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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI Edison,

Appellant.

Docket No. OPA-PA 13-010

APPELLANT'S HEARING BRIEF

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

I. INTRODUCTION

This submission of a Hearing Brief is offered as allowed by the Public Auditor's Order after hearing/Scheduling Order issued on August 27, 2013. It supplements Appellant JMI-Edison's ("JMI") Notice of Appeal submitted on August 2, 2013, as well as JMI's Comments on Agency Report submitted on August 26, 2013.

II. RELEVANT BACKGROUND

JMI-Edison ("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 publicly 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. On July 3, 2013 JMI submitted a

Procurement Protest to GDOE. On July 25, 2013 GDOE issued its decision denying JMI's protest. This appeal followed.

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 will show at the hearing on the merits that it did not submit an unresponsive bid, and that the contracting officer erroneously determined that its detailed submission was instead an impermissible alternate bid. JMI will show that its bid did not violate the terms of the IFB, was in full compliance with Clarification 1, and was ultimately the lowest priced submission. 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.

III. 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, and contained the edict that "Bidders shall offer one (1) price per item and shall submit one (1) bid..." See Clarification 1. 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. See Amendment 3.

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. To the contrary, JMI's submission was specifically crafted to provide the clarity necessitated by the mandatory site visit.

GDOE continues to hold to a singular ground justifying the casting aside of JMI's bid for IFB008-2013. GDOE tells us that JMI's submission was non-responsive since it violated the bid edict contained in IFB Clarification No. 1 which states "[b]idders shall offer (1) price per item and shall submit one (1) bid." GDOE Exhibit 7. This GDOE edict states in its entirety 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." GDOE Exhibit 7.

GDOE discarded JMI's bid since GDOE's Procurement staff determined that JMI submitted an alternate bid. DOE puts forward as evidence of an "alternate bid" the fact that "In its bid, JMI listed two prices that distinguished a number of units as replacement units and new installation units for items 5 and 7 of the bid form." Agency Statement, 3 *citing* GDOE Exhibit 5. GDOE also finds an alternate bid based upon items 6,7,8,10, and 12 of the bid form where, according to GDOE, JMI "listed two prices that distinguished a number of units." Agency Statement, 3 *citing* GDOE exhibit 5.

JMI will show that it did not submit an alternate bid as alleged by DOE. Merriam-Webster defines "Alternate" as constituting an "alternative." <http://www.merriam-webster.com/dictionary/alternate>. "Alternative is defined as "offering or expressing a choice."

<http://www.merriam-webster.com/dictionary/alternative?show=0&t=1377224866>. JMI's submission did not offer a choice to GDOE regarding the procurement, but instead simply provided clarity regarding the single offer being made to the Agency. JMI provided specific pricing based on actual known specifications and scope of work for the bid items where it was possible to do so. No alternative price or product was offered.

JMI will show that all of its bid submissions were offered with a single total of units, and not submitted to DOE as a choice between alternates. Bid item 5 of JMI's submission lists unit prices for three hundred forty (340) replacement units and unit prices for nine (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 three hundred forty nine (349) units was provided. The same is true for Bid item 6, which lists a total of thirty one (31) units as a total breakdown of thirty (30) 460v units and one (1) 208-230 v unit. Bid item 7 similarly lists a single total of two hundred thirty six (236) units encompassing two hundred eight (208), eighteen (18) and ten (10) units. Bid item 8 lists a single total of nine (9) units, comprised of one (1) 208 v units and eight (8) 460 v units. Item 10 lists ten (10) total units comprising two (2) of one type and eight (8) of another. Item 12 similarly provides just a single total of six (6) units. Further demonstrating that no "alternative" was provided to GDOE is the fact that GDOE was provided with a single total lump sum price of Nine Million Fifty-Five Thousand Four Hundred and Seventy-Four Dollars (\$9,055,474.00). JMI did not submit a price for air-conditioning units coupled with an alternate price for another group of air-conditioning units. A single total price


for the units was provided. JMI will show that it cannot be more plain that no alternate bid was submitted.¹

IV. RULING REQUESTED

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.

Submitted this 18th day of September, 2013.

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¹ Even if JMI did submit an alternate bid, GDOE procurement regulations would have required that such an alternate bid be evaluated if the bidder “clearly indicates a base bid.” DOE Procurement Regulations, §3.2.4. JMI’s single price submission would have clearly allowed the procurement officer to find a base bid from which to conduct an evaluation. Rather than do this after finding an “*alternate bid*”, the procurement officer ignored the procurement law and discarded JMI’s bid altogether.