



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

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

IN THE APPEAL OF

PHIL-GETS (GUAM) INTERNATIONAL
TRADING CORP. DBA J&B MODERN
TECH,

Appellant.

APPEAL NO. OPA-PA-17-003

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for this appeal, OPA-PA-17-003. Appellant, PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP. dba J&B MODERN TECH (“J&B”) filed its appeal on March 20, 2017 of GUAM COMMUNITY COLLEGE’s (“GCC”) March 9, 2017 denial of protest of GCC’s January 27, 2017 Notice of Cancellation of Invitation for Bid No.: GCC-FB-17-001 (“IFB”).

On April 10, 2017, GCC filed Purchasing Agency’s Motion for Expeditious Dismissal. On April 10, 2017, J&B filed the Declaration of Generoso M. Bangayan. On April 17, 2017, J&B filed Appellant’s Opposition to Purchasing Agency’s “Motion for Expeditious Dismissal.” On April 24, 2017, GCC filed Purchasing Agency’s Reply in Support of Motion for Expeditious Dismissal, along with the Declaration of Doris U. Perez, the Declaration of Francisco (Kiko) E. Palacios, and the Declaration of Richard (Wayne) Pritchard.

On May 2, 2017, J&B filed a Withdrawal of Request for Hearing and agreed to submit this case on the record without a hearing. On May 5, 2017, the Public Auditor issued an Order granting

1 J&B's unopposed withdrawal of its request for a hearing on the merits of its appeal. On May 9,
2 2017, J&B filed Appellant's Appeal Brief. On May 10, 2017, GCC filed Purchasing Agency's
3 Appeal Brief. On May 17, 2017, J&B filed Appellant's Response Brief and GCC filed Purchasing
4 Agency's Response to Appellant's Appeal Brief.

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6 The Public Auditor holds that GCC's rejection of all bids and cancellation of the bid was
7 authorized.

8 Accordingly, J&B's appeal is DENIED.

9 10 **II. FINDINGS OF FACT**

11 The Public Auditor in reaching this Decision has considered and incorporates herein the
12 procurement record and all documents submitted by the parties, and all arguments made during the
13 hearings held on April 11, 2017 and May 1, 2017. Based on the aforementioned record in this
14 matter, the Public Auditor makes the following findings of fact:

- 15 1. On October 3, 2016, GCC issued GCC-FB-17-001 for the construction of a generator
16 building and installation of a back-up generator system to service GCC Allied Health Center
17 and Building A. [Agency Report ("AR") Tab 10.]
- 18 2. The IFB included a "Special Reminder to Prospective Bidders" advising bidders of what
19 was to be included in their bids. [AR, Tab 10, AR002.] There is no mention of a requirement
20 for "shop drawings" or a "sketch" or any other type of unwritten pictorial material in this
21 list.
- 22 3. IFB Section 1 of the General Requirements & Scopes of Work is entitled "Cost Proposal".
23 [AR, Tab 10, AR0030.] Part 1.1 of this subsection requires bidders to provide the "lump-
24 sum, firm-fixed price and cost proposal" for the work to be done under the contract. *Id.* It
25 states, "Contractor's cost proposal shall include (and not be limited to) ..." [AR, Tab 10,
26 AR0031.] The items to be included in the cost proposal are then listed in Part 1.2:
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1 Construct a design-build generator building and provide diesel electric
2 generating unit with accessories, auxiliary equipment, and associated work
as specified.

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

5 1. Ensure drawings, shop drawings and submittals provided are
6 certified by master electricians and electrical contractors and
subcontractors.

7 2. Ensure civil and structural engineers certify drawings, shop drawings
and submittals.

8 3. Submit certified drawings, shop drawings, and submittals to GCC for
review and acceptance.

9 4. Ensure shop drawings and submittals are provided for feeder cables
to the Allied Health Building and Building A.

10 B. Construct design-build building.

11 C. Install generator set/system sanctioned under the Buy American Act.

12 D. Connect generator set/system to buildings A and Allied Health Center.

13 E. Test to ensure functionality of system.

14 4. The IFB stated, “The College shall have the authority to award, cancel, or reject bids, in
15 whole or in part for any one or more items if he determines it is in the public interest.” [AR,
16 Tab 10, AR0009, ¶ 23.]

