



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

Docket No. OPA-PA-17-011

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

DECISION

Appellant.

I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-17-011 regarding PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP. dba J & B MODERN TECH's ("J&B") Appeal of the GUAM COMMUNITY COLLEGE's ("GCC") denial of procurement protest dated October 17, 2017, concerning Invitation for Bid No. GCC-FB-17-015 ("the IFB"), which solicits bids for the construction of a GCC forensic DNA lab.

This matter came before the Public Auditor and Hearing Officer Delia Lujan Wolff for a Hearing on January 29, 2018. Present at the Hearing were Daniel J. Berman, counsel for J&B, J&B President Generoso M. Bangayan, Rebecca J. Wrightson, counsel for GCC, and GCC President Mary A.Y. Okada. In reaching this Decision, the Public Auditor has considered and incorporates herein the procurement record, all documents submitted by the parties, and all arguments made during the January 29, 2018, Hearing on J&B's Appeal. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1 **II. FINDINGS OF FACT**

2 1. On June 7, 2017, GCC issued the IFB which solicits bids for “GCC Forensic DNA Lab
3 Construction.” (Procurement Record, Tab 3, Bid Invitation at 000530.)

4 2. The IFB provides, in relevant part, the following:

5 a. Each bidder shall furnish the information required by the IFB. (Procurement
6 Record, Tab 3 at 000532.)

7 b. “Unit price for each unit offered shall be shown and such price shall include
8 packing unless otherwise specified. A total shall be entered in the amount column the Schedule for
9 each item offered. In case of discrepancies between a unit price and the extended price, the unit
10 price will be presumed to be correct.” (Procurement Record, Tab 3 at 000532.)

11 c. “In case of an error in the extension of prices, unit price will govern.”
12 (Procurement Record, Tab 3 at 000551.)

13 d. Bidders shall submit a Base Bid which shall be broken down into subtotals for
14 each of 16 CSI [Construction Specifications Institute] Divisions, the bid shall be further broken
15 down between material costs and labor costs in each division, and “OH+P [overhead and profit]
16 shall be identified for each Division and shall be the basis for Change Orders and Directives.”
17 (Procurement Record, Tab 3 at 000568.)

18 e. Bid prices include overhead and profit, including all fees, taxes, insurance,
19 coordination costs, material and wage increases, and any other costs affecting the construction and
20 completion of the project in accordance with contract documents. (Procurement Record, Tab 3 at
21 000573.)

22 f. In determining the lowest responsible offer, GCC shall be guided by factors
23 including the price of items offered, the sufficiency of the financial resources and ability of the
24

1 Bidder to perform, and the compliance with all of the conditions of the IFB. (Procurement Record,
2 Tab 3 at 000550.)

3 g. Certain requirements be submitted in the bid envelope, in duplicate, at the date
4 and time for bid opening, including “outstanding issues with the GCLB and OSHA: (See Section
5 0310 Bid Form)” and “certificate of owner’s attorney,” and that the “[f]ailure to comply with the
6 requirements in the special reminder will be a basis for disqualification and rejection of the bid.”
7 (Procurement Record, Tab 3 at 000558.)

8
9 h. On Section 00310 – Bid Form, it states in part: “Contractors shall indicate
10 outstanding issues with the GCLB and OSHA and indicate methods being utilized to avoid similar
11 problems in the future. Contractor records will be checked with the Guam Contractors Licensing
12 Board and shall be considered in determining the most responsive responsible bidder.”
13 (Procurement Record, Tab 3 at 000573.)
14

15 i. The Certificate of Owner’s Attorney is on form RD Instruction 1942-A and states:

16 I, the undersigned, _____, the duly authorized and acting
17 legal representative of _____, do hereby certify as follows

18 I have examined the attached contract(s) and performance and payment
19 bond(s) and the manner of execution thereof, and I am of the opinion that each of
20 the aforesaid agreements are adequate and have has [sic] been duly executed by the
21 proper parties thereto acting through their duly authorized representatives; that said
22 representatives have full power and authority to execute said agreements on behalf
23 of the respective parties named thereon; and that the foregoing agreements constitute
24 valid and legally binding obligations upon the parties executing the same in
25 accordance with terms, conditions, and provisions thereof.”

