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Corp. dba J&B Modern Tech

OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)	Docket No. OPA-PA-13-002
)	
PHIL-GETS (GUAM) INTERNATIONAL)	COMMENTS ON AGENCY
TRADING CORP. dba J&B MODERN TECH)	REPORT
)	
Appellant.)	
_____)	

J&B Modern Tech (“J&B”), hereby submits its comments on the Agency Report filed by the Appellee, Guam Department of Education (“DOE”).

With respect to the warranty issue here on appeal, it had appeared that J&B was involved in trying to resolve a contract or breach of contract controversy with the DOE pursuant to 5 GCA Section 5427 and its implementing regulations. 2 GAR Section 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 the DOE 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 here by the DOE’s own Purchase Order which recited the dispute resolution clause of 2 GAR Section 9103(g). *See*, DOE April 4, 2013 Submission of Procurement Record, Bate Stamp GDOE 004-005. In *Pacific Rock Corp. v. Dept. of Education*, 2001 Guam 21, ¶ 32 and fn. 5, the Court similarly noted

that “the 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’”

However, the DOE 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, the DOE simply jumped straight to a suspension and proposed debarment. The DOE thereby ignored the relevant provisions of the procurement law and regulations governing the resolution of contract controversies. The DOE 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 the DOE of a written decision on the controversy that would be the subject of administrative or judicial review.

Furthermore, this was certainly a legitimate contract controversy. Out of the 500 A/C units J&B installed, the DOE has implemented a suspension over a contractual warranty dispute involving but three (3) of those units. J&B investigated the DOE’s complaints regarding those units and provided the DOE with numerous photographs of the units which illustrated quite clearly that they 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. The DOE admits in its Agency Report that it did not touch the units.

Instead of doing any routine maintenance itself, the DOE 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 DOE 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.” *See*, 17 GCA Section 7119(c). Rather than following the law, the DOE separated the procurement of the air conditioners from the procurement of a maintenance and minor repair contract.

Now realizing the error of its ways, the DOE’s latest air conditioner procurement 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 page 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*, **Exhibit A**. While this will not solve the problem, it does show that the DOE is slowly coming around to an acknowledgement of the grave error it made in ignoring the requirements of 17 GCA Section 7119(c).

While, the DOE did award a maintenance and minor repair contract to another contractor as of November, 2012, there is no evidence that DOE sent its maintenance contractor out to perform simple preventative maintenance on the three units at issue here. 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. The DOE has never provided any notice under the J&B warranty of any defect in workmanship, materials or a defect with respect to the compressor.

It has simply been requiring that J&B, on threat of debarment, perform routine maintenance on those units. But, the DOE 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, the DOE has 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 covers. 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 the DOE 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. The DOE has provided notice of nothing other than its own failure to provided routine maintenance. It has never provided any specific notice of a product

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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.

The DOE has not shown a lawful basis for its actions and its suspension determination against J&B must be overturned.

Dated this 22nd day of April, 2013.

DOOLEY ROBERTS & FOWLER LLP

By:



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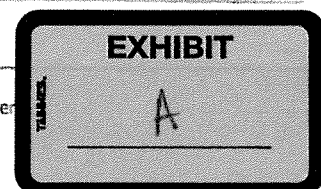
related work not covered in the original Scope of Work and Guam Department of Education reserves the right to solicit other price quotation/cost proposal from other vendors should Guam Department of Education deems that Contractor's proposal is excessive/high.

