



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**In the Appeal of All Business Enterprises Corp. Docket No OPA-PA-22-002**

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**Monique Sanchez** <MSanchez@guamlawoffice.com>

Wed, Mar 2, 2022 at 12:05 PM

To: "jhernandez@guamopa.com" &lt;jhernandez@guamopa.com&gt;

Cc: "cguerrero@triton.uog.edu" &lt;cguerrero@triton.uog.edu&gt;, "arcamacho@triton.uog.edu" &lt;arcamacho@triton.uog.edu&gt;, "arcesq@hotmail.com" &lt;arcesq@hotmail.com&gt;, Seth Forman &lt;Forman@guamlawoffice.com&gt;

Good afternoon,

Per Attorney Forman, please see the following documents regarding the above referenced matter for filing:

1. Appellant's Comments on Agency Report (with Exhibit)
2. Hearing Request

Thank you.

Regards,

*Monique J. Sanchez*

Legal Assistant to Tim Roberts, Seth Forman, David Dooley &amp; Colin Jones

**ROBERTS FOWLER & VISOSKY LLP**

865 South Marine Corps Drive, Suite 201

Tamuning, Guam 96913

Tel: (671) 646-1222

Fax: (671) 646-1223

Email: msanchez@guamlawoffice.com

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**2 attachments** **Appellant's Comments on Agency Report.pdf**  
830K **Hearing Request.pdf**  
58K

Seth Forman  
Roberts Fowler & Visosky LLP  
865 South Marine Corps Drive, Ste. 201  
Tamuning, Guam 96913  
Telephone (671) 646-1222  
Facsimile (671) 646-1223  
E-mail: Forman@guamlawoffice.com

Attorneys for Appellant  
All Business Enterprises Corp.

**OFFICE OF PUBLIC ACCOUNTABILITY**

**PROCUREMENT APPEAL**

In the Appeal of	)	<b>APPELLANT’S COMMENTS ON</b>
	)	<b>AGENCY REPORT</b>
All Business Enterprises Corp.,	)	
	)	Docket No. OPA-PA-22-002
Appellant.	)	
_____	)	

**I. INTRODUCTION**

Appellant All Business Enterprises Corp. (“ABEC”) responds to the University of Guam’s (“UOG”) Statement Answering the Allegations of All Business Enterprises Corp.’s Appeal as follows. To summarize, a contract can only be awarded to a responsive bidder whose bid conforms in all material respects to the invitation for bids. If bid specifications give bidders a choice as to the required coating, a bid that does not provide for any coating is not responsive. An unresponsive bid cannot be rendered retroactively responsive after a contract has been awarded to a nonresponsive bidder. For these reasons, the OPA should overrule UOG’s denial of ABEC’s protest<sup>1</sup> and remand the matter to UOG for further action in accordance with the OPA’s ruling.

**II. DISCUSSION**

**A. The bid from Tony’s Workshop should have been rejected as nonresponsive.**

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<sup>1</sup> On page 4 of its Notice of Appeal, ABEC mistakenly referred to “GCC’s denial of ABEC’s protest.” This should have referred to UOG’s denial of the protest. Counsel apologizes for this error.

**1. The Tony's Workshop bid was nonresponsive because it did not conform in all material respects to the Invitation for Bids.**

University of Guam Procurement Regulation 3.9.12.1 provides in pertinent part:

The contract is to be awarded "to the lowest responsible and responsive bidder" whose bid meets the requirements and criteria set forth in the Invitation for Bids. . . . The Invitation for Bids shall set forth the requirements and criteria which shall be used to determine the lowest responsive bidder.

University of Guam Procurement Regulation 3.9.14.2 provides in pertinent part:

Responsiveness of bids is covered by Section 5201(g) (Definitions, Responsive Bidder) of the Guam Procurement Act, which defines "responsive bidder" as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

*See also* In the Appeal of Pacific Data Systems, Guam Office of Public Accountability Appeal No. OPA-PA-10-005 at 11 (Decision, Jan. 12, 2011) (citing 5 GCA §5201(g)); Mack Trucks, Inc. v. United States, 6 Cl. Ct. 68, 70 (1984) ("A bid is responsive if it conforms with the requirements of the solicitation.").

UOG does not contest that the bid specifications required coating the condenser and the evaporator coils. UOG contends that the bid specifications set forth options for different types of coating. However, while Tony's Workshop specified coating for some units, it did not specify any coating at all for six others. *Compare* Exhibit 3 and Exhibits 1-E through 1-J to ABEC's Notice of Appeal. UOG does not contest this fact. If an invitation for bids for police car procurement specified that the vehicles had the option of one of three types of special tires, a bid offering cars with no tires would not be responsive.

