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 PROCUREMENT APPEALS

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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

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	)	<b>APPEAL NO. OPA-PA-17-003</b>
IN THE APPEAL OF	)	
	)	
Phil-Gets (Guam) International Trading Corp.	)	<b>PURCHASING AGENCY'S APPEAL BRIEF</b>
dba J&B Modern Tech,	)	
	)	
Appellant.	)	
	)	

Pursuant to the Public Auditor's May 5, 2017 Order, Purchasing Agency Guam Community College ("GCC") submits its Appeal Brief. In light of the record and the law, Appellant Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech's ("J&B") Appeal is unavailing and J&B has already received the only remedy available to it. Accordingly, the Public Auditor should deny or dismiss the instant Appeal.

**BACKGROUND**

On October 3, 2016, GCC issued Bid Invitation No. GCC-FB-17-001 ("IFB" or "Solicitation") for two connected items: (1) the design-build construction of a generator building and (2) the installation of back-up generator system. (See generally GCC's Agency Report at Tab 10 [cited "GCC~Tab [ ]~AR"].) The instant Appeal involves the first item and

the documents that the IFB required the bidders to submit regarding their proposed design-build structures.

In the IFB's "Special Reminder to Prospective Bidders," the second page of the Solicitation stated, in pertinent part:

Bidders are reminded to read the Sealed Bid Solicitation and Instructions, and General Terms and Conditions attached to the IFB to ascertain that all of the following requirements checked below are submitted in the bid envelope, in duplicate, at the date and time for bid opening.

[X] DESCRIPTIVE LITERATURE/PRODUCT BROCHURE

(GCC~Tab 10~AR0002.) The Solicitation's "General Terms and Conditions" provided:

20. DESCRIPTIVE LITERATURE:

. . . The literature furnished must clearly identify the item(s) in the Bid. *The descriptive literature is required to establish, for the purpose of evaluation and award, details of the product(s) the bidder proposes to furnish including design, materials, components, performance characteristics, method of manufacture, construction, assembly or other characteristics which are considered appropriate. . . . Failure to furnish the descriptive literature(s) by the time specified in Solicitation will require rejection of the Bid.*

(GCC~Tab 10~AR0009 (emphasis added).)

In its "General Requirements & Scopes of Work," the Solicitation directed:

1.2. DESCRIPTION:

....

A. Provide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator set/system.

(GCC~Tab 10~AR0031-32.) GCC drafted Section 1.2.A with the intention that this Section required the bidders to submit drawings of their proposed design-build structures in their bid packets. (*See Decl. D. Perez (Apr. 24, 2017) at ¶¶ 4-9; Decl. F. Palacios (Apr. 24, 2017) at ¶¶ 4-9; Decl. R. Pritchard (Apr. 24, 2017) at ¶¶ 4-9.*)

At the pre-bid conference on October 10, 2016, GCC advised the prospective bidders of “important requirements” for their bid packets including: “Descriptive Literature/Product Brochure: *the information regarding the housing. . .*” (GCC~Tab 9~AR0001-02 (emphasis added).) Also at the pre-bid conference, GCC and the bidders discussed the turnkey — i.e., design-build — nature of the project solicited for by the IFB. (See GCC~Tab 9~AR0004.) J&B asked, “is the turnkey only applicable to the generator[?]” (*Id.*) GCC answered, “it is the whole, overall project.” (*Id.*) J&B inquired, “this is to include the building[?]” (*Id.*) “Yes, to include the building,” GCC replied. (*Id.*)

Along with preliminary inquiries addressed at the pre-bid conference, the IFB’s “Instructions” directed:

3. EXPLANATION TO BIDDERS:

*Any explanation desired by a bidder regarding the meaning or interpretation of the Solicitation, drawings, specifications, etc., must be submitted in writing and with sufficient time allowed for a written reply to reach all bidders before submission on their bids.*

(GCC~Tab 10~AR0003 (emphasis added).)

The prospective bidders desired and sought several explanations regarding the meaning and interpretation of the Solicitation — including its General Requirements & Scopes of Work. Indeed, J&B submitted several written questions specifically about the design-build structure. (GCC~Tab 10~AR0050-51.) The bidders’ queries resulted in: five amendments to the IFB, two additional site visits, and an extension of the bid packet submission deadline. (See GCC~Tab 10~AR0044-53.)

At the bid opening on November 8, 2016, three bid packets were submitted in response to the IFB. (See GCC~Tab 7~AR001.) All the bid packets contained descriptive information for one item in the IFB: the generator. (See generally Procur. Rec. at Tab 11.) In

fact, J&B submitted nearly 100 pages of information, with numerous drawings and schematics, for the generator it offered.<sup>1</sup> (See GCC~Tab 8~AR0007-102.) However, no bidder submitted even an illustration of the IFB's other item: the design-build structure to house the generator. (See *generally* Proc. Rec. at Tab 11; see Decl. D. Perez at ¶¶ 10-11; Decl. F. Palacios at ¶¶ 10-11; Decl. R. Pritchard at ¶¶ 10-11.) And although J&B was the only bidder to describe the structure that it planned to design-build and noted "(see attached sketch)" in its narrative (GCC~Tab 8~AR0006 at No. 6), J&B failed to include the denoted "sketch" in its bid packet (*see generally id.*).

