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RECEIVED
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PROCUREMENT APPEALS

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FILE NO OPA-PA: 14-001

Interested Party

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

8 In the Appeal of J & B Modern Tech,
9
10 Appellant.

OPA-PA-14-001

**INTERESTED PARTY'S
HEARING BRIEF**

13
14 **COMES NOW** Interested Party, JRN Air Conditioning & Refrigeration, Inc. ("JRN"
15 herein), and submits its Hearing Brief.

16
17 **STATEMENT OF FACTS**

18 On or about September 20, 2013, Mr. John Leon Guerrero of GDOE Facilities and
19 Maintenance requested a cost proposal from JRN for duct work to be performed at Simon
20 Sanchez High School, Southern High School, and Upi Elementary School, three of the four
21 schools listed in the relevant invitation for bid (GDOE IFB 005-2014 lists a fourth school, C.L.
22 Taitano Elementary School). Interested Party JRN Air Conditioning & Refrigeration, Inc.'s
23 Comments to Submitted Agency Report ("JRN's Comments" herein), Exhibit A. To prepare the
24 requested cost proposal, JRN personnel conducted thorough site inspections at Upi Elementary
25 School on September 20, 2013 and at Simon Sanchez High School on September 23, 2013. *Id.*,
26 Exhibit B and Exhibit C. Because of inclement weather, JRN personnel did not complete a site
27 inspection of Southern High School until September 24, 2013. *Id.*, Exhibit D.

28 Upon completing site inspections at the three schools, JRN's Project Engineer, Mr. Dan

1 Gomez, informed Mr. Leon Guerrero that the scope of work for which the cost proposal was
2 requested amounts to more than \$100,000 and should thus be opened for bids. Subsequently, on
3 November 25, 2013, an invitation for bid identified as GDOE IFB 005-2014 was issued by the
4 Purchasing Agency in this matter, the Guam Department of Education (“GDOE” herein), for the
5 Air Conditioning Systems Exterior Duct Restoration Project (“Project” herein). Procurement
6 Record, Exhibit 6. Government certification for this project was set at \$300,000. *Id.*

7 A December 5, 2013 notice from GDOE’s Mr. Marcus Pido informed all bidders that a
8 pre-bid conference and site inspection was to take place on December 6, 2013, commencing at
9 Simon Sanchez High School and proceeding onto the three other schools. *Id.* Mr. Elmer Santos,
10 a senior technician of JRN, attended this day specifically because C.L. Taitano Elementary
11 School was not among the schools initially discussed by Mr. Leon Guerrero and Mr. Gomez.
12 Consequently, JRN did not conduct a site inspection at C.L. Taitano Elementary School during
13 the month of September 2013. The visit to Southern High School was, however, rescheduled for
14 December 10, 2013 due to time constraints. JRN did not participate in the December 10, 2013
15 Southern High School site inspection organized by GDOE because JRN had already conducted
16 its own on September 24, 2013.

17 By the amended deadline for submission on December 17, 2013, only J & B Modern
18 Tech, (“Appellant” herein) and JRN submitted bids for GDOE’s consideration. *Id.*, Exhibit 7.
19 Appellant’s bid presented a total cost of \$350,000. JRN’s bid presented a total cost of
20 \$254,501.90. *Id.*; Notice of Appeal, pp. 51-53.

21 On February 5, 2014, GDOE issued a Bid Status notification to both bidders relating its
22 award to JRN. Procurement Record, Exhibit 8. On that same day, Purchase Order No.
23 20140367-00 was issued by GDOE to JRN reflecting the award. Submission of Agency Report,
24 Exhibit 15.

25 On February 6, 2014, Appellant submitted its Protest of the award to GDOE. *Id.*, Exhibit
26 12; Notice of Appeal, pp. 9-10. Appellant protested the award on the ground that JRN did not
27 attend the December 10, 2013 site inspection organized by GDOE at Southern High School. *Id.*
28 As its immediate response to Appellant’s Protest, GDOE issued a Notice of Stay of Procurement

1 on February 7, 2014 pursuant to 5 GCA § 5425(g).¹ Submission of Agency Report, Exhibit 16.
2 In that same notice, GDOE advised participating bidders that the stay “shall remain in effect until
3 the protest is resolved.” *Id.*

4 On March 7, 2014, GDOE issued a Notice to Lift the Stay of Procurement following its
5 determination that the stay was improperly imposed as Appellant’s Protest was submitted after
6 the award had already been issued. *Id.*, Exhibit 17. In its Notice to Lift the Stay of Procurement,
7 GDOE cited 2 GAR § 9101(e) and stated that “[t]he Protest, in this instance, came after the
8 award and a Stay should not have been issued . . . [t]herefore, the issued Stay is hereby lifted.”²
9 *Id.* GDOE also denied Appellant’s Protest in its entirety on March 7, 2014. *Id.*, Exhibit 18.
10 Immediately following the lift of the stay, JRN commenced work to meet the 120-day turnaround
11 called for in the invitation for bid.

