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Attorneys for Appellant  
Phil-gets (Guam) International Trading Corp.  
dba J&B Modern Tech

**OFFICE OF THE PUBLIC AUDITOR**

In the Appeal of )  
 )  
PHIL-GETS (GUAM) INTERNATIONAL )  
TRADING CORP. dba J&B MODERN TECH, )  
 )  
Appellant. )  
\_\_\_\_\_ )

Docket No. OPA-PA-13-003

**COMMENTS ON AGENCY  
REPORT**

**I. INTRODUCTION**

Appellant J&B Modern Tech (“J&B”) hereby submits its comments on the Agency Report filed by the Appellee, Guam Department of Education (“GDOE”). The Agency Report raises both substantive and procedural issues. The substantive issues involve the merits, or lack thereof, of the suspension that was the basis for GDOE’s refusal to consider J&B’s low bid for IFB 008-2013. The procedural issue involves GDOE’s contention that service of the first of the two protests at issue in accordance with the applicable statute and regulations was somehow insufficient.

**II. DISCUSSION**

**A. The suspension was improper, and therefore J&B’s bid should be considered.**

**ORIGINAL**

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The issues pertaining to GDOE's suspension of J&B have been discussed at length in J&B's Notice of Appeal in this appeal and exhibits thereto, and also documents filed in the direct appeal of the suspension itself in OPA-PA-13-002. Lest it be contended that J&B has waived any issue already briefed in OPA-PA-13-002, arguments and positions from J&B's Comments on Agency Report from that appeal are repeated below.

With respect to the warranty issue, J&B was involved in trying to resolve a contract or breach of contract controversy with GDOE pursuant to 5 GCA § 5427 and its implementing regulations. 2 GAR § 9103(e) expressly provides that "All controversies involving claims asserted by the territory against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Chief Procurement Officer ... or the head of a Purchasing Agency ... ." The warranty related disagreement between J&B and GDOE is certainly a contract controversy and, based on the foregoing statute, *must* be resolved pursuant to the dispute resolution provisions of Section 9103. This was made manifest by GDOE's own Purchase Order which recited the dispute resolution clause of 2 GAR § 9103(g). *See* GDOE April 4, 2013 Submission of Procurement Record, Bate Stamp GDOE 004-005 in OPA-PA-13-002. In *Pacific Rock Corp. v. Department of Education*, 2001 Guam 21, ¶ 32 n. 5, the Court similarly noted that "[t]he requirement of resolving the dispute at the administrative level provided for in the Procurement Act comport with the contracts signed by the parties in this case. Each of the four contracts contained a 'Disputes Clause' . . . ."

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GDOE did not attempt to resolve the parties' contract controversy through issuance of a written decision which could then be subject to administrative or judicial review. Instead, GDOE jumped straight to a suspension and proposed debarment. DOE ignored the relevant provisions of the procurement law and regulations governing the resolution of contract controversies. GDOE also ignored the provisions of the parties' contract which expressly incorporated the regulatory provisions mandating that *all* contract controversies would be resolved through the issuance by GDOE of a written decision on the controversy that would be the subject of administrative or judicial review.

Furthermore, the warranty was certainly a legitimate contract controversy. Out of the 500 A/C units J&B installed, GDOE has implemented a suspension over a contractual warranty dispute involving only three (3) of those units. J&B investigated GDOE's complaints regarding those units and provided DOE with numerous photographs of the units which illustrated quite clearly that those particular units had not been maintained at all. The units were filthy and covered with dirt/mold. The filters had not been cleaned nor had the units been rinsed, the most basic of maintenance procedures that all homeowners on Guam must attend to. GDOE admitted in its Agency Report in OPA-PA-13-002 that it did not touch the units.

Instead of doing any routine maintenance itself, the GDOE simply ignored these units while it went about trying to solicit a separate contract for maintenance and minor repair, all in violation of the law requiring that GDOE air conditioning units "[b]e the subject of a warranty and maintenance agreement that guarantees the system's working life for not less than five (5) years."

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*See* 17 GCA § 7119(c). Rather than following the law, the GDOE separated the procurement of the air conditioners from the procurement of a maintenance and minor repair contract.

Now realizing the error of its ways, GDOE's latest air conditioner procurement, the subject of this appeal, contains specifications requiring the winning bidder to guarantee that a warranty will not be voided if a maintenance and repair contractor follows its own maintenance schedule. The relevant provision from IFB No. 008-2013 provides that "[t]he Contractor in submitting their bid acknowledges and agrees that in the event that preventative maintenance is performed on the installed HVAC units by a person(s) other than the Contractor, the Contractor will continue to honor the five (5) year warranty, so long as, Preventative Maintenance is performed according to the Preventative Maintenance Schedule." *See* Procurement Record, filed April 12, 2013, at GDOE 00177-00178, While this will not solve the problem, it does show that GDOE is slowly coming around to an acknowledgement of the grave error it made in ignoring the requirements of 17 GCA § 7119(c).

