



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
JRN AIR CONDITIONING &
REFRIGERATION, INC.

Appellant

APPEAL NO: OPA-PA-10-008

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on October 28, 2010, by JRN AIR CONDITIONING & REFRIGERATION, INC. (Hereafter referred to as "JRN") regarding the Department of Education, Government of Guam's (Hereafter referred to as "DOE") denial of JRN's September 11, 2010 protest concerning DOE's solicitation of Invitation for Bid No. IFB-008-2010 (Preventive Maintenance and Repair of Split Type and Window Air Conditioning Equipment for all GDOE Public Schools and Support Facilities) (Hereafter referred to as "IFB"). The Public Auditor holds that she does not have the jurisdiction to decide issues regarding a contractor's alleged violation of 5 G.C.A. §5801 and §5802, and the Public Auditor holds that DOE violated Guam Procurement Law and Regulations by failing to include a recitation, reference, or copy of the most recent U.S. Department of Labor Wage Determination for Guam in the IFB, and by failing to identify which occupational codes in said wage determination applied to the technicians and helpers the IFB required. Accordingly, JRN's appeal is DENIED in part and GRANTED in part.

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II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, pursuant to JRN's January 18, 2011 Waiver of Hearing. Anthony R. Camacho, Esq. served as the Office of Public Accountability's Hearing Officer for this appeal, and the Public Auditor makes the following findings of fact:

1. On or about July 13, 2010, DOE issued the IFB.¹

2. The IFB required the bidders to submit a U.S. Department of Labor (Hereafter referred to as "U.S. DOL") Affidavit (Hereafter referred to as "Wage Compliance Declaration").² The IFB included Form E – Declaration Re Compliance with U.S. DOL Wage Determination which the bidders were to fill out and which stated, in relevant part, that: (1) The bidder read and understands the provisions of 5 G.C.A. §5801 and §5802. The Declaration form included the language of both statutes in the Affidavit; (2) The bidder is in full compliance with 5 G.C.A. §5801 and §5802, as may be applicable to the procurement referenced herein; and (3) That the bidder attached the most recent wage determination applicable to Guam issued by the U.S. DOL, and the declaration instructed the bidder to attach said document to the declaration.³ The IFB did include Form E – Wage Compliance Declaration, however, DOE did not attach the Wage Determination issued by the U.S. DOL as of July 13, 2010, the date DOE publicly announced the IFB.

¹ Page 1, Bid Invitation and Award, IFB, Exhibit 1, Procurement Record filed on November 9, 2010.

² Page 2, IFB – Special Reminder to Prospective Bidders, Id.

³ Page 10, Bid Invitation Form E, Declaration Re Compliance with U.S. DOL Wage Determination, Id.

1 3. The IFB stated that bidders awarded a contract from the IFB shall comply with the
2 applicable standard, provisions, and stipulations of all pertinent Federal or local laws, rules, and
3 regulations relative to the performance of the contract and furnishing of goods.⁴
4

5 4. The IFB required the bidders to provide labor cost requirements for: (1) Preventive
6 Maintenance of Air-Conditioning Equipment; (2) Minor Repairs of Air-Conditioning
7 Equipment; and (3) Major Repairs, Installation, Relocation, and Replacement of Central Air-
8 Conditioning Equipment.⁵ Further, the charges for the aforementioned services were to be
9 based on a fixed-hourly rate to include labor, transportation, insurance, parts, and for any other
10 reasonable expenses related to the scope of work.⁶
11

12 5. The bidder, awarded the contract for the IFB, would provide a minimum of two (2)
13 crews for installation, and three (3) crews for repair and preventive maintenance per district (one
14 (1) technician and one (1) helper per crew or a total of ten (10) persons per district). The IFB did
15 not provide job position descriptions or job classification codes that correspond with the U.S.
16 DOL Wage Determination for each crew.⁷
17

18 6. The deadline for bidders to submit their bids in response to the IFB was set to August
19 4, 2010 at 2:00 p.m.⁸
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21 7. A pre-bid conference for the IFB was scheduled for July 27, 2010.⁹

22 8. At the pre-bid conference, DOE took questions from the prospective bidders regarding,

23 ⁴ Paragraph 34, Compliance with Laws, General Terms and Conditions, Id.
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25 ⁵ Paragraph 1, General Specifications, Bid Specifications, Id.

