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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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5 Attorneys for Appellant:
6 PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP.
7 dba J & B MODERN TECH

8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 IN THE APPEAL OF

Appeal No. OPA-PA-17-011

10 PHIL-GETS (GUAM)
11 INTERNATIONAL TRADING CORP.
12 dba J & B MODERN TECH,

**COMMENTS ON AGENCY REPORT
BY PHIL-GETS (GUAM)
INTERNATIONAL TRADING CORP.
dba J & B MODER TECH**

Appellant.

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14 The Appellant Phil-Gets (Guam) International Trading Corp. dba J & B Modern
15 Tech (herein "J&B") submit the following comments on the Guam Community College
16 (herein "GCC") Agency Report.

17 **I. J&B TIMELY FILED NOTICE OF APPEAL**

18 5 G.C.A. Section 5425 (a) requires that "the protest shall be submitted in writing
19 to the head of the purchasing agency within fourteen (14) days 'after such agreed
20 person knows or should know the fact giving rise thereo'."

21 On June 7, 2017, GCC received a bid invitation for "IFB" for the construction of a
22 Forensic DNA Lab. See Agency Report at 1.

23 On July 20, 2017, J&B submitted a Sunshine Act Request to GCC for a copy of the
24 ProPacific Builder Corp. (herein "PBC") bid documents. Agency Report at 2.

25 On or after July 24, 2017, GCC forwarded the bid packets to their designated
26 architect for evaluations. Agency Report at 2.

1 On or after July 27, 2017, J&B received a copy of "PBC's bid" documents. Agency
2 Report at 2. However, nothing in the PBC documents disclosed that GCC was in
3 violation of the procurement law, GCC intended to violate the law, nor showed that
4 GCC was in any kind of violation of law. Therefore, no cause or good cause existed to
5 appeal anything done wrong by the GCC at that point in time.

6 On September 7, 2017, GCC issued a Notice of Intent to Award the contract to
7 PBC and a Notice of Non-Award to J&B. Agency Report at 2. Accordingly, J&B then
8 understood that GCC was in violation of procurement law.

9 On September 11, 2017, J&B sent and served on GCC a complaint or form of
10 protest regarding the procurement award. Agency Report at 2, PR Tab 12 at 0352-54; *see*
11 *also* PR Tab 13 at 1544-47.

12 On September 20, 2017, J&B served their protest on GCC, and GCC received this
13 protest, based on the violations of procurement law committed by GCC. Agency
14 Report at 2, Tabs 4, 12 and 13.

15 Only after September 7, 2017, could J&B have known that GCC intended to
16 violate the procurement law, its regulations and the specifications of the IFB. Nothing
17 in the PBC bid submission proved any earlier violations by GCC of the procurement
18 law; for example, collusion was not shown between GCC and PBC nor a bribe from
19 PBC to GCC. Instead, the PBC bid failures to mathematically compute sums, and other
20 glaring deficiencies, presented issues only relevant to GCC as the purchasing agency to
21 make the correct application of procurement law and evaluation to reject the bid of
22 PBC. Stated another way, J&B had no reason to know or believe that GCC would
23 violate the procurement law, its regulations and IFB until September 7, 2017.

24 Importantly, on September 8, 2017, J&B sent their formal written complaint to
25 GCC regarding the award to PBC that was stamped received on September 11, 2017.
26 Tab 12. On September 20, 2017, J&B served their formal "Protest!" with detailed
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1 supporting documents and records to explain the protest. PR, Tab 14. No doubt may
2 remain that the J&B protest is timely served before 14 days expired.

3 GCC is a sorely confused in its effort to apply the Decision of 1-A Guam WEBZ
4 OPA-PA-16-002. Instead of filing an appeal or protest of what PBC may have done
5 wrong, J&B is timely protesting the actions and conduct of the GCC mistakes and
6 violations of procurement law. J&B could not know what GCC would do with PBC
7 error-filled miscalculations, omissions and the higher bid in PBC's bid package, until
8 only after the September 7, 2017 GCC intent to award to PBC, and non-award of
9 J&B was issued by GCC.