17 5. The GCC “Team” consisting of Doris U. Perez, the GCC Assistant Director Planning &
18 Development Department; Francisco (Kiko) E. Palacios, the GCC Sustainability and
19 Project Coordinator; and Richard (Wayne) Pritchard, the GCC Facilities and Maintenance
20 Supervisor; along with feedback from GCC’s retained architect, prepared IFB Section 1.2.A
21 with the intention that this Section required bidders to submit drawings of their proposed
22 design-build structures in their bid packets. [Declaration of Doris U. Perez, ¶¶ 4-9;
23 Declaration of Francisco (Kiko) E. Palacios, ¶¶ 4-9; Declaration of Richard (Wayne)
24 Pritchard, ¶¶ 4-9.]
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1 6. In her Declaration, Doris U. Perez, declared that it was GCC's intention for the bidders to
2 submit drawings of the structure that they proposed to design and build to properly maintain
3 their proposed generator. This intention was based on multiple reasons, including:

- 4 • To ensure the suitability of the proposed design-build structure
- 5 • To visualize the footprint of the proposed structure
- 6 • To ascertain the reasonableness of the price for the proposed structure
- 7 • To view the structure in which GCC will be making a significant investment

8 [Declaration of Doris U. Perez, ¶¶ 6-7.]

9 7. Ms. Perez declared that "GCC also considered this IFB's shop drawings requirement...to
10 be a *material component* (emphasis added) of the bidders' submissions..." [*Id.* at ¶ 8.]

11 8. In his Declaration, Francisco (Kiko) E. Palacios, declared that the IFB Scope of Work was
12 drafted with the intention for the bidders to submit drawings of the structure that they
13 proposed to design and build, that the language of IFB Section 1.2.A required bidders to
14 submit drawings, that the IFB's shop drawings requirement was a material component of
15 the bidders' submissions, and reiterated the reasons for the shop drawings requirement.

16 [Declaration of Francisco (Kiko) E. Palacios, ¶¶ 5-8.]

17 9. In his Declaration, Richard (Wayne) Pritchard, declared that the IFB Scope of Work was
18 drafted with the intention for the bidders to submit drawings of the structure that they
19 proposed to design and build, that the language of IFB Section 1.2.A required bidders to
20 submit drawings, that the IFB's shop drawings requirement was a material component of
21 the bidders' submissions, and reiterated the reasons for the shop drawings requirement.

22 [Declaration of Richard (Wayne) Pritchard, ¶¶ 5-8.]

23 10. On November 8, 2016, three bidders submitted packets in response to the IFB: J&B, Talion
24 Construction, and Propacific Builder Corporation. [AR, Tab 7; Procurement Record
25 ("PR"), Tab 11.]
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- 11. J&B’s bid was the lowest. [AR, Tab 7.]
- 12. Neither J&B nor any other bidder submitted drawings of their proposed design-build structures in their bid packets. [PR, Tab 11; Declaration of Doris U. Perez, ¶¶ 10-11; Declaration of Francisco (Kiko) E. Palacios, ¶¶ 10-11; Declaration of Richard (Wayne) Pritchard, ¶¶ 10-11.]
- 13. When GCC evaluated the bid packets, the evaluation sheets included the criterion: “Drawings were submitted with Bid Proposal.” [AR, Tab 7, AR0004, 0026, 0048.]
- 14. J&B’s bid submittal included 169 pages of documentation, including some pictures and diagrams, pertaining to the generator. [AR, Tab 8, AR0001-0169.] Mr. Bangayan stated in his Declaration that descriptive literature for a generator was included in J&B’s bid package for GCC-FB-17-001 and was provided free of charge by the manufacturer. [Declaration of Generoso M. Bangayan, ¶ 4.] J&B could not get shop drawings or descriptive literature from a manufacturer for the generator building free of charge. [*Id.* at ¶ 5.] J&B did submit a Project Narrative Technical Approach, which included an “Executive Summary of Construction/Installation Work to be Performed”. [AR, Tab 8, AR0004-0007.] This summary included a detailed description of the building, including the dimensions, materials to be used, size of the exterior and interior doors, and ventilation. *Id.* J&B referenced an attached sketch, but no sketch was attached.
- 15. GCC determined that 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.” [AR, Tab 6, AR0001; Declaration of Doris U. Perez, ¶¶ 10-12; Declaration of Francisco (Kiko) E. Palacios, ¶¶ 10-12; Declaration of Richard (Wayne) Pritchard, ¶¶ 10-12.]

1 16. On January 27, 2017, GCC, by its President, Mary A.Y. Okada, Ed. D., issued a Notice of
2 Cancellation advising all bidders that the bid is cancelled in whole and will be re-issued at
3 a later date. [AR, Tab 5, AR0001.] President Okada notified the three bidders that “no
4 awards will be made” for the IFB and stated:

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

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

8 President Okada further advised:

9 After reviewing the submission and all other documents submitted, GCC
10 wants to ensure that all issues and requirements are addressed and taken into
11 consideration. In view of the above, the GCC Planning & Development
12 office will review the Scope of Work and requirements of this project and a
13 new bid will be issued. All bidders above will be advised when a new bid is
14 issued so that you may have another opportunity to participate.

