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10 dba J & B MODERN TECH

11 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

12 IN THE APPEAL OF

13 Appeal No. OPA-PA-17-011

14 PHIL-GETS (GUAM)
15 INTERNATIONAL TRADING CORP.
16 dba J & B MODERN TECH,

17 **HEARING BRIEF OF PHIL-GETS
18 (GUAM) INTERNATIONAL TRADING
19 CORP. dba J & B MODERN TECH**

20 Appellant.

21 The Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern
22 Tech (herein "J&B") submits the following as its Hearing Brief.

23 **I. INTRODUCTION**

24 It is the position of J&B that the Guam Community College's (herein "GCC")
25 award of the forensic DNA lab to Propacific Builder Corp. (herein "PBC") violated the
26 IFB, violated procurement law, and that J&B as the lower-priced bidder and must be
27 granted the award for the forensic DNA lab.

28 **II. BACKGROUND RECORD UNDISPUTED**

On August 4, 2017, Taniguchi Ruth Makio Architects ("TRMA") Bid Evaluation
Report informed GCC that PBC's "base bid is \$3,903,000 approximately which exceeds
J&B's \$3,880,850 base bid." Procurement Record ("PR") p. 000339, Agency Report
("AR") Tab 9 - 0019; App. Ex. "A".

On September 7, 2017, GCC issued a Notice of Intent to Award the contract to
PBC and a Notice of Non-Award to J&B. Agency Report at 2; PR pp. 00346-00347.

1 On September 8, 2017, importantly, J&B sent its formal written complaint to GCC
2 regarding the award to PBC that was stamped received on September 11, 2017. PR pp.
3 00351-00354, Tab 12; App. Ex. "B".

4 On September 11, 2017, GCC received a complaint or protest regarding the
5 procurement award. *Id.*

6 On September 20, 2017, J&B served their formal "Protest!" with detailed
7 supporting documents and records to explain the protest based on J&B's lower price,
8 the violations of procurement law and the IFB committed by GCC. AR Tab 4, Protest!
9 dated 9/20/17, Exhibits "A" to "K"; also, PR pp. 00364-00401, Tab 14; App. Ex. "C". No
10 doubt may remain that the J&B protest is timely served before 14 days expired.

11 **III. J&B IS THE LOWEST BIDDER; PBC IS THE HIGHER BIDDER;**
12 **COMPUTATION OF THE UNIT PRICES OF BIDDERS IS REQUIRED BY**
13 **PROCUREMENT LAW**

14 **A. The Numbers: J&B Bid of \$3,880,850 is less than the PBC bid**
15 **\$3,903,747**

16 On October 17, 2017, GCC's response to J&B's protest clarified these numbers as
17 accurate and the truth. PR p. 00403, Tab 14; App. Ex. "D". First, the J&B base bid price
18 is \$3,880,850.00. *Id.* at p. 00403. Although PBC mistakenly calculated and inserted a
19 unsupported conclusory bid number of \$3,863,714.00, the true summation of the unit
20 prices bid by PBC is \$3,903,747.00. See TRMA Report (8/4/17); PR pp. 0337-0339; AR
21 Tab 9; also, J&B Protest Exhibit "B" at Tab 14, pp. 00371-00375. Therefore, J&B is
22 unquestionably lower by \$22,984.00 than PBC. PR p. 00366, Tab 14; App. Ex. "A".

23 In fact, GCC does not deny, and admits that the accurate numbers as set forth by
24 J&B above, are true. PR p. 00403, Tab 14, (GCC Response to Protest, October 17, 2017) ;
25 App. Ex. "D".
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1 TRMA employed as the evaluation consultant specifically found the properly
2 computed J&B bid of \$3,880,850.00 was lower than the PBC bid of \$3,903,000.00. See PR
3 p. 00339, Tab 11, TRMA (8/14/17); App. Ex. "A".

4 Moreover, GCC admits again that the J&B bid price is lower by \$22,984.00:
5 "While J&B correctly notes that the sum of PBC cost breakdown did not equal its Base
6 Bid, GCC properly clarified with PBC that its stated Base Bid price was the price the
7 PBC was offering [see AR Tab 9 at 04-07]¹. See Agency Report (11/16/17) at 6; PR pp.
8 00324-00326; App. Ex. "E". (Emphasis added.) So, what happened in the so-called
9 "proper clarification"?

10 **B. The Procurement Law Obliges GCC to Compute Correctly and**
11 **Award the Contract to the Lowest Bidder**

12 (1) The IFB Specifications

13 No discretion remains with the purchasing agency GCC to negotiate or "clarify"
14 prices after the opening of bids, in order to allow changes to the bidder's actual price
15 bid in response to the IFB. However, GCC improperly and illegally did just that. See
16 PR pp. 00324-00326; AR Tab 9 at 04-07; App. Ex. "E". By email exchange dated August
17 18, 2017, GCC violated the procurement law and boldly accepted the self-serving
18 conclusion of "yes" from PBC as to the GCC question, using one line, is the PBC "base
19 bid price of \$3,863,714 correct?" PR p. 00324; AR Tab 9; App. Ex. "E". Oddly, everyone
20 but GCC knows it is not correct.