26 ⁶ Paragraph 3.F., Allowable Cost, Bid Specifications, Id.

27 ⁷ Paragraph 3.F.4., Crew Requirements Per District, Bid Specifications, Id.

28 ⁸ Page 1, Bid Invitation and Award, Id.

⁹ Amendment No. 1 dated July 20, 2010, Exhibit 2, Id.

1 in relevant part, whether work hours would be coordinated with DOE's School Administrators,
2 and whether DOE would extend the bid opening.¹⁰ However, the issue of wage determination
3 compliance was not discussed at the pre-bid conference.¹¹
4

5 9. On July 30, 2010, DOE postponed further solicitation of the IFB indefinitely.¹²

6 10. However, on August 18, 2010, DOE re-instated the IFB and clarified that it had four
7 (4) school districts. Further, DOE rescheduled the bid opening date for the IFB to September 2,
8 2010 at 2:00 p.m.¹³
9

10 11. On September 2, 2010, JRN, Global Food Services, LLC, dba GFS Group (Hereafter
11 referred to as "GFS"), and Phil-Gets (Guam) International Trading Corp., dba J&B Modern Tech
12 (Hereafter referred to as "J&B") submitted bids in response to the IFB.¹⁴
13

14 12. JRN submitted a Wage Compliance Declaration with its bid and attached a copy of
15 U.S. DOL Wage Determination No. 2005-2147, Revision No. 11, dated June 15, 2010.¹⁵

16 13. GFS submitted a Wage Compliance Declaration with its bid and attached a copy of
17 U.S. DOL Wage Determination No. 2005-2147, Revision No. 12, dated August 19, 2010.¹⁶
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19 14. J&B submitted a Wage Compliance Declaration with its bid and attached a copy of
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21 ¹⁰ Notes from July 27, 2010 Pre-Bid Conference, Exhibit 2, Id.

22 ¹¹ Declaration of Martin Mercado dated November 24, 2010, Appellant's Comments
23 in Response to the Agency Report filed on November 24, 2010.

24 ¹² Amendment No. 2 dated July 30, 2010, Exhibit 2, Procurement Record Filed on
25 November 9, 2010.

26 ¹³ Amendment No. 3 dated August 18, 2010, Exhibit 3, Id.

27 ¹⁴ Bidder's Register, Exhibit 3, Id.

28 ¹⁵ Exhibit 3, Wage Compliance Declaration, JRN Bid, Id.

¹⁶ Exhibit 3, Wage Compliance Declaration, GFS Bid, Id.

1 U.S. DOL Wage Determination No. 2005-2147, Revision No. 10, dated May 5, 2010.¹⁷

2 15. DOE deemed JRN, GFS, and J&B to be compliant with the wage determination
3 requirements set forth in the IFB and 5 G.C.A. §5801 and §5802 solely on the Wage Compliance
4 Declarations, despite the fact that each bidder submitted a different revision of Wage
5 Determination No. 2005-2147 with their respective bids.¹⁸

7 16. JRN bid: (1) Twenty-four-dollars-and-fifty-cents per hour (\$24.50) for the Minor
8 and Major Repairs, respectively, for a total of thirty-six-thousand-seven-hundred-fifty-dollars
9 (\$36,750) for the fifteen hundred (1,500) man hours the contract would require for each of the
10 aforementioned repairs, respectively; and (2) Fifteen-dollars-and-seventy-five-cents (\$15.75) for
11 the Preventive Maintenance for a total of twenty-three-thousand-six-hundred-and twenty-five
12 dollars (\$23,625) for the fifteen hundred (1,500) man hours the contract would require for such
13 services. JRN's total bid was for ninety-seven-thousand-one-hundred-twenty-five-dollars
14 (\$97,125) when the aforementioned prices were added up.¹⁹

17 17. GFS bid thirty-two-dollars (\$32) per hour for the Major and Minor Repairs and the
18 Preventive Maintenance for a total of forty-eight-thousand-dollars (\$48,000), respectively, for
19 the fifteen hundred (1,500) man hours the contract would require respectively for such services.
20 GFS' total bid was for one-hundred-forty-four-thousand-dollars (\$144,000) when the
21 aforementioned prices were added up.²⁰

23 18. J&B bid: (1) Fifteen-dollars-and ninety-cents per hour (\$15.90) for the Minor and

24 ¹⁷ Exhibit 3, Wage Compliance Declaration, J&B Bid, Id.