15 17. On February 6, 2017, J&B filed a bid protest (“Protest”). J&B asserted that “shop drawings
16 were not included in the requirements for bids ...” and, “[b]ecause the bid was improperly
17 cancelled, and because J&B had the lowest bid, J&B should be awarded the contract for
18 this matter.” [AR, Tab 4, AR0001-0002.]

19 18. On March 9, 2017, GCC denied the Protest stating that “shop drawings were required and
20 stated in the Scope of Work.” GCC further stated, “GCC has the right to reject all bids and
21 cancel a solicitation when none of the bids meet all the material specifications.” [AR, Tab
22 3, AR0001-0002.]

23 19. On March 20, 2017, J&B filed the instant Appeal from GCC’s denial of J&B’s Protest.

24 20. GCC drafted the IFB Scope of Work with the intention that bidders submit shop drawings
25 of the structure that they proposed to design and build.

26 21. GCC intended that the language of IFB Section 1.2.A require bidders to submit shop
27 drawings.
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1 22. From GCC's perspective, the IFB's shop drawings requirement was a material component
2 of the bidders' submissions.

3 23. However, the IFB language was materially ambiguous as to whether or not IFB Section
4 1.2.A required bidders to provide shop drawings of their proposed design-build structures
5 in their bid packets.

6 24. The IFB's material ambiguity resulted in no bidder providing GCC with shop drawings and
7 submittals.
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9 III. CONCLUSIONS OF LAW

10 Pursuant to 5 G.C.A. § 5703, the Public Auditor reviews GCC's denial of J&B's Protest *de*
11 *novo* and concludes GCC's cancellation of the bid was proper. The IFB provides that "The College
12 shall have the authority to award, cancel, or reject bids, in whole or in part for any one or more
13 items if he determines it is in the public interest." [AR, Tab 10, AR0009, ¶ 23.]

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15 After bid opening, GCC President Okada rejected the bids and advised the bidders *inter alia*
16 that the bid would be cancelled in whole and re-issued at a later date; that no awards would be
17 made; that it is in the interest of the college to cancel the above bid; and, that all bidders failed to
18 provide GCC with shop drawings and submittals. [AR, Tab 5, AR0001.]

19 In its March 9, 2017 Denial of Protest, GCC, through President Okada and the GCC
20 Procurement & Inventory Administrator denied the Protest stating that "shop drawings were
21 required and stated in the Scope of Work." GCC further stated, "GCC has the right to reject all bids
22 and cancel a solicitation when none of the bids meet all the material specifications." [AR, Tab 3,
23 AR0001-0002.]
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25 Based upon the evidence presented, the IFB language was materially ambiguous as to
26 whether or not IFB Section 1.2.A to required bidders to provide shop drawings of their proposed
27 design-build structures in their bid packets. GCC's cancellation of the bid was proper. GCC
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1 determined that cancellation of the IFB was in the territory's best interests. Pursuant to 2 GAR,
2 Div. 4, § 3115(d)(2)(A)(ii):

3 After opening, but prior to award, all bids or proposals may be rejected in
4 whole or in part when the Chief Procurement Officer... or the head of a
5 Purchasing Agency determines in writing that such action is in the territory's
6 best interest for reasons including, but not limited to... ambiguous or
7 otherwise inadequate specifications were part of the solicitation.

8 5 G.C.A. § 5225, provides:

9 An Invitations for Bids... may be cancelled, or any or all bids... may be
10 rejected in whole or in part as may be specified in the solicitation, when it is
11 in the best interests of the Territory in accordance with regulations
12 promulgated by the Policy Office. The reasons therefor shall be made part
13 of the contract file.


14 IV. CONCLUSION

15 The Public Auditor holds that:

- 16 1. GCC's rejection of all bids and cancellation of the bid was authorized.
- 17 2. J&B's appeal is DENIED.
- 18 3. The parties shall bear their respective costs and attorney's fees.

19 This is a Final Administrative Decision. The Parties are hereby informed of their right to
20 appeal from a Decision of the Public Auditor to the Superior Court of Guam in accordance with
21 Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final
22 Administrative Decision. A copy of this Decision shall be provided to the Parties and their
23 respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review
24 on the OPA website at www.opaguam.org.

25 **DATED** this 9th day of June, 2017.

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27 **DORIS FLORES BROOKS, C.P.A., C.G.F.M.**
28 *Public Auditor of Guam*