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

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

Pursuant to the Public Auditor's May 5, 2017 Order, Purchasing Agency Guam Community College ("GCC") submits its Response to Appellant Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech's ("J&B") Appeal Brief ("Brief"). Nothing in J&B's Brief precludes the conclusion that the Public Auditor should deny or dismiss the instant Appeal.

INTRODUCTION

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. As fully explained in GCC's Appeal Brief, this matter has been honed to two fundamental questions that must be decided by the Public Auditor. In a nutshell, these questions are: (1) whether the IFB contained a material ambiguity that resulted in all the bid submissions being non-responsive and (2) whether J&B already received the only remedy available when GCC cancelled the Solicitation for the purpose of re-soliciting the IFB. Both questions should be answered in the affirmative.

J&B's Brief surmises perspectives and argues matters that do not bestow merit on its Appeal. At the outset, J&B misguidedly portrays GCC as changing its position regarding the IFB's requirement for the bidders to submit shop drawings. Contrary to J&B's misguided portrayal, the record shows GCC has always maintained that the Solicitation's Section 1.2.A required bidders to submit shop drawings and has never claimed that the bidders' drawings must be engineer-certified. J&B also incorrectly deduces that the Public Auditor cannot address the ambiguity presented by Section 1.2.A. Such a deduction is flawed because, without doubt, the ambiguity question is properly before the Public Auditor. Further, J&B erroneously insists Section 1.2.A is not ambiguous, when the record clearly shows that there are two possible interpretations of this Section. Finally, J&B's misconceptions about several aspects of the instant matter do not aid its Appeal.

In short, nothing in J&B's Brief precludes the conclusion that the Public Auditor should deny or dismiss the instant Appeal.

ARGUMENT

A. J&B Misguidedly Portrays GCC's Position Because GCC Has Always Maintained that Section 1.2.A Required the Bidders to Submit Shop Drawings of Their Proposed Design-Build Structures and Has Never Claimed that the Bidders' Drawings Must Be Engineer-Certified

At the outset, an apparent misconception in J&B's Brief must be addressed. J&B portrays GCC as changing positions on the Solicitation's requirement of shop drawings. (J&B's Brief at 6-12.) Seemingly, J&B is confused. Contrary to J&B's misguided portrayal, the record shows GCC has consistently maintained that Section 1.2.A required the bidders to submit shop drawings of their proposed design-build structures and has never claimed that Section 1.2.A required the bidders to submit engineer-certified drawings.

Perhaps J&B's confusion about GCC's position stems from J&B misreading Section 1.2.A and restrictively defining the term "shop drawings" to mean only engineer-certified drawings. Notably, however, GCC has never claimed that Section 1.2.A required the bidders to submit *engineer-certified* shop drawings. In fact, GCC has always maintained that the term "shop drawings" *does not necessarily mean engineer-certified* drawings. Rather, as GCC several times explained, the term "shop drawings" can also mean *simply* drawings, diagrams, illustrations, schematics, layouts, etc. (*See* GCC's Statement at 7-8; Rebuttal at 8; Motion at 9-10; Reply at 9; Appeal Brief at 11-12.) And because it understood that certifications could be expensive and therefore deter bidders from competing, GCC drafted Section 1.2.A with the intention that the bidders would provide 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.)

Furthermore, the record shows that GCC has been steadfast its position regarding the Solicitation’s shop drawings requirement. It is indisputable that GCC drafted the IFB, which solicited for a design-build structure to house the generator and directed that the bidders were to provide shop drawings of their proposed structures. (See GCC~Tab 10 ~AR0030-31.) The evaluation sheets for the bid packets included the criterion: “Drawings were submitted with Bid Proposal.” (GCC~Tab 7~AR0004, 26 & 48.) The declarations of the team who both prepared the Solicitation and evaluated the bid packets establish that GCC — the drafter of the IFB — intended for the bidders to submit shop 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.) GCC cancelled the Solicitation because “[a]ll bidders failed to provide GCC with shop drawings and submittals.” (GCC~Tab 5 ~AR001.) In its Protest Decision, GCC stated: “Please be advised that shop drawings were required and stated in the Scope of Work.” (GCC~Tab 3~AR0001.) And throughout its papers in the instant Appeal, GCC consistently argued that Section 1.2.A required the bidders — albeit ambiguously — to submit shop drawings of their proposed design-build structures. (See GCC’s: Statement at 7-11; Rebuttal at 5-8; Motion at 8-13; Reply at 5-13; Brief at 8-12.) Moreover, the regulations that guide the design-build procurement method expect bidders to submit drawings in their bid packets. (See *infra*.)

