GUAM DEPARTMENT OF EDUCATION
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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEAL OF J&B MODERN TECH, Appellant.	APPEAL NO. OPA-PA-14-001 **GUAM DEPRTMENT OF EDUCATION'S HEARING BRIEF**

Comes now the Guam Department of Education ("GDOE") by and through its counsel and submits its Hearing Brief pursuant to the Scheduling Order for Hearing Re Appellant's Appeal dated April 4, 2014.

ARGUMENT

As previously stated in GDOE's Agency Statement, GDOE respectfully requests the Office of Public Accountability ("OPA") to dismiss J&B's appeal in its entirety. Under Guam law, 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); Chapter I, Section 1.9.43., DOE Procurement Regulations; 2 GAR Div. 4 § 3109(n)(2). Additionally, Section 2.1.2 requires that "[t]he Contractor must conduct pre site inspections to determine existing conditions and any special needs/requirements for execution of project. **Site inspection and field verification of existing layout is mandatory**." GDOE Exhibit 6, Bates Stamp No. GDOE0230. The issue before the OPA is whether JRN was responsive to the requirements of the IFB when it did not attend the site visit to Southern High School on December 10, 2013.

The IFB plainly states in Section 2.3.1 that any potential bidder may request for a pre-bid conference in writing. GDOE Exhibit 6, Bates Stamp No. GDOE0236. Section 2.3.1 goes on to

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further state that if GDOE determines to hold a pre-bid conference, all bidders will be notified of the date, time, location and requirements of the pre-bid conference. *Id.* Section 2.3.1 of the IFB is substantially similar to the language contained in Chapter 3, Section 3.9.8., DOE Procurement Regulations and 2 GAR Div. 4 §3109(g)(4) of Guam Procurement Regulations that discuss pre-bid conferences and the requirements needed to conduct a pre-bid conference. *Id.* Neither Section 2.3.1 of the IFB, Section 3.9.8. of the DOE Procurement Regulations, nor §3109(g)(4) of the procurement regulations state that the effect of holding a pre-bid conference or site visit makes attendance a mandatory condition for bidders to be deemed responsive.

In response to JRN and J&B's request for a pre-bid conference and site visit, GDOE exercised its discretion under Section 2.3.1 of the IFB, Section 3.9.8. of the DOE Procurement Regulations, and §3109(g)(4) of the procurement regulations when it issued Amendment 1 wherein it scheduled the date, time, location and requirements of the pre-bid conference and site visits. GDOE Exhibit 6, Bates Stamp No. GDOE0294-0295. Nonetheless, GDOE did not make the attendance of either the pre-bid conference or the site visit mandatory. Amendment 1 did not state that a failure to attend the pre-bid conference or site visits would result in a bidder being determined non-responsive. *Id.*

Although GDOE did not require attendance at the pre-bid conference or the site visits, GDOE, Section 2.1.2 of the IFB, required that all bidders conduct a site visit of the project sites. GDOE Exhibit 6, Bates Stamp No. GDOE0230. Section 2.1.2 required the bidders to conduct their own site inspection in order to determine the existing conditions and any special needs for the execution of the scope of work contained in the IFB. Attendance of the December 6 and 10, 2013, site visits may be evidence that a bidder conducted the site visits. However, a bidder may inform GDOE that they conducting their own site visit, and this may serve as evidence of a bidder's compliance of Section 2.1.2 of the IFB.

On January 16, 2014, Marcus Y. Pido spoke with Dan Gomez, a representative of JRN regarding whether JRN conducted a site visit at Southern High School, and confirmed the

conversation by email. GDOE Exhibit 10, Bates Stamp No. 0333. Mr. Gomez verified JRN's bid price and confirmed that JRN conducted a site visit of Southern High School prior to the December 6, 2013 site visit. *Id.* GDOE confirmed that JRN complied with the requirement of Section 2.1.2 of the IFB. Therefore, GDOE correctly deemed JRN as a responsive bidder.

If the OPA finds that the December 10, 2013, site visit was mandatory, the OPA must determine JRN's absence was a minor informality that has no material effect on price, quality, quantity, delivery, or contractual conditions. Chapter 3, Section 3.9.13.4.1(c)(ii), DOE Procurement Regulations. As stated above, JRN conducted its own site visit, assessed the Southern High project site and submitted a bid of $254,501.91. GDOE Exhibit 5, Bates Stamp No. GDOE0150. JRN's bid is $95,498.09 less than the J&B's bid. GDOE Exhibit 7, Bates Stamp No. GDOE0316. Mr. Gomez confirmed that JRN's site visit of Southern High School was used to develop its bid in response to the IFB. Therefore, GDOE was still correct in deeming JRN's bid as responsive.

The evidence demonstrates that GDOE correctly deemed JRN as a responsive bidder, JRN's bid was the lowest responsive bid and JRN was correctly issued the purchase order in GDOE IFB 005-2014. There is no merit in J&B's appeal, and therefore, GDOE asks the OPA to dismiss J&B's Appeal in its entirety.

Dated this 23rd day of April 2014.

Respectfully submitted,

GUAM DEPARTMENT OF EDUCATION

By: _____

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