25 ¹⁸ Statement of Albert Garcia, DOE Acting Supply Management Administrator,
26 Exhibit G, Agency Report filed on November 15 2010.

27 ¹⁹ JRN Bid, Exhibit 3, Procurement Record filed on November 9, 2010.

28 ²⁰ GFS Bid, and Abstract of Bids, Id.

1 Major Repairs, respectively, for a total of twenty-three-thousand-eight-hundred-and-fifty-dollars
2 (\$23,850) for the fifteen hundred (1,500) man hours the contract would require for each of the
3 aforementioned repairs, respectively; and (2) Fifteen-dollars-and-eighty-five-cents (\$15.85) for
4 the Preventive Maintenance for a total of twenty-three-thousand-seven-hundred-seventy-five
5 dollars (\$23,775) for the fifteen hundred (1,500) man hours the contract would require for such
6 services. J&B's total bid was for seventy-one-thousand-four-hundred-seventy-five (\$71,475)
7 when the aforementioned prices were added up.²¹
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9
10 19. DOE determined that J&B's seventy-one-thousand-four-hundred-seventy-five
11 (\$71,475) bid was the lowest responsive and responsible bid.²² Further, JRN's ninety-seven-
12 thousand-one-hundred-twenty-five-dollars (\$97,125) bid was the second lowest, and GFS' one-
13 hundred-forty-four-thousand-dollars (\$144,000) bid was the highest bid.²³
14

15 20. On September 3, 2010, DOE issued a notice of its intent to award the contract to
16 J&B.²⁴
17

18 21. That same day, DOE issued a bid status to JRN informing JRN that DOE rejected
19 JRN's bid due to the bid's high price and that DOE recommended that the contract be awarded to
20 J&B.²⁵ JRN received the aforementioned bid status on September 7, 2010.²⁶
21

22 22. On September 11, 2010, four (4) days after receiving the aforementioned bid status,
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24 ²¹ J&B Bid, Id.

25 ²² DOE Office of Supply Management Memorandum dated September 3, 2010, Exhibit
26 3, Id.

27 ²³ Abstract of Bidders, Exhibit 3, Id.

28 ²⁴ Letter of Intent dated September 3, 2010, Exhibit 3, Id.

²⁵ Bid Status dated September 3, 2010, Id.

²⁶ Facsimile Confirmation Report dated September 7, 2010, Id.

1 JRN filed a protest with DOE alleging that J&B's seventy-one-thousand-four-hundred-seventy-
2 five (\$71,475) bid was based on an unfair wage and labor calculations that violated 5 G.C.A.
3 §5801 and §5802. JRN further alleged that J&B's bid was too low to comply with the current
4 U.S. DOL wage determination for occupation code #23410 (Heating, Ventilation, and Air-
5 Conditioning Mechanic), which includes the necessary base rate, and health and welfare
6 benefits.²⁷

8 23. On October 13, 2010, DOE denied JRN's September 11, 2010 protest for two main
9 reasons: (1) J&B's wage rate plus it's insurance, vacation, retirement plans, and Christmas
10 Bonus benefits were more than enough to meet the U.S. DOL wage determination requirements;
11 and (2) J&B had the lowest and most responsive and responsible bid, J&B complied with 5
12 G.C.A. §5801 and §5802 as evidenced by J&B's Wage Determination Compliance Declaration,
13 and that J&B is obligated to honor all sections of the U.S. DOL wage determination even if it
14 becomes an out of pocket expense for J&B.²⁸

17 25. On October 15, 2010, DOE issued Purchase Order No. 201190016 to J&B for
18 seventy-one-thousand-four-hundred-seventy-five-dollars (\$71,475) for the IFB's contract.²⁹

19 26. On October 28, 2010, fifteen (15) days after DOE denied their September 11, 2010
20 Protest, JRN filed this appeal.³⁰

23 ²⁷ JRN Protest Letter dated September 10, 2010, Exhibit 4, Id.

24 ²⁸ DOE's October 13, 2010 Letter Denying JRN's September 10, 2010 Protest,
25 Exhibit 5, Id.

26 ²⁹ DOE Purchase Order No. 201190016 dated October 15, 2010, Exhibit E6, Agency
27 Report filed on November 15, 2010.

