

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

PROCUREMENT APPEALS

IN THE APPEAL OF,)
J & B MODERN TECH,) **APPEAL NO: OPA-PA-11-018**
Appellant) **DECISION**

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on December 13, 2011, by J & B MODERN TECH (Hereafter referred to as "J&B") regarding the Department of Education, Government of Guam's (Hereafter referred to as "DOE") denial of J&B's October 14, 2011 protest concerning DOE's solicitation of Invitation for Bid No. GDOE-IFB-044-2011 (Preventive Maintenance and Minor Repairs of Split and Central A/C Equipment for Thirty Six (36) Public Schools and Support Facilities) (Hereafter referred to as "IFB"). The Public Auditor holds that the bid submitted in response to the IFB by JRN Air Conditioning & Refrigeration, Inc., (Hereafter referred to as "JRN") was non-responsive, and the Public Auditor holds that J&B's bid submitted in response to the IFB was also non-responsive. Accordingly, J&B's appeal is GRANTED in part and DENIED in part.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made and

1 evidence presented during the March 1, 2012 hearing for Appellant's Appeal. Based on the
2 foregoing record, the Public Auditor makes the following findings of fact:

3 1. On or about September 13, 2011, DOE issued the IFB.¹

4 2. The IFB required in relevant part, that:

5 a. The bidder shall submit two (2) references for contracts performed of similar
6 size and scope to the IFB, the bidder shall have adequate labor to perform the required
7 maintenance and repair work on an on call or scheduled basis, the bidder shall have adequate
8 number of employees on payroll with minimum experience qualifications not less than five (5)
9 years per employee or equivalent experience DOE deems acceptable, the bidder shall have two
10 (2) crews for trouble shooting which consist of two (2) A/C Technicians and two (2) General
11 Helpers for Districts I, II, III, and IV, the bidder shall have six (6) personnel per district which
12 consist of two (2) A/C Technicians and four (4) General Helpers, and that the bidder shall have
13 all required personnel on board upon the execution of the contract.²

14 b. Bids submitted in response to the IFB must fulfill the requirements of the
15 solicitation.³

16 c. DOE reserved the right to waive any minor irregularity in the bids received
17 and, in the case of an error in the extension of prices, unit price will govern.⁴

18 d. Any modification of a bid received after the time and date set for opening of
19 bids at the place designated for opening is late, and no late modification will be considered
20 unless received before contract award, and the bid modification, would have been timely but for
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28 ¹ Invitation for Bid, Exhibit 13, Agency Report filed on December 28, 2011.

² Contractor Qualifications, Contract Terms and Conditions, Section 2.5.5, IFB., page 9, Exhibit 7, Id.

³ Section 3.1, IFB, page 10, Id.

⁴ Paragraph 22, General Terms and Conditions, IFB, page 29, Id.

1 the action or inaction of Government personnel directly serving the procurement activity.⁵

2 e. Bids submitted in response to the IFB were required to contain signed forms
3 identified by the IFB. One of these forms was Attachment B, Labor, which required the bidder
4 to disclose their employees by position title, wage classification number, head count, hours per
5 week, hourly rates of pay, productive labor costs, fringe benefits, labor burden costs, and total
6 pay for labor and fringe benefits.⁶

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8 f. Bidders were required to pay their employees in accordance with the Wage
9 Determination for Guam and the Northern Mariana Islands issued and promulgated by the U.S.
10 Department of Labor, and DOE included a copy U.S. Department of Labor Wage Determination
11 No. 2005-2147, Revision No. 13, dated June 13, 2011 with the IFB.⁷

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13 3. The deadline to submit bids was 10:00 a.m. on September 30, 2011.⁸

14 4. On September 19, 2011, DOE issued IFB Amendment No. 1 changing the Pre-Bid
15 Conference time from 1:30 p.m., September 21, 2011 to 10:00 a.m. on September 21, 2011.⁹

16 5. On September 29, 2011, DOE issued IFB Amendment No. 2, changing, in relevant
17 part:

18 a. The deadline to submit bids from September 30, 2011 to October 7, 2011 at
19 10:00 a.m.¹⁰

20 b. Clarifying and amending Section 2.5.5. of the IFB as follows:

21 (1) The requirement that the bidder shall have adequate labor to perform
22 the required maintenance and repair work on an on call or scheduled basis, the bidder shall have
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27 ⁵ Paragraph 7, Late Bid, Withdrawals, and Late Modifications, Sealed Bid Solicitation Instructions, IFB, page 33, Id.

