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**GUAM DEPARTMENT OF EDUCATION**  
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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
DATE: Sept. 18, 2013  
TIME: 4:22  AM  PM BY: R. Field  
FILE NO OPA-PA: 13-010

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

IN THE APPEAL OF

OPA-PA-13-010

JMI EDISON,

**GUAM DEPARTMENT OF EDUCATION'S  
HEARING BRIEF**

Appellant.

Comes now the Guam Department of Education (“GDOE”) by and through its counsel and submits its Hearing Brief pursuant to the Order After Hearing/Scheduling Order dated August 27, 2013.

**ARGUMENT**

Guam Law defines a responsive bidder as a “person who submitted a bid which conforms in all material respects to the Invitation for Bids.” 5 G.C.A. § 5102(g); 2 GAR Div. 4 § 3109(n)(2). In addition, Section 2.4.1 of GDOE Invitation for Bid 008-2013 (“IFB”) sets forth the evaluation factors in order to determine the lowest responsive bid. GDOE Exhibit 7, Bates Stamp No. GDOE001139-001140. The IFB explicitly include the following evaluation requirements: (1) Price of overall performance and delivery, and (2) Responsiveness to the requirements of this IFB. GDOE Exhibit 7, Bates Stamp No. GDOE001140. Additionally, Clarification No. 1 specifically states that “[b]idders shall offer one (1) price per item and shall submit one (1) bid.” GDOE Exhibit 7, Bates Stamp No. GDOE001219.

1 JMI Edison (“JMI”) plainly submitted a bid form with multiple prices for a number of air  
2 conditioner unit types contained in the IFB’s bid form. JMI listed two prices that distinguished a  
3 number of units as replacement units and new installation units for Items 5 and 7 of the bid form.  
4 GDOE Exhibit 5, Bates Stamp No. GDOE0065 and GDOE0067. Moreover, JMI’s bid listed two  
5 prices that distinguished a number of units as 208-230V/3Ph and 460V/3Ph for items 6, 7, 8, 10  
6 and 12 of the bid form. GDOE Exhibit 5, Bates Stamp No. GDOE0066, GDOE0067-  
7 GDOE0068, GDOE0070, and GDOE0072. In doing the above, JMI failed to comply with the  
8 requirement contained in Clarification No. 1 of the IFB.  
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10 The IFB bid form obviously states the descriptions of the air conditioner units to be  
11 purchased. GDOE Exhibit 5, Bates Stamp No. GDOE001170-GDOE0088. Neither the IFB,  
12 Amendments nor Clarifications allow a bidder to breakdown the price for replacement air  
13 conditioner units and new installation air conditioner units, nor does the IFB, Amendments or  
14 Clarifications allow a bidder to breakdown the price for 208-230V/3Ph air conditioner units and  
15 460V/3Ph air conditioner units. *Id.* Furthermore, there was never an amendment to the bid forms  
16 to allow a breakdown in prices in the manner discussed above. JMI’s actions resulted in JMI  
17 failing to comply with the requirements of the IFB, and consequently, GDOE properly deemed  
18 JMI non-responsive. For the reasons above, JMI’s protest should be found to be without merit  
19 and dismissed in its entirety.  
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22 In the event the OPA should find any portion of JMI’s protest to be valid, and should  
23 make a determination that the award made pursuant to the IFB was somehow in violation of law,  
24 GDOE requests that the OPA allow the award to stand as it is in the best interest of the territory  
25 of Guam.  
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1 Under Guam law, if a party is unlawfully awarded a contract, the Public Auditor must  
2 sustain the award of the contract if (1) the party awarded the unlawful contract neither acted  
3 fraudulently nor in bad faith, and (2) it is in the best interest of to ratify and affirm the award. 5  
4 G.C.A. § 5452(a)(1)(i).

6 GDOE asserts that J&B Modern Tech (“J&B”) did not act fraudulently or in bad faith. In  
7 the instant case, there is neither evidence nor information that has been presented to substantiate  
8 that J&B acted fraudulently or in bad faith in responding to the IFB. There is no evidence to  
9 suggest J&B either defrauded GDOE or mislead GDOE in order to be awarded the contract. The  
10 Public Auditor must find that J&B neither acted fraudulently nor acted in bad faith.

11 Furthermore, GDOE asserts that it is in the best interest of Guam to ratify and affirm the  
12 award to J&B. The funding source that has been identified for IFB is from the Adequate  
13 Education Act Trust Account (“Trust”). GDOE Exhibit 7, Bates Stamp No. GDOE001134. The  
14 Trust was established by Public Law 31-40 and amended by Public Law 31-234. Pursuant to  
15 Public Law 31-234, the funds contained in the Trust are set to expire if these funds are not  
16 obligated by September 30, 2013.

17  
18 In addition, Public Law 28-45 is known as the Every Child is Entitled to an Adequate  
19 Education Act (“the Act”). See 20 G.C.A. § 15136. Under Guam law, GDOE is required to keep  
20 all GDOE classrooms at an air temperature no greater that 78°F (“the Mandate”). See 1 G.C.A. §  
21 715(12)(f). If GDOE fails to comply with the Mandate, GDOE is open to suits for injunctive  
22 relief under the Act, and may be subject paying for the costs associated with the suit. See 7  
23 G.C.A. § 12108.1(a); 19 G.C.A. § 1116(b); 7 G.C.A. § 20302(8); 7 G.C.A. § 26603.1; P.L. 28-45.

24 Thus, a Cancellation or other modifications of the Agreement between GDOE and J&B  
25 pursuant to the IFB (“the Agreement”) would result in the possible loss of these funds and the  
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1 inability of GDOE to purchase much needed air conditioner units. In addition, the cancellation or  
2 other modification of the Agreement would place GDOE in position to violate the Mandate and  
3 the Act, which would result in students and teachers subjected to classrooms at an air temperature  
4 greater than 78°F. Therefore, GDOE respectfully asks that in the event the OPA should find any  
5 portion of JMI's protest to be valid, the OPA allow the award to stand as it is in the best interest  
6 of the territory pursuant to 5 G.C.A. § 5452(a)(1)(i).  
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9 Dated this 18<sup>th</sup> day of September 2013.

10 Respectfully submitted,

11 **GUAM DEPARTMENT OF EDUCATION**

12 By: 

13 **ANDREW T. PEREZ, ESQ.**  
14 *Legal Counsel*