Accordingly, GCC always intended for, interpreted and argued that Section 1.2.A required bidders to submit shop drawings in their bid packets, and has never claimed that the bidders’ drawings must be engineer-certified.

B. Contrary to J&B's Suggestion, the Ambiguity Question Regarding Section 1.2.A Is Properly Before the Public Auditor

J&B deduces that the Public Auditor cannot address the ambiguity in Section 1.2.A. (J&B's Brief at 12-13.) J&B's deduction is flawed. Without doubt, the ambiguity question is properly before the Public Auditor.

As explained above, and in all of its papers, GCC — the drafter of the IFB — intended for, and thus interpreted, Section 1.2.A to require the bidders to submit shop drawings of their proposed design-build structures. Because no bidder submitted shop drawings of the structure that it proposed to design and build, GCC cancelled the Solicitation in order to review its requirements and re-solicit the IFB. (*See* GCC~Tab 5 ~AR0001.) In its Protest, J&B disputed GCC's interpretation of the Solicitation, complaining "shop drawings were not included in the requirements for bids on this project." (*See* GCC~Tab 4~AR0001-02.) GCC denied J&B's Protest because it interpreted the Solicitation as requiring the bidders to submit shop drawings of their proposed design-build structures — which was GCC's intention when it drafted the IFB. (*See* GCC~Tab 3~AR0001; *see also generally* Decl. D. Perez; Decl. F. Palacios; Decl. R. Pritchard.) Thus, there is no dispute that the parties have always disagreed about what the language of the Solicitation meant regarding the shop drawings requirement.

Importantly, and contrary to J&B's contention, GCC definitely has not "abandoned" the ground on which it denied J&B's Protest. (*See* J&B's Brief at 7, 13.) As shown above, GCC has always maintained that the language of Section 1.2.A required the bidders to submit shop drawings. Only through the parties' papers in the instant Appeal did it become apparent that Section 1.2.A was ambiguous regarding this requirement. Thus, the ground for GCC's denial of J&B's Protest remains the same, but a new reason why that ground existed has come to

light. And, to the stark opposite of J&B's suggestion (*see* J&B's Brief at 13), this new reason does not preclude the Public Auditor from deciding the ambiguity question.

The Public Auditor "ha[s] the power to review and determine de novo any matter properly submitted to her," 5 GCA § 5703, including matters arising from protest decisions, *see id.* at § 5425(e). Here, the ambiguity now apparent in Section 1.2.A undoubtedly arises from the ground on which both J&B protested and GCC denied J&B's Protest — i.e., the parties' consistent, but differing, interpretations of the IFB's shop drawings requirement. Thus, the Public Auditor clearly can address the ambiguity question presented by the instant Appeal. *See id.*; *accord, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (explaining the difference between claims and arguments and that when a claim "is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below"; in other words, an appellate tribunal has the power to address "a new argument to support what has been [a] consistent claim") (citations omitted; alterations in original).

C. Despite J&B's Insistence Otherwise, the Record Reveals Two Possible Interpretations of Section 1.2.A; Thus, the IFB Contained a Material Ambiguity for which the Only Remedy Is Cancellation and Re-solicitation

Although the record clearly shows that the IFB's shop drawings requirement can be — and obviously was — interpreted in two different manners, J&B insists that "[t]here was nothing ambiguous about the fact that the bidders were not required to submit shop drawings with this bid." (J&B's Brief at 7.) J&B is wrong. Seemingly, J&B's insistence stems from the fact that the IFB solicited for a design-build project. (*See* J&B's Brief at 7-10.) The design-build nature of the Solicitation, however, does not aid J&B's position and, indeed, undercuts it.