When GCC evaluated the bid packets, the evaluation sheets included the criterion: "Drawings were submitted with Bid Proposal." (GCC~Tab 7~AR004, 26 & 48.) Because no bidder met the IFB's requirement of submitting drawings for the design-build structure to house the generator, GCC decided to reject all the bids, "review the scope of work and specifications, and re-issue the bid." (GCC~Tab 6~AR001; see Decl. D. Perez at ¶¶ 10-12; Decl. F. Palacios at ¶¶ 10-12; Decl. R. Pritchard at ¶¶ 10-12.)

On January 27, 2017, GCC notified the three bidders that "no awards will be made" for the IFB and explained:

It is in the best interest of the college to cancel the above bid due to the following:

- All bidders failed to provide GCC with shop drawings and submittals

After reviewing the submission and all other documents submitted, GCC wants to ensure that all issues and requirements are addressed and taken into consideration. In view of the above, the GCC Planning & Development office

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<sup>1</sup> The IFB's "General Requirements & Scopes of Work" also directed under Section "1.4 SUBMITTALS (refer to 1.2.A) . . . C. Shop Drawings and Calculations: Submit for diesel generating unit and auxiliary equipment . . ." (GCC~Tab 10~AR0032.) As J&B's bid packet included nearly 100 pages of information on this generator, which contained several drawings, diagrams, schematics, and illustrations (*see generally* GCC~Tab 8 ~AR0008-102), the parties agree that J&B met the Solicitation's requirement of shop drawings for the generator it offered (*see* Statement at 6; Comments at 4 n.1; Motion at 7; Opp'n at 5 n.1).

will review the Scope of Work and requirements of this project and a new bid will be issued. All bidders above will be advised when a new bid is issued so that you may have another opportunity to participate.

(GCC~Tab 5~AR001.)

J&B lodged a bid protest (“Protest”) on February 6, 2017, complaining:

The cancellation notice states that the bid was cancelled because “[a]ll bidders failed to provide GCC with shop drawings and submittals.” However, shop drawings were not included in the requirements for bids on this project. This can be seen from the Bid Abstract, a copy of which is attached hereto as “Exhibit 2”, where shop drawings are not included on that checklist. As shown on the checklist, J&B submitted all required items with its bid, including a Project Narrative. A copy of J&B’s Project Narrative is attached as “Exhibit 3”.<sup>2</sup> As a practical matter, shop drawings usually are not and cannot be prepared until after a bid has been awarded.

(GCC~Tab 4~AR0001-02 (alteration in original; footnote added).)

On March 9, 2017, GCC responded to the Protest. (See GCC~Tab 3~AR0001-02.)

Noting the Solicitation’s various references to the requirement of shop drawings, GCC “found that [the Protest] is without merit.” (*Id.* at AR0002.) And, GCC again advised J&B that: “An opportunity will be given to compete on any solicitation or any future procurement of similar services.” (*Id.*)

J&B filed the instant Appeal on March 21, 2017 reiterating its allegation that the Solicitation did not require shop drawings of the design-build structure to be submitted in a bid packet. On April 4, GCC filed its Agency Report, with a Statement Answering Allegations of the Appeal (“Statement”). On April 10, J&B filed its Comments on the Statement, along with its request for an evidentiary hearing on the Appeal. The same day, GCC filed a Motion for Expeditious Dismissal (“Motion”) to dispose of the instant Appeal without an evidentiary hearing because there are no material facts in dispute.

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<sup>2</sup> Exhibit 3 for J&B’s Protest was actually a page from its CPM Chart. (See GCC~Tab 4~AR0007-08.)

The Public Auditor and Hearing Officer convened a scheduling hearing on April 11, 2017. As decided at that hearing, J&B filed its Opposition to the Motion and GCC filed its Rebuttal to J&B's Comments on April 17, and GCC filed its Reply to J&B's Opposition on April 24. On May 1, the Public Auditor and Hearing Officer heard oral arguments regarding GCC's Motion and took the Motion under advisement.

On May 2, 2017, J&B withdrew its request for an evidentiary hearing. The Public Auditor issued an Order on May 5 that directed the parties to file their appeal briefs by May 10 and response briefs by May 17.

### **QUESTIONS PRESENTED**

J&B's allegation in the instant Appeal involves whether the IFB — specifically, Section 1.2.A — required the bidders to submit shop drawings of their proposed design-build structures in their bid packets. The briefs and hearings in this matter have honed the instant Appeal to two fundamental questions that must be decided by the Public Auditor. Both questions should be answered in the affirmative.