⁶ Section 5.1, List of Forms Required for all solicitations, page 16, and Attachment B, Labor Form, page 24, IFB, Id.

⁷ Section 3.11, IFB, Id.

⁸ Section 2.2.3., Time and Date for Receipt of Bids, IFB, page 5, Id.

⁹ Amendment No. 1 dated September 19, 2011 and Clarification No. 1, dated September 20, 2011, Exhibit 8, Id.

¹⁰ Page 1, Amendment No. 2 dated September 29, 2011, Exhibit 8, Id.

1 adequate number of employees on payroll with minimum experience qualifications not less than
2 five (5) years per employee or equivalent experience DOE deems acceptable was limited to
3 HVAC technicians.¹¹

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5 (2) DOE would consider bids containing alternate numbers and
6 classifications of workers which would increase or decrease the two (2) crews for trouble
7 shooting consisting of two (2) A/C Technicians and two (2) General Helpers for Districts I thru
8 IV, and the six (6) personnel per district consisting of two (2) A/C Technicians and four (4)
9 General Helpers required by Section 2.5.5. of the IFB. However, DOE would not allow the
10 bidders to develop their own work plans to accomplish the tasks outlined in the IFB.¹²

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12 (3) The bidders were required to address the requirements of Section
13 2.5.5. of the IFB with a technical proposal in their bids and if a bidders failed to submit such with
14 their bids, DOE would deem them non-responsive.¹³

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16 (4) The requirement for two trouble shooting crews consisting of (2) A/C
17 technicians and two (2) General Helpers for Districts I thru IV are the minimum required.¹⁴

18 c. DOE clarified and amended the IFB's Attachment B, Labor Form by stating
19 that fringe benefits shall be calculated at six-point-fifteen-percent (6.15%) per hour averaged
20 across five (5) years and the health and welfare benefits shall be calculated at three-dollars-and
21 fifty-nine-cents (\$3.59) per hour. Further, DOE authorized the bidders to submit an Attachment
22 B Labor Form in a different excel format than the one in the IFB, provided the bidders provided
23 the same information required by the form in the IFB.¹⁵

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27 ¹¹ Paragraph 3, page 3, Id.

¹² Paragraph 4, Id.

¹³ Paragraph 3, page 4, Id.

¹⁴ Paragraph 5, page 5, Id.

¹⁵ Paragraph 7, page 4, Id.

1 6. On September 30, 2011, DOE issued IFB Amendment No. 3 amending the IFB's bid
2 form.¹⁶

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4 7. On October 6, 2011, DOE issued IFB Amendment No. 4 which:

5 a. Extended the deadline to submit bids in response to the IFB from October 7,
6 2011 to 10:00 a.m. on October 14, 2011.¹⁷

7 b. DOE clarified that despite its statement in Amendment No. 3, that DOE would
8 consider bids containing alternate numbers and classifications of workers which would increase
9 or decrease the two (2) crews for trouble shooting consisting of two (2) A/C Technicians and two
10 (2) General Helpers for Districts I thru IV, and the six (6) personnel per district consisting of two
11 (2) A/C Technicians and four (4) general helpers required by Section 2.5.5. of the IFB, the
12 minimum requirement will be six (6) personnel per district.¹⁸

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14 c. The total prescribed field staff required for the project is a minimum of forty
15 (40) employees, sixteen (16) A/C Technicians and twenty-four (24) General Helpers.¹⁹

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17 d. DOE reversed Amendment No. 3 by agreeing to allow bidders to submit
18 competitive work plans that conformed to the IFB's performance standards and provided that the
19 contractor meets the general quarterly preventative maintenance and minor repair requirements
20 for all districts, and that the bidders were still required to have the minimum requirement of
21 preventative maintenance manpower per district.²⁰

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23 9. On October 14, 2011, DOE received a bid from Global Food Service (Hereafter
24 Referred to as "GFS") for one-million, one-hundred-seventy-six-thousand-seven-hundred-

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27 ¹⁶ Amendment No. 3 dated September 30, 2011, Exhibit 8, Id.