While GDOE did award a maintenance and minor repair contract to another contractor as of November, 2012, there is no evidence that GDOE sent its maintenance contractor out to perform simple preventative maintenance on the three units at issue for the suspension that gave rise to non-consideration of J&B's bid in the current procurement. Those simple maintenance procedures may well have brought those units back to their full operating capacity and remedied their failure to operate efficiently. The warranty provided by J&B guaranteed sound workmanship, materials and the compressor for five (5) years. GDOE never provided any notice under the J&B warranty of any

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defect in workmanship, materials or a defect with respect to the compressor. GDOE has simply been requiring that J&B, on threat of debarment, perform routine maintenance on those units. But GDOE did not contract with J&B for routine maintenance.

Finally, the Guam Procurement Code and its implementing regulations governing suspension and debarment fail to comport with basic notions of due process. While the procurement regulations provide that a contractor notified of a suspension or proposed debarment action may request a hearing, neither the statute nor the regulations provide any time period within which any such hearing must be held. An open ended period of time for the provision of a hearing can visit severe harm on a contractor's property and liberty interests. As noted by the court in *Related Industries, Inc. v. United States*, 2 Cl. Ct. 517, 526 (1983), "[e]ven apart from the procurement regulations on debarment, the due process clauses of the fifth and fourteenth amendments require that a determination by governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of property or the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response."

Here, GDOE never provided any specific notice of any defect in workmanship, materials or with respect to the compressor, which is what the warranty issued by J&B covered. A simple claim that a unit does not operate or cool efficiently suggests a simple maintenance problem, not a warranty issue. If you ignore an air conditioner as GDOE has done here, it will rather quickly stop working efficiently. Basic routine maintenance must be provided to keep an air conditioner in

sound operating condition. GDOE has provided notice of nothing other than its own failure to provided routine maintenance. It has never provided any specific notice of a product defect actionable under a warranty. If you never change the oil in your car, the manufacturer will not honor any warranty when the engine inevitably seizes up.

GDOE has not shown a lawful basis for its actions. Its suspension determination against J&B must be overturned, and thus its refusal to consider J&B's bid for IFB 008-2013 must also be overturned.

**B. GDOE was properly served with J&B's first protest.**

GDOE complains that J&B's first protest was served on GDOE's Office of the Superintendent, rather than GDOE's Office of Supply Management. Section 5425(a) of Title 5 of the Guam Code Annotated provides in pertinent part, "Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or *the head of a purchasing agency.*" (Emphasis added.) The relevant general procurement regulation similarly provides, "Protests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or *the head of a Purchasing Agency . . . .* A protest is considered filed when received by the Chief Procurement Officer, the Director of Public Works, or *the head of a Purchasing Agency.*" (Emphasis added.) 2 GAR §9101(c)(1) (emphasis added). Section 9.2.3.1 of GDOE's own procurement regulations on its website provides, "Protest shall be made in writing to *the Director of Education . . . .* A protest is considered filed when received by *the Director of*

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*Education.*” (Emphasis added.) A provision buried in the IFB itself concerning “correspondence” by e-mail, fax or hand delivery cannot repeal a statute and two regulations specifically addressing service of procurement protests. Service of the first protest upon the Superintendent complied with all applicable statutes and regulations.

That having been said, J&B has served the GDOE Office of Supply Management with courtesy copies of both a prior protest concerning another procurement and the second protest concerning this procurement. In the future, time permitting, J&B and the undersigned counsel will continue to serve such courtesy copies if either has cause to assert additional protests against GDOE. However, as noted in prior documents filed by J&B in both this appeal and OPA-13-002, the suspension at issue was timed so as to drastically reduce J&B’s time to prepare and file both an appeal of the suspension with this Office and a protest with GDOE before the bid opening for IFB 008-2013. By the time J&B was able to contact counsel, and counsel was able to resolve a potential conflict with another client who was believed to be a possible bidder on the project, there was little time to research the issues raised by this novel suspension and prepare both the appeal and the protest for filing and service in advance of the bid opening. Given the bulk of the exhibits attached to both the appeal of the suspension and the first protest concerning this procurement, counsel dispensed with the courtesy copies for the GDOE Office of Supply Management on this one occasion so that both the appeal and the protest could be copied, collated and served nearly 24 hours before the bid opening. It is not J&B’s fault if there is a lack of communication within GDOE.

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### **III. CONCLUSION**

For the foregoing reasons, the Office of Public Accountability should overrule GDOE's denial of J&B's protests and rule that J&B's bid for GDOE IFB 008-2013 must be considered.

Dated this 24 day of April, 2013.

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