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RECEIVED  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
DATE: 05-17-17  
TIME: 11:00  AM  PM BY: JM  
FILE NO OPA-PA: 17-003

## OFFICE OF PUBLIC ACCOUNTABILITY

### PROCUREMENT APPEAL

In the Appeal of	)	<b>APPELLANT'S RESPONSE</b>
	)	<b>BRIEF; CERTIFICATE OF</b>
Phil-Gets (Guam) International Trading Corp.	)	<b>SERVICE</b>
dba J & B Modern Tech,	)	Docket No. OPA-PA-17-003
Appellant.	)	
	)	
And	)	
	)	
Guam Community College,	)	
	)	
Purchasing Agency.	)	
	)	

#### I. INTRODUCTION

Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech (“J&B”) responds to purchasing agency Guam Community College’s (“GCC”) appellate brief as follows. The Order of May 5, 2017, instructed J&B to “address GCC’s present arguments in support of dismissal.” J&B admits its counsel had difficulty discerning GCC’s “present arguments”. Those arguments, unlike the IFB at issue, may have been ambiguous. When GCC asserted during the hearing on its motion to dismiss that it was no longer relying on material “under” subsection 1.2.A of the “Scope of Work”, J&B’s interpreted that as meaning GCC was no longer relying upon subsection 1.2.A. By way of example, if a lawyer said she was no longer raising legal arguments

“under” Chapter 5 of Title 5 of the Guam Code Annotated, that could be interpreted as meaning (A) that she was not basing her argument on Chapter 5, rather than as meaning (B) she was basing her argument on Chapter 5, but not upon the chapters “under” it, i.e., Chapters 6-87.

Having reviewed GCC’s appeal brief and an informal in-house transcript of the hearing on GCC’s motion to dismiss, it is now J&B’s understanding that GCC’s “current argument” is more akin to example (B) in the preceding sentence. GCC is adopting the strained position that somehow the first sentence of subsection 1.2.A of the Scope of Work, should or could have been reasonably read as being wholly disconnected from any other language in the Scope of Work, including but not limited to (a) the preceding subsection 1.1 in the Scope of Work, (b) the four sub-sections within subsection 1.2.A itself, and (c) the remaining four subsections (B through E) of subsection 2. Without waiving the issue of whether or not GCC’s new position differs from the reasons for denial of the protest given, as required, pursuant to 5 GCA §5425(c)(1), J&B responds to what it believes to be GCC’s current argument.

If this is in fact GCC’s current position, it can be described as the “anti-Udall approach”. Many years ago when Congressman Morris Udall of Arizona was running for re-election, his opponent accused him of being a Communist. Udall called a press conference and stated, “My opponent says I am a Communist. I am not.” Udall’s opponent got a tape of the press conference, edited it to take a phrase out of context, and ran commercials purporting to show Udall confessing, “I am a Communist.”

The tactic did not work then, and it should not work here. Taking one phrase at a press conference out of context did not make Mo Udall a Communist, and taking one sentence in the IFB out of context does not make it ambiguous.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

The relevant facts are apparent on the face of the procurement record. Thus any disagreement J&B has with the “Background” section of GCC’s brief primarily concerns “spin” and selective omissions. J&B will not repeat (or spin) the full factual and procedural background below, but will only focus on a few key points.

GCC originally rejected all bids “due to the following: All bidders failed to provide GCC with shop drawings and submittals.” Agency Report, GCC~Tab 5~AR0001. J&B protested, asserting “shop drawings were not included in the requirements for bids on this project.” *Id.* at GCC~Tab 4~AR0001-02. GCC denied the protest, reiterating its position that “shop drawings were required” and citing, *inter alia*, the reference to shop drawings in subsection 1.2.A of the Scope of Work. *Id.* at GCC~Tab 3~AR0002. GCC was required to state the reasons for denial of J&B’s protest at the time that it acted upon the protest. 5 GCA §5425(c)(1). GCC has nonetheless expanded the rationale for its action during this appeal by referencing other portions of the bid solicitation and by contending that the Scope of Work was somehow ambiguous.

In this appeal, GCC has referred to the requirement for “descriptive literature” in both the “Special Reminder to Prospective Bidders” and the “General Terms and Conditions”. In neither instance did the reference to “descriptive literature” mention drawings, sketches, or blueprints.

“Descriptive literature” can be words without pictures. J&B acknowledges that adults who still read comic books due to prolonged childhood (such as the undersigned counsel) sometimes refer to comic books, which contain both words and pictures, as “graphic literature”.<sup>1</sup> However, J&B has been unable to find any authority holding that comic book terminology applies to government procurement law. It is not disputed that J&B submitted a narrative description of the planned building.