28 ¹⁷ Page 1, Amendment No. 4 dated October 6, 2011, Exhibit 8, Id.

¹⁸ Paragraph 2, page 1, Id.

¹⁹ Paragraph 2, page 2, Id.

²⁰ Page 2, Id.

1 eleven-dollars-and-twenty-eight-cents (\$1,176,711.28), DOE received a bid from J&B for one-
2 million-ninety-thousand-nine-hundred-seventy-dollars-and-seventy-three-cents (\$1,090,970.73),
3 and DOE received a bid from JRN for nine-hundred-fifty-seven-thousand-nine-hundred-four-
4 dollars (\$957,904.00).²¹

6 10. JRN's bid, in relevant part, included:

7 a. A Statement of Qualifications for its eighteen (18) employees which included
8 seven (7) A/C Technicians, two (2) Electricians, one (1) Project Engineer, and eight (8) General
9 Helpers.²²

11 b. JRN's bid offered: "When trouble shooting, JRN will have two crews which
12 will consist of 2 AC Technicians and 2 General Helpers for Districts I, II, III, and IV. JRN will
13 have six personnel per district which will consist of 2 AC Technicians and 4 General Helpers for
14 Districts I, II, III, and IV."²³

16 c. JRN submitted the required Declaration Re Compliance with U.S. DOL Wage
17 Determination stating that it was in full compliance with 5 G.C.A. §5801 and §5802.²⁴

18 d. JRN submitted its Computations for Bidding Purposes, Attachment B, which
19 provided hourly rates and other payroll information for one (1) A/C Technician, and one (1)
20 Helper.²⁵

22 e. JRN submitted five (5) contracts with DOE as its reference.²⁶

23 11. J&B's bid disclosed that it would pay its General Maintenance Workers, with

25 ²¹ Abstract of Bidder, Exhibit 9, Id.

26 ²² Statement of Qualifications, Page 20, Bates Stamp No. GDOE00166, JRN Bid, Exhibit 6, Id.

27 ²³ Paragraph 2, Technical Approach, Technical Proposal, Page 2, Bates Stamp No. GDOE00169, Id.

27 ²⁴ Declaration Re Compliance with U.S. DOL Wage Determination, JRN's Bid, Bates Stamp No. GDOE00152,
Exhibit 6, Id.

28 ²⁵ Attachment B, Bates Stamp No. GDOE00178, JRN's Bid, Id.

²⁶ Introduction and Impact, Page 1, JRN Technical Proposal, JRN's Bid, Exhibit 6, Agency Report filed on
December 28, 2011.

1 Department of Labor Classification No. 23370, nine-dollars-and-ninety-two-cents (\$9.92) per
2 hour.²⁷

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4 12. On October 14, 2011, J&B submitted a letter to DOE Interim Superintendent, Taling
5 Taitano, and DOE Supply Management Administrator, Marcus Y. Pido, stating that DOE should
6 disqualify JRN and GFS's bids because:

7 a. JRN's bid did not include a cost breakdown for Preventative Maintenance and
8 Repair Works consistent to their bid amount to reflect the use of twenty-four (24) personnel for
9 preventative maintenance and sixteen personnel for repair work required by Section 2.5.5. of the
10 IFB.
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12 b. GFS had the highest bid amount and GFS' bid offered four (4) personnel for
13 all four (4) districts for the performance of repair work, which does not comply with the
14 requirement for sixteen (16) personnel set forth in Section 2.5.5. of the IFB.²⁸
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16 13. On October 20, 2011, DOE Buyer Supervisor II, Albert G. Garcia, analyzed the bids
17 DOE received and opened on October 14, 2011 and recommended that JRN be awarded the
18 contract. This recommendation was subsequently approved by DOE Supply Management
19 Administrator Marcus Y. Pido.²⁹
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21 14. Also on October 20, 2011, DOE's Supply Management Administrator, Marcus Y.
22 Pido, issued a Letter of Intent to award the contract for the IFB to JRN.³⁰

23 15. On October 21, 2011, DOE issued a bid status advising J&B that its bid was rejected
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25 ²⁷ Attachment B, Labor, Form, J&B Bid, Exhibit 5, Id.