21 At Section 23 of the IFB Specifications: **Award, Cancellation and Rejection**, the
22 specifications for the Project require:

23 In case of an error in the extension of prices, unit price will
24 govern. See IFB, PR p. 00551; AR Tab 6 ~ 010; at AR Tab 6, p.
25 00551; App. Ex. "K".

26 ¹ Respectfully, GCC has granted the higher bidder the prohibited opportunity to lower its Bid Price After
27 Opening to a dollar number below J&B.

1 All that remains is for GCC to accept the properly computed unit prices as found by
2 TRMA. PR p. 00339, Tab 11; App. Ex. "A".

3 (2) 2 GAR Procurement Regulations §3109(m)(4)(C)

4 This section states:

5 (C) Mistakes where intended correct bid is evident. If the
6 mistake and the intended correct bid is clearly evident on
7 the face of the bid document, the bid shall be corrected to the
8 intended correct bid and may not be withdrawn. Examples
9 of mistakes that may be clearly evident on the face of the bid
document are typographical errors, error in extending unit
prices, transportation errors, and arithmetical errors.
(emphasis added)

10 Here, GCC has a non-discretionary duty, when PBC's mistakes are found and the
11 intended correct bid is clearly evident, to follow the law so that PBC's bid "shall be
12 corrected". This specific error "in extending unit prices" is required to be corrected by
13 the purchasing agency. PBC's Base Bid, when computed correctly, is \$3,903,000.00.
14 TRMA Evaluation (8/4/17) at PR 00339; App. Ex. "A". A simple application of this
15 procurement law tells the parties that the PBC bid "may not be withdrawn", or clarified
16 as GCC apparently tried to do, in violation of the procurement law.

17
18 (3) No Allowance of Changes to Bid Price Allowed When
Prejudice to Other Bidder Exists; 2 GAR §3109 (m)(4)(B)

19 While the Procurement Officer is generally allowed to indulge the correction of
20 minor mistakes, this is not true when the other bidders suffer prejudice. 2 GAR
21 §3109(m)(4)(B). The matter of bidder prejudice includes factors that affect "price,
22 quantity, quality, delivery or contractual conditions." (Emphasis added.) *Id.* GCC is
23 directly changing the PBC bid price by modifying in "clarification", the base bid of PBC
24 to reflect a non-supported, not rational based, not unit priced base, lump sum
25 erroneously computed sum bid of \$3,863,714.00, instead of the properly computed unit
26 price that PBC in fact bid before opening equal to \$3,903,747.00.

1 To be clear, GCC and PBC are not in a process of negotiation of a contract to
2 reach agreement on fair or reasonable compensation. 2 GAR §3114(l)(2)(C). This is not
3 a multi-step bid IFB negotiated price to be negotiated after award of the contract.
4 Instead, the base bid price controls. The lowest bidder by unit price should be
5 determined as only J&B.

6 **C. J&B Alternate Bid Items Are Even Lower Than PBC**

7 An annotated copy of J&B's bid form was submitted as Exhibit "C" to the J&B
8 Protest. PR pp. 00376-81, Tab 14; App. Ex. "C". As shown on that form, the sum of
9 items 1 through 16 in J&B's bid is \$3,889,850.00 *Id.* Thus, once PBC's mathematical
10 errors are corrected, J&B's bid for items 1 to 16 is \$13,894 lower than PBC's bid. *Id.* This
11 calculation of J&B prices excludes the "Alternate Bid Items". If those items are
12 included, the gap in favor of J&B is even larger, as J&B's total for the alternate bid items
13 was \$513,600 lower when compared to \$690,000 for PBC.

14 **D. Only J&B is Entitled to 15% Local Procurement Preference**

15 GCC failed to grant to J&B the 15% Local Procurement Preference. *See* 5 G.C.A.
16 §5008(d) (Policy in Favor of Local Procurement) (2005). "The aim is to encourage local
17 businesses to the maximum extent possible." *Id.* at Comment. Unfortunately, GCC's
18 Bid Abstract rated J&B equally qualified to PBC under the "Local Procurement
19 Affidavit." PR p. 0063 to 0065, Tab 8, Bid Abstract; App. Ex. "F". This is simply not
20 true.

21 Examination of the PBC Bid package shows that no check marks exist on any of
22 the boxes [] lettered a., b., c. and d. *See* PR p. 00285, Tab 8; App. Ex. "G". In contrast,
23 examination of J&B's Local Procurement Preference Application shows that the
24 required check marks exist and are made on boxes "b." and "c." *See* PR pp. 00113-
25 00114; App. Ex. "H". The only conclusion that follows is PBC and its representative
26 "Mr. Kevin Yu *et. al.* born in Hanam City, Korea," and Ms. Jean Yeon Yu from Guam
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1 Yoshin Corporation, are not local and do not satisfy the requirements of Local as
2 defined in §5008. PR p. 00209, Tab 10; App. Ex. "I".