12 On March 13, 2014, Appellant commenced this Appeal with the OPA by filing its Notice
13 of Appeal. In hearing the matter, the OPA is to determine these issues of fact: (1) whether
14 attending both the GDOE-organized site inspections on December 6, 2013 and December 10,
15 2013 was the only way to comply with Section 2.1.2 of GDOE IFB 005-2014 and (2), if so,
16 whether JRN’s attendance on December 6, 2013 only, after having conducted its own site
17 inspections prior, disqualify it as a nonresponsive bidder and, inter alia, JRN was awarded the bid
18 unjustly.

19 No further stays have been issued and JRN continues its work during the pendency of this
20 Appeal. To date, JRN has completed approximately 50% of the Project and the first and second
21 applications for payment were submitted to GDOE on April 7, 2014 and on April 16, 2014,
22 respectively.

23
24 ¹ Section 5425(g) of Title 5 of the Guam Code Annotated states: “In the event of a timely protest under
25 Subsection (a) of this Section or under Subsection (a) of § 5480 of this Chapter, the Territory shall not proceed
26 further with the solicitation or with the award of the contract prior to the final resolution of such protest, and any
such further action is void”

27 ² Section 9101(e) of Title 2 of the Guam Administrative Rules and Regulations states: “When a protest has
28 been filed within 14 days [pursuant to 2 GAR § 91019(c)(1)] and before an award has been made, the Chief
Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall make no award of the
contract prior to final resolution of such protest, and any such further action is void”

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ARGUMENT

JRN WAS THE LOWEST RESPONSIVE BIDDER TO GDOE IFB 005-2014 AND WAS RIGHTFULLY AWARDED THE BID AND CONTRACT.

A responsive bidder is one “who has submitted a bid which conforms in all material aspects to the Invitation for Bids.” 5 GCA § 5201(g); 2 GAR § 3109(n)(2). Material aspects are substantive, as opposed to minor informalities, and include price, quantity, quality, delivery, and contractual conditions. 2 GAR § 3109(m)(4)(B). The material aspects of GDOE IFB 005-2014 are guided by two factors found in Section 2.4.1 of the invitation for bid: (1) the price of overall performance and delivery and (2) responsiveness to the specific requirements of GDOE IFB 005-2014.

A. JRN Qualified As A Responsive Bidder By Offering A Price Below Government Certification And Offered The Lowest Price Overall.

JRN’s winning bid offered a total cost of \$254,501.90, \$45,498.10 below the government certified amount of \$300,000 and \$95,498.10 less than Appellant’s bid, the only other bid submitted in response to GDOE IFB 005-2014. Procurement Record, Exhibit 6 and Exhibit 7. Furthermore, JRN’s winning bid captured the entire scope of work outlined in GDOE IFB 005-2014, including all of the fabrication, removal, and installation work requested. *Id.*, Exhibit 5. Thus, in terms of price, performance, and delivery, JRN categorically qualified as a responsive bidder.

Contrastingly, Appellant was nonresponsive in its bid by offering a total cost of \$350,000, \$50,000 above government certification and a cost in direct contradiction to GDOE IFB 005-2014 and its Clarification No. 1. *Id.*, Exhibit 6 and Exhibit 7; Notice of Appeal, pp. 51-53.

B. JRN Qualified As A Responsive Bidder By Fully Complying With Section 2.1.2 of GDOE IFB 005-2014 And Conducting All Mandatory Site Inspections and Field Verifications Prior To Submitting Its Bid.

1 The issues in this Appeal concern how a potential bidder sufficiently complies with
2 Section 2.1.2 of GDOE IFB 005-2014. Section 2.1.2 states, in pertinent part, “[t]he Contractor
3 must conduct pre site inspections to determine existing conditions and any special
4 needs/requirements for execution of project. **Site Inspection and field verification of existing**
5 **layout and conditions is mandatory.**” The remainder of this section does not discuss whether
6 GDOE shall schedule site inspections, and if so, whether attendance of such is mandatory.

7 Section 2.3.1 provides that a pre-bid conference may be held at GDOE’s discretion when
8 a potential bidder submits a written request for one. Section 2.3.1 further requires GDOE to
9 inform all potential bidders of the date, time, and location of the pre-bid conference should
10 GDOE oblige. Yet, there is no further language within this section that discusses whether
11 attendance at a pre-bid conference is mandatory. No other part of GDOE IFB 005-2014 speaks
12 on the matter of attendance at either a site inspection or a pre-bid conference scheduled by
13 GDOE.