26 ²⁸ Letter dated October 14, 2011 from Alexander Salazar, J&B Project Manager, to DOE Interim Superintendent,
27 Taling Taitano, and DOE Supply Management Administrator, Marcus Y. Pido, Exhibit 2, Notice of Appeal filed on
December 13, 2011.

28 ²⁹ Memorandum dated October 20, 2011 from DOE Buyer Supervisor II, Albert G. Garcia, to DOE Supply
Management Administrator, Marcus Y. Pido, Exhibit 5, Appellant's Exhibit List filed on February 22, 2012.

³⁰ Letter of Intent dated October 20, 2011, Exhibit 6, Id.

1 due to high price.³¹

2 16. On or about October 27, 2011, Andrew Leon Guerrero, a DOE employee who is part
3 of DOE's Facilities and Maintenance Division, reviewed the bids submitted by GFS, J&B, and
4 JRN, and determined that he could not make a proper calculation of JRN's manpower vs. their
5 wage determination because JRN only provided a head count for one (1) A/C Mechanic and one
6 (1) Helper with their bid. He stated that an e-mail was sent to JRN wherein DOE requested that
7 JRN provide a new sheet for clarification and proper calculation, and that if JRN failed to
8 comply with the request, their bid will be rejected due to non-compliance of the USDOL and the
9 award would be made to the next lowest bidder.³²

10 17. On November 8, 2011, J&B requested that DOE issue a decision on their October 14,
11 2011 protest. J&B's request repeated its allegations that JRN's bid was non-responsive due to
12 JRN's alleged failure to provide a proper breakdown of the manpower hours showing that JRN
13 was offering the mandatory minimum personnel required by the IFB, and J&B requested that
14 DOE award the contract for the IFB to J&B because J&B submitted the next lowest bid.³³

15 18. On November 29, 2011, DOE accepted J&B's October 14, 2011 letter as a protest
16 and denied J&B's allegation concerning JRN's bid stating that, in accordance with 2 G.A.R.,
17 Div. 4, Chap 3, §3109(m)(4), which concerns bid mistakes discovered after bid opening but prior
18 to award, DOE contacted JRN to clarify JRN's bid and DOE determined JRN's bid was
19 responsive because the total cost submitted by JRN met the minimum requirements of the bid,
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25 ³¹ Bid Status dated October 21, 2011, Exhibit 7, Id.

26 ³² DOE Memorandum dated October 27, 2011 from DOE Facilities and Maintenance Division Manager to DOE
27 Supply Management Administrator Re GDOE-IFB-044-2011, Exhibit 8, Id. NOTE: Although the aforementioned
28 Memorandum has a signature block for Billy P. Cruz, it was signed instead by Andrew Leon Guerrero. See
Testimony of Billy P. Cruz, Hearing Re Appellant's Appeal, March 1, 2012.

³³ Letter dated November 8, 2011 from Alexander Salazar, J&B Project Manager, to DOE Interim Superintendent
Taling Taitano, and DOE Supply Management Administrator, Marcus Y. Pido, Re: Request for Decision on Bid
Protest Dated October 14, 2011/IFB No. 044-2011, Exhibit 9, Id.