Question 1: Whether the IFB contained a material ambiguity that resulted in all the bid packets being non-responsive when GCC — the drafter of the Solicitation — intended for Section 1.2.A to require the bidders to provide shop drawings of their proposed design-build structures in their bid packets but J&B, and apparently the other bidders, interpreted Section 1.2.A to apply only to the prevailing bidder after award of the contract?

Short Answer 1: Yes. The IFB contained a material ambiguity because the record unequivocally shows that when GCC drafted the Solicitation, GCC intended for — and reasonably interpreted — Section 1.2.A to mean one thing but J&B, and apparently the other bidders, interpreted Section 1.2.A to mean something other than GCC intended.

Question 2: Whether J&B has already received the only remedy available to it when, because all bidders failed to provide shop drawings of their proposed design-build structures as GCC had intended, GCC cancelled the IFB for the purpose of reviewing the Solicitation and re-soliciting the IFB?

Short Answer 2: Yes. The law is clear that where, as here, a solicitation contains a material ambiguity that results in non-responsive bid submissions, the only appropriate course of action is cancellation, clarification and re-solicitation.

### **ARGUMENT<sup>3</sup>**

In its Appeal, J&B reiterates its protest allegation that GCC wrongfully interpreted the Solicitation to require shop drawings for the design-build structure to be submitted in a bid packet. J&B's allegation is unavailing. This is so because GCC — the drafter of the IFB — intended Section 1.2.A to mean that the bidders would provide drawings of their proposed design-build structures but J&B, and apparently the other bidders, interpreted Section 1.2.A to mean that only the prevailing winning bidder was required to submit drawings after award of the contract. Therefore, the only conclusion is that the IFB contained a material ambiguity, which could be either patent or latent. Moreover, it is important to keep in mind that this IFB solicited for a *design-build* project and that procurements for such projects are guided by special regulations that anticipate the bidders submitting drawings for the project they propose to design and build.

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<sup>3</sup> GCC acknowledges and apologizes for any redundancies in the arguments below. Undersigned counsel strove to minimize repetition. However, due to the overlapping nature of the questions presented and the need to preserve matters for any possible future proceedings, some repetition is necessary.

J&B also claims its remedy for its Appeal is that the Public Auditor should order that J&B's bid packet was responsive to the IFB.<sup>4</sup> J&B is mistaken. Where, as here, the Solicitation contained a material ambiguity that resulted in the bidders' submissions being non-responsive, the law clearly instructs that the appropriate course of action is to cancel the Solicitation for the purpose of clarifying and re-soliciting the IFB — which is exactly what GCC did. In other words, J&B has already received the only remedy available.

**A. The IFB Contained a Material Ambiguity Regarding the Requirement for the Bidders to Submit Shop Drawings of Their Proposed Design-Build Structures in Their Bid Packets**

At issue in this Appeal is the ambiguity in Section 1.2.A (“Section”) of the IFB's General Requirements and Scopes of Work, which states:

**1.2. DESCRIPTION:**

Construct a design-build generator building and provide diesel electric generating unit with accessories, auxiliary equipment, and associated work as specified.

A. Provide GCC with shop drawings and submittals for the construction of design-build generator building to enclose the generator set/system.

1. Ensure drawings, shop drawings and submittals provided are certified by master electricians and electrical contractors and sub-contractors.
2. Ensure civil and structural engineers certify drawings, shop drawings and submittals.
3. Submit certified drawings, shop drawings, and submittals to GCC for review and acceptance.
4. Ensure shop drawings and submittals are provided for feeder cables to the Allied Health Building and Building A.

(GCC~Tab 10~AR0031 (emphasis in original).)

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<sup>4</sup> As explained in GCC's Statement and conceded by J&B in its Comments, the law does not provide for J&B's initially requested remedy of a contract award. (See Statement at 11-12; Comments at 6; see also Notice of Appeal at 7.)



As detailed below, GCC drafted this Section with the intention that the language articulated a requirement for the bidders to submit drawings of their proposed design-build structures in their bid packets; then, after award of the contract, the prevailing bidder would perform subsections 1 through 4. J&B, however, alleges that Section 1.2.A's requirement to provide shop drawings for the design-build structure could only be interpreted to mean that this requirement became effective after award of the contract. (See Notice of Appeal at 3-7; Comments at 5-6; Opp'n at 3-7.) J&B's allegation is misguided.