26 Date: _____

27 NOTE: Delete phrase “performance and payment bonds” when not applicable.

28 (Procurement Record, Tab 3 at 000567.)

29 j. “Owner” is defined in the IFB specifications as “The individual, firm, corporation
30 or government entity that owns the Project.” (Procurement Record, Tab 3 at 000580.)
31
32

1 k. Bidders shall provide a Certificate of Insurance showing that the bidder
2 maintained liability insurance including Commercial General Liability, Commercial Umbrella
3 Liability, Commercial Automobile Liability, and Commercial Crime Insurance, or, if the above
4 insurance was not currently maintained, the bidder must provide a certified statement from an
5 insurance company licensed to conduct business in Guam stating that the bidder is qualified to
6 obtain the required insurance, and that “[f]ailure to provide these documents will result in rejection
7 of the bid.” (Procurement Record, Tab 3 at 000559.)
8

9 l. The Contractor will submit for approval within ten (10) calendar days of award of
10 the Contract certain documents including Insurance Certificates. (Procurement Record, Revised
11 Tab 3 at 000580.)
12

13 m. The Contractor shall not commence work under the Contract until it has obtained
14 all insurance required in the IFB, and such insurance has been submitted to the Owner.
15 (Procurement Record, Revised Tab 3 at 000580.)

16 n. The Contractor shall take out and maintain during the life of the Contract the
17 statutory Workmen’s Compensation and Employer’s Liability Insurance, Commercial General
18 Liability Insurance of not less than \$1,000,000 combined single limit of liability for Bodily Injury
19 and Property Damage, Automobile Liability Insurance of not less than \$1,000,000 combined single
20 limit of liability for Bodily Injury and Property Damage, Owner’s Protective Liability Insurance,
21 and Fire Typhoon Theft and Vandalism Insurance. (Procurement Record, Revised Tab 3 at
22 000581.)
23

24 o. “A certificate of the insurance company as to amount and type of coverage, terms
25 of policies, etc., shall be delivered to the Owner before commencing work.” (Procurement Record,
26 Revised Tab 3 at 000581.)
27
28

1 p. GCC may waive any minor irregularity in bids received. (Procurement Record,
2 Tab 3 at 551.)

3 3. On June 19, 2017, GCC issued Amendment #1 to the IFB, which answers questions posed
4 by J&B and extended the bid opening to July 19, 2017. (Procurement Record, Tab 5 at 000005-
5 000009.)

6 4. On June 20, 2017, GCC issued Amendment #2, which answered questions posed by J&B.
7 (Procurement Record, Tab 5 at 000010-000012.)

8 5. On June 21, 2017, GCC issued Amendment #3, which answered questions posed by J&B.
9 (Procurement Record, Tab 5 at 000013-000014.)

10 6. On June 23, 2017, GCC issued Amendment #4, which includes revised structural
11 drawings for the bid. (Procurement Record, Tab 5 at 000015-000020.)

12 7. J&B and ProPacific Builders Corporation (“ProPacific”) submitted bids in response to
13 the IFB. (Procurement Record, Tab 10.)

14 8. On July 19, 2017, GCC conducted a bid opening. (Agency Report, Tab 10 at 000317-
15 000320)

16 9. J&B’s bid package contained, in pertinent part, the following:

17 a. J&B provided a Base Bid in the sum of \$4,394,450.00. (Procurement Record,
18 Tab 10 at 000127.) However, this amount includes the total cost of \$513,600.00 for the Alternate
19 Bid Items. (Procurement Record, Tab 10 at 000131.) Excluding the total cost for the Alternate Bid
20 Items, J&B’s actual Base Bid is \$3,880,850.00. (Procurement Record, Tab 10 at 000127-000131)

21 b. Regarding outstanding issues with GCLB, J&B provided a Verification of
22 License from the Contractors License Board of the Government of Guam. (Procurement Record,
23 Tab 10 at 000147.) Regarding outstanding issues with OSHA, J&B provided printouts of
24

1 Inspection Detail by the Occupational Safety and Health Administration. (Procurement Record,
2 Tab 10 at 000148-000152.)