As explained in GCC's Brief (*see* GCC's Brief at 15-18), the Regulations guide the design-build method of procurement and instruct how a contractor is selected for award.¹ Notably, the Regulations provide: "*The contractor is selected on the basis of its design proposal, proposed price, and other stated evaluation criteria.*" 2 GAR, Div. 4, § 5102(7)(a) (emphasis added). The Regulations also belie J&B's contention that the "design" is provided only after the award. (*See* J&B's Brief at 7.) This is so because the Regulations instruct: "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). Axiomatically, a design proposal must be submitted with a bid in order for that design to be completed after award. Thus, under the 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; then after the contract award, the prevailing bidder finalizes the design that it had submitted with its bid packet.²

Moreover, as GCC has explained (*see* GCC's: Brief at 17-18; Reply at 6-7), the submission of drawings is commonplace for design-build procurements. *See, 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 submitted by a bidder on a government solicitation for a design-build pump station); *Am.*

¹ GCC also detailed how J&B was well aware that the IFB solicited for a design-build project. (*See* GCC's Brief at 16-17.)

² This is the procedure that GCC intended for the IFB. (*See* Decl. D. Perez at ¶ 9; Decl. F. Palacios at ¶ 9; Decl. R. Pritchard at ¶ 9.)

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”).

Ironically, J&B’s efforts to argue a lack of ambiguity in the IFB actually reinforce the conclusion that Section 1.2.A is ambiguous. “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.” *RELI Grp., Inc.*, B-412380, 2016 WL 625148, at *5 (U.S. Comp. Gen. Jan. 28, 2016) (citations omitted).³

J&B argues that it, and apparently the other bidders, read Section 1.2.A to mean that all the items thereunder were to be performed only by the prevailing bidder after award of the contract. (See J&B’s Brief at 8.) The record, however, clearly shows that, with the language in Section 1.2.A, GCC intended to require the bidders to provide drawings of their proposed buildings; then, the prevailing bidder would obtain the necessary certifications after award of the contract — i.e., “perform subsections 1 through 4 of Section 1.2.A.” (Decl.

³ Notably, all the cases that J&B relies upon for support of its position on whether a document is ambiguous (see J&B’s Brief at 9, 14) 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 negotiated and drafted by 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.

D. Perez at ¶ 9; Decl. F. Palacios at ¶ 9; Decl. R. Pritchard at ¶ 9; *see also* GCC~Tab 7 ~AR0004, 26 & 48 (bid packet evaluation sheets with the criterion: “Drawings were submitted with Bid Proposal”).) And it is undisputed that GCC interpreted Section 1.2.A in accordance with its intention when it drafted this Section, but J&B interpreted this Section to mean something other than GCC intended.⁴ Because the meanings assigned to Section 1.2.A by both parties are reasonable and this Section is “susceptible” to both meanings, the only conclusion is that Section 1.2.A is ambiguous. *RELI Grp., Inc.*, B-412380, 2016 WL 625148, at *5 (U.S. Comp. Gen. Jan. 28, 2016).

Additionally, J&B’s assertion that a latent ambiguity in Section 1.2.A somehow sustains its Appeal misses the mark. (*See* J&B’s Brief at 16-17.) While true that latent ambiguities are generally resolved against the purchasing agency, the remedy for a latent ambiguity is always the same: Cancellation and Re-solicitation. *See, e.g., 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

⁴ As the drafter of the IFB, GCC’s intended meaning of the language 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).

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, at *6 (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.”).

D. J&B’s Other Misconceptions Do Not Aid Its Appeal

Along with its misguided perception of GCC’s position on the IFB’s shop drawings requirement (*see supra*), J&B apparently misconceives several other aspects of the instant matter. None of these misconceptions aid J&B’s Appeal.

