

CARLSMITH BALL LLP

VINCENT C. CAMACHO

vcamacho@carlsmith.com

Bank of Hawaii Bldg., Suite 401

134 West Soledad Avenue, P.O. Box BF

Hagåtña, Guam 96932-5027

Telephone No. 671.472.6813

Facsimile No. 671.477.4375

Attorneys for Appellant

JRN Air Conditioning & Refrigeration, Inc.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

1-19-11
1:33 PM
JAN 20 2011
TIME: 10:44 BY: [Signature] Fax
FILE NO. OPA-PA: 10-007

Original delivered
1-20-11; 10:44 AM

OFFICE OF PUBLIC ACCOUNTABILITY

GUAM

IN THE APPEAL OF
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant.

APPEAL NO. OPA-PA-10-007

APPELLANT JRN AIR-
CONDITIONING &
REFRIGERATION, INC.'S BRIEF ON
REMEDIES

The remedies afforded by the Guam Procurement Code for award made in violation of the law include ratification or termination. Additionally, the code provides that a protester may be awarded costs associated with the protest. JRN respectfully requests that these remedies be awarded here.

I. Background

This case involves the procurement award made by GDOE on October 15, 2010 to J&B Modern Tech for IFB 007-2010, in violation of sections 5211(b), (e), and (g) of the Guam Procurement Law. As the hearing on this appeal revealed, absent the specifications required by § 5211(b), IFB 007-2010 is defective and resulted in GDOE's inability to objectively evaluate the bid submissions in violation of § 5211(e) of the procurement law. Without a proper evaluation any award made in this procurement violates § 5211(g) because GDOE could not determine if

COPY

the lowest bidder is the most responsible and that the lowest bid price be sufficient to comply with the Article 13 of Title 5 of the Guam Code Annotated (Wage Determination provisions).

Should the OPA determine that the solicitation and/or award of a contract violated Guam Procurement Law in GDOE IFB 007-2010 for the procurement of preventive maintenance and repair of central air-conditioning equipment for all GDOE public schools and support facilities, and also determine that J&B Modern Tech did not act fraudulently or in bad faith, the following discussion outlines the proper remedies to be awarded in this case.

II. Termination of Purchase Order 201190017 and Reissue IFB for Preventive Maintenance of Central Air-Conditioning Equipment for all GDOE Public Schools and Support Facilities.

Section 5452(a)(1) of Title 5 of the Guam Code Annotated sets forth the applicable remedies:

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(i) the contract may be ratified and affirmed, provided that it is in the best interest of the Territory, or

(ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

5 G.C.A. § 5452 (a)(1).

Finding that GDOE failed to comply with Sections 5211(b), (e), and (g), the OPA should also conclude that ratifying or affirming the contract (purchase order) with J&B Modern Tech is not in the best interest of the government of Guam (or in this case the GDOE). The award was made in violation of the Guam Procurement Law because GDOE failed: (1) to properly identify specifications (e.g., most recent wage determination schedule and the applicable occupation titles), (2) to objectively evaluate the bids in accordance with the bid specifications and Guam Procurement law, and (3) to conduct responsibility inquiries when armed with information that

may disqualify the lowest bidder. GDOE's failure to comply with the procurement law caused the unlawful award of the contract (purchase order) to J&B Modern Tech. These violations pose a serious threat to the quality and integrity of the procurement process and cannot be allowed to be condoned by ratification or affirmation of the contract. *See In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007 (Sept. 5, 2008) (failure to evaluate bids with the express terms of the IFB, which was the root cause of the unlawful award is a serious threat to the integrity of the procurement process and must not be condoned). *See also In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005 (Jan. 12, 2011) (waiver of statutory requirements that contracts be awarded to the lowest mores responsible bidder are serious threats to the integrity of the procurement process and must not be condoned by contract ratification).

The OPA must terminate the contract (Purchase Order No. 201190017) immediately. In the interim, GDOE may rely on other procurement methods such as small purchases and emergency procedures to procure servicing of air-conditioning equipment until a proper award is made. Upon termination of the contract GDOE should within a reasonable time reissue an invitation for bid for preventive maintenance and repair of central air-conditioning for all GDOE public schools and support facilities that complies with the Guam Procurement Law.

III. Costs and Attorney's Fees

The Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. 2 G.A.R. § 12201(a). In addition to the relief provided above, when a protest is sustained, the protestant is entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fee's *if*:

(1) the protestant should have been awarded the contract under the solicitation but was not; *or*

(2) there is reasonable likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation.

5 G.C.A. §5425(h).

Should the OPA sustain JRN's protest, JRN should be entitled to reasonable costs with the solicitation and protest including bid preparation costs.