While J&B's interpretation of the IFB's shop drawings requirement bears on whether Section 1.2.A was ambiguous, J&B's interpretation alone is not enough for its Appeal to prevail. Rather, as the drafter of the Solicitation, GCC's intention for the IFB's bid submission requirements must be afforded considerable weight. See, e.g., *Gov't & Military Certification Sys., Inc.*, B-413875, 2016 WL 7425332, at \*2-4 (U.S. Comp. Gen. Dec. 22, 2016) (discussing the agency's intention for the solicitation requirements); *Ashe Facility Servs., Inc.*, B-292218.3, 2004 WL 901404, at \*8-9 (U.S. Comp. Gen. Mar. 31, 2004) (same); *Mobile Dredging & Pumping Co.*, B-278725, 1998 WL 98732, at \*2-3 (U.S. Comp. Gen. Mar. 6, 1998) (same); *MLC Fed., Inc.*, B-254696, 1994 WL 8658 (U.S. Comp. Gen. Jan. 10, 1994) (same).<sup>5</sup>

Here, there is no question that GCC intended for the bidders to provide something that illustrated the structure they proposed to design and build. It is indisputable that GCC drafted the IFB, which solicited for a design-build structure to house the generator and

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<sup>5</sup> Notably, all the cases that J&B has cited in support of its position on whether a document is ambiguous (see Opp'n at 4) involved the interpretation of agreements that had been negotiated and drafted by the parties. See *Curry Rd. Ltd. v. K Mart Corp.*, 893 F.2d 509 (2d Cir. 1990) (commercial lease agreement); *Niehaus v. Cowles Bus. Media, Inc.*, 819 A.2d 765 (Conn. 2003) (agreement regarding the sale of stock); *Steiner v. Lewmar, Inc.*, 816 F.3d 26 (2d Cir. 2016) (settlement agreement). Here, the document in issue is *not* an agreement between two parties. Importantly, the document in issue is a bid solicitation and J&B obviously had no role whatsoever in preparing the IFB. Thus, J&B's cited cases have little, if any, bearing on the instant matter.

directed that the bidders were to provide drawings of their proposed structures (*see* GCC~Tab 10~AR0030-31). And, as explained below, under the regulations that guide the design-build procurement method, bidders are expected to submit drawings of their proposed projects in their bid packets. (*See infra.*) Also, the procurement record clearly reveals that the evaluation sheets for the bid packets included the criterion: “Drawings were submitted with Bid Proposal.” (GCC~Tab 7~AR0004, 26 & 48.) Furthermore, it is axiomatic that these evaluation sheets were based on the Solicitation and prepared in advance of the bid packets’ evaluations.

Additionally, the declarations of the GCC team (“Team”) who both prepared the Solicitation and evaluated the bid packets unequivocally establish that GCC — the drafter of the IFB — intended for the bidders to submit drawings of the structure that they proposed to design and build. (*See* Decl. D. Perez at ¶¶ 4-8; Decl. F. Palacios at ¶¶ 4-8; Decl. R. Pritchard at ¶¶ 4-8.) And GCC had several valid reasons for requiring the bidders to submit drawings of their proposed design-build structures, such as:

- a. to ensure that the proposed design-build structure
  - i. is constructed of materials capable of properly housing a generator — e.g., concrete or steel;
  - ii. is large enough to house the generator;
  - iii. provides for adequate ventilation of the generator;
  - iv. allows for adequate access to perform maintenance on the generator;
  - v. completely encloses the generator;
  - vi. adequately fits between Building A, the Anthony A. Leon Guerrero Allied Health Center Building and the parking lot nearby<sup>6</sup>;

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<sup>6</sup> The campus map provided in the Solicitation illustrates the small space in which the prevailing bidder’s proposed design-build structure must fit. (*See* GCC~Tab 10~AR0027 (Building A, the Allied Health Center (Building 3000) and the parking lot are located at the bottom center of the map).)

- vii. does not obstruct the elevator for Building A7;
- viii. integrates with the current architecture of the campus;
- ix. does not impair the overall safety of the campus community;
- b. to visualize the footprint of the proposed structure;
- c. to ascertain the reasonableness of the price for the proposed structure; and
- d. to view the structure in which GCC will be making a significant investment.

(*See id.* at ¶¶ 7-8.) Moreover, and in sharp contrast to the overblown reading that J&B has propounded (*see* Notice of Appeal at 5-7; Comments at 3-6; Opp'n at 6-7), GCC drafted Section 1.2.A with the intention that the bidders would provide shop drawings of their proposed design-build structures in their bid packets; then, after a bidder was selected and awarded the contract, that bidder “would finalize its design with the necessary certifications” — i.e., “perform subsections 1 through 4 of Section 1.2.A.” (Decl. D. Perez at ¶ 9; Decl. F. Palacios at ¶ 9; Decl. R. Pritchard at ¶ 9.)

What is more, the term “shop drawings” does not necessarily mean engineer-certified drawings as J&B has insisted. (*See* Comments at 3; Opp'n at 7-10.)<sup>8</sup> Rather, this term can also mean simply drawings, diagrams, illustrations, schematics, layouts, etc. As defined by professional engineers, “Shop Drawings” are: “All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for Contractor and submitted by Contractor to illustrate some portion of the Work.” Eng'rs Joint Contract Docs. Comm., *ECJCDC C-700 Standard Gen. Conditions of the Constr. Contract*, 4 at No. 40 (2007).<sup>9</sup> Similarly, the Federal Acquisition Regulations provide that “Shop

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<sup>7</sup> On the campus map, the small cube abutting the left side of Building A illustrates the elevator. (*See* GCC~Tab 10~AR0027.)