10 No procurement law authority supports a hypothetical protest or duty to appeal
11 on J&B as to a bidder's mistakes, computation errors and omissions such as the PBC bid
12 submission until and unless the Government; i.e. GCC, commits a violation of the
13 procurement law and publishes a profound mistake in judgment in selection of a higher
14 bidder. A bidder can only protest Government Agency action, which means the time
15 for a protest does not start running until GCC notified the two bidders of intent to
16 award. If the law ever was somehow interpreted any other way, it would be absurd.
17 Every bidder would have to submit a FOIA/Sunshine Act request for every other
18 bidder's bid, and many piecemeal - premature protests would have to be filed before
19 any agency decision to award a contract. Additionally, the interpretation suggested by
20 GCC is contrary to sound public policy, since the agency itself, before award or at the
21 time of award, could moot the issue by finding the problematic competitor's bid to be
22 non-responsive.

23 In the cited Decision by GCC, Guam WEBZ filed their protest late on March 10
24 after the deadline passed on March 9, 2016. Accordingly, the factual chronology in the
25 Guam WEBZ Decision is not applicable to the instant facts arising from J&B's timely
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1 filed notice of protest on September 20th filed that followed thirteen (13) days after the
2 September 7, 2017 notice of intent to award the contract to PBC. Agency Report at 2.

3 **II. J&B IS THE LOWEST BIDDER; PBC IS THE HIGHER BIDDER;**
4 **COMPUTATION OF THE UNIT PRICES OF BIDDERS IS REQUIRED BY**
5 **PROCUREMENT LAW**

6 **A. The Numbers: J&B Bid of \$3,880,850 is less than the PBC bid \$3,903,747**

7 On October 17, 2017, PBC's response to J&B's protest clarified these numbers as
8 accurate and the truth. PR Tab 14, GCC 00403. First, the J&B base bid price is
9 \$3,880,850.00. *Id.* at p. 00403. Although PBC mistakenly calculated and inserted a
10 unsupported conclusory bid number of \$3,863,714.00, the true summation of the unit
11 prices bid by PBC is \$3,903,747.00. See J&B Protest Exhibit "B" at Tab 14 pp. 00371-
12 00375. Therefore, J&B is lower by \$22,984.00 than PBC. Tab 14, p. 00366.

13 In fact, GCC does not deny, and admits that the accurate numbers as set forth by
14 J&B above, are true. Tab 14, p. 00403 (GCC Response to Protest, October 17, 2017).

15 Additionally, TRMA employed as the evaluation consultant specifically found
16 the properly computed J&B bid of \$3,880,850.00 was lower than the PBC bid of
17 \$3,903,000.00. See PR Tab 11, TRMA (8/14/17) at p. 00339.

18 Moreover, GCC admits again that the J&B bid price is lower by \$22,984.00:
19 "While J&B correctly notes that the sum of PBC cost breakdown did not equal its Base
20 Bid, GCC properly clarified with PBC that its stated Base Bid price was the price the
21 PBC was offering [*see* A.R. Tab 9 at 04-07)]¹. See Agency Report (11-16-17) at 6.
22 (Emphasis added.) So, what happen in the "clarification"?

23 **B. The Procurement Law Obliges GCC to Compute Correctly and Award**
24 **the Contract to the Lowest Bidder**

25 (1) The IFB Specifications

26 ¹ Respectfully, GCC has granted the higher bidder the prohibited opportunity to change its Bid
27 After Opening.

1 No discretion remains with the purchasing agency GCC to negotiate or “clarify”
2 prices after the opening of bids, in order to allow changes to the bidder’s actual price
3 bid in response to the IFB. However, GCC improperly and illegally did just that. See
4 AR Tab 9 at 04-07. By email exchange dated August 18, 2017, GCC boldly accepted the
5 self-serving conclusion of “yes” from PBC as to the GCC question, using one line, is the
6 PBC “base bid price of \$3,863,714 correct?” AR Tab 9 p. 00324.