As for the award of attorney's fees, JRN is entitled to costs incurred in connection with the protest including attorney's fees if, (1) JRN could not be awarded the contract under the defective IFB 007-2010; or (2) it is not reasonably likely that JRN may have been awarded the contract but for the breach of any ethical obligation imposed by statute or the willful or reckless violation of the procurement law.

An award cannot be made to JRN even if J&B Modern Tech's award was terminated because GDOE IFB 007-2010 is defective and in violation of the procurement law. GDOE failed to properly provide the wage determination schedule applicable to this solicitation and also failed to include in the solicitation the proper occupation titles required for performance of the IFB as required by § 5211(b) and (e). Without the proper specifications an objective evaluation of the bid submissions cannot be made. In other words, to award the bid to the next lowest bidder in a defective IFB violates the procurement law and call into question the quality and integrity of the procurement process.

Alternatively, it is not reasonably likely that JRN would have been awarded the contract but for a breach of ethical obligations or the willful or reckless violation of the procurement law for the same reasons stated above. The procurement law requires that the award be made to the

lowest responsible bidder that complies with all the terms and conditions of the IFB and whose minimum bid is sufficient to comply with the wage determination provisions of the law. Without identifying the applicable wage determination schedule and proper occupation codes in the IFB it is impossible to conclusively determine what the minimum bid would be under this procurement. To make an award to a bidder without the proper determination that a bidder is the most responsible is also a violation of the procurement law and calls into question the quality and integrity of the procurement process.

JRN should be allowed to recover its attorney's fees for this appeal of GDOE's denial of its September 10, 2010 protest relative to the solicitation and award to J&B Modern Tech for GDOE IFB 007-2010 for Preventive Maintenance and Repair of Central Air-Conditioning Equipment for all GDOE Public Schools and Support Facilities. JRN or any bidder cannot be awarded the contract even if the current contract was terminated because the IFB is defective. An award is not reasonably likely in this case because of the defects in the IFB specifications.


Should the OPA find that JRN is entitled to its costs and attorney's fees, JRN requests that it be permitted to furnish a complete and detailed Bill of Costs for the OPA's assessment.

IV. Conclusion

Based on the authority set forth above, the OPA, upon finding that GDOE has violated the Guam Procurement Law must immediately terminate the contract (purchase order); order GDOE to reissue the IFB in conformance with the Guam Procurement Law; and award costs and attorney's fees to JRN.

DATED: Hagåtña, Guam, January 19, 2011.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
Attorneys for Appellant
JRN Air Conditioning & Refrigeration, Inc.

CARLSMITH BALL LLP

VINCENT C. CAMACHO
vcamacho@carlsmith.com
Bank of Hawaii Bldg., Suite 401
134 West Soledad Avenue, P.O. Box BF
Hagåtña, Guam 96932-5027
Telephone No. 671.472.6813
Facsimile No. 671.477.4375

Attorneys for Appellant
JRN Air Conditioning & Refrigeration, Inc.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

JAN 20 2011

TIME 10:44 BY MW
FILE NO. OPA-PA- 10-007

OFFICE OF PUBLIC ACCOUNTABILITY

GUAM

IN THE APPEAL OF
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant.

APPEAL NO. OPA-PA-10-007

**APPELLANT JRN AIR-
CONDITIONING &
REFRIGERATION, INC.'S NOTICE OF
FILING AND SERVICE VIA
FACSIMILE OF BRIEF ON
REMEDIES**

Appellant JRN Air-Conditioning & Refrigeration , Inc. ("JRN") by and through its undersigned counsel, hereby files with the Office of the Public Accountability - Procurement Appeals Notice of Filing and Service of its Brief on Remedies via facsimile on January 19, 2011 on the following: The Office of Public Accountability; Laura Mooney, Counsel to Department of Education; and J & B Modern Tech. Attached are copies of the facsimile confirmation reports.

DATED: Hagåtña, Guam, January 20, 2011.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
Attorneys for Appellant
JRN Air Conditioning & Refrigeration, Inc.

COPY

Message Confirmation Report

JAN-19-2011 01:37 PM WED

WorkCentre M20 Series
Machine ID : CARLSMITH BALL
Serial Number : RYU262667.....
Fax Number : 4774375

Name/Number : 4727951
Page : 6
Start Time : JAN-19-2011 01:33PM WED
Elapsed Time : 03'50"
Mode : Fine G3
Results : O.K.

