

1 **GUAM DEPARTMENT OF EDUCATION**
2 Andrew T. Perez, Legal Counsel
3 P.O. Box DE
4 Hagåtña, Guam 96910
5 Telephone (671) 300-1537
6 Email: legal-admin@gdoe.net

7 *Attorney for Guam Department of Education*

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 8/16/2013
TIME: 3:55 AM PM BY: R. Field

FILE NO OPA-PA: 13210

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

10 IN THE APPEAL OF

APPEAL NO. OPA-PA-13-010

11 JMI EDISON,

SUBMISSION OF AGENCY REPORT

Appellant.

12 The Guam Department of Education ("GDOE"), the purchasing agency in this matter,
13 hereby submits the following exhibits as the Agency Report required by 2 GAR §12105:

14 a. A copy of the protest(s):

15 *JMI Edison's Protest*
16 **Bates Stamp No. GDOE 001854-001856**

Exhibit 13

17 b. A copy of the bid submitted by the Appellant.

18 *A copy of the Appellant's bid is included in the Procurement*
19 *Record as Exhibit 5, Bates Stamp Nos. GDOE 0017-00364.*

20 c. A copy of the solicitation, including the specifications or portions thereof relevant
21 to the Appeal:

22 *A copy of IFB008-2013, Amendments and Clarifications are*
23 *included in the Procurement Record as Exhibit 7, Bates Stamp*
24 *Nos. GDOE 001132-001233.*

25 d. A copy of the abstract of bids or offers or relevant or portions thereof relevant to
26 the Appeal:

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A copy of Abstract of Bids is included in the Procurement Record as Exhibit 8, Bates Stamp Nos. GDOE 001234-001247.

e. Any other documents which are relevant to the Appeal; including the contract, if one has been awarded, pertinent amendments, and plans and drawings:

Notice of Stay of Procurement issued July 3, 2013
Bates Stamp No. GDOE 001857 **Exhibit 14**

Notice to Lift the Stay of Procurement
Bates Stamp No. GDOE 001858 **Exhibit 15**

Agreement Between GDOE and J&B Modern Tech
Bates Stamp No. GDOE 001859-001881 **Exhibit 16**

f. The decision from which the Appeal is taken, if different than the decision submitted by Appellant:

GDOE's July 25, 2013, Written Response to JMI Edison's Protest
Bates Stamp No. GDOE 001882-001925 **Exhibit 17**

g. A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal:

GDOE's Agency Statement
Bates Stamp No. GDOE 001926-001928 **Exhibit 18**

h. If the award was made after receipt of the Appeal, the report will include the determination required under 2 GAR §9101(e):

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Not applicable.

i. A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding:

**Declaration Regarding Court Action
Bates Stamp No. GDOE 001929**

Exhibit 19

Dated this 16th day of August, 2013.

Respectfully submitted,

GUAM DEPARTMENT OF EDUCATION

By: 
ANDREW T. PEREZ, ESQ.
Legal Counsel

Exhibit 13

CIVILLE & TANG, PLLC

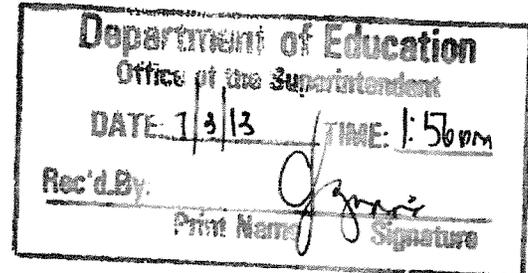
www.civilletang.com

Sender's Direct E-Mail:
jdwalsh@guamattorneys.com

July 3, 2013

VIA HAND DELIVERY

Jon J.P. Fernandez
Superintendent
Guam Department of Education
Manuel F.L. Guerrero Admin Bldg.
312 Aspinall Avenue
Hagåtña, Guam 96910



PROCUREMENT PROTEST

Re: GDOE IFB 008-2013, Indefinite Quantity Purchase of Air Conditioning Equipment

Dear Mr. Fernandez:

Our office represents JMI-Edison ("JMI"). As you know, JMI was an offeror who submitted a bid pursuant to an Invitation for Bid ("IFB") issued by the Guam Department of Education (GDOE) and opened publically on March 28, 2013. The IFB, GDOE IFB 008-2013, sought proposals to provide GDOE with a vendor to provide an Indefinite Quantity Purchase of Air Conditioning Equipment. A "Bid Status and Intent to Award" was received by JMI on June 22, 2013 regarding GDOE IFB 008-2013 indicating that another offeror has been awarded the contract. **This correspondence serves as JMI's timely protest of GDOE's award and a statutory trigger for an Automatic Stay regarding the award of GDOE IFB 008-2013.**

It is understood that there were four offerors who responded to the IFB, and that offeror J&B Modern Tech (J&B) was awarded the contract at issue here. The Bid Status and Intent to Award explained that JMI was determined to be "non-responsive" due to a purported failure to comport with Clarification 1, which contained the instruction that "Bidders shall offer one (1) price per item and shall submit (1) bid." Because JMI did not violate the instructions given in Clarification 1, its bid should not have been deemed "non-responsive."

JMI protests the award on the grounds that it did not submit an unresponsive bid, and that the contracting officer erroneously determined that its detailed submission was an impermissible alternate bid. Its bid not violate the terms of the IFB, was in full compliance with Clarification 1, and was ultimately the lowest priced submission. JMI also protests the award due to J&B's debarred status at the time bid responsiveness was determined. As the lowest priced responsive bidder, JMI should be made the awardee of GDOE IFB 008-2013. The specific nature of JMI's protest is detailed below.

330 Hernan Cortez Avenue, Suite 200 • Hagåtña, Guam 96910
T: (671) 472-8868/9 • F: (671) 477-2511

GDOE 001854

July 3, 2013

Page 2

JMI's SUBMISSION WAS RESPONSIVE

The IFB asked offerors to submit pricing for the purchase and installation of new air conditioning units. The IFB did not provide specific parameters for voltage and phase of the requested air conditioners. Clarification 1 was issued by GDOE to provide some guidance, but contained the edict that "Bidders shall offer one (1) price per item and shall submit one (1) bid...." Offerors were also provided with Amendment 3 to the IFB which mandated a site visit to two schools where offerors were shown the locations of possible new air conditioning installation sites.

As a result of the information additions to the IFB, JMI's bid submission provided the following:

- a) Specific Prices for the air conditioning units based on actual specifications (voltage and phase). *See Bid Items 6, 7, 8, 10, and 12.*
- b) Specific Prices based on actual scope of work (replacement or new installation). *See Bid Items 5, and 7.*

Nothing that was submitted by JMI ran afoul of the IFB, its clarifications, or amendments. GDOE relied upon Clarification 1's instruction to submit a singular bid to dismiss JMI's submission. Clarification 1 (F) explained that:

"Bidders shall offer one (1) price per item and shall submit one (1) bid. Section 2.2.6 on page 8 titled, "ALTERNATE BIDS NOT ACCEPTED", states an alternate bid will not be accepted. If a bidder submits two bids, GDOE may determine both bids as alternate bids and deem both bids non-responsive."

The question, therefore, is whether or not JMI submitted an Alternate Bid. JMI did not do so, and GDOE's conclusion to the contrary was in error because this is an IDIQ solicitation, offerors do not know either the exact quantity or exact nature of the air conditioner units that GDOE will purchase. This uncertainty is best addressed by an offeror providing clarity on actual known specifications and scope of work where possible— clarity that was made possible and in fact mandated by the site visits called for by GDOE.