3 c. J&B provided a signed Certificate of Owner's Attorney, form RD Instruction
4 1942-A, modified to strike out from the second paragraph, "contract(s) and performance and
5 payment bond(s)," and instead writing "Bid Bond No. KIC-14432-B." (Procurement Record, Tab
6 10 at 000126.)

7
8 d. Regarding insurance, J&B provided a letter from Moylan's Insurance
9 Underwriters, Inc., certifying that J&B is a bonding client of Dongbu, that Dongbu Insurance is
10 confirming the availability of the insurance (Commercial Crime Coverage) of J&B in case J&B
11 gets awarded the contract, and that Dongbu is ready to issue the insurance requirements as required
12 by GCC in case J&B is awarded the contract for the IFB. (Procurement Record, Tab 10 at 000116.)
13 J&B also submitted a Certificate of Liability Insurance showing that J&B has a Commercial
14 General Liability insurance policy with Dongbu Insurance Co., Ltd., which is effective from March
15 23, 2017, to March 23, 2018, and Worker's Compensation and Employers' Liability insurance
16 effective from March 23, 2017, to March 23, 2018. (Procurement Record, Tab 10 at 000117.) J&B
17 further submitted a Certificate of Liability Insurance showing that J&B has an Automobile Liability
18 insurance policy effective from November 2, 2016, to November 2, 2017. (Procurement Record,
19 Tab 10 at 000118.)
20
21

22 10. ProPacific's bid package contained, in pertinent part, the following:

23 a. ProPacific provided a Base Bid in the sum of \$3,863,714.00. (Procurement
24 Record, Tab 10 at 000172.) However, the total sum of the Bid Form costs for the CSI Divisions 1
25 through 16 is \$3,903,346.22. (Procurement Record, Tab 10 at 000172-000176 & Tab 11 at
26 000344.) ProPacific provided an additional cost of \$690,000 total for the Alternate Bid Items.
27 (Procurement Record, Tab 10 at 000176 & Tab 11 at 000344.)
28

1 b. Regarding outstanding issues with GCLB and OSHA, ProPacific provided in full,
2 on its letterhead, “ProPacific Builder Corporation has no outstanding issues with the Guam
3 Contractor License Board and/or the Occupational Safety and Health Administration.”
4 (Procurement Record, Tab 10 at 000250).

5 c. ProPacific’s bid package included an unsigned Certificate of Owner’s Attorney,
6 RD Instruction 1942-A form, and a “Certificate of Owner’s Attorney” which states: “As per our
7 attorney’s advice, the Certificate of Owner’s Attorney will be signed only when the project is
8 specifically awarded to Propacific Builder Corporation, upon the issuance of the actual contract,
9 and actual signing process of both parties.” (Procurement Record, Tab 10 at 000296-000297.)

10 d. ProPacific’s bid package did not include any Certificate of Insurance or statement
11 from an insurance company licensed to conduct business in Guam stating that ProPacific is
12 qualified to obtain the required insurance. (See Procurement Record, Tab 10 at 000164-000320.)

13 11. By letter dated August 4, 2017, GCC’s architect informed GCC that both bid
14 submissions have issues, including that, as to ProPacific, “[t]he written total bid price of \$3,863,714
15 does not correspond with a tabulation of the costs identified in the Bid Form. The tabulated cost
16 for ProPacific’s Base Bid is \$3,903,000 approximately, which exceeds J&B Modern Tech’s
17 \$3,880,850 Base Bid. Additionally, it is unclear if the Alternate Bid Items are included within
18 ProPacific’s written total bid price. It is noted that J&B Modern Tech’s written total bid price
19 includes the Alternate Bid Item costs.” The architect recommended that clarification of
20 ProPacific’s bid is necessary prior to determining further action, that ProPacific needs to confirm
21 that its written Bid Sum is correct and that their written total Bid amount covers all of the base bid
22 work identified in the Bid Form, and whether or not it includes the Alternate Bid Items. GCC’s
23 architect then recommended that, if ProPacific confirms that the written total Bid amount is valid,
24 then GCC should award the project to ProPacific. (Procurement Record, Tab 11 at 000339.)
25
26
27
28

