be cost-prohibitive.**

A requirement for submission of certified shop drawings with bids would be cost-prohibitive. GCC previously took the position that “shop drawings” certified by design professionals can be obtained at minimal cost because “descriptive literature” of various completed products, such as generators, can be obtained for little or no cost. While GCC’s position is factually incorrect, it may also be a red herring. The issue before the OPA is not whether shop drawings are costly, but whether shop drawings were required in the bid at all regardless of cost. Even if design professionals will prepare shop drawings for free in some fictional alternate universe, if the IFB did not require shop drawings be included in the bid package, omission of such non-required material would not render a bid unresponsive. On the other hand, it might be technically legal for an agency

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<sup>3</sup> A WestLaw search for cases containing the word “procurement” showed 9,999 hits, but that may reflect a program that only displays four digits in the result.

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to include cost-prohibitive requirements in bid requirements, although this would be bad policy as it would effectively discourage or prevent competitive bidding.

In case the OPA does give weight to the cost of shop drawings, J&B notes that certified shop drawings are expensive. As indicated by the executive summary included in J&B's bid, before preparing shop drawings for the building, J&B would have to secure a building permit, do a survey to determine building orientation and underground excavation clearance, and designate professional civil/structural and electrical engineers to do design work including shop drawings. Bangayan Decl. at ¶6. The estimated cost to prepare shop drawings with the required certifications for this project is \$24,000. Id. at ¶7.

Again, design-build procurements replace the use of two separate bids and two separate contracts, the first for the design of a project and the second for the construction of the project pursuant to the design. If GCC had split the project into separate design and build procurements, it could not expect design professionals to offer bids to do the design phase for free. GCC would expect the design contract to equal some more-than-nominal percentage of the total cost of the design and build phases combined, such as the approximately 5% estimated by J&B.

By way of example, suppose a consumer wanted to buy a Lexus and also wanted to build an elaborate garage to house the vehicle. The consumer could walk into Atkins Kroll or go on-line and get descriptive literature about the Lexus for free. However, an architect would charge for blueprints for the garage. The situation is the same if one wants both (1) a generator and (2) a specially-designed generator building approved by a master electrician and civil and structural

engineers with feeder cables to another building. The unique plans for the latter cost more than advertisements for the former.

Finally on this issue, GCC's previous suggestion that J&B could have met the requirement for "shop drawings" for minimal expense by attaching a mere "sketch" of a building to its bid contradicts GCC's insistence elsewhere that the inclusion of "shop drawings" was mandated by Section 1.2.A of the Scope of Work. This subsection required shop drawings certified by, inter alia, a master electrician and civil and structural engineers. Design professionals face both possible loss of licensure and breach of warranty claims for negligent certification. *See* K. Sido, F. O'Meara & A. Jensen, Architect and Engineer Liability: Claims Against Design Professionals §20.10 (CCH Inc. 2017). Thus it is unlikely that engineers would certify casual cheaply done "sketches" for any price, much less for a price that is not "cost prohibitive".

**B. Legal argument concerning GCC's apparent new position.**

**1. GCC's new grounds for cancellation are not properly before the OPA.**

At the hearing on its motion to dismiss, GCC appeared to withdraw its previous position that "shop drawings" had to be submitted with bids. GCC appeared to concede that the "Scope of Work" listed items to be priced into bids and done after a bid was awarded, i.e., bidders were not required to submit certified shop drawings (and a fully constructed building) with their bids. GCC also appeared to concede that a requirement to include certified shop drawings in a bid would be cost prohibitive. Instead, GCC now argues that even if the only mentions of the word "drawings" anywhere in its bid package did not refer to drawings to be submitted with a bid prior to an award,

the bid requirements were somehow nonetheless ambiguous and bidders were required to submit a "sketch".

GCC did not advance this theory as a basis for cancelling the solicitation and rejecting all bids as nonresponsive. It did not advance this theory as grounds for denying J&B's protest. When an agency denies a procurement protest, it is required to "state the reasons for the action taken". 5 GCA §5425(c)(1). If GCC has abandoned the reason given in its denial of J&B's protest (failure to include the certified shop drawings mentioned in the Scope of Work) and is now relying on new previously unstated reasons for its action, this raises the question of whether the OPA has jurisdiction to consider GCC's new position notwithstanding GCC's failure to comply with 5 GCA §5425(c)(1). If the OPA determines its review is limited to the stated reason in GCC's denial of J&B's protest, and GCC has in fact abandoned that reason, then J&B's appeal should be upheld and the matter remanded to GCC with instructions to consider J&B's bid.