Next, GCC quotes the following sentence from section 1.2 in the “General Requirements & Scopes of Work”:

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

GCC then cites to declarations from GCC employees to purportedly show that “GCC drafted [sub]section 1.2.A with the intention that this [sub]section required the bidders to submit drawings of their proposed design-build structures in their bid packets.” GCC continues to pull one sentence of the “Scope of Work” completely out of context.

The preceding subsection of the Scope of Works, section 1.1, provided:

Contractor shall provide their lump-sum, firm-fixed-price, cost proposal for the construction of a design-build generator building and for the comprehensive assessment, installation, proper testing, operation and commissioning of a turn-key, 600 kilowatt Generator Set/System to provide back-up emergency power for the Allied Health Center and Building A;

[chart omitted]

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<sup>1</sup> A few generations ago, “graphic literature” may have had a different meaning which was even less relevant to government procurement.

Contractor's cost proposal shall include (and not be limited to) ...

Agency Report at GCC~Tab 10~AR0031-32 (Emphasis in original deleted).

Section 1.2 of the Scope of Work then continued from where the ellipses at the end of section 1.1 left off and provided in its entirety:

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 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.

Outside of subsection 1.2.A, GCC has not identified any other mention of shop drawings, drawings, blueprints, sketches, paintings, doodles or other pictorial representation of the generator building in the IFB. While GCC refers to evaluation sheets and its employees' declarations as evidence of an alleged requirement for drawings, none of these were available to bidders when the bidders prepared and submitted their bids.

## **II.      LEGAL ARGUMENT**

### **A.      There was no ambiguity in the Scope of Work.**

Sections 1.1 and 1.2 in the Scope of Work in the IFB were not ambiguous. GCC has complained that J&B has cited to contract cases, rather than procurement cases, for a definition of “ambiguous”. The word “ambiguous” is not “ambiguous”; it means the same whether one looks to contract cases, procurement cases, a legal dictionary, or a standard English dictionary. However, in view of GCC’s objections, J&B will rely upon procurement decisions cited in GCC’s Appeal Brief to establish the meaning of “ambiguous”. “An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible.” RELI Group, Inc., 2016 WL 625148, \*5 (U.S. Comp. Gen.). *Accord Ashe Facilities Services, Inc.*, 2004 WL 901404, \*7 (U.S. Comp. Gen.). “An ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole.” Brickwood Contractors, Inc., 2003 WL 21276279, \*4 (U.S. Comp. Gen.).

When section 1.2.A of the Scope of Work is read “in the context of the solicitation as a whole”, or even just in the context of the sections 1.1. and 1.2. of the Scope of Work, there is only

one “reasonable interpretation”. The Scope of Work refers to work to be done by the successful bidder after a contract is awarded, not to work to be done and included in bid submissions.

Section 1.1 of the Scope of Work starts the instructions concerning items to be priced into the “lump-sum, firm-fixed-price, cost proposal” for the building and the generator. The final sentence of section 1.1, stating the “cost proposal shall include” and ending in ellipses, makes it clear that the prices of all items in section 1.2, not the actual items themselves, are to be included in the “cost proposal”. Nothing in section 1.1 implies that any sentence of the following section 1.2 should be disregarded for purposes of the cost proposal but instead treated as having been mistakenly transplanted into the Scope of Work from the Special Reminder List without explanation.

Moving on to section 1.2 itself, there is no hint that subsections A through E of section 1.2 are disconnected items randomly placed in the same section for no apparent reason. Obviously, all are to be addressed in the same manner. If subsection 1.2.A was drafted with the intention that bidders submit shop drawings of the building in their bid packet, then it would follow that subsection 1.2.B must have been drafted with the intention that bidders include the fully – constructed building in their bid packet. Subsection 1.2.C would have been drafted with intent that bidders install the generator in their bid packet. This is, of course, absurd. There is no “ambiguity” that could lead anyone to believe that interpretation. Rather, all subsection of section 1.2 refer to items the price of which is to be included in the cost proposal.

Finally, reading only subsection 1.2.A, there is no hint on the face of that subsection that the first sentence of that subsection is not modified or explained by the four indented sub-subsections below it which require, *inter alia*, that the shop drawings be certified. No reasonable person would believe that the sub-subsections were randomly placed there and were unrelated to the subsection in which they are found, or that the first sentence of subsection 1.2.A was randomly placed there with no intention that it be modified or elaborated upon by the sub-subsections immediately beneath it.

