

**CABOT
MANTANONA LLP**
 929 South Marine Corps Dr., Ste. 200
 Tamuning, Guam 96913
 Telephone (671) 646-2001
 Facsimile (671) 646-0777
Attorneys for Purchasing Agency Guam Community College

RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENTS DIVISION
 DATE: 01/11/18
 TIME: 4:08 AM PM BY: C. Lopez
 FILE NO OPA-PA: 17-011

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

IN THE APPEAL OF)	APPEAL NO. OPA-PA-17-011
)	
J&B Modern Tech,)	
Appellant,)	PURCHASING AGENCY'S
)	STATEMENT OF STIPULATED FACTS
and)	
)	
Guam Community College)	
)	
Purchasing Agency.)	

On November 16, 2017, Purchasing Agency Guam Community College (“GCC”) filed a Motion to Dismiss for Lack of Jurisdiction or, Alternatively, for Expeditious Disposition (“Motion to Dismiss”) because the undisputed facts in the record clearly establish that Appellant J&B Modern Tech (“J&B”) untimely protested every substantive issue presented in its Notice of Appeal.¹ GCC’s Motion to Dismiss is awaiting decision by the Public Auditor and should be granted. In the interim, pursuant to the Scheduling Order (*see* Order (Dec. 4, 2017)), GCC submits its Statement of Stipulated Facts for the scheduled January 17, 2018 Hearing on Appellant J&B Modern Tech’s (“J&B”) Appeal.

¹ GCC’s Motion to Dismiss alternatively requested an Expeditious Disposition because there are no undisputed facts regarding the issues presented by J&B’s Appeal, which renders it proper to decide this Appeal solely on the procurement record. GCC maintains its position that a hearing on this Appeal is an unnecessary use of this tribunal’s and the parties’ time and resources. J&B, however, insisted on a formal hearing and, for this reason, the Hearing Officer denied the alternative portion of the Motion to Dismiss.

STIPULATED FACTS

In a conversation between counsels on January 9, 2018, the parties agreed to stipulate to the Procurement Record in this matter. For the Public Auditor's and the Hearing Officer's convenience, GCC highlights the following undisputed facts in the Procurement Record (also provided in the tabs of the Agency Report) that are material to, and dispositive of, the issues presented by J&B in its Notice of Appeal.

1. On June 7, 2017, GCC issued Bid Invitation No. GCC-FB-17-105 ("IFB" or "Solicitation") for the construction of a Forensic DNA Lab ("Project"). (See Procurement Record [cited "PR"], Tab 2 at 0002; see also Agency Report [cited "AR"], Tab 6 (pertinent pages of IFB).)

2. The IFB contained a detailed chart for nearly eighty different costs that are incorporated in the bidders' total price for the Base Bid, along with the bidders' prices for three alternate bid items. (See AR, Tab 6 at 027-31.)

3. The IFB's cost breakdown applied to divisions in the specifications for the Project. (See AR, Tab 6 at 027.)

4. The IFB required that the Project must be completed in "540 consecutive calendar days." (AR, Tab 6 at 0031.)

5. The IFB stated:

Contractors shall indicate outstanding issues with the GCLB [Guam Contractors Licensing Board] and OSHA and indicate methods being utilized to avoid similar problems in the future. Contractor records will be checked with the Guam Contractors Licensing Board and shall be considered in determining the most responsive responsible bidder.

(AR, Tab 6 at 032.)

6. The IFB required the prevailing bidder to submit insurance certificates:

1.9 ADMINISTRATIVE SUBMATERIALS

A. Contractor will submit for approval within ten (10) calendar days of award of the Contract, the following, which may also be referred to in other portions of these Specifications:

....

6. Insurance Certificates.

(AR, Tab 6 at 039.)

7. The IFB stated that GCC wanted the Project to be constructed in a manner that would result in a LEED certification:

1.2 WORK COVERED BY CONTRACT DOCUMENTS

....

G.

Sustainable Design & Construction

A primary goal for the Owner is to promote and carry out sustainable design and construction on the project. Sustainable design and construction is defined as the materials and methods that preserve landscape, conserve energy, use materials efficiently, enhance environmental quality, and safeguard water.

Sustainable design and construction will be evaluated by the US Green Building Council through fulfillment of a LEED Rating for the Project. The Owner desires a Certified LEED Rating for the Project.

The Contractor is encouraged to research and select materials, building systems, methods and construction procedures that provide the greatest use of recycled materials, environmentally safe building materials and construction technologies, and to enhance energy efficiency.