JMI-Edison did not submit alternate bids. JMI provided different pricing based on actual known specifications and scope of work for the bid items where it was possible to do so. Bid item 5 of JMI's submission lists unit prices for 340 replacement units and unit prices for 9 complete new installations. Though this price and unit detail was provided to GDOE to provide clarity on exactly which units would be replaced as opposed to which units would need completely new installations, a **single total amount of 349 units was provided, as was a single total lump sum price of \$9,055,474.** JMI did not submit a price for 349 units coupled with an alternate price for another group of 349 units. **A single total price for 349 units was provided.** It cannot be more plain that no alternate bid was submitted.

J&B WAS DEBARRED AT THE TIME OF THE BID OPENING, AND ITS SUBMISSION SHOULD NOT HAVE BEEN CONSIDERED.

OPA Consolidated Decision on Appeal No: OPA-PA-13-002 and OPA-PA-13-003 makes it clear that awardee J&B held a debarred status when its bid was opened by GDOE on March 28, 2013. Their submission should not have been reviewed or otherwise considered.

SUNSHINE ACT REQUEST AND REQUEST FOR DETAILED EXPLANATION

In addition to the instant protest, JMI also requests, pursuant to 2 GAR §3115(e)(4), for a detailed explanation of the reasons why its submission was rejected. JMI also requests, pursuant to the Guam Sunshine Act, PL 25-06 and 5 G.C.A. § 10101, *et seq* the following documents:

- The Procurement Record kept in this matter in accordance with Guam law;
- Evaluation sheets, reviewer notes, internal memoranda, and documents in whatever format that detail GDOE's decision to award solicitation GDO IFB 008-2013 to the awardee.

CONCLUSION

Section 2.4.1(b) of the IFB states that the bid award will be based upon the "Total Lump Sum Bid Price." JMI's total lump sum bid price is \$9,055,474. Awardee J&B's total was nearly two million dollars higher, at \$10,926,274. As the lowest priced responsive offeror, JMI should be made the awardee under GDO IFB 008-2013. We look forward to your prompt and expeditious resolution of this protest.

Sincerely,



Joshua D. Walsh

Cc: **Marcus Y. Pido**
Supply Management Administrator

Exhibit 14



**DEPARTMENT OF EDUCATION
OFFICE OF SUPPLY MANAGEMENT**

www.gdoe.net
Manuel F.L. Guerrero Administration Building
2nd Floor, Suite B-220
Hagatna, Guam 969310
Telephone: (671) 475-0438/Fax: (671) 472-5001



Jon J. P. Fernandez
Superintendent of Education

Marcus Y. Pido
Supply Management Administrator

July 3, 2013

NOTICE OF STAY OF PROCUREMENT

To: All Participating Bidders
FROM: GDOE Office of Supply Management
Reference: INDEFINITE QUANTITY BID FOR PURCHASE OF AIR CONDITIONING EQUIPMENT
Formal Bid: GDOE IFB 008-2013

This notice is to advise you that the Department has received a letter of protest regarding the referenced Invitation for Bid. Therefore, pursuant to 5 GCA §5425(g), a "STAY OF PROCUREMENT" is hereby issued and shall remain in effect until the protest is resolved.

Once resolution of this matter is achieved, the Department will advise all participating bidders.

Should you have any questions regarding this matter, please do not hesitate to call our office at (671) 300-1581.

Please acknowledge receipt of this **NOTICE OF STAY OF PROCUREMENT** for **IFB 008-2013** by signing below and returning the signed document via fax at (671)472-5001 or e-mail to cttaitano@gdoe.net.

MARCUS Y. PIDO
Supply Management Administrator

Acknowledge Receipt:

Print Name

Signature

Business Name

_____ AM/PM
Date Time

Exhibit 15



JON J. P. FERNANDEZ
Superintendent of Education

**DEPARTMENT OF EDUCATION
OFFICE OF SUPPLY MANAGEMENT**

www.gdoe.net
Manuel F.L. Guerrero Administration Building
2nd Floor, Suite B-220
Hagatna, Guam 96910
Telephone: (671) 475-0438/Fax: (671) 472-5001



MARCUS Y. PIDO
Supply Management Administrator

July 25, 2013

NOTICE TO LIFT THE STAY OF PROCUREMENT

To: **All Participating Bidders**

Reference: Indefinite Quantity Bid For Purchase of Air Conditioning Equipment
Formal Bid: GDOE IFB 008-2013

This notice serves as a notification that the Guam Department of Education ("GDOE") hereby **Lifts the Stay of Procurement** for IFB 008-2013 that was put into place on Wednesday, July 3, 2013, due to a protest that was lodged. GDOE has responded to the protest and no appeal has been timely filed. Subsequently, GDOE will proceed with the procurement of IFB 008-2013 Indefinite Quantity Bid for Purchase of Air Conditioning Equipment.

Sincerely,

MARCUS Y. PIDO
Supply Management Administrator

cc: Procurement File: IFB 008-2013

Exhibit 16



**DEPARTMENT OF EDUCATION
OFFICE OF THE SUPERINTENDENT**



www.gdoe.net
P.O. Box D.E., Hagatña, Guam 96932
Telephone: (671)475-0457 or 300-1547/1536 • Fax: (671)472-5001
Email: jonfernandez@gdoe.net

JON J. P. FERNANDEZ
Superintendent of Education

July 25, 2013



MEMORANDUM

To: Governor of Guam
From: Superintendent of Education
Subject: **Agreement Between GDOE and Phil-Gets (Guam) International Trading Corp. dba J&B Modern Tech for Services Pursuant to GDOE IFB 008-2013**

Attached please find the Agreement Between Guam Department of Education and Phil-Gets (Guam International Trading Corp. dba J&B Modern Tech for your review and approval.

Should you have any comments, questions or concerns, please do not hesitate to contact Mr. Andrew T. Perez, Legal Counsel at 300-1537.

Senseramente,

JON J.P. FERNANDEZ
Superintendent of Education

Attachments

CFD0713-2684

13-0528

**AGREEMENT BETWEEN GUAM DEPARTMENT OF EDUCATION AND
PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP dba J&B MODERN TECH
FOR SERVICES PURSUANT TO GDOE IFB 008-2013**

THIS AGREEMENT is entered into by and between the **GUAM DEPARTMENT OF EDUCATION** ("GDOE"), an agency of the government of Guam, whose address is P.O. Box DE, Hagåtña, Guam 96932 and **PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP dba J&B MODERN TECH** ("Contractor"), whose address is P.O. Box 9788, Tamuning, Guam 96931.

WHEREAS, GDOE issued a Invitation for Bid ("IFB") **GDOE IFB 008-2013**, soliciting **Indefinite Quantity Bid for Purchase of Air Conditioning Equipment**;

WHEREAS, GDOE has determined it does not have adequate personnel or resources to perform the services contemplated in this agreement and it is in the best interests of GDOE to have such services performed under contract;

WHEREAS, Contractor responded to the IFB by submitting a bid ("Bid") to provide services in accordance with the IFB, and was selected as the most qualified offeror;

WHEREAS, by submitting its Bid, Contractor warrants and represents that it possesses the necessary knowledge, resources and experience to perform the work and services herein described professionally, skillfully and diligently; and

WHEREAS, GDOE desires to retain Contractor for specific services on the terms and conditions set forth in this Agreement and Contractor has agreed to accept such terms and conditions;

WITNESSETH, in consideration of the mutual covenants hereinafter set forth, the Parties agree as follows:

I. Statement of Services to be Performed.

A. Scope of Work. The Contractor shall purchase, install and provide preventative maintenance for all air conditioning equipment purchased under this Contract to be installed at all public schools and support facilities within GDOE as described in the following documents:

GDOE IFB 008-2013, Amendments and Clarifications attached herewith as **Exhibit 1**
Preventative Maintenance Schedule attached herewith as **Exhibit 2**

Contractor shall provide status reports on the services performed as required under this Agreement or more frequently as requested by GDOE. Contractor recognizes the failure to

CFD0713-2684

perform any services required under this Agreement per the terms and conditions herein constitutes a material breach of this Agreement.