1 and that the cost accurately took into account the use of twenty-four (24) employees for
2 maintenance purposes and sixteen (16) employees for repair purposes. DOE agreed with J&B's
3 allegation that GFS submitted the highest bid and denied J&B's allegation that GFS' bid was
4 non-responsive because DOE determined that GFS' bid complied with the IFB requirements
5 because GFS offered four (4) employees for each of the four (4) districts for a total of sixteen
6 (16) employees for repair services.³⁴

8 19. On December 5, 2011, DOE issued an Amended Bid Status rejecting J&B's bid for
9 high price and recommending JRN for award of the contract for the IFB.³⁵

11 20. On December 13, 2011, fourteen (14) days after DOE denied J&B's October 14,
12 2011 Protest, J&B filed this appeal.³⁶

14 III. ANALYSIS

15 Pursuant to 5 G.C.A. 5703, the Public Auditor shall review DOE's November 29, 2011
16 Decision denying J&B's October 14, 2011 protest *de novo*.

18 A. JRN's Bid was non-responsive.

19 JRN failed to submit Attachment B, Labor Form as required by the IFB. A responsive
20 bidder is defined as a bidder who has submitted a bid which conforms in all material respects to
21 the invitation for bids. 5 G.C.A. §5201(g). As stated above, Section 5.1 required the bidders to
22 disclose information concerning their employees to include a headcount by position
23 classification. Further, as stated above, JRN's bid only disclosed information for one (1) A/C
24 Technician and one (1) Helper on its Attachment B Labor Form. This disclosure excluded the
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28 ³⁴ DOE Decision Denying Protest dated November 29, 2011, Exhibit 10, Id.

³⁵ Amended Bid Status dated December 5, 2011, Exhibit 11, Id.

³⁶ Notice of Appeal filed on December 13, 2011.

1 other six (6) A/C Technicians, and the other seven (7) General Helpers, and failed to disclose any
2 information concerning the two (2) Electricians, one (1) Project Engineer JRN listed in its
3 Statement of Qualifications. This was a material omission because DOE was unable to properly
4 calculate the wages JRN was paying their employees to verify JRN compliance with the Federal
5 Wage Determination applicable to Guam.³⁷ Thus, JRN's failure to disclose this information as
6 required by the IFB's Attachment B, Labor form, made JRN's bid non-responsive. The Public
7 Auditor must now determine whether DOE properly allowed JRN to correct its bid.
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10 DOE correctly states that it has the authority to allow bidders to confirm their bids and
11 correct mistakes discovered after bid opening and prior to award. However, DOE may only
12 exercise this authority by complying with the procedures set forth in its procurement regulations.
13 5 G.C.A. §5211(f). Generally, correction of a bid because of an inadvertent non-judgmental
14 mistake in the bid requires careful consideration to protect the integrity of the competitive
15 bidding system and to assure fairness, if the mistake is attributable to an error in judgment, the
16 bid may not be corrected, bid correction by reason of non-judgmental mistake is permissible, but
17 only to the extent it is not contrary to DOE's interests or the fair treatment of other bidders.
18 Section 3.9.13.1, Chapter III, DOE Procurement Regulations. When DOE's Superintendent
19 knows or has reason to conclude that a mistake has been made, such officer should request the
20 bidder to confirm the bid, and situations in which confirmation should be requested include
21 obvious apparent errors on the face of the bid, if the bidder alleges mistake, the bid may be
22 corrected or withdrawn if other conditions, described below, are met. Section 3.9.13.3, Chapter
23 III, DOE Procurement Regulations. Here, JRN's Attachment B Labor Form contained an
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27 ³⁷ DOE Memorandum dated October 27, 2011 from Manager, Facilities and Maintenance Division to Supply
28 Management Administrator, Exhibit 8, J&B's Exhibit List filed on February 22, 2012.