<sup>8</sup> GCC agrees with J&B's statement that the actual cost of engineer-certified shop drawings is a non-issue for this Appeal. (*See* Opp'n at 8-9.)

<sup>9</sup> Available at [www.govbids.com/StoredDoc/MITN/Documents/Bid/123155\\_0\\_2.PDF](http://www.govbids.com/StoredDoc/MITN/Documents/Bid/123155_0_2.PDF)

drawings . . . includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the contractor to explain in detail specific portions of the work required by the contract.” FAR § 52.236-21(d). Indeed, if J&B had not failed to provide the “attached sketch” of the design-build structure it proposed (GCC~Tab 8 ~AR0006, No. 6), that sketch might have met the Solicitation’s requirement of shop drawings for the building to house the generator (*see* Decl. D. Perez at ¶ 13; Decl. F. Palacios at ¶ 13; Decl. R. Pritchard at ¶ 13).

On another note, as the Hearing Officer pointedly observed at the May 1 hearing, GCC could reject the winning bidder’s previously unseen design after award of the contract. And as J&B’s counsel acknowledged, such a rejection could result in the contractor being required to redesign the building and redo certified shop drawings. Thus, submitting drawings of a design-build project in bid packets also benefits the bidders by decreasing the likelihood of incurring costs that were not incorporated into a bid price.

Accordingly, the record clearly shows that GCC always intended for — and reasonably interpreted — Section 1.2.A to require bidders to submit drawings of their proposed design-build structure in their bid packets. Given J&B’s alternative reading of Section 1.2.A, coupled with the fact that no bidder provided drawings of their proposed design-build structures, the Solicitation contained a material ambiguity. *RELI Grp., Inc.*, B-412380, 2016 WL 625148 (U.S. Comp. Gen. Jan. 28, 2016) (“An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible. A party’s particular interpretation need not be the most reasonable to support a finding of ambiguity; rather, a party need only show that its reading of the solicitation provisions is reasonable and susceptible of the understanding that it reached.”) (citations omitted).

**1. *Whether Section 1.2.A Is Patently or Latently Ambiguous, J&B's Appeal Is Unavailing***

Where, as here, an ambiguity exists in the solicitation's terms, the tribunal must "determine whether the ambiguity is latent or patent." *Linc Gov't Servs., LLC v. United States*, 96 Fed. Cl. 672, 708 (2010) (citation omitted). "[A] patent ambiguity in a solicitation is one that is 'obvious, gross, [or] glaring'" and "may take the form of 'facially inconsistent provisions' that would 'place a reasonable [offeror] on notice' of a conflict or discrepancy." *Id.* (alterations in original; citations omitted). "When a solicitation contains a patent ambiguity, the offeror has 'a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation' in a subsequent court action." *Id.* (citations omitted). On the other hand, "[a]n ambiguity is latent if it is not apparent on the face of the solicitation and is not discoverable through reasonable or customary care." *Id.* (citations omitted).

Here, the ambiguity in Section 1.2.A could be considered a patent one. J&B submitted numerous questions regarding the Solicitation's requirements. (See GCC~ Tab 10~AR0045-53.) Indeed, J&B submitted questions specifically on the design-build structure to house the generator. (See *id.* at AR0050-51.) Moreover, J&B obviously interpreted the Solicitation to require the submission of a drawing for the design-build structure because J&B intended, but neglected, to include a "sketch" of the building in its bid packet. (See GCC~Tab 8~AR0006 at No. 6 (describing the building in a narrative and denoting "(see attached sketch)").) Thus, J&B could be held to the duty to seek clarification on the submission requirements for the design-build structure. See, e.g., *CliniComp Int'l, Inc. v. United States*, 117 Fed. Cl. 722, 738-39 (2014)("[E]ven if the court were to perceive an ambiguity within the solicitation's terms, any such ambiguity would be patent . . . . [T]he

provisions of the solicitation upon which plaintiff relies in support of its interpretation of CPRS were clearly apparent to CliniComp before it submitted its quotation. . . . CliniComp submitted inquiries regarding other technical requirements before the September 25, 2013 deadline for the submission of quotations, thus demonstrating that CliniComp had ample time to discern and object to any ambiguity in the RFQ before that date. CliniComp therefore had a duty to seek clarification regarding any such ambiguity prior to the close of bidding.”) (citations omitted).

Accordingly, given J&B’s several inquiries about the IFB’s requirements for the design-build structure and its obvious intention to provide more than a just a narrative description of the structure, J&B could be found “on notice” of any ambiguity and therefore should have sought clarification before submitting its bid packet. Notably, a protest grounded on a patent ambiguity should be denied. *See, e.g., Deco Sec. Servs.*, B-294516, 2004 WL 2480944 (U.S. Comp. Gen. Nov. 1, 2004).