“A bid which contains a material variance is an unresponsive bid . . . .” Leo Michuda & Son Co. v. Metro. Sanitary Dist. of Greater Chicago, 422 N.E.2d 1078, 1082 (Ill. App. 3d 1981). Material requirements include those which affect the price and quality of the solicited products. Tel-Instrument Elecs. Corp. v. United States, 56 Fed. Cl. 174, 176 (2003), aff'd, 87 F. App'x 752 (Fed. Cir. 2004). The requirement for coating was material. The coating required in the IFB is necessary to protect units from corrosion and to prolong the life of the units. Declaration of Generoso M. Bangayan, attached hereto as “Exhibit 1”, at ¶5. The cost of the coating is not an insignificant part of a bid. *See id.* at ¶7 (cost of coating for all units in ABEC bid was \$77,650).

Because the bid from Tony's Workshop omitted coating for six units, it did not conform in all material respects to the IFB. Tony's Workshop was not a responsive bidder and could not be awarded the contract.

**2. A nonresponsive bid cannot be made retroactively responsive after a contract is awarded.**

Responsiveness is determined when bids are opened, not at some undetermined time after a contract has been awarded. *E.g.*, 2M Research Services, LLC v. United States, 139 Fed. Cl. 471, 479 (2018); Firth Const. Co. v. United States, 36 Fed. Cl. 268, 275 (1996); Mack Trucks, *supra*, 6 Ct. Cl. at 71; Carl Bolander & Sons Co. v. City of Minneapolis, 451 N.W.2d 204, 206 (Minn. 1990). As noted above, the UOG procurement regulations state, “The contract is to be awarded ‘to the lowest responsible and responsive bidder’ whose bid meets the requirements and criteria set forth in the Invitation for Bids.” UOG Procurement Regulations 3.9.14.1. The Guam Procurement

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Code provides, "The contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids . . . ." 5 GCA §5211(g). Neither the regulation nor the statute says that a bid may be awarded to a bidder whose bid might, or might not, meet the requirements or criteria set forth in the Invitation for Bids once additional information is provided at some later date after bids have been opened and a contract has been awarded. *Cf. Pacific Data Systems, supra* at 12 (bids may not be modified after time and date set for bid opening). A bid that is nonresponsive due to a material variance "may not be corrected after the bids have been opened in order to make it responsive." *Leo Michuda, supra*, 422 N.E.2d at 1082. The bid from Tony's Workshop did not meet the requirements and criteria in the IFB. Thus, the contract should not have been awarded to that nonresponsive bidder.

The coating required by IFB specifications such as 2.6.2.1 and 2.6.2.2 could not be done on Guam.<sup>2</sup> *Bangayan Decl.* at ¶6. It has to be specifically requested from the manufacturer. *Id.* Thus, even if a bid could be rendered retroactively responsive with information provided after an award, the "Manufacturer's standard catalog data" upon which UOG relies for tardy retroactive compliance with bid specifications probably would not identify the coating specifically requested for a particular order. Going back to a prior analogy, if an IFB for police cars included special "add-ons"

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<sup>2</sup> These and other relevant bid requirements can be found in Exhibit 2 to the Notice of Appeal, as well as in various places in UOG's voluminous submissions.

or options for that particular purpose, the manufacturer's standard owner's manual for the particular make and model would probably not provide documentation of compliance with such requirements.

**B. The second place bid from JWS was also nonresponsive.**

If the bid from Tony's Workshop was nonresponsive due to failure to provide for the required coating for six units, then the bid from JWS was plainly nonresponsive since it made no mention of coating for any of the units.

UOG contends that issues pertaining to JWS are not properly before the OPA. ABEC will defer to the OPA on that issue. However, UOG's position is strange in that UOG seeks to have ABEC sanctioned for allegedly causing unnecessary delay in the procurement process. There would truly be unnecessary delay if (1) the OPA were to uphold the protest as to Tony's Workshop and remand this matter to UOG, (2) UOG were then to award the contract to the second place bidder, JWS, and (3) ABEC then had to file another appeal raising the same issue of nonresponsiveness already decided as to Tony's Workshop. It is more practical to decide the issue as to both Tony's Workshop and JWS now if the OPA determines it has jurisdiction over both.