1 obvious and apparent error because JRN's headcount only disclosed information for two (2)
2 employees which was far lower than the eighteen (18) employees JRN listed in its Statement of
3 Qualifications and the work crews JRN described in its technical proposal. However, DOE did
4 not follow the bid confirmation procedure. As stated above, DOE's Facilities and Maintenance
5 Division requested for JRN to clarify their bid and not DOE's superintendent. This is not a
6 minor omission because DOE's Facilities and Maintenance Division had only a limited role in
7 the evaluation of the bids, and there is no record of JRN alleging a mistake in its bid and we are
8 left to assume that such an allegation was made.³⁸ The Public Auditor finds that making this
9 assumption prejudices the other bidders who complied with the IFB by properly disclosing the
10 wages and benefits they were paying to all their employees on the IFB's Attachment B, Labor
11 Form.
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15 There is no record of a written determination authorizing JRN to correct its bid. When a
16 bid is corrected or withdrawn, or correction or withdrawal of a bid is denied for mistakes
17 discovered after opening but prior to award, DOE's superintendent shall prepare a written
18 determination showing that the relief was granted or denied in accordance with DOE's
19 Procurement Regulations. Section 3.9.13.6., Chapter III, DOE Procurement Regulations. Here,
20 there is no record or evidence of DOE's Superintendent authorizing the correction of JRN's bid
21 in accordance with DOE's Procurement Regulations. Accordingly, the Public Auditor finds that
22 DOE did not confirm or correct JRN's Bid in accordance with its regulations.
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24 Without a proper confirmation or correction of JRN's Bid, JRN's amendments to its bid
25 after bid opening were a late bid modification. Any bid modification received after the time and
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27 ³⁸ Testimony of Billy P. Cruz and Marcus Y. Pido, Hearing Re Appellant's Appeal, March 1, 2012, and DOE
28 Memorandum dated October 27, 2011 from Manager, Facilities and Maintenance Division, to Supply Management
Administrator, Exhibit 8, J&B's Exhibit List filed on February 22, 2012. NOTE: Exhibit 15 of the Agency Report
concerns JRN's e-mail reply to DOE Buyer Supervisor Albert Garcia's e-mail request to JRN for "breakdown of all
districts total headcount." However, this does not include any JRN allegation of mistake.

1 date set for opening of bids at the place designated for opening is late. Section 3.9.11.1, Chapter
2 III, DOE Procurement Regulations. No late bid modification will be considered unless received
3 before contract award and the bid modification would have been timely but for the action or
4 inaction of DOE personnel directly serving the procurement activity. 5 G.C.A. §5211(f) and
5 Section 3.9.11.2. Here, JRN's bid corrections were late because they were submitted on or about
6 October 27, 2011 which is well after the October 14, 2011 deadline to submit bids.³⁹ Further,
7 there is no evidence or record that the late modification would have been timely but for the
8 action or inaction of DOE personnel directly involved in the IFB solicitation. Therefore, the
9 Public Auditor finds that JRN's late modification must not be considered.
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12 Additionally, DOE is correct in admitting that JRN's bid also failed to comply with
13 Section 2.5.5., of the IFB.⁴⁰ As stated above, Section 2.5.5. of the IFB required the bidders to
14 submit two (2) references for contracts performed of similar size and scope to the IFB. Further,
15 as stated above, IFB Amendment No. 2 stated that the bidders were required to address the
16 requirements of IFB Section 2.5.5. with a technical proposal in their bids and that bids failing to
17 comply with this requirement would be deemed non-responsive. As stated above, JRN only
18 submitted DOE as its reference. Accordingly, the Public Auditor finds that JRN failed to comply
19 with IFB Section 2.5.5. requirement that bidders submit two (2) references for contracts
20 performed of similar size and scope to the IFB.
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23 **B. J&B's Bid was Non-Responsive.**

24 Although J&B submitted the next lowest bid, it is not entitled to award of the contract
25 because its bid was also non-responsive. As stated above, J&B alleged in its protest that it must
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28 ³⁹ JRN reply e-mail to Albert Garcia dated October 27, 2011, Exhibit 15, Agency Report filed on December 28, 2011.

⁴⁰ Line 10, Page 2, DOE's Hearing Brief filed on February 29, 2012.