Alternatively, the material ambiguity in Section 1.2.A could also be deemed a latent one. This is so because the ambiguity was not apparent until GCC’s evaluation of the bid packets, none of which contained drawings of the bidders’ proposed design-build structures. *See, e.g., Ashe Facility Servs., Inc.*, B-292218.3, 2004 WL 901404, at \*8 (U.S. Comp. Gen. Mar. 31, 2004) (“[A] latent ambiguity is more subtle. Since . . . the ambiguity only came to light in the context of the agency’s price evaluation, we conclude that the ambiguity was latent[.]”). And, as explained in detail below, even if Section 1.2.A’s requirement of shop drawings for the design-build structure was a latent ambiguity that resulted in bid packets being non-responsive, GCC appropriately cancelled the Solicitation so that it could re-issue the IFB.

Most notably, whether the ambiguity in Section 1.2.A was patent or latent, J&B's Appeal is unavailing. A patent ambiguity warrants denial of the Appeal because J&B should have sought clarification on Section 1.2.A's requirements. And a latent ambiguity warrants dismissal of the Appeal because J&B's remedy is exactly what GCC already did: Cancel the Solicitation for the purpose of clarifying and re-soliciting the IFB. Simply put, J&B has already gotten the best that it can get.

***2. Importantly, the Regulations that Guide the Design-Build Procurement Method Instruct that a Contractor Is Selected Based on Its Proposed Design and J&B Knew that the IFB Solicited for a Design-Build Project***

It is noteworthy that this IFB solicited for a design-build project — i.e., the structure to house the generator. Guam's Procurement Regulations guide the design-build method of procurement. Chapter 5 of the Regulations provides the following description:

(d) Design Build or Turnkey. In a design-build or turnkey project, a business contracts directly with the territory to meet the territory's requirements as described in a set of performance specifications by constructing a facility to its own plans and specifications. Design responsibility and construction responsibility both rest with the design-build contractor. This method can include instances where the design-build contractor supplies the site as part of the package.

2 GAR, Div. 4, § 5102(3)(d). Further, the Regulations instruct how this procurement method is used to select a contractor for award.

(a) Use. The design-build or turnkey method gives the contractor maximum control of the construction project consistent with territory needs. The territory prepares a set of performance specifications including functional criteria, any life-cycle cost considerations, and other evaluation factors. The territory shall also specify the degree of detail necessary in a design proposal. *The contractor is selected on the basis of its design proposal, proposed price, and other stated evaluation criteria. . . .* In appropriate circumstances, it may be advantageous to provide in the solicitation for payment to all or any of the firms of proposal preparation costs or a stipulated stipend to ensure adequate continuing competition. *After award, the contractor completes the design,*

subject to review by the territory or its architect-engineer as set forth in the contract, and constructs the project. . . .

2 GAR, Div. 4, § 5102(7)(a) (emphasis added).

Thus, under Guam's Procurement Regulations, when a solicitation is for a design-build project, the bidders are expected to submit drawings of the project that they propose to design and build. Moreover, the submission of drawings is a common expectation for design-build procurements. Indeed, a continuing education provider for professional engineers instructs that a design-build solicitation response includes "Presentation Drawings" and that: "The presentation drawings that are required are usually stipulated in the RFP."<sup>10</sup> Furthermore, the regulations anticipate exactly what GCC intended with Section 1.2.A and its subsections. As established by the Team's declarations (*see* Decl. D. Perez at ¶ 9; Decl. F. Palacios at ¶ 9; Decl. R. Pritchard at ¶ 9), GCC intended that the bidders would provide drawings of their proposed buildings and the prevailing bidder would obtain the necessary certifications after award of the contract, which is the very process articulated in the regulations that guide a design-build procurement, *see* 2 GAR, Div. 4, § 5102(7)(a) ("The territory shall also specify the degree of detail necessary in a design proposal. . . . After award, the contractor completes the design, subject to review by the territory or its architect-engineer[.]").

Here, there is no question that all the bidders — especially, J&B — were aware that this Solicitation was for a design-build, or turnkey, project. The IFB clearly stated that GCC was soliciting for "a *design-build* generator building." (GCC~ Tab 10~AR0030 (emphasis added).) The IFB's "General Requirements and Scope of Work" stated that the bidders were

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<sup>10</sup> Engineer Educators, [www.engineereducators.com/docs/designMaterials.pdf](http://www.engineereducators.com/docs/designMaterials.pdf) (last visited Apr. 22, 2017).



to “[p]rovide GCC with shop drawings and submittals for the construction of *design-build* generator building to enclose the generator set/system.” (GCC~Tab 10~AR0030-31 (emphasis added).) At the pre-bid conference, GCC and the bidders discussed the turnkey — i.e., design build — nature of the project solicited for by the IFB. (See GCC~Tab 9~AR0004.) J&B asked, “is the *turnkey* only applicable to the generator[?]” (*Id.* (emphasis added).) GCC answered, “it is the whole, overall project.” (*Id.*) J&B inquired, “*this is to include the building[?]*” (*Id.* (emphasis added).) “*Yes, to include the building,*” GCC replied. (*Id.* (emphasis added).) And when J&B submitted written questions about the specifics of the building, GCC four times answered: “*As a design-build project, it is up to the contractor to determine . . .*” (GCC~Tab 10~AR0050-51 (emphasis added).)