B. Contractor Provisions of Resources. Contractor agrees to furnish all qualified personnel, facilities, tools, equipment, materials and transportation to perform the services and work provided for in this Agreement. Contractor represents that it and its employees possess the professional and technical expertise necessary to perform the services called for in this Agreement in a competent, professional manner, in line with the services of a typical Contractor engaged in the same and similar field as Contractor herein. GDOE may, in its sole discretion and based upon availability, provide staff assistance to Contractor in furtherance of this Agreement. The Contractor shall insure that its employees engaged in work hereunder are informed of all relevant provisions of this Agreement and of the IFB.

C. Other Work. GDOE acknowledges and agrees that Contractor may provide services to other clients, persons or companies apart from the services performed in this Agreement, as long as the performance of such other services does not in any way conflict with or hinder the performance of services herein. In the event GDOE discovers or determines that the Contractor is providing services to a third party which conflicts with or hinders the performance of services under this Agreement, Contractor must immediately cease performing those third party services upon being provided written notice by GDOE and GDOE may invoke any further available remedies under the terms of this Agreement.

D. Location of Services. Contractor may perform the services under this Agreement and the IFB at any suitable location as approved by GDOE.

II. Term of Agreement.

A. This initial Agreement shall be effective upon its full execution by all necessary parties until **September 30, 2014**. GDOE, at its option, may renew this Agreement strictly for Preventative Maintenance for up to four (4) additional one year terms subject to the availability of funds.

B. This Agreement will be cancelled if funds are not appropriated or otherwise made available to support continuation after this fiscal year, or pursuant to the terms of Section III of this Agreement. GDOE shall provide timely notice if funds are not available for continuation of contract beyond fiscal year. In the event of cancellation due to unavailability of funds, Contractor will be reimbursed unamortized, reasonably incurred, non-recurring costs.

C. This Agreement may thereafter be renewed, upon written agreement between GDOE's Superintendent and Contractor's authorized representative. Such renewal shall be subject to the certification and availability of funds.

III. Compensation.

A. Compensation. For the initial term of this Agreement, Contractor shall receive compensation in an amount not to exceed **Seven Million Four Hundred Eighty-Four Thousand Six Hundred Seventy-Four Dollars (\$7,484,674.00)**.

Pricing for services under a renewal term will be determined pursuant to Contractor's bids for each renewal term. Contractor's bids for second through fifth year terms are attached herewith as **Exhibit 3**.

B. Expenses. Contractor shall be solely responsible for all expenses incurred in the performance of services under this Agreement unless otherwise expressly provided for herein.

C. No Compensation Prior to Approval of Agreement. GDOE shall not be liable to Contractor for any services performed by Contractor prior to full execution of this Agreement by all parties, and Contractor expressly waives any and all claims for services performed in expectation of this Agreement prior to its full execution.

D. Final Payment. Final payment shall be made upon satisfactory performance of all services required to be performed by Contractor under this Agreement. Prior to the final payment due Contractor, and as a condition precedent thereto, Contractor shall execute and deliver to GDOE a release in form approved by GDOE of claims against GDOE arising under this Agreement. Contractor expressly waives the provision of Section 82602 of Title 18, Guam Code Annotated, which states:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

E. Payment. All rates and prices and payments to the Contractor shall be in the currency of the United States.

IV. Early Termination.

A. By GDOE. GDOE reserves the right to cancel or terminate this Agreement prior to its completion for reasons including, but not limited to, the following:

(i) Termination without Cause: GDOE may terminate this Agreement, without cause, upon the delivery of written notice to the Contractor at least thirty (30) days prior to the intended date of termination;

(ii) Termination in the Best Interest of the Government of Guam: GDOE may terminate this Agreement based upon a determination that such termination is in the best interests of the Government of Guam by delivering a written notice of such termination to the Contractor and the effective date of such termination. Circumstances for termination under this clause include but are not limited to Contractor's successful completion of services under this Agreement to the satisfaction of GDOE.

(iii) Termination for Cause/Default. If the Contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its

completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer may notify the Contractor in writing of the delay or non-performance and if not cured in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the Contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part the Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Procurement Officer. The Contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(iv) Termination for Convenience. The GDOE procurement officer may, when the interests of GDOE so require, terminate this contract in whole or in part, for the convenience of GDOE. The procurement officer shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective. The Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The procurement officer may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to GDOE. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as necessary to do so.

The Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by 2 GAR §3118. If the Contractor fails to file a termination claim within one year from the effective date of termination, the procurement officer may pay the Contractor, if at all, an amount set in accordance with this section. The procurement officer and the Contractor may agree to a settlement provided the Contractor has filed a termination claim as required herein and the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by GDOE and the contract price of the work not terminated. Absent agreement of a settlement, the procurement officer shall pay the Contractor the following amounts: with respect to all contract work performed prior to the effective date of the termination, the total, without duplication of any items, of: (a) the cost of such work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amount paid or to be paid for completed portions of such work; provided that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss; (b) cost of settling and paying claims arising out of the termination of subcontracts or orders pursuant to this clause. These costs must not include costs paid in accordance with subsection (a) above; (c) the reasonable settlement costs of the Contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder. The total sum to be paid the Contractor under this subsection shall not exceed the total contract price plus the

reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies or materials under this section, and the contract price of work not terminated.

B. By Contractor.

(i) Termination for Cause: Contractor shall notify GDOE in writing of deficiencies or default in the performance of GDOE's duties under this Agreement. GDOE shall have twenty (20) days to correct the deficiency or cure the default, which period may be extended by Contractor (said extension not to be unreasonably denied). Upon 60 days' written notice of Contractor's termination of this Agreement for cause, the Contractor shall be entitled to payment, in accordance with Section III of this Agreement, for satisfactory services rendered up to the termination date and GDOE shall have no obligations to Contractor. The Contractor shall be obligated to continue performance of services, in accordance with this Agreement, until the termination date and shall have no further obligation to perform services after the termination date.

C. Termination/Modification for Lack of Funds. GDOE may terminate or modify this Agreement based upon a lack of funding. In such an event, GDOE shall promptly provide notice to Contractor and within twenty (20) days of the notice, the Parties shall renegotiate the terms of this Agreement in good faith. If the parties are unable to reach an agreement on the renegotiation, then either Party may terminate this Agreement pursuant to Section IV of this Agreement as applicable.

D. Preservation of Property. Notwithstanding any termination of this Agreement, and subject to any directions from GDOE, the Contractor shall take timely and reasonable and necessary action to protect and preserve the property in the possession of Contractor in which GDOE has an interest.

E. Additional Provisions. In the event that either party effects an Early Termination, it is expressly provided that GDOE may issue a new Invitation for Bid with respect to such terminated services. This provision shall not be deemed an admission or waiver of any rights and defense with respect to rights of either Party under this Agreement, including but not limited to, either Parties' rights to assert damages for breach of Agreement.