First, given its repeated analogies to contract cases and scenarios (*see, e.g.*, J&B’s Brief at 9, 14-15), J&B seemingly misunderstands the framework of the instant Appeal. This Appeal does not involve a contract. This Appeal involves the cancellation of a procurement solicitation. And, importantly, a procurement solicitation is not even an offer to enter a contract — much less a contract. Indeed, it is well settled that a procurement solicitation is merely an invitation for bidders to present an offer that, if accepted, would result in a contract. *See, e.g., E.H. Oftedal & Sons, Inc. v. State ex rel. Montana Transp. Comm’n*, 40 P.3d 349, 354 (Mont. 2002) (“an invitation for bids is not itself an offer, but merely an invitation

to make an offer” (citing *Peerless Food Products, Inc. v. Washington*, 835 P.2d 1012, 1017 (Wash. 1992) and 64 Am.Jur.2d *Public Works and Contracts* § 53 (1972)); *King v. Alaska State Hous. Auth.*, 633 P.2d 256, 261 (Alaska 1981) (“an agency’s solicitation of bids is not an offer, but rather a request for offers; no contractual rights based on the content of a bid arise prior to its acceptance by the agency.”). Thus, J&B’s contract analogies are misplaced.

Second, for reasons not altogether clear, J&B places great emphasis on the “sketch” that it denoted, but failed to provide, in its bid packet. (See J&B’s Brief at 13-15, 17-18.) J&B highlighting its un-provided “sketch” is puzzling because GCC has not stated that this never-seen sketch would satisfy Section 1.2.A’s requirement for the bidders to submit shop drawings. Rather, GCC stated that J&B’s denoted but un-provided “sketch” *might have* satisfied the IFB’s requirement because, as explained many times in GCC’s papers, the term “shop drawings” does not necessarily mean engineer-certified drawings but can also mean *simply* drawings, diagrams, illustrations, schematics, layouts, etc. — which is how GCC applied the term. (See GCC’s: Statement at 7-8; Rebuttal at 8; Motion at 9-10; Reply at 9; Appeal Brief at 11-12; *see also* Decl. D. Perez at ¶ 9; Decl. F. Palacios at ¶ 9; Decl. R. Pritchard at ¶ 9.)

Third, the strained definition that J&B proffers for “descriptive literature” is inconsequential to the instant Appeal. (See J&B’s Brief at 13-14.) This is so because the IFB clearly stated: “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[.]*” (GCC~Tab 10~AR0009 (emphasis added).) Thus, along with Section 1.2.A and the regulations that guide a design-build procurement, the IFB’s requirement to provide

descriptive literature also directed that bidders needed to submit shop drawings of their proposed buildings.

Fourth, J&B inaccurately posits that the ambiguity in Section 1.2.A arose because, after the bid opening, GCC determined that it would like shop drawings of the bidders' proposed design-build structures. (J&B's Brief at 14-15.) The record belies J&B's position. In fact, the record clearly shows that GCC *always* intended for Section 1.2.A to require bidders to submit shop drawings of their proposed design-build structure in their bid packets. (*See, e.g.,* Decl. D. Perez at ¶ 9 (explaining the intention when Section 1.2.A was drafted); Decl. F. Palacios at ¶ 9 (same); Decl. R. Pritchard at ¶ 9 (same); GCC~Tab 7~ AR0004, 26 & 48 (evaluation sheets with the criterion: "Drawings were submitted with Bid Proposal"); GCC~Tab 5~AR001 (cancellation notice explaining, "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.").)