7 At Section 23 of the IFB Specifications: **Award, Cancellation and Rejection**, the
8 specifications for the Project require:

9 In case of an error in the extension of prices, unit price will
10 govern. AR Tab 6, p. 00551.

11 All that remains is for GCC to accept the properly computed unit prices as found by
12 TRMA. Tab 11, 00339.

13
14 (2) 2 GAR Procurement Regulations §3109(m)(4)(C)

15 This section states:

16 (C) *Mistakes where intended correct bid is evident. If the*
17 *mistake and the intended correct bid is clearly evident on*
18 *the face of the bid document, the bid shall be corrected to the*
19 *intended correct bid and may not be withdrawn.* Examples
20 of mistakes that may be clearly evident on the face of the bid
21 document are typographical errors, error in extending unit
22 prices, transportation errors, and arithmetical errors.
(Emphasis added)

23 Here, GCC has a non-discretionary duty and the bid “shall be corrected” by
24 GCC. And, this specific error “in extending unit prices” is required to be corrected by
25 the purchasing agency GCC. A simple application of this procurement law tells the
26 parties that the PBC bid “may not be withdrawn”, or clarified as GCC apparently tried
27 to do, in violation of the procurement law.
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1 (3) No Allowance of Changes to Bid is Prejudice of Other Bidders; 2
2 GAR §3109 (m)(4)(B)

3 While the Procurement Officer is generally allowed to indulge the correction of
4 minor mistakes, this is not true when the other bidders suffer prejudice. 2 GAR
5 §3109(m)(4)(B). The matter of bidder prejudice includes factors that affect “price,
6 quantity, quality, delivery or contractual conditions.” (Emphasis added.) *Id.* GCC is
7 directly changing the bid price by modifying in “clarification”, the base bid of PBC to
8 reflect a non-supported, not rational based, not unit priced base, lump sum erroneously
9 computed bid of \$3,863,714.00, instead of the properly computed unit price that PBC in
10 fact bid before opening equal to \$3,903,747.00.

11 To be clear, GCC and PBC are not in a process of negotiation of a contract to
12 reach agreement on fair or reasonable compensation. 2 GAR §3114(1)(2)(C). This is not
13 a multi-step bid IFB negotiated price to be negotiated after award of the contract.
14 Instead, the base bid price controls. The lowest bidder by unit price should be
15 determined as only J&B.

16 **C. J&B Alternate Bid Items Are Even Lower Than PBC**

17 An annotated copy of J&B’s bid form was submitted as Exhibit “C”. PR, Tab 14,
18 at p. 00376-81. As shown on that form, the sum of items 1 through 16 in J&B’s bid is
19 \$3,889,850.00 *Id.* Thus once PBC’s mathematical errors are corrected, J&B’s bid for
20 items 1 to 16 is \$13,894 lower than PBC’s bid. *Id.* This calculation of J&B prices excludes
21 the “Alternate Bid Items”. If those items are included, the gap in favor of J&B is even
22 larger, as J&B’s total for the alternate bid items was \$513,600 lower when compared to
23 \$690,000 for PBC.

24 **D. Only J&B is Entitled to 15% Local Procurement Preference**

25 GCC failed to grant to J&B the 15% Local Procurement Preference. See 5 G.C.A.
26 §5008(d) (Policy in Favor of Local Procurement)(2005). “The aim is to encourage local
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1 businesses to the maximum extent possible.” *Id.* at Comment. Unfortunately, GCC’s
2 Bid Abstract rated J&B equally qualified to PBC under the “Local Procurement
3 Affidavit.” PR Tab 10, Bid Abstract, p. 0003. This is simply not true.

4 Examination of the PBC Bid package shows that no check marks exist on any of
5 the boxes [] lettered a., b., c. and d. See PR Tab 8, p. 00285. In contrast, examination of
6 J&B’s Local Procurement Preference Application shows that check marks exist and are
7 made on boxes “b.” and “c.” The only conclusion that follows is PBC and its
8 representative Mr. Kevin Yu et. al. born in Hanam City, Korea, and Ms. Jean Yeon Yu
9 from Guam Yoshin Corporation, do not satisfy the requirements of Local as defined in
10 §5008. Tab 8, PR 00209.