1 12. On August 17, 2017, GCC sent an email to ProPacific, requesting, in part, confirmation
2 that ProPacific's base bid price of \$3,863,714.00 is correct and if the base bid price of
3 \$3,863,714.00 includes the alternate bids. (Procurement Record, Tab 11 at 000331.) GCC resent
4 the email to ProPacific on August 18, 2017. (Procurement Record, Tab 11 at 000329.)

5 13. On August 18, 2017, ProPacific sent an email to GCC confirming that ProPacific's base
6 bid price of \$3,863,714.00 is correct and that ProPacific's base bid price of \$3,863,714.00 does not
7 include the alternate bids. (Procurement Record, Tab 11 at 000326.)

8 14. On September 7, 2017, GCC issued a notice of intent to award to ProPacific and a notice
9 of non-award to J&B. (Procurement Record, Tab 12 at 000346-000350.)

10 15. On September 20, 2017, GCC received a protest from J&B wherein it argued that
11 ProPacific's bid should have been rejected and the contract awarded to J&B because ProPacific
12 was not the low bid as the actual amount of the sum of the costs listed in divisions 1 through 16 is
13 \$3,903,744.00, while J&B's total sum of the costs listed in divisions 1 through 16 is \$22,894 lower
14 than ProPacific's bid. J&B contended that, even including the Alternate Bid Items costs, the price
15 gap in favor of J&B is larger, as J&B's total for the alternate bid items is \$513,600 compared to
16 \$690,000 for ProPacific. J&B further argued that ProPacific's bid should have been rejected as not
17 responsive because it failed to comply with the IFB requirements that bidders disclose "outstanding
18 issues with the GCLB and OSHA," that bidders provide a Certificate of Owner's Attorney in the
19 form given in the IFB, and that bidders provide a Certificate of Insurance showing that the bidder
20 maintained liability insurance including Commercial General Liability, Commercial Umbrella
21 Liability, Commercial Automobile Liability, and Commercial Crime Insurance, or, if the insurance
22 was not currently maintained, the bidders provide a statement from an insurance company licensed
23 to do business in Guam stating that the bidder is qualified to obtain the required insurance.
24 (Procurement Record, Tab 14 at 000364-000401.)
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. Timeliness of Protest

J&B appeals GCC’s denial of its protest on the basis of untimeliness. The issue of the timeliness of J&B’s protest was previously ruled upon by the Public Auditor in her Order Re: Motion to Strike Amended Opposition and Motion to Dismiss for Lack of Jurisdiction or, Alternately, for Expeditious Disposition, which was issued on January 16, 2018. In that Order, the Public Auditor determined that J&B’s September 20, 2017, protest was timely under 5 GCA § 5425(a). (Order at 3.)

B. Bid Price

J&B appeals GCC’s denial of its protest on the basis that ProPacific is the lower bidder with a correct Base Bid price of \$3,863,714.00.

As noted earlier, the IFB requires that a bidder show the unit price for each unit offered and that the total shall be entered in the amount column the Schedule for each item offered. Further, the IFB states that, in case of discrepancies between a unit price and the extended price, the unit price will be presumed to be correct and the unit price will govern. In this IFB, bidders were required to submit a Base Bid which shall be broken down into subtotals for each of 16 CSI Divisions, and that the bid shall be further broken down between material costs and labor costs in each division. The IFB requires that overhead and profit be identified for each Division and that the overhead and profit prices shall be the basis for Change Orders and Directives.

Although the parties seemed to agree at the Hearing that the IFB did not solicit unit prices, the Public Auditor finds that the prices provided for each of the 16 Divisions are unit prices and that the total sum of these prices, the Base Bid, is the extension or addition of these prices. Thus, where the written Base Bid differs from the total sum of these unit prices, the unit prices are presumed correct and shall govern.