**2. Even if the OPA considers GCC's new grounds for cancellation, the denial of J&B's protest should be reversed.**

**a. The bid requirements were not ambiguous.**

The bid requirements were not ambiguous. There was nothing on the face of the requirements that required a "sketch". GCC now appears to admit that the only reference to "drawings" in the solicitation referred to shop drawings to be produced after an award, not before. GCC seems to be contending that the requirement for "descriptive literature/brochures" could be construed as requiring a "sketch" of the building. "Literature" refers to writings, not drawings. A

sketch, without words, would not be “literature”. Cf. People v. Lo Pinto, 75 A.D. 2d 63, 67, 275 N.Y.S. 2d 969, 973 (1966) (postal card duplicating ballot was not “political literature”). A “brochure” is “a pamphlet or leaflet”. [www.dictionary.com](http://www.dictionary.com). The word “brochure” has its origins in France circa 1755-65, long before modern techniques of reproducing pictures in publications. See *id.* Thus a brochure could contain only words without pictures or sketches. As noted above, there are no manufacturer's brochures for prefabricated buildings for the GCC campus.

Again, a document is only “ambiguous” if it is capable of more than one meaning when viewed objectively. See Curry Road, *supra*, 893 F.2d at 511. An adjudicative body should not “torture words” to create ambiguity where the ordinary meaning leaves no room for ambiguity. Niehaus v. Cowled Business Media Inc., 819 A.2d 765, 771 (Conn. 2003). Similarly, an adjudicative body is not required to find ambiguity in a document when the interpretation urged by one party, in this case GCC, would strain the language of the document beyond its reasonable and ordinary meaning. See Steiner v. Lewmar, Inc., 816 F.3d 26, 32 (2<sup>nd</sup> Cir. 2016). J&B met the requirement for “descriptive literature/brochure” when it submitted a narrative describing the building it would construct.

**b. GCC cannot create ambiguity after the fact.**

GCC's current position appears to be that its solicitation for bids was “ambiguous” because, although the IFB contained no language hinting at a need for a “sketch”, either (a) GCC secretly wanted a sketch but did not happen to say so in the solicitation, or (b) after issuing the solicitation

which did not require a sketch, GCC decided it would be nice to have one but did not amend the IFB to say so, or (c) GCC somehow construes something in the solicitation as requiring a sketch even though neither the bidders nor a reasonable person reading the IFB could discern any language hinting at such a requirement. A document is not ambiguous merely because one party has a subjective or, in this case, highly creative perception of its terms. See Niehaus v. Cowled Business Media Inc., 819 A.2d 765, 771 (Conn. 2003).

By way of another Atkins Kroll-based analogy, suppose a consumer contracted with AK to buy a new basic Toyota Yaris for \$14,999 (the current price on AK's web site.) On the day the customer is to assume delivery, he shows up at AK with payment. But after looking at the car, the customer refuses to pay, saying, "It doesn't have the alloy wheel locks, mudguards, all-weather floor liners, window tinting, a sun roof, or the most advance sound system." The salesman points out that all of those items are extras not included in the basic model and price. The customer says, "But I've decided I want them, so if they aren't in our sales contract, the contract is ambiguous! And since ambiguities in your adhesion sales contract are interpreted in favor of the consumer, the contract includes all those extras and I can refuse to pay if I don't get them."

That is basically GCC's position here, except that GCC (unlike the customer in the hypothetical) drafted the document that it now claims is ambiguous because it did not disclose its own undisclosed or subsequent desires. The hypothetical customer would not prevail on his claim of "ambiguity", and GCC should not prevail on its similar claim here.

**c. Latent ambiguities should be construed against GCC.**

Without conceding that there was any ambiguity concerning “sketches” or “drawings” whatsoever in the solicitation, in the alternative J&B contends that any alleged “ambiguity” was latent rather than patent. As GCC explained in its motion for dismissal, a patent ambiguity 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. Purchasing Agency’s Motion for Expeditious Dismissal, filed April 10, 2017, at 11 (citing Linc Government Services, LLC v. United States, 96 Fed. Cl. 672, 709 (2010)). Patent ambiguities are construed in favor of the government. Linc, *supra*, 96 Fed. Cl. at 709. In the current case, where there was no mention of a “sketch” in the IFB, and nothing to put a reasonable offeror on notice, the alleged ambiguity (if any) was latent.

As GCC also explained in its motion to dismiss:

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 preferentem*, a latent ambiguity is resolved against the government as drafter of the solicitation. *Contra preferentem*, 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.* [[at 708-09]] (citations omitted).



Purchasing Agency's Motion at 11. GCC went on to contend that the "ambiguity" in its solicitation was patent, rather than latent. *Id.* at 12. However, since GCC can point to no obvious ambiguity, the ambiguity, if any, is latent.