1 be awarded the contract because JRN's bid was non-responsive and J&B was the next lowest
2 bidder. However, the contract is to be awarded to the lowest responsible and responsive bidder
3 whose bid meets the criteria set forth in the invitation for bids. 5 G.C.A. §5211(g) and Section
4 3.9.14.1, Chapter III, DOE Procurement Regulations. As stated above, the IFB required to the
5 bidders to pay their employees in accordance with U.S. Department of Labor Wage
6 Determination No. 2005-2147, Revision No. 13, dated June 13, 2011, which was included with
7 the IFB. As stated above, J&B's bid disclosed that it would pay its General Maintenance
8 Workers, with Department of Labor Classification No. 23370, nine-dollars-and-ninety-two-cents
9 (\$9.92) per hour. However, the aforementioned wage determination, requires that such workers
10 be paid the amount of eleven-dollars-and-ninety-five-cents (\$11.95) per hour.⁴¹ J&B asserts that
11 the aforementioned nine-dollars-and-ninety-two-cents (\$9.92) hourly wage, combined with the
12 benefits J&B provides its employees, worth an additional three-dollar-and-twenty-cents
13 additional per hour, exceeds the eleven-dollars-and-ninety-five-cents (\$11.95) per hour wage
14 determination requirement.⁴² However, this argument is not supported by the wage
15 determination attached to the IFB, which requires that General Maintenance Workers, with
16 Department of Labor Classification No. 23370, be paid an hourly rate of eleven-dollars-and-
17 ninety-five-cents (\$11.95) for their wages, and an hourly rate of three-dollars-and-fifty-nine-
18 cents (\$3.59) in health and welfare benefits for a total payment of fifteen-dollars-and-fifty-four-
19 cents (\$15.54) per hours for wages and benefits.⁴³ Thus, assuming *arguendo* that J&B could
20 pays its General Maintenance Workers benefits worth three-dollars-and-fifty-nine-cents per hour,
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26 ⁴¹ U.S. Department of Labor Wage Determination No. 2005-2147, Revision No. 13, dated June 13, 2011, IFB,
27 Exhibit 7, Agency Report filed on December 28, 2011.

28 ⁴² Testimony of Gene Bengayan, Hearing for Appellant's Appeal, March 1, 2012.

⁴³ Pages 4 and 7, U.S. Department of Labor Wage Determination No. 2005-2147, Revision No. 13, dated June 13,
2011, IFB, Exhibit 7, Agency Report filed on December 28, 2011

1 plus their hourly wage of nine-dollars-and-ninety-two-cents (\$9.92), for a total of thirteen-
2 dollars-and fifty-one-cents, this amount is two-dollars-and-three-cents short of the of fifteen-
3 dollars-and-fifty-four-cents (\$15.54) hourly wage and benefit payment required by Section 3.11
4 of the IFB and the wage determination included with the IFB. Therefore, the same analysis
5 concerning responsiveness, given above, applies equally to J&B and the Public Auditor finds
6 that J&B's bid is non-responsive because its fails to comply with Section 3.11 of the IFB.
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8 The Public Auditor finds no merit to DOE's allegations that J&B failed to comply with
9 IFB Section 2.5.5's requirement for two (2) references for contracts performed of similar size
10 and scope to the IFB. J&B's bid clearly contains at least thirteen (13) references which are for
11 contracts performed of similar size and scope to the IFB.⁴⁴
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13 **C. DOE may Cancel the IFB revise its IFB solicitation it to comply with Guam**
14 **Procurement Law and DOE's Procurement Regulations.**

15 The Public Auditor finds that DOE's may cancel the IFB, as it requests, or revise its
16 solicitation to comply with Guam Procurement Law and Regulations. If prior to award it is
17 determined that a solicitation or proposed award of a contract is in violation of law, then the
18 solicitation or proposed award shall be cancelled or revised to comply with the law. 5 G.C.A.
19 §5451. As stated above, DOE violated 5 G.C.A. §5211(f) by allowing JRN to amend its bid after
20 bid opening in violation of its procurement regulations. As this violation of law occurred prior to
21 award, DOE may cancel the IFB or revise its solicitation to comply with Guam Procurement
22 Law and DOE's Procurement Regulations. To properly cancel the IFB after bid opening, DOE
23 must reject the remaining bids and submit a written determination finding that such action is in
24 DOE's best interest and setting forth the reasons it is taking such action. 5 G.C.A. §5225 and
25 Section 3.15.4.2, Chapter III, DOE Procurement Regulations. Should DOE choose to revise its
26 IFB solicitation to comply with the Guam Procurement Law and DOE's Procurement
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⁴⁴ Technical Proposal, page 2, J&B Bid, Exhibit 5, Agency Report filed on December 28, 2011, and Testimony of Alex Salazar and Gene Bengayan, Hearing Re Appellant's Appeal, March 1, 2012.