28 ³⁰ Procurement Appeal filed on October 28, 2010.

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III. ANALYSIS

A. The Issues Regarding J&B's Alleged Violations of 5 G.C.A. §5801 and §5802 Are Not Properly Before the Public Auditor.

As a preliminary matter, the Public Auditor must address the issue of whether she has the jurisdiction to decide whether J&B violated the wage and benefit determination provisions of 5 G.C.A. §5801 and §5802. The Public Auditor has the power to review and determine *de novo* any matter properly submitted to her. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12, §12103(a). The Public Auditor has the jurisdiction to hear an appeal of a purchasing agency's written decision on a protest concerning the purchasing agency's method of source selection, solicitation, or award of a contract. 5 G.C.A. §5425(e), and 2 G.A.R., Div. 4, Chap. 12, §12201(a). Here, as stated above, the main issue underlying JRN's September 11, 2010 protest was JRN's allegation that J&B's seventy-one-thousand-four-hundred-seventy-five dollar (\$71,475) bid was based on unfair wage and labor calculations that violate 5 G.C.A. §5801 and §5802. This issue is now before the Public Auditor on appeal concerning JRN's allegations that the bid award was defective because: (1) J&B failed to be a responsive bidder by not complying with 5 G.C.A. §5801 and §5802; and (2) DOE had reason to suspect J&B's bid submission did not comply with 5 G.C.A. §5801 and §5802 and DOE failed to conduct a responsibility inquiry prior to awarding the contract.³¹ Due to the fact that DOE awarded J&B the contract on October 15, 2010, the Public Auditor would have to determine whether J&B complied with 5 G.C.A. §5801 and §5802 to determine these issues.

The aforementioned statutes dictate that Government of Guam contractors must comply with U.S. DOL's Wage Determination for Guam regarding the wages and benefits they pay their

³¹ Paragraphs 4d and e, Page 7, Procurement Appeal filed on October 28, 2010.

1 employees who are directly providing contractual services to the Government of Guam.

2 Generally, where the Government of Guam enters contracts with sole proprietors, partnerships,
3 or corporations for the provision of services and such contractors employ persons to directly
4 provide those services then the contractors shall pay such employees in accordance with the most
5 recently issued U.S. DOL Wage Determination for Guam at the time the contract is awarded. 5

6 G.C.A. §5801. Further, in addition to the wage determination, any such contract shall also
7 contain provisions mandating health and similar benefits for their employees providing direct
8 services to the Government of Guam under the contract and such benefits shall have the
9 minimum value as detailed in the U.S. DOL Wage Determination and such contract shall include
10 provisions guaranteeing a minimum of ten (10) paid holidays per annum, per employee. 5
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12 G.C.A. §5802. As will be discussed below, the enforcement of these statutory provisions is not
13 through the procurement protest and appeal process but an entirely separate administrative
14 adjudicatory process.
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17 The enforcement of 5 G.C.A. §5801 and §5802 is entrusted to the Department of Labor,
18 of the Government of Guam (Hereafter referred to as “Guam DOL”). The Guam DOL or its
19 successor shall monitor compliance with Wage and Benefit Determination compliance and the
20 Director of the Guam DOL shall investigate possible or reported violations of Wage and Benefit
21 Determination compliance. 5 G.C.A. §5803. The Guam DOL shall promulgate rules and
22 regulations, pursuant to the Administrative Adjudication Law, as needed to ensure the equitable
23 investigation of violations and the maintenance of due process, as well as the assessment of
24 monetary penalties in the event of a violation. 5 G.C.A. §5803. In addition to the monetary
25 penalties, a contractor who is found, via the Guam DOL’s administrative adjudication process
26 described above, to have violated the wage and benefit determination provisions may be placed
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1 on a probationary status by the Chief Procurement Officer of the General Services Agency of the
2 Government of Guam for a period of one (1) year, and during such probationary period, a
3 contractor shall not be awarded any contract by any instrumentality of the Government of Guam.
4

5 5 G.C.A. §5804. A contractor who has been placed on probationary status by the Chief
6 Procurement Officer or assessed monetary fines by the Guam DOL, as set forth above, may
7 appeal such penalty or probationary status to the Superior Court of Guam. 5 G.C.A. §5804.