In regards to the Buy America issue, after further reflection, ABEC admits that issue is moot for this appeal. If the OPA decides the Tony's Workshop bid was nonresponsive, then the JWS bid is nonresponsive for the same reason. It would not matter where JWS would have acquired the units. If the OPA rules in favor of UOG, then the award to Tony's Workshop stands, and any issues pertaining to JWS are moot. Nonetheless, UOG asserts Dunham-Bush has a factory in Florida

without any proof beyond an unsupported statement of counsel. ABEC's counsel has done further Googling. He has found that although Dunham-Bush is based in Malaysia, it does have offices in places around the world, including Florida. ABEC does not know if the Florida location is a factory or just a dealership office. In addition, UOG apparently assumes JWS would obtain units from a Florida factory, although given the distances involved Dunham Bush would probably try to fill a Guam order from Malaysia rather than Florida. However, again, "Buy America" is a moot issue.

**C. UOG's request for sanctions is just plain silly.**

Since there is no merit to UOG's position on the merits, and ABEC's position is correct, UOG's demand for sanctions is ridiculous. If for any reason the OPA does decide that UOG could disregard bid specifications when awarding the contract, and then allow the "winning" bidder to possibly rectify the situation with some literature from the manufacturer after the award, it still cannot be said ABEC's position was fraudulent, frivolous, or intended solely to disrupt the procurement process. ABEC's protest and appeal raise valid, important issues. If anything, UOG's position on the merits is a frivolous attempt to justify its carelessness in the review of bids. UOG cites no authority for the sanctions it erroneously seeks. Be that as it may, the OPA has more important things to do than consider rants from either party about sanctions, and ABEC has just given this particular issue more time and space than it deserves.

**III. CONCLUSION**

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The bids from both Tony's Workshop and JWS were nonresponsive. For the foregoing reasons, the OPA should overrule UOG's denial of ABEC's protest and remand the matter to UOG for further action in accordance with the OPA's ruling.

Respectfully submitted,

ROBERTS FOWLER & VISOSKY LLP

Date: March 2, 2022

By: Seth Forman  
**SETH FORMAN**  
Attorneys for Appellant All Business  
Enterprises Corp.

# EXHIBIT 1

Seth Forman  
Roberts Fowler & Visosky LLP  
865 South Marine Corps Drive, Ste. 201  
Tamuning, Guam 96913  
Telephone (671) 646-1222  
Facsimile (671) 646-1223  
E-mail: Forman@guamlawoffice.com

Attorneys for Appellant  
All Business Enterprises Corp.

**OFFICE OF PUBLIC ACCOUNTABILITY**

**PROCUREMENT APPEAL**

In the Appeal of	)	<b>DECLARATION ON GENEROSO</b>
	)	<b>M. BANGAYAN</b>
All Business Enterprises Corp.,	)	
	)	Docket No. OPA-PA-22-002
Appellant.	)	
_____	)	

I, Generoso M. Bangayan, also known as Gene Bangayan, declare under penalty of perjury under the laws of Guam that the following facts are within my personal knowledge and are true and correct:

1. I am the Responsible Management Employee for All Business Enterprises Corp. (“ABEC”) with respect to the procurement which is the subject of the above-captioned appeal.

2. I am also the President of Phil-Gets (Guam) International Trading Corporation dba J&B Modern Tech (“J&B”), and I have been President of J&B since the company was formed in 1990.

3. The President of ABEC, Nelia Bangayan, has been the Vice President of J&B since 1990.

4. While ABEC is a new company, J&B has been in the business of, among other things, selling and installing air conditioning since its inception in 1990.

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Declaration of Generoso M. Bangayan

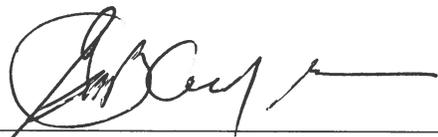
5. Based on my experience in the air conditioning business, the coating required in UOG IFB B21-17(Purchasing of HVAC Equipment) is necessary to protect units from corrosion and prolong the life of units.

6. Based on my experience in the air conditioning business, the types of coating required by provisions such as 2.6.2.1 and 2.6.2.2 of the IFB specifications cannot be done on Guam, but must be specifically requested from the manufacturer.

7. The coating required by the IFB specifications is expensive. The cost of the coating for all units included in ABEC's bid for this procurement was \$77,650.

Executed March 2, 2022 at Tamuning, Guam.

By

  
\_\_\_\_\_  
**Generoso M. Bangayan**