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

134 W. SOLEDAD AVE
BANK OF HAWAII BLDG., SUITE 401
HAGATÑA, GUAM 96910
TELEPHONE 671.472.6813 FAX 671.477.4375
WWW.CARLSMITH.COM

FACSIMILE TRANSMISSION

UNLESS OTHERWISE INDICATED OR OBVIOUS FROM THE NATURE OF THE TRANSMITTAL, THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED BELOW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR OR ARE NOT SURE WHETHER IT IS PRIVILEGED, PLEASE IMMEDIATELY NOTIFY US BY COLLECT TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE AT OUR EXPENSE. THANK YOU.

DATE: January 19, 2011

TO:	Name	Fax No.	Phone No.
	Doris Flores Brooks, CPA, CGFM Public Auditor OPA Procurement Appeals	472-7951	475-0390
	Ms. Laura Mooney Department of Education	472-5003	
	J & B Modern Tech	646-0589	

FROM: Vincent C. Camacho, Esq.

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

CASE NAME: JRN Air Conditioning & Refrigeration, Inc.

CASE NUMBER: 064248-00001

ORIGINAL/COPY WILL BE MAILED ORIGINAL/COPY WILL NOT BE MAILED

MESSAGE: We are submitting this fax in lieu of filing due to the closure of your offices and our office. We will file the original document tomorrow morning. Thank you.

If problems occur, please call our fax operator at 671.472.6813.

Message Confirmation Report

JAN-19-2011 01:40 PM WED

WorkCentre M20 Series

Machine ID : CARLSMITH BALL
Serial Number : RYU262667.....
Fax Number : 4774375

Name/Number : 4725003 ✓
Page : 6 ✓
Start Time : JAN-19-2011 01:38PM WED
Elapsed Time : 02' 36"
Mode : Fine G3
Results : O.K ✓

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP
134 W. SOLEDAD AVE
BANK OF HAWAII BLDG., SUITE 401
HAGATÑA, GUAM 96910
TELEPHONE 671.472.6813 FAX 671.477.4375
WWW.CARLSMITH.COM

FACSIMILE TRANSMISSION

UNLESS OTHERWISE INDICATED OR OBVIOUS FROM THE NATURE OF THE TRANSMITTAL, THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED BELOW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR OR ARE NOT SURE WHETHER IT IS PRIVILEGED, PLEASE IMMEDIATELY NOTIFY US BY COLLECT TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE AT OUR EXPENSE. THANK YOU.

DATE: January 19, 2011

TO:	Name	Fax No.	Phone No.
	Doris Flores Brooks, CPA, CGFM Public Auditor OPA Procurement Appeals	472-7951	475-0390
	Ms. Laura Mooney Department of Education	472-5003	
	J & B Modern Tech	646-0589	

FROM: Vincent C. Camacho, Esq.

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

CASE NAME: JRN Air Conditioning & Refrigeration, Inc.
CASE NUMBER: 064248-00001

ORIGINAL/COPY WILL BE MAILED ORIGINAL/COPY WILL NOT BE MAILED

MESSAGE: We are submitting this fax in lieu of filing due to the closure of your offices and our office. We will file the original document tomorrow morning. Thank you.

If problems occur, please call our fax operator at 671.472.6813.

Message Confirmation Report

JAN-19-2011 01:43 PM WED

WorkCentre M20 Series
Machine ID : CARLSMITH BALL
Serial Number : RYU262667...
Fax Number : 4774375

Name/Number : 6460589 ✓
Page : 6 ✓
Start Time : JAN-19-2011 01:41PM WED
Elapsed Time : 02'38"
Mode : Fine G3
Results : O.K ✓

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

134 W. SOLEDAD AVE
BANK OF HAWAII BLDG., SUITE 401
HAGATNA, GUAM 96910
TELEPHONE 671.472.6813 FAX 671.477.4375
WWW.CARLSMITH.COM

FACSIMILE TRANSMISSION

UNLESS OTHERWISE INDICATED OR OBVIOUS FROM THE NATURE OF THE TRANSMITTAL, THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED BELOW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR OR ARE NOT SURE WHETHER IT IS PRIVILEGED, PLEASE IMMEDIATELY NOTIFY US BY COLLECT TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE AT OUR EXPENSE. THANK YOU.

DATE: January 19, 2011

TO:	Name	Fax No.	Phone No.
	Doris Flores Brooks, CPA, CGFM Public Auditor OPA Procurement Appeals	472-7951	475-0390
	Ms. Laura Mooney Department of Education	472-5003	
	J & B Modern Tech	646-0589	

FROM: Vincent C. Camacho, Esq.

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

CASE NAME: JRN Air Conditioning & Refrigeration, Inc.