11 III. GCC VIOLATIONS OF THE IFB IN PROCUREMENT PROCESS

12 A. GCLB Compliance

13 The Special Reminder to Prospective Bidders (submitted as “Exhibit D”) required
14 bidders to “indicate outstanding issues with GCLB and OSHA.” Tab 14, p. 00382-83;
15 *also*, AR Tab 7, p. 0066. PBC only submitted a one-sentence statement (submitted as
16 “Exhibit E” at Tab 14, p. 000384-85) on its own letterhead stating, “ProPacific Builder
17 Corporation has no outstanding issues with the Guam Contractor License Board and/or
18 the Occupational Safety and Health Administration.” This is insufficient.

19 To confirm the status of outstanding issues or lack thereof, PBC should have
20 submitted a “Verification of License” from the GCLB indicating “Complaints on File”
21 and an Inspection Detail print-out from OSHA, as was done by J&B (J&B’s verification
22 and print-out submitted as “Exhibit F”). Tab 13, p. 000386-89. As noted in the Special
23 Reminder to Bidders from GCC, “[f]ailure to comply with the requirements in the
24 special reminder will be a basis for disqualification and rejection of the bid.”
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1 **B. Insurance Requirement**

2 The Insurance requirement (submitted as "Exhibit G") stated that bidders shall
3 provide a Certificate of Insurance showing that the bidder maintained liability
4 insurance including, Commercial General Liability, Commercial Umbrella Liability,
5 Commercial Automobile Liability, and Commercial Crime Insurance. Tab 13, p. 00390-
6 91. This requirement further stated that if the insurance was not currently maintained,
7 the bidder had to provide a statement from an insurance company, licensed to do
8 business on Guam, stating the bidder is qualified to obtain the required insurance. The
9 Insurance Requirement further provided, "Failure to provide these documents will
10 result in rejection of the bid." Unlike J&B (J&B's certificates and statement submitted as
11 "Exhibit H" at Tab 13, p. 00392-395), PBC did not provide the required certificates or
12 statement.

13 **C. Certificate of Owner's Attorney**

14 There is a requirement for submitting a Certificate of Owner's Attorney
15 (submitted as Exhibit I"). Tab 13, p. 00396-97. The form for this Certificate stated that
16 the phrase "performance and payment bonds" should be deleted when not applicable.
17 J&B's counsel deleted that phrase, inserted the applicable information for J&B's bid
18 bond, and signed the Certificate (copy submitted as "Exhibit J"). Tab 13, p. 00398-99.
19 But, PBC did not submit a Certificate of Owner's Attorney. Instead, PBC submitted its
20 own statement, not signed by an attorney, stating that the Certificate would be signed
21 only when the project was awarded to PBC (copy submitted as "Exhibit K"). Tab 13, p.
22 00400-01.

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IV. CONCLUSION

J&B requests that the Office of Public Accountability (1) overrule GCC's denial of J&B's protest, (2) remand the matter to GCC for further action in accordance with the OPA's ruling, and (3) award the contract to J&B as the lowest bidder.

DATED this 27th day of November, 2017.

Respectfully submitted,

BERMAN O'CONNOR & MANN
Attorneys for Appellant
PHIL-GETS (GUAM) INTERNATIONAL
TRADING CORP. dba J & B MODERN TECH

By:



DANIEL J. BERMAN

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CERTIFICATE OF SERVICE

1 I, Jennifer Quitugua, hereby certify that on the 27th day of November, 2017, I
2 caused the foregoing *Comments on Agency Report by Phil-Gets (Guam) International*
3 *Trading Corp. dba J & B Modern Tech* to be served as follows:
4

5 1) Via Hand Delivery to:

6 Rebecca Wrightson, Esq.
7 Cabot Mantanona LLP
8 Edge Bldg., Second Floor
9 929 S. Marine Corps Drive
10 Tamuning, Guam 96913

11 2) Via U.S. Mail to:

12 Propacific Builders Corporation
13 750 Rt. 8, Suite 202
14 Barrigada, Guam 96913

15 DATED this 27th day of November, 2017.

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JENNIFER QUITUGUA