V. Contact Person. The Contractor agrees that, during the term of this Agreement, it shall identify a primary contact person who is familiar with the services being performed hereunder and who shall be responsible to the questions and direction of GDOE. The contact person must be identified in writing within thirty (30) days after full execution of this Agreement by all parties. GDOE reserves the right to request replacement of the contact person designated by the Contractor under this Agreement.

VI. Confidentiality.

A. Information. The Contractor hereby warrants that it shall not disclose any documents, materials or information, whether verbal, written, electronic or digital media or

otherwise (collectively, the "Information"), made available or acquired for the purpose of carrying out this Agreement. Only authorized persons shall use and have access to the Information, and then only for the period such access is required to perform services under this Agreement. All necessary steps shall be taken by the Contractor to safeguard the confidentiality of the Information in conformance with any applicable United States and Guam laws, statutes and regulations.

The Contractor shall keep copies of the Information and the provisions of this Section shall remain in effect as long as determined by GDOE. All of the Information shall be returned promptly after use to GDOE and all copies or derivations of the Information shall be physically and/or electronically destroyed. Contractor shall include a letter attesting to the completereturn of Information and documenting the destruction of copies and derivations with the returned Information.

The Contractor shall not enter into any Agreements or discussions with a third party concerning such Information without the prior written consent of GDOE, and then only if the Contractor requires the third party(ies) to agree to the terms of the confidentiality set forth herein and the Information is provided to such third party(ies) only for purposes of enabling the Contractor to discharge its responsibilities under this Agreement.

It is specifically provided that the limitations contained in this paragraph A shall not apply (i) to the extent required by applicable law, (ii) to the extent that any Information is now or hereafter becomes part of the public domain, but only to the limited extent that such Information, or any portion thereof, is in the public domain not as a result of any breach or violation of this Agreement, or (iii) to the extent that a party is directed otherwise under the terms of a valid and effective order, issued by a court of competent jurisdiction.

B. Liability. Failure to comply with the provisions of Paragraph A shall subject the Contractor to liability, including all damages and injunctive relief.

VII. Conflicts of Interests/Ethics

A. The Contractor warrants and covenants that it has not violated and will not violate Guam's procurement law or regulations pertaining to ethics in public contracting.

B. It is expressly understood that breach of any of the covenants or warranties in this Section on the part of the Contractor is a material breach of this Agreement and shall entitle GDOE to immediately terminate this Agreement. Contractor agrees that in the event of a breach or violation of this Section, GDOE shall have the right to terminate this or any other Agreement with the Contractor without liability.

C. Notwithstanding the provisions contained in this Agreement with regard to the assignment or subcontracting of any work under this Agreement, Contractor agrees that with respect to any subcontractor it engages to perform any work contemplated by this Agreement that any Agreements it enters into with such subcontractor(s) will include provisions which

XIII. Assignment/Subcontractors. It is expressly acknowledged that Contractor is solely responsible for the fulfillment of its duties and obligations under this Agreement, regardless of whether or not Contractor utilizes one or more subcontractors for such purpose. The right and interest of Contractor under this Agreement (including, but not limited to, Contractor's right to or interest in any part of or all payments under this Agreement) may not be assigned, transferred or subcontracted to any other person, firm, corporation or other entity, whether by agreement, merger, operation of law or otherwise, without the prior, express written consent of GDOE. In the event of a permissive subcontract or assignment of this Agreement by Contractor, Contractor agrees that any subcontractors retained by Contractor or assignees shall be subject to all provisions of this Agreement.

XIV. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of the Parties hereto and their respective successors, assigns and transferees, except as otherwise provided for under the terms of this Agreement.

XV. Scope of Agreement. This Agreement and its attachments, the IFB, and Bid collectively: (i) supersede any and all other Agreements, either oral or in writing, between the Parties hereto with respect to the subject matter hereof, and (ii) contain all of the covenants and Agreements between the Parties with respect to such subject matter in any manner whatsoever. The Contractor and GDOE each acknowledge that no representations, inducements, promises or agreement, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in the Agreement shall be valid or binding.

XVI. Captions. All Section and paragraph titles or captions contained in this Agreement are for convenience only and shall not be deemed part of the content of the Agreement.

XVII. Counterparts. This Agreement may be executed in counterparts, all of which taken together shall be deemed one original.

XVIII. Governing Law and Forum Selection. Except to the extent U.S. federal law is applicable, the laws and regulations of Guam shall govern the interpretation, effect, and validity of this Agreement. Any court action shall be exclusively in Guam.

XIX. Compliance with Laws.

A. In General. The Contractor shall comply with all U.S. and Guam laws, statutes, regulations and ordinances applicable to this Agreement. The Contractor represents and warrants that it is fully licensed to do business in Guam to render the services to be provided herein.

B. Non-Discrimination in Employment. The Contractor agrees: (i) not to unlawfully discriminate in any manner against an employee or applicant for employment because of race, color, religion, creed, age, sex, marital status, national origin, ancestry, or physical or mental handicap; (ii) to include a provision similar to that contained in subsection (i) above in

any subcontract or assignment agreement except a subcontract for standard commercial supplies or raw materials; and (iii) to post and to cause subcontractors and/or assignees to post in conspicuous places available to employees and applicants for employment, notices setting forth the substance of this clause.

C. Family and Educational Rights and Privacy Act.

Contractor acknowledges that certain information about GDOE students may be considered Education Records and that this information must be confidential by reason of the Family and Educational Rights and Privacy Act of 1974, 20 USC § 1232g, and related regulations (collectively referred to as "FERPA"). Both parties agree to protect these records in accordance with FERPA and any relevant GDOE policy or standard operating procedure. Contractor represents, warrants, and agrees that if it receives anything protected by FERPA in accordance with this Agreement, it will: (1) hold the FERPA Records in strict confidence and will not use or disclose the FERPA Records except as (a) permitted or required by the Contract, (b) required by law, or (c) otherwise authorized by GDOE in writing; (2) safeguard the FERPA Records according to commercially reasonable administrative, physical and technical standards that are no less rigorous than the standards by which Contractor protects its own confidential information; and (3) continually monitor its operations and take any action necessary to assure that the FERPA Records are safeguarded in accordance with the terms of the Contract. Contractor agrees to provide GDOE with a written summary of the procedures Contractor uses to safeguard the FERPA Records.

Contractor will have procedures and solutions implemented to prevent unauthorized access, and the procedures will be documented and available for GDOE to review on request. Those employees allowed to send data and receive data to and from the Contractor must be identified and sign a non-disclosure agreement.

Accidental exposures of data covered by the Contract to unauthorized persons will result in the Contractor notifying GDOE within four (4) hours of discovery; failure to do so will be considered a material breach of the Contract. Notification to those whose data have been exposed will occur, at Contractor's sole expense, by GDOE.

Within thirty (30) days after the termination or expiration of the term of the Contract for any reason, Contractor shall either: (a) return or destroy, as applicable, all sensitive data, including any data protected under FERPA, provided to the Contractor's employees, subcontractors, agents, or other affiliated persons or entities; or (b) in the event that returning or destroying the sensitive data, including any data protected under FERPA, is not feasible, provide notification of the conditions that make return or destruction not feasible, in which case, the Contractor must continue to protect all sensitive data, including any data protected under FERPA, that it retains and agree to limit further uses and disclosures of such data to those purposes that make the return or destruction not feasible as Contractor maintains such sensitive data, including any data protected under FERPA.

Contractor's computer(s) must be protected by acceptable industry practices for antivirus, firewalls, and network and system intrusions detections systems, which may be periodically tested by GDOE personnel.