J&B would suggest that the concept of "latent ambiguity" is a legal fiction. If an alleged ambiguity is "not apparent on the face of the solicitation" and "not discoverable through reasonable or customary care", then the solicitation is unambiguous. If the ambiguity is not apparent and not discoverable, then the plain language of the solicitation should control "unless it is manifest that another meaning was intended and understood by all parties." Linc, *supra*, 96 Fed. Cl. at 708. However, if the OPA recognizes the concept of latent ambiguity, and finds such latent ambiguity here, then it must be "resolved against the government as drafter of the solicitation."<sup>4</sup> Once such a mysterious latent ambiguity is resolved against GCC, there is no hidden requirement for bidders to submit a "sketch".

**d. GCC will not be prejudiced if the J&B's bid is considered without a "sketch".**

GCC will not be adversely affected if the contract is awarded without a "sketch". As noted above, the narrative in J&B's bid included a detailed description of the building, including dimensions, materials to be used, size of the exterior and interior doors, and ventilation. This is

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<sup>4</sup> At the hearing on GCC's motion to dismiss, J&B's counsel conceded that GCC would prevail if the solicitation was ambiguous as GCC contended. That concession is limited to a patent ambiguity concerning the alleged requirement for a sketch, and does not extend to any phantom, or latent, "ambiguity" that could not have appeared ambiguous to J&B or its counsel.

more information pertaining to safety and environmental concerns than could be derived from a mere "sketch". A sketch might address some aesthetic concerns that GCC might have. However, part 1.2.A.3 in the Scope of Work specified that the contractor had to "[s]ubmit certified drawings, shop drawings, and submittals to GCC for review and acceptance." Agency Report at GCC~Tab 10~AR0031. Thus purely aesthetic concerns could be addressed by GCC during that review before the plans were accepted and the building was constructed.<sup>5</sup>

**C. A do-over is unfair to the responsive low bidder and inconsistent with the principles of procurement law.**

Finally, there is the issue of the proper remedy if the OPA overturns GCC's denial of J&B's protest. If the agency determination that the bidder was nonresponsive is overturned, the agency should be ordered to consider the appellant's bid. *See, e.g., In the Appeal of JMI Edison*, Docket No. OPA-PA 13-010 at 4 (Decision, Sept. 25, 2013) (agency erred in determining bid was nonresponsive, agency order to consider bid); *In the Appeal of Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech*, Consolidated Appeals Nos. OPA-PA-13-002, OPA-PA-13-003 at 13 (Consolidated Decision, June 14, 2013) (vacating erroneous suspension of J&B and ordering agency to consider J&B's bid).

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<sup>5</sup> GCC filed affidavits from some of its employees on April 24, 2017, setting forth reasons for drawings to be submitted with bids. Those declarations clearly refer to shop drawings referenced in the Scope of Work, not mere sketches, and thus have been mooted if GCC now concedes shop drawings were not required. *See, e.g., Pritchard Decl.* at ¶¶5, 6, 8. In addition, the concerns raised in the declarations could be addressed during the post-award review and acceptance phase.

GCC has implied that J&B has no complaint because J&B will be able to submit a new bid if and when the project is re-bid. Of course, on a re-bid, all of J&B's possible competitors will have had the opportunity to see J&B's previous low bid. J&B's initial low bid will serve as a ceiling rather than a floor for bids the second time around. In that situation, J&B, which submitted the legitimate low bid the first time around, will be forced to "bid against itself" and undercut its own fair low price. J&B might still lose out.

The purposes of Guam's procurement law include providing for increased public confidence in procurement procedures, ensuring fair and equitable treatment of all persons who deal with the procurement system, fostering effective broad-based competition, and providing safeguards for the integrity of the procurement system. 5 GCA §5001(b). All of these policies are undermined if an agency can simply toss out all the responsive bids in a procurement and get a mulligan.

#### IV. CONCLUSION

For the foregoing reasons, GCC's denial of J&B's protest should be overturned, and this matter should be remanded to GCC with instructions to fairly consider J&B's bid.

Respectfully submitted,

DOOLEY ROBERTS FOWLER & VISOSKY LLP

Date: May 9, 2017

By: Seth Forman

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CERTIFICATE OF SERVICE

I certify that on May 9, 2017, I caused the above Appellant's Appeal Brief to be served by hand delivery on the Purchasing Agency's attorneys, Cabot Mantanona LLP, Edge Bldg., 2<sup>nd</sup> Floor, 929 South Marine Corps Drive, Tamuning, Guam 96913.

Date: May 9, 2017

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