(AR, Tab 6 at 034-35; *see also id.* at 034 (“C. Structural, mechanical, electrical and all material finishes are included in the scope of work as well as additional commissioning measures related to LEED certification.”))

8. The IFB contained a “Certificate of Owner’s Attorney,” which is a form required by the U.S. Department of Agriculture (“USDA”),² and GCC confirmed with USDA that this form is completed only upon award of the contract. (*See* AR, Tab 6 at 026; AR, Tab 9 at 012-16.)

9. The “Certificate of Owner’s Attorney” is a document that is to be completed by the “Owner’s Attorney” — i.e., not a bidder’s or a contractor’s attorney. (AR, Tab 6 at 026; *see id.* at 037 (stating the “Contract Form shall be: AIA Standard Form – Owner/Contractor Agreement A-101-2007”); *see generally* PR, Tab 3 at 00466-522 (AIA Standard Form contract documents that are executed by and between the Owner and the Contractor).)

10. At the Bid Opening on July 19, 2017,³ two bidders submitted bid packets for the Solicitation: (1) J&B Modern Tech, and (2) ProPacific Builder Corporation (“PBC”). (*See* AR, Tab 10 at 003-04.)

11. As prominently stated in their respective bid packets, PBC’s Base Bid was \$3,863,714.00 (*see* AR, Tab 8 at 009), and J&B’s Base Bid was \$4,394,450.00 (*see* AR, Tab 7 at 061).

12. On July 20, 2017 — the day after the Bid Opening — J&B, acting on the advice of its attorney, “submitted a Sunshine Act request to GCC for a copy of PBC’s bid documents.” (Appeal at 2; *see* AR, Tab 5 at 001-02.)

13. “J&B received a copy of [PBC’s bid] documents on July 27, 2017.” (Appeal at 2; *see* AR, Tab 5 at 003-06.)

² This project is federally funded. (*See* PR, Tab 7 at 061.)

³ Through Amendment No. 2, the Bid Opening was extended from June 28 to July 19. (*See* PR, Tab 5 at 0011.)

14. On July 24, 2017, GCC forwarded the bid packets to its architect, Taniguchi Ruth Makio Architects (“Architect” or “TRMA”), for evaluation. (See AR, Tab 9 at 025.)

15. Noting that both bidders’ packets had “issues,” on August 4, 2017, the Architect recommended that GCC seek clarification for items in both J&B’s bid packet and PBC’s bid packet. (See AR, Tab 9 at 018-20.)

16. Regarding J&B’s bid packet, the Architect advised of the following “issues”:

- The project schedule exceeds the required contract completion time of 540 calendar days.⁴
- The project schedule does not identify required LEED activities.
- Previous work experience does not identify any LEED projects.

(AR, Tab 9 at 019.)

17. Regarding PBC’s bid packet, the Architect advised of the following “issues”:

- The written total bid price of \$3,863,714 does not correspond with a tabulation of the costs identified in the Bid Form. The tabulated cost for ProPacific’s Base Bid is \$3,903,000 approximately, which exceeds J&B Modern Tech’s \$3,880,850 Base Bid. Additionally, it is unclear if the Alternate Bid Items are included within ProPacific’s written total bid price. It is noted that J&B Modern Tech’s written total bid price includes the Alternate Bid Item costs.⁵
- The project schedule does not identify required LEED activities.

(AR, Tab 9 at 019.)

18. Regarding clarification from both bidders, the Architect recommended:

TRMA recommends that clarification of ProPacific’s bid is necessary prior to determining further action. ProPacific needs to confirm that their written Bid Sum is correct. ProPacific also

⁴ On this issue, the Architect found that J&B’s CPM Chart showed an “805-day project duration (approximately 540-workdays excluding weekends).” (AR, Tab 6 at 023.)

⁵ On this issue, the Architect found that the “[c]osts identified in [PBC’s] bid form” summed to “\$3,903,346.22 dollars with an additional cost of \$690,000 total for the Alternate Bid Items.” (AR, Tab 6 at 024.)

needs to confirm that their written total Bid amount covers all of the base bid work identified in the Bid Form, and whether or not it includes the Alternate Bid Items. Should ProPacific confirm that the written total Bid amount is valid, TRMA recommends that GCC award the project to ProPacific.

Should ProPacific's written total bid price be determined invalid, TRMA recommends clarification with J&B Modern Tech regarding their CPM Chart timeframe. J&B Modern Tech needs to confirm that they can complete the project within the required 540-calendar day timeframe. TRMA recommends GCC award the project to J&B Modern Tech if the bidder confirms and accepts the timeframe requirement.