XX. Retention and Access to Records and Other Review. The Contractor, including subcontractors, if any, shall maintain all books, documents, papers, accounting records and other evidence pertaining to the services performed and costs incurred, and to make such materials available at its respective offices at all reasonable times during the Agreement period and for six (6) years from the date of the final payment under the Agreement, for inspection by GDOE. GDOE agrees to comply with reasonable requests of Contractor to provide access to all documents and GDOE property reasonably necessary to the performance of Contractor's services under this Agreement. The conditions of this section shall be placed in any subcontract or assignment arising under this Agreement.

XXI. Liability.

A. Indemnification. Contractor shall indemnify and hold harmless GDOE and its officers, agents, Board members and employees from or on account of any claims, losses, expenses, injuries, damages, actions, lawsuits, judgments, or liability resulting or arising from (but only to the extent caused or contributed to by) the negligent or wrongful act or omission or the Contractor or its employees, officers, directors, contractors, agents, representatives, successors, or assigns, in the performance or nonperformance of services under this Agreement.

B. GDOE not Liable. GDOE assumes no liability for any accident, loss, claim, judgment, action or injury that may occur to the Contractor and/or the Contractor's officers, directors, agents, servants, subcontractors and/or employees, and/or to the personal property of any such person or entity, arising out of the performance of services under this Agreement except to the extent caused or contributed to by the negligent act or omission of GDOE. In addition, no Board member, officer, agent, or employee of GDOE shall be liable personally under or by reason of this Agreement or any of its provisions. In addition, GDOE assumes no liability for any accident or injury that may occur to Contractor's officers, directors, employees, agents, or dependents while traveling to and from Guam in furtherance of this Agreement.

XXII. Delays, Extensions and Suspensions. GDOE unilaterally may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of GDOE. The Contractor agrees to prosecute the work continuously and diligently apart from those periods of suspension, delay or interruption. Except as otherwise agreed to by the Parties, reasonable time extensions for the performance of Contractor's services will be granted only for excusable delays that arise from causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, acts of the public enemy, acts of the Government of Guam or the Government of the United States in either its sovereign or contractual capacity, acts of another contractor in the performance of an agreement with the Government of Guam, fires, floods, typhoons, earthquakes, epidemics, quarantine restrictions, strikes, freight, or embargoes.

XXIII. Modifications including those Due to Public Welfare, Change in Law or Change in Marketing Conditions. GDOE shall have the unilateral power to modify the

Agreement at any time subject to the written agreement of Contractor. GDOE shall have the power to make changes in the Agreement and to impose new rules and regulations on the Contractor under the Agreement relative to the scope and methods of providing services as shall from time-to-time be necessary and desirable for the public welfare or due to a change in law. GDOE shall give the Contractor notice of any proposed change in the Agreement and an opportunity to be heard concerning those matters. The scope and method of providing services as referenced herein shall also be liberally construed to include, but is not limited to, the manner, procedures, operations and obligations, financial or otherwise, of the Contractor. In the event GDOE materially alters the obligations of the Contractor, or the benefits to GDOE, then the Agreement shall be amended consistent therewith. Should these amendments materially alter the obligations of the Contractor, then the Contractor or GDOE shall be entitled to an adjustment in the rates and charges established under the Agreement. Contractor shall be entitled to terminate this Agreement rather than accept modified terms. Nothing contained in the Agreement shall require any party to perform any act or function contrary to law. GDOE and the Contractor agree to enter into good faith negotiations regarding modifications to the Agreement, which may be required in order to implement changes in the interest of the public welfare or due to changes in law. When such modifications are made to the Agreement, GDOE and the Contractor shall negotiate in good faith a reasonable and appropriate adjustment for any changes in services or other obligations required of the Contractor directly and demonstrably due to any modification in the Agreement under this clause.

XXIV. Independent Contractor and its Employees.

A. Status of Contractor. The Contractor and its officers, agents, servants, subcontractors and employees are independent contractors performing professional services for GDOE, and are not employees of GDOE. The Contractor and its officers, agents, servants and employees shall not accrue vacation or sick leave, participate in the Government of Guam retirement system, insurance coverage, bonding, use of government vehicles or any other benefits accorded to Government of Guam employees as a result of this Agreement. Contractor agrees that Contractor and its aforementioned employees, officers, directors, agents, servants, and subcontractors are not and will not become an employee, officer or Board member of GDOE at any time during the duration of this Agreement, and will otherwise comply with the provisions of the Guam Procurement Law regarding ethics in public contracting (Title 5 Guam Code Annotated, Chapter 5, Article 11, and its associated rules and regulations). Nothing in this Agreement or any action taken under this Agreement shall be deemed or construed in any manner or for any purpose to evidence or establish as between Contractor and GDOE a relationship of partnership, agency, association, joint, venture or representative, nor does this Agreement authorize any party to undertake or bind any obligation or responsibility on behalf of the other party. In addition, there shall be no withholding of taxes by GDOE for the Contractor.

B. Liability. The Contractor assumes responsibility for its personnel and subcontractors providing services hereunder and will make all deductions and payments for social security and withholding taxes and for contributions to employment compensation funds, or any other payments required by the governments of the U.S. and Guam, if required. Contractor is responsible for paying when due any and all income taxes, gross receipts taxes, or any other taxes or assessments incurred as a result of the services performed by the Contractor

and Contractor's employees or agents under this Agreement or the compensation paid to Contractor for services performed under this Agreement. Furthermore, Contractor shall maintain at the Contractor's expense all necessary insurance for its employees including but not limited to Worker's Compensation, Errors and Omissions, and liability insurance for each employee as required under U.S. and Guam Law and the mandates of the underlying IFB to this Agreement. Contractor agrees to hold harmless and indemnify GDOE, its officers, directors, employees, agents, representatives, successors and assigns, for any and all claims, demands, costs, losses, fees, penalties, interest, or damages, including attorney's fees, which may be brought or asserted due to (i) any injury, death, or property damage arising from the negligence or other wrongful or tortious acts of Contractor or Contractor's employees, officers, contractors, directors, agents, representatives, successors, or assigns, or (ii) Contractor's failure to comply with terms of this subparagraph B.

C. Wage and Benefits Compliance. Contractor warrants it shall comply with all applicable federal and local laws, rules, and regulations regarding the payment of minimum wages and benefits, in particular in accordance with the Wage Determination for Guam issued and promulgated by the U.S. Department of Labor and with Guam Public Law 26-111. Contractor assumes all liability for, and hereby indemnifies GDOE from, any violation of any applicable law, rule, or regulation relating to the payment of wages or benefits.

XXV. Disclosure. The Contractor hereby represents that it has disclosed to GDOE all matters regarding Contractor which if not disclosed to GDOE would materially affect GDOE's decision to enter into this Agreement with Contractor.

XXVI. Disposition of Property and Materials; Intellectual Property Rights.

A. All plans, outlines, briefs, memoranda, studies, reports, analyses and all other work product and materials incidental or otherwise ("Work Product") which are produced by reason of this Agreement shall be and remain the property of GDOE, regardless of whether Contractor is in possession of such Work Product, and may be used by GDOE without permission from Contractor and without any additional costs to GDOE.

B. All Work Products, including any and all intellectual property rights in said Work Product, arising out of the Agreement shall be the sole and exclusive property of GDOE. Contractor explicitly acknowledges that GDOE possesses exclusive rights to the Work Product arising out of this Agreement. Contractor shall not use or permit others to use in any way or form the Work Product without the express written consent of GDOE.