1 Regulations, DOE must void its December 5, 2011 Amended Bid Status and its October 20, 2011
2 Notice of Intent to award the contract for the IFB to JRN.

4 **IV. CONCLUSION**

5 Based on the foregoing, the Public Auditor hereby determines the following:

6 1. JRN's Bid is non-responsive because it did not comply with Section 5.1 of the IFB
7 due to JRN's failure to fully disclose the information required on the IFB's Attachment B, Labor
8 Form, and because JRN failed to provide two (2) references as required by Section 2.5.5. of the
9 IFB and IFB Amendment No. 2.

10 2. DOE violated 5 G.C.A. 5211(f) by allowing JRN to modify their bid after the October
11 14, 2011 deadline to submit bids, and by failing to follow the bid confirmation procedure set
12 forth in Section 3.9.13.3, Chapter III, DOE Procurement Regulations, and by failing to make the
13 written determination authorizing the modification required by Section 3.9.13.6., Chapter III,
14 DOE Procurement Regulations.

15 3. JRN's October 27, 2011 modification of its bid was late and shall not be
16 considered in accordance with 5 G.C.A. §5211(f) and Section 3.9.11.2.

17 4. J&B is not entitled to award of the contract for the IFB as the next lowest bidder
18 because its bid was also non-responsive because J&B's bid failed to comply with Section 3.11,
19 with the correct Wage and Benefits Determination for Services, of the IFB.

20 5. J&B's Appeal is GRANTED in part and DENIED in part.

21 6. DOE's may either cancel the IFB by rejecting the remaining bid in accordance with 5
22 G.C.A. §5451, §5225 and Section 3.15.4.2, Chapter III, DOE Procurement Regulations, or it
23 may revise its solicitation to comply with Guam Procurement Law and DOE's Procurement
24 Regulations by voiding its December 5, 2011 Amended Bid Status and its October 20, 2011
25 Notice of Intent to award the contract for the IFB to JRN. DOE shall take either action no later
26 than seven (7) working days after receiving this Decision.


27 7. J&B is not entitled to its reasonable costs, pursuant to 5 G.C.A. §5425(h)(2),
28 excluding attorney's fees, incurred in connection with the solicitation and its October 14, 2011

1 protest, because, there was no reasonable likelihood that J&B could have been awarded the
2 contract for the IFB due to its bid being non-responsive.

3 This is a Final Administrative Decision. The Parties are hereby informed of their right to
4 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
5 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
6 Decision. 5 G.C.A. §5481(a).

7 A copy of this Decision shall be provided to the parties and their respective attorneys, in
8 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
9 www.guamopa.org.

10
11 **DATED** this 13th day of April, 2012.

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14 
15 _____
16 DORIS FLORES BROOKS, CPA, CGFM
17 PUBLIC AUDITOR
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FAX

To: **Ms. Rebecca Perez, Esq.**
Legal Counsel
GDOE – Purchasing Agency

Cabot Mantanona
Rawlen Mantanona, Esq.
Catrina Campana, Esq.
Legal Counsel for Appellant –
J & B Modern Tech

From: **Doris Flores Brooks, CPA, CGFM**
Public Auditor
OPA Procurement Appeals
Suite 401 DNA Bldg.
238 Archbishop Flores St.
Hagatna, Guam 96910

Agency: _____ Pages 17 (including cover)

CC: Gene M. Bangayan, J & B Modern Tech Date: April 13, 2012

Fax: GDOE: 472-5001 or 472-5003 Point of Contact **Tel: 475-0390 x 210 (Vincent Duenas)**
CM: 646-0777 **Fax: 472-7951**
J&B Modern Tech: 646-0589 Nos.

Re: **Appeal No. OPA-PA-11-018**
(1) Decision

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Vincent Duenas – vduenas@guamopa.org

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