(AR, Tab 9 at 019.)

19. By August 18, 2017, GCC had sought, and received, clarification for the items noted by the Architect, along with confirmation that both bidders included LEED activities in their Base Bid prices. (See AR, Tab 9 at 003-11.)

20. J&B "confirm[ed] to complete the project in 540 consecutive calendar days" and "that the LEED Activities was included in our bid price per GCC bid specification." (AR, Tab 9 at 003.)

21. PBC replied: "Correct" to GCC's request: "Please confirm that [PBC's] base bid price of \$3,863,714.00 is correct." PBC also stated that its base bid "doesn't include the alternate bids" and that "LEED activities i[s] included in this bid price." (AR, Tab 9 at 004.)

22. The Architect reviewed both J&B's and PBC's clarifications and, on August 25, 2017, recommended that contract be awarded to PBC because it was the lowest responsive and responsible bidder. (See AR, Tab 9 at 002.)

23. GCC approved the Architect's recommendation on September 1, 2017 with the intent to award the contract to PBC based on its Base Bid and Alternate Bid Items #2 and #3. (See AR, Tab 9 at 001.)

24. On September 7, 2017, GCC issued a notice of intent to award to PBC and a notice of non-award to J&B. (*See PR, Tab 12 at 0346-50.*)

25. On September 11, 2017, J&B sent GCC a complaint regarding three items in PBC's bid packet. (*See PR, Tab 12 at 0352-54; see also PR, Tab 13 at 1544-47.*)

26. On September 20, 2017, GCC received a protest ("Protest") from J&B based on four items in PBC's bid packet that J&B alleged made PBC's not the lowest bid and non-responsive. (*See AR, Tab 4 at 003-04.*)

27. As the record clearly and indisputably shows, J&B alleged that "PBC's bid was not the low bid and also was not responsive" and presented four issues in its Protest:

- A. J&B alleged that PBC's bid packet contained an arithmetical error because the division cost breakdown did not sum to PBC's stated Base Bid price, and J&B attached pages from PBC's bid packet to demonstrate this alleged error;
- B. J&B alleged that PBC should have submitted records from GCLB and OSHA, and J&B attached a page from PBC's bid packet to demonstrate this alleged error;
- C. J&B alleged that PBC should have submitted an insurance certificate, and J&B further alleged that PBC's bid packet did not contain this item; and
- D. J&B alleged that PBC should have submitted a Certificate of Owner's Attorney, and J&B attached a page from PBC's bid packet to demonstrate this alleged error.

(*See AR, Tab 4 at 003-04; 008-12; 022; 038.*)

28. On October 18, 2017, GCC issued its decision on the Protest. (*See AR, Tab 3.*) Because J&B had received a copy of PBC's bid packet in July and a bid protest must be filed within fourteen days after the protestor knows or should know of the facts underlying its protest, GCC denied J&B's September 20 Protest as untimely. (*See AR, Tab 3 at 002-04.*)

Nonetheless, GCC addressed the issues raised by J&B and also denied the Protest on its merits. (*See id.*)

29. Regarding the issues presented in J&B's Protest, GCC responded:

- A. GCC had clarified with PBC that its Base Bid was \$3,863,714.00, as stated in PBC's bid packet.
- B. The IFB required the bidders to only "indicate outstanding issues" with GCLB and OSHA and that PBC "complied with this requirement."
- C. The IFB required insurance certificates to be provided by the prevailing bidder prior to the award of the contract.
- D. The Certificate of Owner's Attorney is a USDA form that is signed only when the contract documents are executed.

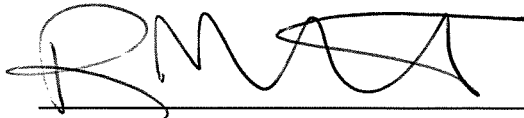
(*See AR, Tab 3 at 002-04.*)

30. On October 30, 2017, J&B filed its Notice of Appeal with the Office of Public Accountability ("OPA"). (*See Appeal.*)

31. In its Appeal, J&B reiterates its Protest's allegations that "PBC's bid was not the low bid and also was not responsive" because PBC's bid packet allegedly contained four errors. (*See Appeal at 3-4.*) J&B also complains that GCC incorrectly denied its Protest as untimely. (*See id. at 5.*)

Respectfully submitted this 11th day of January 2018.

CABOT MANTANONA LLP
Attorneys for Purchasing Agency
Guam Community College

By: 
REBECCA J. WRIGHTSON