In short, there is no ambiguity. Section 1.2.A, interpreted both as a whole (including its subsections) and in its context, unambiguously requires (1) that the cost of certified shop drawings be included in bidders' cost proposals, and (2) that such certified drawings be done and submitted to GCC for approval as part of the scope of work done by the successful bidder after an award. No reasonable person could interpret sections 1.1 and 1.2 as requiring that the work described in some random subsection or sub-subsection thereof be completed and submitted with a bid.

While GCC refers to evaluation sheets and its employees' declarations as evidence of an alleged requirement for drawings, none of these were available to bidders when bids were prepared and submitted. GCC says its undisclosed intention for the IFB's bid submission requirements should be given considerable weight. However, none of the authorities it cites for this proposition support GCC's position that secret, belatedly disclosed intentions that could not possibly be inferred from unambiguous language in a bid solicitation should be given any weight, considerable or otherwise. Rather, those precedents provide for cancellation in two situations. The first involves situations where both the agency and the protester had reasonable, if nonetheless conflicting,

interpretations of language in the solicitation. *E.g., Ashe Facilities, supra*, 2004 WL 901404 at \*8; MLC Federal, Inc., 1994 WL 8658, \*3 (U.S. Comp. Gen.) The second is when there is a compelling reason to cancel, such as the IFB as written for dredging a reservoir mistakenly not meeting environmental standards for potable water, Mobile Dredging & Pumping Co., 1998 WL 98732, \*1-\*3 (U.S. Comp. Gen.). As discussed above, GCC does not advance a reasonable alternative interpretation of Sections 1.1 and 1.2 of the Scope of Work that would justify cancellation. As discussed below in Section D., there was no compelling reason to cancel here.

**B. Design-build solicitations are not inherently ambiguous.**

GCC takes the position that because bidders are sometimes required to submit drawings with their bids for design-build projects, the fact that this was a design-build project created an ambiguity requiring submission of drawings. While drawings are sometimes required in bids for design-build projects, it is not the case here given the plain language of the IFB.

The authorities cited by GCC do not alter the situation here. The regulatory description of design-build projects cited by GCC provides that “[d]esign responsibility and construction responsibility both rest with the design-build **contractor**.<sup>1</sup>” 2 GAR §5102(3)(d) (emphasis added). Thus this subsection places responsibility on the post-award contractor, not the pre-award bidder.

Subsection (7)(a) of the same regulation states, “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.” This subsection goes on to discuss various options, such as using a multi-step process or payment of proposal preparation costs, which would

be consistent with a requirement of submission prior to an award of more detailed designs, inclusive of drawings. GCC did not avail itself of any of those options. Instead, GCC's specification of "the degree of detail necessary" at the bidding stage was merely a requirement for "descriptive literature". J&B fulfilled that requirement with its narrative description. The plain language of the IFB did not include drawings in the "degree of detail required" before an award.

**C. Bidders did not have to concoct imaginative questions about unambiguous provisions in the IFB.**

GCC asserts that J&B should have asked questions about the nonexistent and undetectable "ambiguity" in the IFB. But what could J&B and other bidders have asked that would have led them to uncover the alleged hidden meaning or alleged misplacement of section 1.2.A (but not its subsections) in the Scope of Work? Should the bidders have gone section by section, subsection by subsection, and sentence by sentence through the entire IFB and asked, "Does this really mean what it plainly seems to mean?" "Does any phrase in the 'Scope of Work' list of work to be done after an award really belong in the "Special Reminder to Prospective Bidder" list of items to be submitted with a bid, or vice versa?" There was no ambiguity that would have triggered questions about the submission of shop drawings. There was no logical question prompted by the IFB that would have revealed GCC's secret or subsequently alleged intent.

**D. A "sketch" would not have resolved some issues raised belatedly by GCC's declarations, while some of those issues were addressed by J&B's narrative.**

After its rejection of all bids, its denial of J&B's protest, and its submission of the Purchasing Agency Statement, GCC submitted three largely identical declarations setting forth for

the first time detailed reasons why GCC allegedly wanted a sketch or shop drawings or something submitted with bids, even though it had not asked for such drawings prior to the award in the IFB. GCC asserts a drawing was needed to (a) ensure the building was constructed of proper materials, was large enough to house the generator, provided adequate ventilation of the generator, allowed access for maintenance to the generator, completely enclosed the generator, fit in the available space, did not obstruct an elevator in a nearby building, and integrated with the current architecture of the campus, (b) visualize the footprint of the proposed structure, (c) ascertain the reasonableness of the price, and (d) view the structure.