8 Thus, the Public Auditor finds that she does not have the jurisdiction to enforce the provisions of
9 5 G.C.A. §5801 and §5802, or investigate violations of said statutes, and that such jurisdiction
10 rests with the Guam DOL. Therefore, the issues regarding whether J&B failed to comply with 5
11 G.C.A. §5801 and §5802 are not properly before the Public Auditor. The Public Auditor will
12 now explore *de novo* whether DOE's October 13, 2010 determination that J&B's bid was
13 responsive, as described above, was correct.
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16 **B. The IFB Did Not Include the U.S. DOL's Most Recent Wage Determination.**

17 An invitation for bids must include a recitation of the wage determination most recently
18 issued by the U.S. DOL. 5 G.C.A. §5211(b). Here, as stated above, the IFB required the bidders
19 to attach a copy of the most recent U.S. DOL Wage Determination for Guam to their Wage
20 Determination Compliance Declarations and submit the declaration with their bids. DOE did
21 not include a copy of U.S. DOL's most recent Wage Determination with the IFB when the IFB
22 was publicly announced on July 13, 2010. DOE's omission of the most recently issued U. S.
23 DOL Wage Determination resulted in prospective bidders not having a baseline wage
24 determination reference point to prepare their bid submissions. Further, said omission resulted in
25 DOE not having a computation wage floor or minimum comparative benchmark to evaluate bid
26 submissions against. Additionally, the IFB lacks any recitation, reference, or copy of the U.S.
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1 DOL Wage Determination for Guam that was in effect on July 13, 2010, the date the IFB was
2 issued.

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4 The natural consequence of this fatal omission was that the bidders were forced to
5 research or guess which version of the U.S. DOL Wage Determination for Guam they would
6 base their bid prices on and attach to their Wage Determination Compliance Declarations to
7 submit with their bids. In fact, as described above, the three (3) bidders who submitted bids in
8 response to the IFB each attached a different version of U.S. DOL's Wage Determination for
9 Guam to their Wage Determination Compliance Affidavits.
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11 The bidder determined by DOE to have the lowest bid and awarded the IFB had
12 submitted the oldest revision of the U. S. DOL Wage Determination of the three bidders who
13 submitted bid responses to the IFB to DOE on September 2, 2010. J&B's bid included a revision
14 as of May 5, 2010, JRN's bid included a revision as of June 15, 2010, and GFS' bid included a
15 revision as of August 19, 2010. The GFS bid, determined by DOE to be the highest bid had the
16 most recent wage compliance declaration. DOE finally identified which U.S. Wage
17 Determination for Guam it believed was applicable to the IFB in its October 13, 2010
18 Memorandum denying JRN's protest, wherein DOE stated that JRN's bid complied with U.S.
19 DOL Wage Determination No. 2005-2147, Revision No. 12, dated August 19, 2010.³² However,
20 as JRN points out, this version of the wage determination had already been superseded by U.S.
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27 ³² DOE's October 13, 2010 Denial of JRN's September 11, 2010 Protest, Exhibit
28 4, Procurement Record filed on November 9, 2010.

1 DOL Wage Determination No. 2005-2148, Revision No. 14, dated August 19, 2010.³³ These
2 facts clearly show DOE did not know or seek to know which wage determination applied to the
3 services required by the IFB when it issued the IFB on July 13, 2010, when it opened and
4 evaluated the bids on September 2, 2010, and when it awarded the contract to J&B on October
5 15, 2010. The Public Auditor finds that 5 G.C.A. §5211(b) required DOE to determine which
6 U.S. DOL Wage Determination applied to the services required by the IFB and include a
7 recitation, reference, or copy of the wage determination with the IFB when it was issued on July
8 13, 2010. The severe consequences of DOE's omission to comply with this requirement will be
9 discussed next.
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12 **C. The IFB Lacked Objectively Measurable Pricing Criteria.**