XXVII. Mandatory Representations by Contractor:

A. **Persons Convicted of Sex Offense.** Contractor warrants that no person in its employment who has been convicted of a sex offense under the provisions of Chapter 25 of Title 9 Guam Code Annotated or of an offense defined in Article 2 of Chapter 28 of Title 9 Guam Code Annotated, or who has been convicted in any other jurisdiction of an offense with the same elements as heretofore defined, or who is listed on the Sex Offender Registry, shall provide services on behalf of Contractor while on government of Guam property, with the

exception of public highways. If any employee of Contractor is providing services on government property and is convicted subsequent to an award of a contract, then Contractor warrants that it will notify GDOE of the conviction within twenty-four hours of the conviction, and will immediately remove such convicted person from providing services on government property. If Contractor is found to be in violation of any of the provisions of this paragraph, then GDOE will give notice to Contractor to take corrective action. Contractor shall take corrective action within twenty-four (24) hours of notice from GDOE, and Contractor shall notify GDOE when action has been taken. If Contractor fails to take corrective steps within twenty-four (24) hours of notice from GDOE, then GDOE in its sole discretion may temporarily suspend this agreement.

B. Gratuities and Kickbacks. Contractor warrants it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in 2 GAR Division 4 §11107.

C. Contingent Fees. Contractor warrants it has not retained a person to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies.

D. Ethical Standards. Contractor warrants it has not knowingly influenced and promises that it will not knowingly influence a government employee to breach any of the ethical standards set forth in 5 GCA Chapter 5 Article 11 of the Guam Procurement Act and in Chapter 11 of the Guam Procurement Regulations.

XXVIII. Disputes. In accordance with Guam procurement law, all controversies between the territory and the Contractor which arise under, or by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the GDOE procurement officer in writing, within 60 days after written request by the Contractor for a final decision concerning the controversy; provided however that if the procurement officer does not issue a written decision within 60 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the Contractor may proceed as if an adverse decision had been received. The procurement officer shall immediately furnish a copy of the decision to the Contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. Any such decision shall be final and conclusive, unless fraudulent, or the Contractor brings an action seeking review of the decision before the Guam Office of Public Accountability. The Contractor shall comply with any decision of the procurement officer and proceed diligently with performance of this contract pending final resolution by the Office of Public Accountability or the Superior Court of Guam of any controversy arising under or by virtue of this contract, except where there has been a material breach of the contract by GDOE; provided, however, that in any event the Contractor shall proceed diligently with the performance of the contract where GDOE has made a written determination that continuation of work under the contract is essential to public health and safety.

XXIX. Attachments, Exhibits, Schedules, and Entire Agreement. This Agreement, including its Attachments, Exhibits and Schedules, constitutes the entire Agreement and supersedes all prior written or oral understandings. No Agreement, oral or written, expressed or implied, has been made by any party hereto, except as expressly provided herein. All prior Agreements and negotiations are superseded hereby. This Agreement and any duly executed amendments hereto constitute the entire Agreement between the Parties hereto.

XXX. Computation of Time. Whenever this Agreement provides for a time period of ten (10) days or less days, weekends and Government of Guam holidays are not included in the computation. When this Agreement provides for a time period of over ten (10) days, weekends and Government of Guam holidays are to be included in the computation.

XXXI. Partial Invalidity. If any provision of this Agreement shall be deemed by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall continue to be in full force and effect.

XXXII. Amendments/Modifications. Any amendment or modification to this Agreement will be effective only if it is in writing and signed by both parties.

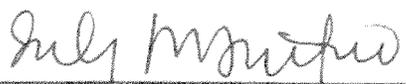
A. **Changes To Work.** Any modifications to the quantities of services or equipment to be delivered pursuant to this Agreement, and the compensation therefore, may be made by a written Change Order signed by an authorized representative of GDOE and Contractor. A Change Order may only be made on the conditions that the work to be performed by a Change Order is not inconsistent with the scope of work under this Agreement, and that where there is an increase in the costs for services, GDOE shall certify in writing that funds are available for the increased costs prior to such Change Order becoming effective.

B. **Extension of Time to Perform Services.** This Agreement may be modified to extend time for Contractor to perform services upon writing signed by GDOE and Contractor. A modification to extend time to perform services under this Agreement may only be made on the condition that such modification shall not increase the costs for services hereunder.

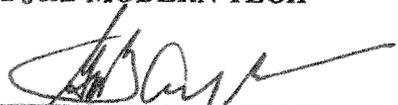
IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year appearing below their respective signatures.

GUAM DEPARTMENT OF EDUCATION

**PHIL-GETS (GUAM)
INTERNATIONAL TRADING CORP
dba J&B MODERN TECH**



JON J.P. FERNANDEZ
Superintendent



GENEROSO M. BENGAYAN
President

DATE: 6/26/13

DATE: 6-24-13

13-0528

Agreement between GDOE and Phil-Gets (Guam) International Trading Corp dba J&B Modern Tech
GDOE IFB 008-2013

GUAM DEPARTMENT OF EDUCATION

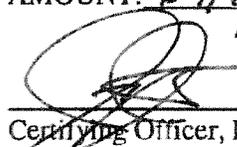


ANDREW T. PEREZ
Legal Counsel

DATE: 6/26/2013

CERTIFIED FUNDS AVAILABLE

AMOUNT: \$ 7,484,674.00
net \$ 180-11.000.00004-11.2600.12.00360



Jeremy J. Rojas
Certifying Officer, Department of Education

DATE: 6/24/13

REVIEWED BY



MARCUS Y. PIDO
Supply Management Administrator

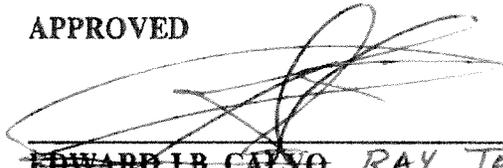
DATE: 06/24/2013

APPROVED AS TO FORM AND LEGALITY APPROVED



LEONARDO RAPADAS
Attorney General of Guam

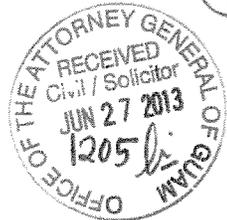
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EDWARD J.B. CALVO **RAY TENORIO**
Governor of Guam

DATE: July 25, 2013

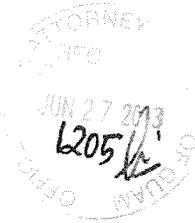
DOE 13-0528



**AGREEMENT BETWEEN GUAM DEPARTMENT OF EDUCATION AND
PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP dba J&B MODERN TECH
FOR SERVICES PURSUANT TO GDOE IFB 008-2013**

EXHIBIT 1

**GDOE IFB 008-2013, Amendments and Clarifications Thereto (on CD)
(Referenced on page 1 of 15, Section I. Statement of Services to be Performed)**



**AGREEMENT BETWEEN GUAM DEPARTMENT OF EDUCATION AND
PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP dba J&B MODERN TECH
FOR SERVICES PURSUANT TO GDOE IFB 008-2013**

EXHIBIT 2

Preventative Maintenance Schedule (on CD)

(Referenced on page 1 of 15, Section I. Statement of Services to be Performed)



**AGREEMENT BETWEEN GUAM DEPARTMENT OF EDUCATION AND
PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP dba J&B MODERN TECH
FOR SERVICES PURSUANT TO GDOE IFB 008-2013**

EXHIBIT 3

Contractor's Bids for Second through Fifth Year Terms (on CD)