As previously noted, the narrative in J&B's bid included a detailed description of the building, including dimensions, materials to be used, size of the exterior and interior doors, and ventilation. This information directly addressed many of the concerns belatedly raised by GCC. The narrative provided more of the information listed in GCC's declarations than could be obtained from a mere "sketch".

In addition, the "Scope of Work" expressly provided that before construction, the contractor was to provide GCC with shop drawings certified by master electricians and civil and structural engineers. Such certification would guarantee that many of the concerns listed in GCC's declaration would be reviewed and approved by professional engineers before construction began.

A sketch submitted with a bid might have addressed some aesthetic concerns noted in GCC's declarations. However, sub-subsection 1.2.A.3 in the Scope of Work specified that the contractor had to "[s]ubmit certified drawings, shop drawings, and submittals to GCC for review

and acceptance.” Thus purely aesthetic concerns could be addressed by GCC during that review before the plans were accepted and the building was constructed.

Finally, none of the bidders uncovered or predicted the unstated alleged requirement of submission of a drawing of the building with their bids. J&B provided a narrative description of the building containing much of the information that GCC identified in the declarations after this appeal was well underway. Given these facts, the omission the unrequested drawing can be deemed a correctable nonjudgmental mistake (2 GAR §3109(m)(1)) or a minor informality that can be corrected or waived (2 GAR §3109(m)(4)(B)).

**E. GCC's actions are inconsistent with the policies of procurement law.**

GCC states, “Guam’s procurement laws are designed to place all bidders on an even footing when responding to a solicitation.” Purchasing Agency’s Appeal Brief at 20. However, GCC seeks to do the opposite here. GCC did not claim there was a requirement for a drawing with bid submissions until after the prices submitted by the bidders were publicly available. *See* 2 GAR §3109(l)(2). On a re-bid, all of J&B’s possible competitors will have had the opportunity to see J&B’s previous low bid. J&B’s competitors will also have the opportunity to correct their previous failure to include any description, narrative or pictorial, of the generator building in their initial bid submissions. J&B’s initial low bid, accompanied by such a description of the building, will serve as a ceiling rather than a floor for bids the second time around. J&B, which submitted a legitimate and responsive low bid the first time around, will be forced to “bid against itself” and undercut its own fair low price. J&B might still lose out.

GCC cites authority for the proposition that a rebid is appropriate in the case of ambiguous specifications. Those authorities involve situations where there was an actual ambiguity caused by the content of the IFB or RFP. *See, e.g., RELI Group, supra*, 2016 WL 625148 at \*5 (“An ambiguity exists where two or more reasonable interpretations of the terms or specifications of the solicitation are possible.”); *Ashe Facilities, supra*, 2004 WL 901404 at \*7 (“An ambiguity exists where two or more reasonable interpretations of the solicitation are possible.”); *Brickwood Contractors, supra*, 2003 WL 21276279 at \*4 (“An ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole.”). In *MLC Federal, Inc.,* 1994 WL 8658, \*3 (U.S. Comp. Gen.), an ambiguity led to at least one offeror interpreting a requirement differently from others, such that offerors were not competing on an equal basis. That was not the case here, where all bidders competed on an equal basis because they all knew no drawings were required and none submitted drawings. In *Bade Roofing & Sheet Metal Co.,* 1991 WL 126507, \*1 (U.S. Comp. Gen.), it was held that cancellation and resolicitation was more appropriate than an award to a low bidder who do not comply with a material IFB requirement. In the current case, J&B complied with all requirements stated in the IFB.

There was no ambiguity here that would require the drastic remedy of cancellation and resolicitation, which could more accurately be described as a drastic penalty against a winning bidder who did nothing wrong.. J&B won fair and square. GCC is seeking to rewrite the bid requirements after J&B submitted the low responsive bid, This is not the “fair and equitable treatment of all persons who deal with the procurement process” required by 5 GCA §5001(b)(4).

#### IV. CONCLUSION

The IFB was not ambiguous. Bidders were not required to submit shop drawings or sketches with their bids. GCC's denial of J&B's protest should be overturned, and this matter should be remanded to GCC with instructions to fairly consider J&B's bid.

Respectfully submitted,

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Date: May 17, 2017

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#### CERTIFICATE OF SERVICE

I certify that on May 17, 2017, I caused the above Appellant's Response Brief to be served by hand delivery on the Purchasing Agency's attorneys, Cabot Mantanona LLP, Edge Bldg., 2<sup>nd</sup> Floor, 929 South Marine Corps Drive, Tamuning, Guam 96913.

Date: May 17, 2017

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