13 DOE did not conduct a bid evaluation using objectively measurable criteria. Generally,
14 an invitation for bids shall set forth the requirements and evaluation criteria to be used to
15 determine the lowest responsive bidder and those criteria that will affect the bid price and be
16 considered in evaluation for award shall be objectively measurable. 5 G.C.A. §5211(e) and 2
17 G.A.R., Div. 4, Chap. 3, §3109(n)(1). As stated above, the IFB contained very specific
18 requirements for a minimum of two (2) crews for installation and three (3) crews for repair and
19 preventive maintenance for each of DOE's four (4) districts and that each crew would contain at
20 least one (1) technician and one (1) helper per crew or a total of ten (10) persons per each of
21 DOE's four (4) districts. Further, as stated above, the IFB had specific requirements for
22 technicians with a minimum of five (5) years experience in Preventive Maintenance, Minor
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27 ³³ Paragraph 4f, Page 8, and U.S. DOL Wage Determination No. 2005-2148,
28 Revision No. 14, dated August 19, 2010, Exhibit G, Procurement Appeal filed
on October 28, 2010.

1 Repairs, Major Repairs, Installation, and Relocation and Replacement of Split Air-Conditioning
2 units. Also, as stated above, the IFB's pricing criteria was based on a fixed-hourly rate, inclusive
3 of labor, transportation, insurance, parts, and any other reasonable expenses related to the scope
4 of work. The total price for each type of service required by the IFB was based on one-
5 thousand-five-hundred (1,500) man hours. These requirements made it essential for DOE to
6 determine which U.S. DOL Wage Determination applied to the IFB, and which occupational
7 codes applied to the experienced technicians and helpers, the IFB required, to objectively
8 measure each bidder's hourly rates to ensure compliance with the applicable wage determination.
9 These requirements create an inherent pricing floor that prevents the bidders from submitting
10 hourly wages that were less than the floor. Due to DOE's omission of the recitation of the wage
11 determination applicable to the IFB as required by 5 G.C.A. §5211(b), and due to DOE's
12 omission of which occupation codes in the wage determination that applied to the experienced
13 technicians and helpers required by the IFB, the bidders were left to choose which version of the
14 wage determination they desired to use and which occupational codes in such wage
15 determinations they believed applied. DOE aggravated this problem by merely assuming that the
16 hourly prices submitted by the bidders complied with the wage determination because each
17 bidder submitted a Wage Determination Compliance Declaration with their bid. DOE had not
18 established for its own guidance, analysis, and computations, the minimum requirements to
19 compare and evaluate the bids DOE received in response to the IFB to determine which of the
20 three (3) bidders was the lowest responsive bid and make an award decision based solely on the
21 IFB's criteria.

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27 The Public Auditor's *de novo* review of DOE's procurement record reveals that DOE
28 prepared the Analysis and Recommendation on September 3, 2010 based solely on the lowest

1 price offered. The procurement record is devoid of any kind of comparative analysis of the three
2 bids received by DOE relative to the U. S. DOL Wage Determination. DOE's award
3 recommendation to J&B was solely based on the fact that J&B bid offer was the lowest of the
4 three bids received by DOE. Thus, the Public Auditor finds that DOE could not have objectively
5 measured the bidders' prices and that DOE could not have determined which bid met the criteria
6 and evaluation factors set forth in the IFB without identifying the applicable wage determination
7 or such wage determination's occupational codes that applied to the experienced technicians and
8 helpers the IFB required.
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11 **D. DOE's Award of the Contract to J&B Is Void.**

12 The Public Auditor finds that DOE's award of the contract to J&B is void. If after an
13 award, it is determined that a solicitation or award of a contract is in violation of law, and the
14 person awarded the contract has not acted fraudulently or in bad faith, the contract may be: (1)
15 Ratified or affirmed if doing so is in the best interests of Guam; or (2) The contract may be
16 terminated and the person awarded the contract shall be compensated for the actual expenses
17 reasonably incurred under the contract plus a reasonable profit, prior to the termination. 5
18 G.C.A. §5452(a)(1). Here, as set forth above, the Public Auditor finds that the award of the
19 contract to J&B violated Guam's Procurement Laws and Regulations because DOE failed to
20 include a recitation, reference, or copy of the applicable wage determination as required by
21 5 G.C.A. §5211(b), and DOE's omission of which wage determination and occupational codes
22 applied to the IFB prevented DOE from objectively measuring the bids as required by 5 G.C.A.
23 §5211(e) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1). Further, the Public Auditor finds that there
24 is nothing in the record indicating that J&B acted fraudulently or in bad faith in procuring the
25 contract. The Public Auditor finds that ratifying or affirming J&B's contract with DOE is not in
26 the best interests of the Government because the IFB's hourly pricing methodology and DOE's
27 non-existent evaluation of whether such hourly wages were compliant with at least the minimum
28 requirements of the U.S. DOL Wage Determination for Guam are serious threats to the integrity