(Referenced on page 3 of 15, Section III. Compensation)



IFB 008-2013
Exhibit 1: IFB Packet;
Amendments and Clarifications
Exhibit 2: J&B's PM
Schedule

Exhibit 3: Contractor's
Bids for Second through
Fifth Year terms



JON J. P. FERNANDEZ
Superintendent of Education

DEPARTMENT OF EDUCATION
OFFICE OF SUPPLY MANAGEMENT

www.gdoe.net
Manuel F.L. Guerrero Administration Building
2nd Floor, Suite B-220
Hagatna, Guam 96910
Telephone: (671) 475-0438/Fax: (671) 472-5001



MARCUS Y. PIDO
Supply Management Administrator

July 25, 2013

NOTICE TO LIFT THE STAY OF PROCUREMENT

To: **All Participating Bidders**

Reference: Indefinite Quantity Bid For Purchase of Air Conditioning Equipment
Formal Bid: GDOE IFB 008-2013

This notice serves as a notification that the Guam Department of Education ("GDOE") hereby **Lifts the Stay of Procurement** for IFB 008-2013 that was put into place on Wednesday, July 3, 2013, due to a protest that was lodged. GDOE has responded to the protest and no appeal has been timely filed. Subsequently, GDOE will proceed with the procurement of IFB 008-2013 Indefinite Quantity Bid for Purchase of Air Conditioning Equipment.

Sincerely,

MARCUS Y. PIDO
Supply Management Administrator

cc: Procurement File: IFB 008-2013

Exhibit 17



**DEPARTMENT OF EDUCATION
OFFICE OF THE SUPERINTENDENT**

www.gdoe.net
P.O. Box D.E., Hagatña, Guam 96932
Telephone: (671)475-0457 or 300-1547/1536•Fax: (671)472-5001
Email: jonfernandez@gdoe.net



JON J.P. FERNANDEZ
Superintendent of Education

July 25, 2013

Joshua Walsh, Esq.
Civille & Tang
330 Hernan Cortes Avenue, Suite 200
Hagatna, Guam 96910

Via Email: jdwalsh@guamattorneys.com

RE: Protests of GDOE Invitation for Bid No. 008-2013; Indefinite Quantity Bid for Purchase of AC Equipment

Dear Attorney Walsh,

This letter is written in response to your letter of protest dated July 3, 2013 regarding Guam Department of Education (“GDOE”) Invitation for Bid No. 008-2013 GDOE Invitation for Bid 008-2013 for Indefinite Quantity for Purchase of AC Equipment (“IFB”). GDOE has reviewed your protests and hereby denies them in their entirety on the following bases:

I. JMI’s Bid was Nonresponsive

On June 22, 2013, GDOE disqualified your client JMI-Edison (“JMI”) based on the determination that JMI’s bid was nonresponsive to the IFB. GDOE came to its conclusion to disqualify JMI after review the requirements of the GDOE IFB 008-2013’s amendments and clarifications. Pursuant to 5 GCA §5201(g), responsiveness of a bidder will be determined by compliance with the requirements of the IFB.

Section 2.4.1 of the IFB states that an evaluation factor for award is that a bidder must be responsive to the requirements of this IFB. The IFB required that all bids must be submitted in the format of the Bid Form included with the IFB. GDOE disclosed to all bidders that one price per item must be submitted. The IFB’s Clarification No. 1 states that “[b]idders shall offer one (1) price per item and shall submit one (1) bid.”

JMI submitted a bid in response to the IFB. The bid contained a bid form that included multiple prices for a number of air conditioner unit types. *See* Attachment A. GDOE made the determination that JMI was nonresponsive to the requirements of the IFB when it included more than one price per item as required by the IFB as required by the IFB’s Clarification No. 1. A mandatory site visit resulted in additional information on voltage and phase specifications and replacement versus new installation of air conditioner units. However, the new information did not change the “one (1) price per item” requirement of the IFB’s Clarification No. 1. Therefore, GDOE denies your protest.

II. J&B's Bid was Responsive

You assert that the OPA Consolidated Decision in OPA-PA-13-002 and OPA-PA-13-003 held that J&B Modern Tech ("J&B") held a debarred status at the time of its bid was opened, and thus, J&B's bid should not have been reviewed or considered. This is an erroneous reading of the OPA's decision. In fact, the OPA vacated the suspension of J&B and explicitly stated that GDOE was to consider J&B's bid for the IFB. *See* Attachment B. Therefore, GDOE denies your protest.

Therefore, GDOE denies your protest in its entirety. Please be advised that you have the right to appeal this denial pursuant to 5 G.C.A. § 5425(e).

Senseramente,



MARCUS Y. PIDO

Supply Management Administrator

ACKNOWLEDGED RECEIPT

_____	_____
Print Name	Signature
Date: _____	Time: _____

ATTACHMENT A

1 3. J&B submitted a warranty to GDOE as required by 17 G.C.A. § 7119(c) and the
2 IFB.

3 4. GDOE did not object to J&B's warranty language. Both GDOE and J&B are
4 bound by the language of the J&B warranty unless a warranty limitation or exception
5 applies, or unless the warranty is voided by the occurrence of acts stated in the warranty
6 language. Consequently, the warranty is not nor would it be voided because a third party
7 provides maintenance.

8 5. GDOE did not prove that J&B violated the warranty and did not establish that any
9 of the 500 air conditioning units provided by J&B were defective in materials and
10 workmanship or that the compressors were in need of warranty work.

11 6. Of the 500 units installed by J&B, only 3-5 had issues, but as to those units J&B
12 established that those issues arose from a lack of preventive maintenance by GDOE.

13 7. J&B performed under the warranty it provided to GDOE by providing repairs
14 when required and responding to service calls through March 2013.

15 8. J&B did not perform nor was it required to perform preventive maintenance, as
16 these services were subject to a separate maintenance contract which was awarded to
17 another company.

18 9. J&B did not violate the warranty terms. GDOE agreed that it did not assert a
19 provable warranty claim that was disallowed by J&B.

20 10. GDOE did not comply with 5 G.C.A. § 5426 and the J&B suspension was invalid.
21 Subsection (a) provides:

22 After reasonable notice to the person involved and reasonable
23 opportunity for that person to be heard, the Chief Procurement
24 Officer, the Director of Public Works or the head of a purchasing
25 agency, after consultation with the using agency and the Attorney
26 General, shall have authority to debar a person for cause from
27 consideration for award of contracts. The debarment shall not be for
28 a period of more than two (2) years. The same officer, after
consultation with the using agency and the Attorney General, shall
have authority to suspend a person from consideration for award of
contracts if there is probable cause for debarment. The suspension
shall not be for a period exceeding three (3) months. The authority

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to debar or suspend shall be exercised in accordance with regulations promulgated by the Policy Office.

GDOE did not comply with subsection (a) because GDOE did not give J&B reasonable notice or a reasonable opportunity to be heard prior to issuing the suspension nor did GDOE establish that the Chief Procurement Officer, the head of GDOE and the Attorney General consulted prior to the suspension.

GDOE did not establish that there was probable cause for the suspension. Under subsection (b), the causes for debarment or suspension include:

(4) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency to be so serious as to justify debarment action: (A) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or (B) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment...(5) any other cause the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a territorial contractor, including debarment by another governmental entity for any cause listed in regulations of the Policy Office.

GDOE did not establish that J&B violated its contract provisions or that J&B did so deliberately, without good cause, or that J&B had a recent record of failure to perform or performed unsatisfactorily. GDOE did not establish any other suspension basis including any cause that the GDOE head determined was so serious and compelling, as to affect responsibility of J&B for any causes listed in the regulations of the policy office.