14 JRN submits that a bidder fails to comply with the provisions of Section 2.1.2 by not at
15 all conducting the mandatory site inspections and field verifications prior to submitting a bid.
16 Noncompliance thereto would then disqualify that bidder as nonresponsive. However, JRN,
17 relying on the plain language of Section 2.1.2 and GDOE’s written responses to the pre-bid
18 questions, contends that what is mandatory are the site inspections and field verifications
19 themselves and that such are conducted prior to the submission of a bid. In fact, GDOE
20 previously stated that though a pre-bid conference and site inspections were scheduled at the
21 request of potential bidders, attendance was not made mandatory and potential bidders were
22 welcomed to satisfy Section 2.1.2 on their own initiative through separate site visits. Submission
23 of Agency Report, Exhibit 18; Notice of Appeal, p. 11.

24 JRN more than sufficiently complied with the requirements of Section 2.1.2 when it
25 conducted the requisite site inspections and field verifications at Upi Elementary School on
26 September 20, 2013, at Simon Sanchez High School on September 23, 2013, at Southern High
27 School on September 24, 2013, and at C.L. Taitano Elementary School on December 6, 2013.
28 JRN’s Comments, Exhibits A, B, C, and D. That JRN was proactively conducting site

1 inspections well ahead of time because of GDOE's previous request for a cost proposal is basis
2 to disqualify JRN as nonresponsive is insupportable. *Id.*, p. 1.

3 The plain language of Section 2.1.2 cannot be interpreted to mean anything beyond its
4 own words or with regard to events that may or may not be scheduled by GDOE in the future.
5 Presumably, the spirit of Section 2.1.2 seeks to ensure that bidders responsibly know the sites
6 prior to submitting bids in order to maximize the accuracy of the costs and project needs they in
7 turn present to GDOE for consideration. However, without more than a basic provision requiring
8 bidders to conduct site inspections, presumably in the interest of accurately gauging costs,
9 Section 2.1.2 cannot be read to require attendance at either the December 6, 2013 or December
10 10, 2013 site inspections.

11 Furthermore, any reference at all to attendance at the December 6, 2013 or December 10,
12 2013 site inspections being mandatory was not made by GDOE. Rather, in the questions
13 submitted to GDOE, JRN itself asked two questions: "Will there be a pre-bid conference?" and
14 "Who will be scheduling the *mandatory* site inspection (emphasis added)?" In response to
15 JRN's first question, GDOE noted the December 6, 2013 date, and to the latter, GDOE answered
16 "[s]ite inspection will kick off immediately following pre-bid conference commencing with
17 Simon Sanchez High School followed by Upi Elementary, CL Taitano and finally Southern High
18 School". Procurement Record, Exhibit 6.

19 JRN, like all other potential bidders, had prior notice of GDOE's exercise of discretion in
20 calling and organizing a pre-bid conference and site inspections. *Id.* JRN then characterized the
21 GDOE-organized site inspection as "mandatory" in its question because of the addition of C.L.
22 Taitano Elementary School to the Project. As stated above, this school was not one of the
23 schools initially discussed when GDOE requested a cost proposal from JRN and, it was the only
24 school JRN had not previously inspected in September 2013. Thus, to JRN's understanding,
25 attending the one GDOE-organized site inspection at C.L. Taitano Elementary School on
26 December 6, 2013 was necessary to its bid. Attendance at all other GDOE-organized site
27 inspections on December 6, 2013 was not.

28 Similarly, that time ran out on December 6, 2013 and the Southern High School site

1 inspection would have to take place on December 10, 2013 did not concern JRN because a
2 second site inspection of that school would have been frivolous in light of the site inspection
3 already conducted by JRN on September 24, 2013. Thus, while attendance on December 6, 2013
4 was "mandatory" for JRN, i.e. a self-imposed requirement, attendance on December 10, 2013
5 was not.

6 Lastly, JRN's difference in treatment of December 6, 2013 and December 10, 2013 was
7 also due to the occurrence of the pre-bid conference on December 6, 2013, immediately prior to
8 the site inspections, which was called and organized also at the discretion of GDOE per Section
9 2.3.1 of GDOE IFB 005-2014. Attendance at the pre-bid conference entailed attendance for the
10 rest of the December 6, 2013 agenda.


11 Thus, JRN qualified as responsive to all of the specific requirements of GDOE IFB 005-
12 2014, especially those mandated by Section 2.1.2 regarding site inspections and field
13 verifications.

14
15 **CONCLUSION**

16 The facts and entire record wholly belie a finding in favor of Appellant. The ground upon
17 which Appellant protested and now appeals is not only misguided but has already been
18 sufficiently addressed by GDOE.

19
20 Respectfully submitted on April 23, 2014

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22 By

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25 _____
26 JULISIS R. NUCUM
27 JRN Air Conditioning & Refrigeration, Inc.
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