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 PROCUREMENT APPEALS
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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of)
)
 Phil-Gets (Guam) International Trading Corp.)
 dba J & B Modern Tech,)
)
 Appellant.)
)
 And)
)
 Guam Community College,)
)
 Purchasing Agency.)
)
 _____)

**APPELLANT'S COMMENTS ON
 PURCHASING AGENCY'S
 STATEMENT**

Docket No. OPA PA-17-003

I. INTRODUCTION

Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech ("J&B") responds the Purchasing Agency Statement of Guam Community College ("GCC") as follows.

II. FACTS

It is well established that arguments and statements by counsel are not evidence. *See, e.g.,*

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Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 1404 (Fed. Cir. 1984); Stading v. Equilease Corp., 471 So. 2d 1379, 1379 (Fla. App. 1985). The Purchasing Agency Statement illustrates the need for that rule.

GCC, through counsel with no supporting documentation, flippantly asserts that the fact that J&B submitted descriptive literature pertaining to a generator proves that it would not be cost prohibitive for J&B and other bidders to also submit shop drawings, certified by multiple design professionals, for a building. The Declaration of Generoso M. Bangayan of J&B, attached to this Response as "Exhibit 1", states the obvious. Descriptive literature concerning generators is available free of charge from manufacturers. Bangayan Decl. at ¶4.

That is not the case with certified shop drawings for a design-built building. The Design-Build Institute of America defines "design-build" as follows:

Design-build is a method of project delivery in which one entity – the design-build team – works under a single contract with the project owner to provide design and construction services. One entity, one contract, one unified flow of work from initial concept through completion – thereby re-integrating the roles of designer and constructor. Design-build is an alternative to the traditional design-bid-build project delivery method. Under the latter approach, design and construction services are split into separate entities, separate contracts, separate work.

<https://www.dbia.org/about/Pages/What-is-Design-Build.asp>.

To state the obvious, even if one ignores the oxymoron, there is no manufacturer making pre-fabricated design-built buildings especially designed for GCC. Bangayan Decl. at ¶5. J&B and

other bidders could not get shop drawings or descriptive literature for the generator building free of charge from some manufacturer. *Id.*

As indicated by the executive summary included in J&B's bid, before preparing shop drawings for the building, J&B would have to secure a building permit, do a survey to determine building orientation and underground excavation clearance, and designate professional civil/structural and electrical engineers to do design work including shop drawings. Bangayan Decl. at ¶6. The estimated cost to prepare shop drawings with the required certifications is \$24,000. *Id.* at ¶7. This is one reason, in addition to others noted below, why in approximately 20 years of bidding on and performing government projects, J&B has never seen a government invitation for bids or request for proposals that required a bidder or prospective contractor to submit completed shop drawings as part of the bid or proposal on a design-build project. *Id.* at ¶3. Not only would this be anywhere from highly impractical to impossible in many cases, but no bidder would expend large sums to have design professionals prepare certified shop drawings or blueprints that might merely be used for free by a competitor who submitted a lower bid.

II. LEGAL ARGUMENT

A. Bidders were not required to submit shop drawings with their bids.

Bidders such as J&B simply were not required to submit shop drawings for the generator building with their bids. GCC indisputably sought bids for a "design-built generator building." *See, e.g.,* Agency Report at GCC~Tab 10~AR0030-31/GCC PR0032-33 (description of scope of work

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as including “[c]onstruct a design-build generator building”). From the very definition of “design-built”, as set forth above, a contract for a design-built project provides for a single contractor to provide the design and construction. The design work for a design-built building is done pursuant to the contract; it is not done for free before there ever is a contract.