11. The March 28, 2013 Notice of Non-Consideration was based upon GDOE's erroneous suspension of J&B and was invalid.

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DECISIONS

On the basis of the foregoing findings of fact and conclusions of law:

- 1. GDOE's suspension of J&B is vacated; and
- 2. GDOE shall consider J&B's bid for IFB 008-2013.

The parties shall bear their respective costs and fees associated with these appeals.

This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal from a Decision of the Public Auditor to the Superior Court of Guam in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at www.guamopa.org.

DATED, this 14th day of June, 2013.

DORIS FLORES BROOKS, CPA, CGFM
Public Auditor of Guam

Exhibit 18

1 **GUAM DEPARTMENT OF EDUCATION**

Andrew T. Perez, Legal Counsel

2 P.O. Box DE

Hagåtña, Guam 96910

3 Telephone (671) 300-1537

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4 *Attorney for Guam Department of Education*

5 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

7 IN THE APPEAL OF

OPA-PA-13-010

8 JMI EDISON,

AGENCY STATEMENT

9 Appellant.

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11
12 Comes now the Guam Department of Education (“GDOE”) by and through its counsel
13 and files its Agency Statement pursuant to 2 G.A.R. § 12105(g).

14
15 **BACKGROUND**

16 GDOE issued GDOE Invitation for Bid 008-2013 (“IFB”) on February 25, 2013, for the
17 Indefinite Quantity Bid for Purchase of Air Conditioning Equipment. GDOE Procurement
18 Record, Exhibit 7, Bates Stamp No. GDOE001132-001233.

19 On March 28, 2013, bid submissions for the IFB were due at 10:00 a.m., and a bid
20 opening was conducted at that time. JMI Edison (“JMI”) submitted a bid. GDOE Procurement
21 Record, Exhibit 5, Bates Stamp No. GDOE0017-00364. All bids submitted were opened and
22 logged onto an Abstract of Bids. GDOE Procurement Record, Exhibit 8, Bates Stamp No.
23 GDOE001234-001247.

24 On June 22, 2013, GDOE issued a Bid Status and Intent to Award indicating that GDOE
25 intended to enter into a contract with Phil-Gets (Guam) International Trading Corp. dba J&B
26 Modern Tech (“J&B”). GDOE Procurement Record, Exhibit 9, Bates Stamp No. GDOE001248-
27 001253. In addition, the Bid Status and Intent to Award indicated that JMI was considered non-

1 responsive because JMI failed to offer one (1) price per item. *Id.* An Analysis and
2 Recommendation was issued indicating that J&B was the lowest responsible bidder. GDOE
3 Procurement Record, Exhibit 10, Bates Stamp No. GDOE001258-001259.

4 On July 3, 2013, JMI, through its Attorney Joshua Walsh, submitted a protest to the
5 Superintendent of Education. GDOE Exhibit 13, Bates Stamp No. GDOE001854-001856. In its
6 protest, JMI argued the following: (1) JMI's bid was responsive; and (2) J&B's bid should not
7 have been considered because they were disbarred when the bid was opened on March 28, 2013.
8 *Id.* On July 3, 2013, A Notice of Stay of the Procurement was issued after the receipt of the
9 Protest. GDOE Exhibit 14, Bates Stamp No. GDOE001857.

10 On July 25, 2013, GDOE issued a Written Response to JMI's protest. GDOE Exhibit 17,
11 Bates Stamp No. GDOE001882-001925. GDOE denied the protest in its entirety on the basis that
12 JMI failed to comply with the requirements of the IFB when it failed to submit one price per item
13 pursuant to 5 G.C.A. § 5201(g), Section 2.4.1 and Clarification No. 1 of the IFB. A Notice to Lift
14 the Stay of Procurement was issued on July 25, 2013. GDOE Exhibit 15, Bates Stamp No.
15 GDOE001858. On July 25, 2013, a contract was fully executed between GDOE and J&B.
16 GDOE Exhibit 16, Bates Stamp No. GDOE001859-001881.

17 ARGUMENT

18
19 Guam Law defines a responsive bidder as a "person who submitted a bid which conforms
20 in all material respects to the Invitation for Bids." 5 G.C.A. § 5102(g); 2 GAR Div. 4 §
21 3109(n)(2). In addition, Section 2.4.1 set the evaluation factors in order to determine the lowest
22 responsive bid. GDOE Exhibit 7, Bates Stamp No. GDOE001139-001140. These requirements
23 include: (1) Price of overall performance and delivery, and (2) Responsiveness to the
24 requirements of this IFB. GDOE Exhibit 7, Bates Stamp No. GDOE001140. Furthermore,
25 Clarification No. 1 expressly states that "[b]idders shall offer one (1) price per item and shall
26 submit one (1) bid." GDOE Exhibit 7, Bates Stamp No. GDOE001219.

1 JMI submitted a bid form with multiple prices for a number of air conditioner unit types.
2 In its bid, JMI listed two prices that distinguished a number of units as replacement units and new
3 installation units for Items 5 and 7 of the bid form. GDOE Exhibit 5, Bates Stamp No.
4 GDOE0065 and GDOE0067. Additionally, JMI's bid listed two prices that distinguished a
5 number of units as 208-230V/3Ph and 460V/3Ph for items 6, 7, 8, 10 and 12 of the bid form.
6 GDOE Exhibit 5, Bates Stamp No. GDOE0066, GDOE0067-GDOE0068, GDOE0070, and
7 GDOE0072. JMI failed to comply with the requirement contained in Clarification No. 1 of the
8 IFB.

9 The IFB bid form clearly states the descriptions of the air conditioner units to be
10 purchased. GDOE Exhibit 5, Bates Stamp No. GDOE001170-GDOE0088. The bid forms do not
11 allow a bidder to breakdown the price for replacement air conditioner units and new installation
12 air conditioner units, nor does the bid form allow a bidder to breakdown the price for 208-
13 230V/3Ph air conditioner units and 460V/3Ph air conditioner units. *Id.* In addition, there was
14 never an amendment to the bid forms to allow JMI to breakdown the prices discussed above. In
15 breaking down the prices for these air conditioner units, JMI failed to comply with the
16 requirements of the IFB, and as a result, GDOE has correctly deemed JMI non-responsive. There
17 is no merit in JMI's appeal, and therefore, GDOE asks the OPA to dismiss JMI's Appeal in its
18 entirety.

19 Dated this 16th day of August, 2013.

20 Respectfully submitted,

21 **GUAM DEPARTMENT OF EDUCATION**

22
23 By: 

24 **ANDREW T. PEREZ, ESQ.**

25 *Legal Counsel*

Exhibit 19

1 **GUAM DEPARTMENT OF EDUCATION**
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9 JMI EDISON,

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APPEAL NO.: OPA-PA-13-010

**DECLARATION REGARDING
COURT ACTION**

12 The undersigned party does hereby confirm that to the best of his knowledge, no case or
13 other action concerning the subject of this Appeal has been commenced in any court of Guam.
14 All parties are required to and the undersigned party agrees to notify the Office of the Public
15 Auditor within twenty-four (24) hours of being informed of the commencement of a court action
16 regarding this Appeal or the underlying procurement action.

17 Dated this 16th day of August, 2013.

18 Respectfully submitted,

19 **GUAM DEPARTMENT OF EDUCATION**

20
21 By: 
22 **ANDREW T. PEREZ, ESQ.**
Legal Counsel