1 Here, it is undisputed that there is a discrepancy between ProPacific's written Base Bid of
2 \$3,863,714.00 and the actual tabulated total of the prices ProPacific provided, the actual sum being
3 \$3,903,346.22. Given this discrepancy, the unit prices shall govern, resulting in ProPacific having
4 an actual Base Bid of \$3,903,346.22. This conclusion is bolstered by the fact that, as stated in the
5 IFB, the overhead and profit prices shall be the basis for any change orders or directives. As unit
6 prices for overhead and profit are material to the determination of change orders and directives, it
7 is clear that the stated Base Bid is not the controlling amount.
8

9 Regarding GCC's contention that ProPacific properly confirmed its Base Bid to be
10 \$3,863,714.00, the Public Auditor finds that ProPacific was not authorized by law to correct its
11 Base Bid. Guam's procurement statute permits correction of erroneous bids, stating:
12

13 (f) Correction or Withdrawal of Bids; Cancellation of Awards. Correction
14 or withdrawal of inadvertently erroneous bids before or after award, or cancellation
15 of awards or contracts based on such bid mistakes, shall be permitted in accordance
16 with regulations promulgated by the Policy Office. After bid opening, no changes
17 in bid prices or other provisions of bids prejudicial to the interest of the Territory or
18 fair competition shall be permitted. Except as otherwise provided by regulation, all
decisions to permit the correction or withdrawal of bids, or to cancel awards or
contracts based on bid mistakes, shall be supported by a written determination made
by the Chief Procurement Officer, the Director of Public Works or head of a
purchasing agency.

19 5 G.C.A. § 5211(f). 2 GAR 4 § 3109(m)(4)(C), a regulation which requires correction of bids,
20 provides:

21 (m) Mistakes in Bids

22 ...
23 (4) Mistakes Discovered After Opening but Before Award.

24 ...
25 (C) Mistakes where intended correct bid is evident. If the mistake
26 and the intended correct bid is clearly evident on the face of the bid
27 document, the bid shall be corrected to the intended correct bid and may
28 not be withdrawn. Examples of mistakes that may be clearly evident on
the face of the bid document are typographical errors, errors in extending
unit prices, transportation errors, and arithmetical errors.

2 GAR 4 § 3109(m)(4)(C).

1 The Public Auditor finds that ProPacific’s bid contains a mistake as the actual sum of all of
2 the prices for the 16 Divisions is inconsistent with the stated Base Bid. Either the unit prices are in
3 error or the extended Base Bid amount is in error, or both. However, despite the inconsistency, it
4 is not clear whether the mistake is in the unit prices or the extended Base Bid amount. Therefore,
5 the Public Auditor finds that there is not a clear mistake in the unit prices and that ProPacific is not
6 permitted to correct the mistake by confirming the correctness of the stated Base Bid price.
7

8 **C. Outstanding Issues with GCLB and OSHA**

9 J&B appeals GCC’s denial of its appeal on the basis that ProPacific complied with the IFB
10 requirement that a bidder submit outstanding issues with the GCLB and OSHA.

11 The Public Auditor agrees with GCC that ProPacific’s disclosure that there are no
12 outstanding issues with the GCLB and OSHA complies with this IFB requirement, since the IFB
13 did not require that bidders provide any particular GCLB or OSHA documents to satisfy this
14 disclosure requirement.
15

16 **D. Certificate of Owner’s Attorney**

17 J&B appeals GCC’s denial of its appeal on the basis that ProPacific was not required to
18 submit a signed Certificate of Owner’s Attorney as part of its bid package. The Public Auditor
19 agrees with J&B that the IFB requires the submission of the Certificate as part a bid. However, the
20 text of the Certificate form provided in the IFB suggests that this Certificate is to be made after an
21 award and not beforehand, as the signer is certifying that the representatives signing the contract
22 have full power and authority to execute the agreement on behalf of the parties and that the contract
23 constitutes a valid and legally binding obligation upon the parties. Further, given the IFB’s
24 definition of “owner” as the owner of the project, it appears that the certificate is meant to be signed
25 by the attorney for GCC, the owner of the project.
26
27
28