1 of the procurement system and must not be condoned by contract ratification. The Public
2 Auditor finds that the contract awarded to J&B shall be terminated within thirty (30) days of the
3 date of this Decision. The Public Auditor further finds that J&B shall be compensated for the
4 actual expenses it reasonably incurred under the contract plus a reasonable profit, which the
5 Public Auditor finds to be the prices J&B submitted in its bid, prior to the termination.
6

7 **IV. CONCLUSION**

8 Based on the foregoing, the Public Auditor hereby determines the following:

9 1. The Public Auditor does not have the jurisdiction to decide the issues regarding
10 whether J&B violated 5 G.C.A. §5801 and §5802 and said issues are not properly before the
11 Public Auditor.

12 2. DOE did not include a recitation, reference, or copy of the most recent U.S. DOL
13 Wage Determination for Guam in the IFB as publicly announced on July 13, 2010 and DOE's
14 omission to do so is in violation of 5 G.C.A. §5211(b).

15 3. DOE's omission of which wage determination and which wage determination
16 occupational codes applied to the technicians and helpers the IFB required prevented DOE from
17 objectively measuring whether any of the bids could be the lowest responsive bid is in violation
18 of 5 G.C.A. §5211(e) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1).

19 4. DOE's award of the contract to J&B is void because DOE could not objectively
20 measure and properly evaluate the bids to determine whether any of the bids were the lowest
21 responsive bid.

22 5. JRN's Appeal is DENIED in part and GRANTED in part.

23 6. DOE's contract with J&B, arising from the IFB, is hereby terminated, and said
24 contract termination shall be effective thirty (30) days from the date of this decision and J&B
25 shall be compensated for its actual expenses it reasonably incurred under the contract plus a
26 reasonable profit for the period prior to the contract termination date which the Public Auditor
27 finds are the prices J&B submitted with its bid.
28

1 7. JRN is hereby awarded its reasonable costs, pursuant to 5 G.C.A. §5425(h) (2),
2 excluding attorney's fees, incurred in connection with the solicitation and its September 11, 2010
3 protest, including JRN's reasonable bid preparation costs, excluding JRN's attorney's fees,
4 because, as JRN was the second lowest bidder, there is a reasonable likelihood that JRN could
5 have been awarded the contract but for DOE's omission of which wage determination and
6 occupational codes applied to the IFB is in violation of Guam Procurement Laws and
7 Regulations as set forth above. JRN shall submit its reasonable costs, excluding attorney's fees
8 to DOE, within thirty (30) days of the date of this Decision. DOE may object to JRN's cost
9 demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days
10 after JRN submits such cost demand to DOE.

11 This is a Final Administrative Decision. The Parties are hereby informed of their right to
12 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
13 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
14 Decision. 5 G.C.A. §5481(a).

15 A copy of this Decision shall be provided to the parties and their respective attorneys, in
16 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
17 www.guamopa.org.

18
19 **DATED** this 17th day of February, 2011.

20
21 

22
23 DORIS FLORES BROOKS, CPA, CGFM
24 PUBLIC AUDITOR



FAX

To: **Laura Mooney, Esq.**
Legal Counsel, GDOE

Vincent C. Camacho, Esq.
Legal Counsel for JRN Air Conditioning and
Refrigeration, Inc. (Appellant)

From: **Doris Flores Brooks, CPA, CGFM**
Public Auditor
OPA Procurement Appeals
Suite 401 DNA Bldg.
238 Archbishop Flores St.
Hagatna, Guam 96910

Agency:		Pages	17 (Including cover)
CC:	Gene M. Bangayan, J & B Modern Tech All Media	Date:	February 17, 2011
Fax:	GDOE: 472-5003 and 472-5001 Carlsmith Ball LLP / JRN: 477-4375 J & B Modern Tech: 646-0589	Point of Contact Nos.	Tel: 475-0390 x 211 (Anne Camacho) Fax: 472-7951
Re:	Appeal No. OPA-PA-10-008 (1) DECISION		

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●Comments:

See attachment for reference.

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver. Thank you.

Anne Camacho – acamacho@guamopa.org

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