Moreover, J&B’s prior experience with procurement solicitations not requiring shop drawings until after award of the contract (see Decl. G. Bangayan (Apr. 10, 2017) at ¶¶ 2-3) is irrelevant because *this IFB* — soliciting for, in part, a *design-build* project — required the bidders to provide “shop drawings and submittals” for the structure they proposed to design and build.<sup>11</sup> And, as explained above, it is common that a solicitation for a design-build project will require bidders to submit drawings of their proposed design. See also, e.g., *SPEC Inc. v. Dept. of Transport.*, No. 01-1169BID, 2001 WL 629842, at \*7-8 (Fla. Div. Admin. Hrgs. June 5, 2001) (discussing the drawings submitted by bidders on a government solicitation for a design-build roof replacement project); *PCCP Constr., JV, Bechtel Infrastructure Corp.*, B-405036, 2011 WL 3510746, at \*7-9 (U.S. Comp. Gen. Aug. 4, 2011) (discussing the drawings

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<sup>11</sup> Tellingly, the “Statement of Experience” attached to Mr. Bangayan’s Declaration does not mention any design-build projects. (See Decl. G. Bangayan at Ex. A.) And this list of experience includes several non-government projects and numerous projects that apparently involved air conditioning units. (See *id.*) Thus, it is questionable whether J&B has ever bid on a design-build structure like the one solicited by this IFB.

submitted by a bidder on a government solicitation for a design-build pump station); *Am. Physical Sec. Grp., LLC*, B-405059, 2011 WL 3097958, at \*1 (U.S. Comp. Gen. July 25, 2011) (noting that a government solicitation for “the fabrication and installation of aluminum forced-entry/ballistic-resistant windows . . . required that offerors provide sample shop drawings”); *Medlin Constr. Grp.*, B-286166, 2000 WL 1745358, at \*3-6 (U.S. Comp. Gen. Nov. 24, 2000) (discussing the drawings submitted by a bidder on a government solicitation for the “design and construction of physical fitness centers”). What is more, the fact that this IFB’s requirements differed from J&B’s prior experience was all the more reason for J&B to seek clarification before submitting its bid packet. (*See supra* discussion on patent ambiguity.)

Accordingly, the regulations that guide a design-build procurement — and J&B was well aware that the IFB solicited for design-build project — should be taken into consideration for the instant Appeal.

**B. Cancellation and Re-solicitation Is the Only Remedy Available and Because J&B Already Received this Remedy, the Appeal Should be Dismissed**

Cancellation for the purpose of re-solicitation is the only remedy for the instant matter — which is exactly what GCC already did (*see* GCC~ Tab 5~AR001). Nonetheless, relying on two decisions of the Public Auditor, J&B insisted that ordering reconsideration of its bid packet is an available remedy. (*See* Comments at 6-7.) The decisions that J&B relied upon are inapposite for the matter at hand.

Contrary to J&B’s insistence, neither *JMI Edison*, OPA-PA-13-010, Dec. (Sept. 25, 2013) nor *Phil Gets (Guam) International Trading Corp. dba J&B Modern Tech*, OPA-PA-13-002 & -003, Consol. Dec. (June 14, 2013), can be likened to the instant Appeal. In *JMI Edison*, the purchasing agency found that only the protestor’s bid was non-responsive and the agency

stipulated to facts that rendered that bid to be responsive. *See* OPA-PA-13-010, Dec. at 2-3. *J&B Modern Tech* involved an appeal from the purchasing agency's suspension of the protesting bidder and subsequent rejection of that protestor's bid packet because of the suspension. *See* OPA-PA-13-002 & -003, Consol. Dec. at 1.

Here, in stark contrast to *JMI Edison* and *J&B Modern Tech*, GCC found that *all* bid packets were non-responsive. And when all bids are rejected for non-responsiveness, the purchasing agency should cancel and re-issue the solicitation. *See* 2 GAR, Div. 4, § 3115(d)(2); *see also* 5 GCA § 5225; *accord, e.g., Jarrett S. Blankenship Co.*, B-213294, 1984 WL 44046 (U.S. Comp. Gen. Apr. 2, 1984) ("Since all bids received were nonresponsive, the Navy properly canceled IFB-A200 and resolicited the requirement."); *Gulf & W. Healthcare, Inc.*, B-209684, 1983 WL 27277 (U.S. Comp. Gen. Aug. 25, 1983) ("the Army's cancellation of the solicitation was proper because it received no bid which was completely responsive"). Accordingly, *JMI Edison* and *J&B Modern Tech* are wholly inapposite for the instant Appeal.