CASE NUMBER: 064248-00001

ORIGINAL/COPY WILL BE MAILED ORIGINAL/COPY WILL NOT BE MAILED

MESSAGE: We are submitting this fax in lieu of filing due to the closure of your offices and our office. We will file the original document tomorrow morning. Thank you.

If problems occur, please call our fax operator at 671.472.6813.

CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

134 W. SOLEDADE AVE
BANK OF HAWAII BLDG., SUITE 401
HAGATFA, GUAM 96910
TELEPHONE 671.472.6813 FAX 671.477.4073
WWW.CARLSMITH.COM

FACSIMILE TRANSMISSION

UNLESS OTHERWISE INDICATED OR OBVIOUS FROM THE NATURE OF THE TRANSMITTAL, THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF ONE PARTY OR ANOTHER RESPONSIBLE FOR TRANSMISSION. IF YOU ARE NOT THE ADDRESSEE, YOU ARE HEREBY ADVISED THAT ANY DISSEMINATION, DISTRIBUTION OR COPIING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE AT OUR EXPENSE. THANK YOU.

DATE: January 19, 2011

TO:	Name	Fax No.	Phone No.
	Doris Flores Brooks, OPA, OOPM Public Auditor OPA Procurement Appeals	472-1771	473-0390
	Ms. Laura Mooney Department of Education	472-5003	
	J & B Modern Tech	646-0589	

FROM: Vincent C. Camacho, Esq.

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

CASE NAME: JRN Air Conditioning & Refrigeration, Inc.

CASE NUMBER: 064248-00001

ORIGINAL/COPY WILL BE MAILED

ORIGINAL/COPY WILL NOT BE MAILED

MESSAGE: We are submitting this fax in lieu of filing due to the closure of your office and our office. We will file the original document tomorrow morning. Thank you.

If problems occur, please call our fax operator at 671.472.6813.

4816-5057-2040.1.064248-00001

CARLSMITH BALL LLP

VINCENT C. CAMACHO

vcamacho@carlsmith.com

Bank of Hawaii Bldg., Suite 401

134 West Soledad Avenue, P.O. Box 88

Hagåtña, Guam 96932-5027

Telephone No. 671.472.6813

Facsimile No. 671.477.4575

Attorneys for Appellant

JRN Air Conditioning & Refrigeration, Inc.

OFFICE OF PUBLIC ACCOUNTABILITY

GUAM

IN THE APPEAL OF
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant.

APPEAL NO. OPA-PA-10-007

**APPELLANT JRN AIR-
CONDITIONING &
REFRIGERATION, INC.'S BRIEF ON
REMEDIES**

The remedies afforded by the Guam Procurement Code for award made in violation of the law include ratification or termination. Additionally, the code provides that a protester may be awarded costs associated with the protest. The protester requests that these remedies be awarded here.

I. Background

This case involves the procurement award made by GDOE on October 15, 2010 to I&R
Procurement Law. As the hearing on this appeal revealed, absent the specifications required by § 5211(b), IFB 007-2010 is defective and resulted in GDOE's inability to objectively evaluate the bid submissions in violation of § 5211(e) of the procurement law. Without a proper evaluation any award made in this procurement violates § 5211(g) because GDOE could not determine if

the lowest bidder is the most responsible and that the lowest bid price be sufficient to comply with the Article 13 of Title 5 of the Guam Code Annotated (Wage Determination provisions).

Should the OPA determine that the solicitation and/or award of a contract violated Guam Procurement Law in GPOE IEB 007-2010 for the procurement of preventive maintenance and repair of central air-conditioning equipment for all GDOE public schools and support facilities, and also determine that J&B Modern Tech did not act fraudulently or in bad faith, the following discussion outlines the proper remedies to be awarded in this case.

IV. Termination of Purchase Order 201100017 and Refund IEB for Preventive Maintenance of Central Air-Conditioning Equipment for all GDOE Public Schools and Support Facilities.