Fifth, groundless is J&B's suggestion that GCC will not be prejudiced by awarding the contract without first seeing a drawing of the design-build structure. (*See* J&B's Brief at 17.) GCC drafted the IFB with the intention that the bidders were required to submit shop drawings of their proposed design-build structures, and had several valid reasons for this requirement. (*See* Decl. D. Perez at ¶¶ 4-8; Decl. F. Palacios at ¶¶ 4-8; Decl. R. Pritchard at ¶¶ 4-8.) If GCC were to award this contract sight-unseen, there is an increased likelihood that once the contractor finally presents shop drawings of the building, GCC might reject those drawings for the valid reasons that it desired shop drawings with the bid submissions. Such a rejection would result in delaying the project's completion — *which obviously injures GCC* — because the contractor will need to redesign the building and, consequently, redo

certified shop drawings. To this end, along with decreasing the chances of delay, submitting drawings of a design-build project in bid packets also decreases the likelihood of the contractor incurring costs that were not incorporated into its bid price.

Finally, J&B misguidedly focuses on the cost associated with engineer-certified shop drawings. (*See* J&B's Brief at 10-12.) Notably, as explained above, GCC has never taken the position that the IFB required the bidders to submit engineer-certified shop drawings. Moreover, if GCC desired the bidders to submit engineer-certified shop drawings, it could require them to do so — which J&B concedes (*see* J&B's Brief at 10-11). Indeed, the regulations that guide a design-procurement provide: "The territory shall also specify the degree of detail necessary in a design proposal." 2 GAR, Div. 4, § 5102(7)(a). Accordingly, the cost of engineer-certified shop drawings is irrelevant for the instant Appeal.⁵

E. Cancellation and Re-solicitation Is the Only Proper Course of Action

J&B complains that cancellation and re-solicitation of the IFB is "unfair" because its "possible competitors have had the opportunity to see [its] previous low bid." (J&B's Brief at 18-19.) Such a complaint misses the mark. 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 insists that

⁵ Although the parties seemingly had agreed that the actual cost of engineer-certified shop drawings was not relevant to the instant Appeal (*see* J&B's Opp'n at 8-9; GCC's Reply at 9 n.6), J&B again accents its cost estimate. (*See* J&B's Brief at 11.) Maintaining its position that this is a non-issue, GCC notes that J&B's estimated cost should not be well taken and is likely exaggerated. For its cost estimate, J&B relies solely on the opinion of its president — who does *not* state that he is an engineer, or architect, or anyone involved in the preparation of certified drawings. (*See id.*; Decl. G. Bangayan at 7.) Further, J&B's "Statement of Experience" does not mention any design-build structures, and this list of experience primarily includes projects that apparently involved air conditioning units or equipment maintenance. (*See* Decl. G. Bangayan at Ex. A.) Thus, it questionable whether J&B has ever done a design-build construction project like the one solicited for by this IFB. Moreover, under-signed counsel spoke with a civil engineer who estimated that certified drawings for this design-build project would cost about half the amount J&B posits. In the event that the Public Auditor decides the actual cost of engineer-certified shop drawings is relevant to the instant Appeal, GCC respectfully requests the opportunity to submit evidence that rebuts J&B's cost estimate.

ordering reconsideration of its bid packet is an available remedy. (See J&B's Brief at 18.) The decisions that J&B relies 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 shop 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.⁶

As J&B notes (*see* J&B's Brief at 19), 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. 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, as discussed above and explained in all of its filings, GCC properly cancelled the Solicitation in order to review its requirements and re-solicit the IFB.

⁶ While complaining about its competitors' ability to see its bid price, J&B neglects its role in providing ready access to the price offered in its bid. (*See* J&B's Brief at 19). Although the entire procurement record has been available for review at GCC since the bid opening, J&B's Notice of Appeal — denoting the prices offered by all the bidders (*see* Appeal at 2) — made its bid price handily accessible to its competitors. By filing its Notice of Appeal, J&B caused its bid price to become effortlessly discoverable via OPA's website and also triggered GCC's obligation to inform the other bidders of the Appeal.

CONCLUSION

For the foregoing reasons, J&B's Brief proffers nothing that sustains its Appeal. Accordingly, GCC respectfully requests that the Public Auditor either deny or dismiss the instant Appeal.

Respectfully submitted this 17th day of May 2017.

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Guam Community College

By: 
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