Most importantly, the only remedy for this Appeal is cancellation and re-solicitation. GCC drafted Section 1.2.A with the intention that the bidders would submit drawings of their proposed design-build structures in their bid packets and that the prevailing bidder would finalize its design, with the necessary certifications, after award of the contract. Apparently, GCC's intention was unclear in the IFB because no bidder submitted drawings of its proposed design-build structure. The Solicitation therefore contained a material ambiguity for which the only remedy is cancellation and re-solicitation. Although indeed unfortunate that this IFB must be redone, cancellation and re-solicitation is the only appropriate course of action for GCC, and the only remedy available to J&B.

Guam's procurement laws are designed to place all bidders on an even footing when responding to a solicitation. *See* 5 GCA §§ 5001(b)(4) & (6). Here, unfortunately, *all* bid packets were non-responsive to the IFB's requirement to include drawings of the design-build structure — which GCC, as the drafter of the Solicitation, undoubtedly intended for the bidders to do (*see* GCC~Tab 7~AR004, 026 & 048 (evaluation sheets' criteria included: "Drawings were submitted with Bid Proposal"); *see also* Decl. D. Perez at ¶¶ 5-9 (explaining the intention when the Team drafted the Section 1.2.A of the IFB's General Requirements and Scopes of Work); Decl. F. Palacios at ¶¶ 5-9 (same); Decl. R. Pritchard at ¶¶ 5-9 (same).) In such a situation, all bidders must be provided an opportunity to submit a responsive bid packet that would allow GCC to award the contract in accordance with the procurement law. *See, e.g., Brickwood Contractors, Inc.*, B-292171, 2003 WL 21276279, at \*4 (U.S. Comp. Gen. June 3, 2003) ("Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis.") (citation omitted); *Ashe Facility Servs., Inc.*, B-292218.3, 2004 WL 901404, at \*9 (U.S. Comp. Gen. Mar. 31, 2004) ("the appropriate course of action is to clarify the RFP and afford offerors an opportunity to submit proposals based on the clarified solicitation") (citation omitted).

Accordingly, GCC properly cancelled the Solicitation in order to review its requirements and re-solicit the IFB. *See, e.g.,* 2 GAR, Div. 4, § 3115(2)(A)(ii) (providing that "[a]fter opening, but prior to award, all bids or proposals may be rejected in whole or in part . . . for reasons including, but not limited to: . . . (ii) ambiguous or otherwise inadequate specifications were part of the solicitation"); *Bade Roofing & Sheet Metal Co.*, B-243496, 1991 WL 126507 (U.S. Comp. Gen. Jun. 25, 1991) ("[W]here a solicitation contains a latent ambiguity that has the effect of misleading one or more bidders into submitting

nonresponsive bids, the appropriate remedy is cancellation and resolicitation rather than award to the low bidder; it is not appropriate to make award to a bidder, which did not comply with a material invitation for bids requirement.”); *MLC Fed., Inc.*, B-254696, 1994 WL 8658 (U.S. Comp. Gen. Jan. 10, 1994) (“Where a solicitation has a latent ambiguity that misleads one or more offerors, the appropriate remedy is cancellation and resolicitation.”); *Bosco Contracting, Inc.*, B-244659, 1991 WL 182206 (U.S. Comp. Gen. Aug. 27, 1991) (“Where, as here, a solicitation contains a latent ambiguity that misleads bidders into submitting nonresponsive bids, the appropriate remedy is cancellation and resolicitation; contrary to [the protestor’s] contention, award could not be made to it because its bid was nonresponsive[.]”); *Ashe Facility Servs., Inc.*, B-292218.3, 2004 WL 901404, at \*9 (U.S. Comp. Gen. Mar. 31, 2004) (“Under these circumstances [latent ambiguity], the appropriate course of action is to clarify the RFP and afford offerors an opportunity to submit proposals based on the clarified solicitation.”); *RELI Grp., Inc.*, B-412380, 2016 WL 625148 (U.S. Comp. Gen. Jan. 28, 2016) (“Where there is a latent ambiguity, the appropriate course of action for an agency is to clarify the requirement and afford offerors an opportunity to submit proposals based on the clarified requirement.”).

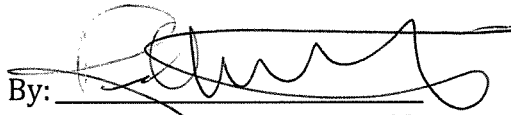
In short, the only possible remedy available to J&B is the one that it has already received: cancellation and re-solicitation. The instant Appeal should therefore be dismissed. *See, e.g., Bade Roofing & Sheet Metal Co.*, B-243496, 1991 WL 126507 (U.S. Comp. Gen. Jun. 25, 1991) (dismissing because the purchasing agency already provided the only remedy available); *Bosco Contracting, Inc.*, B-244659, 1991 WL 182206 (U.S. Comp. Gen. Aug. 27, 1991) (same).

## CONCLUSION

For the foregoing reasons, along with those articulated in its prior filings and during oral argument on its Motion, GCC respectfully requests that the Public Auditor either deny or dismiss the J&B's Appeal.

Respectfully submitted this 10th day of May 2017.

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