Section 5452(a)(1) of Title 5 of the Guam Code Annotated sets forth the applicable remedies:

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(i) the contract may be ratified and affirmed, provided that it is in the best interest of the Territory, or

(ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

5 G.C.A. § 5452 (a)(1).

Finding that GDOE failed to comply with Sections 5211(b), (e), and (g), the OPA should also conclude that ratifying or affirming the contract (purchase order) with J&B Modern Tech is not in the best interest of the government of Guam (or in this case the GDOE). The award was made in violation of the Guam Procurement Law because GDOE failed: (1) to properly identify specifications (e.g., most recent wage determination schedule and the applicable occupation titles), (2) to objectively evaluate the bids in accordance with the bid specifications and Guam Procurement law, and (3) to conduct responsibility inquiries when armed with information that

may disqualify the lowest bidder. GDOE's failure to comply with the procurement law caused of the unlawful award of the contract (purchase order) to J&B Modern Tech. These violations pose a serious threat to the quality and integrity of the procurement process and cannot be allowed to be condoned by ratification or affirmation of the contract. *See In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007 (Sept. 5, 2008) (failure to evaluate bids with the express terms of the IFB, which was the root cause of the unlawful award is a serious threat to the integrity of the procurement process and must not be condoned). *See also In the Appeal of Pacific Data Systems, Inc.*, OPA PA 10 005 (Jan. 12, 2011) (waiver of statutory requirements that contracts be awarded to the lowest more responsible bidder are serious threats to the integrity of the procurement process and must not be condoned by contract ratification).

The OPA must terminate the contract (Purchase Order No. 201190017) immediately. In the interim, GDOE may rely on other procurement methods such as small purchases and emergency procedures to procure servicing of air conditioning equipment until a proper award is made. Upon termination of the contract GDOE should within a reasonable time reissue an invitation for bid for preventive maintenance and repair of central air-conditioning for all GDOE public schools and support facilities that complies with the Guam Procurement Law.

III. Costs and Attorney's Fees

The Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. 2 G.A.R. § 12201(a). In addition to the relief provided above, when a protest is sustained, the protestant is entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees *if*:

(1) the protestant should have been awarded the contract under the solicitation but was not; *or*

Page 3 of 5

(2) there is reasonable likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation.

5 G.C.A. §5425(h).

Should the OPA sustain JRN's protest, JRN should be entitled to reasonable costs with the solicitation and protest including bid preparation costs.

As for the award of attorney's fees, JRN is entitled to costs incurred in connection with the protest including attorney's fees if: (1) JRN could not be awarded the contract under the defective IFB 007-2010; or (2) it is not reasonably likely that JRN may have been awarded the contract but for the breach of any ethical obligation imposed by statute or the willful or reckless violation of the procurement law.

An award cannot be made to JRN even if J&B Modern Tech's award was terminated because GDOE IFB 007-2010 is defective and in violation of the procurement law. GDOE failed to properly provide the wage determination schedule applicable to this solicitation and also failed to include in the solicitation the proper occupation titles required for performance of the IFB as required by § 5211(b) and (c). Without the proper specifications an objective evaluation of the bid submissions cannot be made. In other words, to award the bid to the next lowest bidder in a defective IFB violates the procurement law and call into question the quality and integrity of the procurement process.

Alternatively, it is not reasonably likely that JRN would have been awarded the contract but for a breach of ethical obligations or the willful or reckless violation of the procurement law for the same reasons stated above. The procurement law requires that the award be made to the lowest responsible bidder that complies with all the terms and conditions of the IFB and whose minimum bid is sufficient to comply with the wage determination provisions of the law. Without

identifying the applicable wage determination schedule and proper occupation codes in the IFB it is impossible to conclusively determine what the minimum bid would be under this procurement. To make an award to a bidder without the proper determination that a bidder is the most responsible is also a violation of the procurement law and calls into question the quality and integrity of the procurement process.

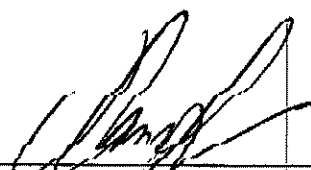
JRN should be allowed to recover its attorney's fees for this appeal of GDOE's denial of its September 10, 2010 protest relative to the solicitation and award to J&B Modern Tech for GDOE IFB 007 2010 for Preventive Maintenance and Repair of Central Air-Conditioning Equipment for all GDOE Public Schools and Support Facilities. JRN or any bidder cannot be awarded the contract even if the current contract was terminated because the IFB is defective. An award is not reasonably likely in this case because of the defects in the IFB specifications.

Should the OPA find that JRN is entitled to its costs and attorney's fees, JRN requests that it be permitted to furnish a complete and detailed Bill of Costs for the OPA's assessment.

IV. Conclusion

Based on the authority set forth above, the OPA, upon finding that GDOE has violated the Guam Procurement Law must immediately terminate the contract (purchase order); order GDOE to reissue the IFB in conformance with the Guam Procurement Law; and award costs and attorney's fees to JRN.

DATED: Hagåtña, Guam, January __, 2011
CARL SMITH HALL, LLP



VINCENT C. CAMACHO
Attorneys for Appellant
JRN Air Conditioning & Refrigeration, Inc.