GCC attempts to string together various sentences, phrases, and subsections from divergent parts of the IFB in an attempt to show that there was at least some ambiguity about whether or not bidders had to provide expensive, certified shop drawings to GCC for free with their bids. In both the denial of J&B's protest and its Statement, GCC identifies no reference to “shop drawings” for the design-built generator building other than in Section 1.2 in the Scope of Work, which identified items that are to be included in the cost proposal, not items that are to be completed and submitted with the bid.¹ With apologies for repetition of material already included in J&B's Notice of Appeal, Section 1.2 provided:

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 GCC also notes a reference to “shop drawings” in Section 1.4.C. in the Scope of Work, reprinted in the Agency Report at GCC~Tab 10~AR0032/GCC PR0034. However, that subsection, which also concerns work to be included in the cost proposal and done after an award, refers to drawings for the generator and auxiliary unit. GCC concedes that J&B submitted extensive and presumably sufficient information for the generator. Purchasing Agency's Statement at 6 (citing GCC~Tab 8~AR0008-102).

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1. Ensure drawings, shop drawings, and submittals provided are certified by master electricians and electrical contractors and subcontractors.
 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.
- B. Construct design-build building.
- C. Install generator set/system sanctioned under the Buy America Act.
- D. Connect generator set/system to buildings A and Allied Health Center.
- E. Test to ensure a functionality of system.

Agency Report at GCC~Tab 10~AR0031/GCC PR0033.

Obviously the items in this list could not be completed before an award, given both financial and physical limitations. GCC's position is that bidders were somehow supposed to determine through telepathy or some similar means that some of the items in this single section were to be completed before submitting a bid, while others were to be done after an award. GCC further takes the position that bidders were supposed to figure this out even though Section 1.2 is in Part 1 of the document is entitled "Cost Proposal", leading to the obvious conclusion that items in the following sections of Part 1 are to be included in the cost proposal in a bid, not completed before submitting a

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bid. GCC further takes the position that bidders were supposed to figure out that a “design-built” contract somehow required the design to be completed and submitted before there was a contract. It is clear now, as it was clear to all the bidders when they submitted their bids, that the only reference to “shop drawings” for the building in the entire bid package referred to shop drawings (1) to be included in the bid price, and (2) to be done as part of the project after an award, not as part of the bid submission. There is no merit to GCC’s position that it is free to concoct bizarre interpretations of or manufacture alleged ambiguities in the plain language of the bid requirements after the bids have been submitted in order to have a pretext to reject all bids.

B. J&B has a remedy.

J&B does have a remedy for GCC’s erroneous rejection of its bid. The situation here is similar to that in In the Appeal of JMI Edison, Docket No. OPA-PA 13-010 (Decision, Sept. 25, 2013). In the JMI case, the Guam Department of Education (“GDOE”) had rejected JMI’s low bid in a procurement as being nonresponsive for a single reason. The Public Auditor held that the DOE’s determination that JMI’s bid was nonresponsive for that reason was in error. Since GDOE had not asserted JMI’s bid was non-responsive on any other basis, GDOE was ordered to consider JMI’s bid. *Id.* at 4. A similar result was reached in In the Appeal of Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech, Consolidated Appeals Nos. OPA-PA-13-002, OPA-PA-13-003 (Consolidated Decision, June 14, 2013). In that matter, the Public Auditor vacated GDOE’s suspension of J&B and ordered GDOE to consider J&B’s bid. *Id.* at 13.

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In this case, as in JMI, if the agency determination that the bidder was nonresponsive is overturned, the agency should be ordered to consider the appellant's bid. J&B admits that it overstated the relief in its Notice of Appeal when it asked that the OPA direct GCC to award the contract to J&B. Since J&B was the low bidder and the only bidder to appeal, that is the likely result if the OPA reverses the determination of nonresponsiveness and orders that J&B's bid be considered. Nonetheless, J&B will concede that the OPA cannot simply award the contract outright to J&B in this appeal. The OPA can still provide effective relief as it did in the JMI and prior J&B appeals.

IV. CONCLUSION

For the foregoing reasons, J&B requests that the Office of Public Accountability (1) overrule GCC's denial of J&B's protest, (2) rule that J&B's bid on GCC-FB-17-001 was responsive, and (3) order GCC to consider J&B's bid on GCC-FB-17-001.

Respectfully submitted,

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