3 **IV. GCC VIOLATIONS OF THE PROCUREMENT PROCESS**

4 **A. GCLB Compliance**

5 The Special Reminder to Prospective Bidders (submitted as J&B Protest "Exhibit
6 D") required bidders to "indicate outstanding issues with GCLB and OSHA." PR pp.
7 00382-83, Tab 14; also, AR Tab 7, p. 0066; App. Ex. "C". PBC only submitted a one-
8 sentence statement (submitted as J&B Protest "Exhibit E") on its own letterhead stating,
9 "ProPacific Builder Corporation has no outstanding issues with the Guam Contractor
10 License Board and/or the Occupational Safety and Health Administration." PR pp.
11 000384-85, Tab 14; App. Ex. "C". This is insufficient.

12 To confirm the status of outstanding issues or lack thereof, PBC should have
13 submitted a "Verification of License" from the GCLB indicating "Complaints on File"
14 and an Inspection Detail print-out from OSHA, as was done by J&B (J&B's verification
15 and print-out submitted as J&B Protest "Exhibit F"). PR pp. 000386-89, Tab 13; App. Ex.
16 "C". As noted in the Special Reminder to Prospective Bidders from GCC signed by
17 PBC, "Failure to comply with the requirements in the special reminder will be a basis
18 for disqualification and rejection of the bid." PBC Consent to Special Reminder
19 (6/20/17), PR p. 00383 (IFB); AR Tab 4 ~ 00201; App. Ex. "J".

20 **B. Insurance Requirement**

21 The Insurance requirement (submitted as J&B Protest "Exhibit G") stated that
22 bidders shall provide a Certificate of Insurance showing that the bidder maintained
23 liability insurance including, Commercial General Liability, Commercial Umbrella
24 Liability, Commercial Automobile Liability, and Commercial Crime Insurance. PR pp.
25 00390-91, Tab 13; App. Ex. "C". This requirement further stated that if the insurance
26 was not currently maintained, the bidder had to provide a statement from an insurance
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1 company, licensed to do business on Guam, stating the bidder is qualified to obtain the
2 required insurance. The Insurance Requirement further provided, "Failure to provide
3 these documents will result in rejection of the bid." Unlike J&B (J&B's certificates and
4 statement submitted as J&B Protest "Exhibit H"), PR pp. 00392-395, Tab 13; App. Ex.
5 "C", PBC did not provide the required certificates or statement.

6 **C. Certificate of Owner's Attorney**

7 There is a requirement for submitting a Certificate of Owner's Attorney
8 (submitted as J&B Protest "Exhibit I"). PR pp. 00396-97, Tab 13; App. Ex. "C". The
9 form for this Certificate stated that the phrase "performance and payment bonds"
10 should be deleted when not applicable. J&B's counsel deleted that phrase, inserted the
11 applicable information for J&B's bid bond, and signed the Certificate (copy submitted
12 as J&B Protest Exhibit "J"). PR pp. 00398-99, Tab 13; App. Ex. "C". But, PBC did not
13 submit a Certificate of Owner's Attorney. Instead, PBC submitted its own statement,
14 not signed by an attorney, stating that the Certificate would be signed only when the
15 project was awarded to PBC (copy submitted as J&B Protest "Exhibit K"). PR pp.
16 00400-01, Tab 13; App. Ex. "C".

17 **V. RULING REQUESTED**

18 J&B requests that the contract to construct the Forensic DNA lab be awarded and
19 granted to J&B in accordance with the terms stated in the J&B bid, the IFB and the
20 applicable procurement law. Additionally, the PBC bid must be rejected by application
21 of the IFB, 2 GAR §3109(m)(4)(C) and 2 GAR §3109(m)(4)(B).

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1 DATED this 11 day of January, 2018.

2 Respectfully submitted,

3 **BERMAN O'CONNOR & MANN**
4 Attorneys for Appellant
5 **PHIL-GETS (GUAM) INTERNATIONAL**
6 **TRADING CORP. dba J & B MODERN TECH**

7 By:

8 
9 DANIEL J. BERMAN

10 **CERTIFICATE OF SERVICE**

11 I, Christine Pangelinan, hereby certify that on the 11 day of January, 2018, I
12 caused the foregoing *Hearing Brief of Phil-Gets (Guam) International Trading Corp. dba J &*
13 *B Modern Tech* to be served as follows:

14 1) Via Hand Delivery to:
15 Rebecca Wrightson, Esq.
16 Cabot Mantanona LLP
17 Edge Bldg., Second Floor
18 929 S. Marine Corps Drive
19 Tamuning, Guam 96913

20 2) Via U.S. Mail to:
21 Propacific Builders Corporation
22 750 Rt. 8, Suite 202
23 Barrigada, Guam 96913

24 DATED this 11 day of January, 2018.

25 
26 CHRISTINE PANGELINAN