12. After installation, HVAC units must be completed and ready for operation-ready to use. All electrical requirements shall meet the National Electrical Code (NEC) Article 440 Air Conditioning and Refrigeration Equipment.
13. The Contractor must provide both a hard copy and an electronic copy of a list to Facilities and Maintenance Division Manager indicating where the units are installed and the date the units were installed, including date(s) of anticipated preventative maintenance.
14. Contractor shall provide an installation plan for all new HVAC units that are to be installed.
 - A. Contractor must work with Facilities and Maintenance Division in conjunction with Inventory Management Office for an approved plan.
 - B. If a delay occurs for any HVAC unit to be installed at GDOE, any changes in the installation plan must be approved by Facilities and Maintenance.
15. Transition duct must be included with all new Centralized HVAC unit installations. Contractor must submit separate cost proposal on any request for replacement of supply and return ducts and other related work not covered in the original Scope of Work and Guam Department of Education reserves the right to solicit other price quotation/cost proposal from other vendors should Guam Department of Education deems that Contractor's proposal is excessive/high.
16. After the installation of each HVAC unit, the Facilities and Maintenance Division will inspect the each newly installed HVAC unit and determined if the Contractor conformed to the installation requirements of this IFB. GDOE reserves the right to reject and, at its discretion, require replacement of those items that are determined to be defective in material, construction, workmanship, manufacturing, or performance and/or that do not conform to the specifications described in this IFB. Installation of a HVAC unit will be deemed acceptable upon the GDOE's acceptance of the Five (5) year warranty document for each installed HVAC unit.
17. The Contractor shall provide for all newly installed HVAC units, a five (5) year warranty (Title 17 Guam Code Annotated (GCA) Education; Chapter 7 Physical Plant. 7119).

The Five (5) Year warranty for each HVAC unit will come into upon GDOE's acceptance of the Five (5) year warranty document for each installed HVAC unit.

The Contractor will guarantee the five (5) year warranty, so long as, the preventative maintenance is performed according to the Preventative Maintenance Schedule supplied by the Contractor.

→ The 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.

The Contractor in submitting their bid acknowledges and agrees that any communications concerning the interpretation of the Five (5) year warranty is to be directed to GDOE's Supply Management Administrator.

NOTE: Title 17 Guam Code Annotated (GCA) Education; Chapter 7 Physical Plant. 7119. Standards for air conditioning systems funded herein.

18. Any HVAC units (Systems) purchased and used by the Guam Department of Education (GDOE) shall:
 - A. Meet the comfort and air quality standards set forth for heating, ventilation and air conditioning (HVAC) equipment provide in Chapter 5 of the Federal GSA's facilities Standards for Public Buildings Services (Revised November 2000 or Later – PBS-100);
 - B. Repair and replacement parts are readily available within five (5) days, and on Saturdays, Sundays and Government of Guam holidays; and
 - C. Be the subject of a warranty and maintenance agreement that guarantees the system's working life for not less than five (5) years.
19. All new AC Units (with the exception of 9,000 & 12,000 BTU units) are required to have Fresh Air Intakes/Make-Up-Air Units installed as a function and feature of the AC unit or be provided as an external accessory.
20. Contractor shall follow AIR CONDITION TECHNICAL SPECIFICATIONS section here in.

2.1.3 – PURCHASE DESCRIPTION

This Invitation for Bid (IFB) contains detailed specifications for the purchase of Air Conditioning Equipment for Guam Department of Education (GDOE) Public Schools and Support Facilities.

PACKAGE UNITS, SPLIT TYPE UNITS, SPLIT DUCTED TYPE UNITS & CHILL WATER TYPE UNITS:

MINI SPLIT TYPE UNITS	PACKAGE UNITS	SPLIT DUCTED TYPE UNITS	CHILLED WATER TYPE UNIT
12000 BTU-36000 BTU	5 TON-50 TON	5 TON-100 TON	170 TON

For all new HVAC units, installation must include all electrical requirements from main panel box to disconnect switch and to the new HVAC units i.e. junction boxes, conduits, panels and etc. HVAC units shall conform to the National Electrical Code (NEC) 2008. HVAC units shall be complete and ready for operation-ready to use. All electrical requirements shall meet the National Electrical Code (NEC) Article 440 Air Conditioning and Refrigeration Equipment.

2.1.4 – TERM OF WORK

The initial award under this IFB shall be for a term of approximately one year, or through September 30, 2014. The initial award will be for the purchase and installation of the HVAC units, and will include Preventative Maintenance for the initial term. GDOE, at its discretion, may renew the Contract strictly for Preventative Maintenance services for four (4) additional one year terms. Bidders should submit separate bid prices for air conditioning units, inclusive of installation, and preventative maintenance for the initial award term. In the event GDOE opts to renew the Contract for Preventative Maintenance services