1 Guam's procurement regulations provide that minor informalities or insignificant
2 mistakes discovered after opening but before award can be waived without prejudice to other
3 bidders. 2 GAR 4 §3109(m)(4)(B). Further, the IFB specifically provides that the Government
4 may waive minor irregularities in a bid. The Public Auditor finds that ProPacific's failure to
5 provide a signed Certificate of Owner's Attorney in the form provided is a minor informality that
6 could be waived without prejudice to J&B.
7

8 **E. Certificate of Insurance or Certified Statement**

9 J&B appeals GCC's denial of its appeal on the basis that ProPacific was not required to
10 submit Insurance Certificates as part of its bid package but is instead required to submit Insurance
11 Certificates within ten (10) calendar days of award of the contract.
12

13 The Public Auditor disagrees with GCC and finds that the IFB required a bidder to provide
14 a Certificate of Insurance showing that the bidder maintains liability insurance including
15 Commercial General Liability, Commercial Umbrella Liability, Commercial Automobile Liability,
16 and Commercial Crime Insurance, or, if no such insurance is maintained, a certified statement from
17 an insurance company licensed to do business in Guam stating that the bidder is qualified to obtain
18 the required insurance. As the IFB explicitly states that the failure to provide these documents will
19 result in rejection of the bid, the failure to provide these documents is not a minor informality that
20 can be waived.
21

22 The insurance certificates referenced by GCC are to be submitted for approval within 10
23 calendar days of award of the contract, and the contractor's work cannot begin under the contract
24 until the contractor has obtained all insurance required by the IFB and such insurance has been
25 submitted to GCC. The Public Auditor finds that the aforementioned insurance certificates are a
26 separate requirement distinct from the Certificate of Insurance or certified statement required to be
27 submitted as part of the bid. The purpose of the latter requirement is to establish the bidder's ability
28

1 to obtain the required insurance, while the purpose of the former requirement is to ensure that the
2 bidder awarded the contract has the required insurance before work under the contract begins.
3 Accordingly, ProPacific was required to submit as part of its bid package a Certificate of Insurance
4 or certified statement showing ability to obtain the required insurance, and the failure to do so
5 cannot be waived.
6

7 **IV. CONCLUSION**

8 Based on the foregoing, the Public Auditor holds that:

9 1. J&B's protest was timely under 5 GCA § 5425(a).

10 2. ProPacific's actual Base Bid is \$3,903,346.22.

11 3. ProPacific complied with the requirement that bidders indicate outstanding issues with
12 GCLB and OSHA.

13 4. ProPacific's failure to provide a signed Certificate of Owner's Attorney in the form
14 provided in the IFB is a minor informality that can be waived without prejudice to J&B.

15 5. ProPacific failed to comply with the IFB requirement that a bidder submit a Certificate
16 of Insurance showing maintenance of the required insurance or a certified statement from an
17 insurance licensed to conduct business in Guam that it can obtain the required insurance, and the
18 failure to comply with this requirement is not a minor informality that can be waived. Thus,
19 ProPacific's bid was non-responsive.
20

21 6. Based on the Public Auditor's above determination, GCC's proposed award to ProPacific
22 was in violation of the law.
23

24 7. Pursuant to 5 GCA § 5451, GCC's proposed award to ProPacific is cancelled and this
25 matter is remanded to GCC to reconsider J&B's bid.

26 Accordingly, J&B's procurement appeal is hereby GRANTED IN PART and DENIED IN
27 PART.
28

1 This is a Final Administrative Decision. The Parties are hereby informed of their right to
2 judicial review in the Superior Court of Guam of a Decision of the Public Auditor under 5 G.C.A.
3 Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law. In
4 accordance with 5 G.C.A. § 5481(a), such action shall be initiated within fourteen (14) days after
5 receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties
6 and their respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for
7 review on the OPA website at www.opaguam.org.
8

9 SO ORDERED this 28th day of February, 2018.

10 

11

DORIS FLORES BROOKS, CPA, CGFM
12 Public Auditor of Guam
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28