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OFFICE OF THE PUBLIC AUDITOR

GUAM

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

Appellant.

APPEAL NO. OPA-PA-_____

**PROCUREMENT APPEAL; EXHIBITS
A-R; VERIFICATION**

JRN Air Conditioning & Refrigeration, Inc., (hereinafter referred to as "JRN") hereby appeals a decision rendered by the Guam Department of Education (hereinafter referred to as "GDOE") on October 13, 2010, denying JRN's protest of the award of GDOE IFB 007-2010 to J&B Modern Tech.

1. JRN's address is P.O. Box 27070, GMF, Guam 96921. However, for the purposes of this appeal, please direct correspondence to JRN's counsel Vincent C. Camacho, Esq., Carlsmith Ball LLP, Bank of Hawaii Bldg., Suite 401, 134 West Soledad Avenue, P.O. Box BF, Hagåtña, Guam 96932-5027.

COPY

2. This appeal pertains to GDOE IFB No. 007-2010. The Bid was recommended for award to J & B Modern Tech. Exhibit A. JRN has come to know that on October 14, 2010, a GDOE Requisition Form No. 2400-278-03 was issued and funds certified in favor of J&B Modern Tech in reference to GDOE IFB 007-2010. Exhibit B. JRN has also come to know that on October 15, 2010, a GDOE Purchase Order No. 201190017 was issued in favor of J&B Modern Tech referencing GDOE IFB No. 007-2010. Exhibit C.

3. Background.

The GDOE Invitation for Bid 007-2010 was issued on July 9, 2010 and pertains to the preventive maintenance and repair of all central air-conditioning equipment for all GDOE public schools and support facilities. Exhibit D. The Invitation for Bids specifies the following:

a. The bid contains both general and detailed specifications for preventive maintenance, minor and major repairs, installations, and relocation and replacement of central air-conditioning equipment located at all GDOE public schools and support facilities within the GDOE. Bidders were required to provide labor costs requirements for:

- (1) Preventive maintenance of air-condition equipment;
- (2) minor repairs on air-condition equipment; and
- (3) major repairs, installation, relocation, and replacement of central air-condition equipment.

b. The bidder must certify by completing Form E, that the contractor has read and understood and is in full compliance with the wage determination provisions set forth in 5 GCA §§ 5801 & 5802; and that the contractor has attached a copy of the most recent wage determination applicable to Guam issued by the U.S. Department of Labor. Exhibit E.

c. IFB Scope of work includes:

(1) Conducting preventive maintenance on a scheduled basis for all central air-condition equipment, and provide tools, parts (except as provided by GDOE), labor, transportation and other apparatus necessary.

(2) Conducting minor repairs for central air conditions when requested by GDOE, and provide necessary labor, transportation, material, parts (except as provided by GDOE) and apparatus as necessary.

(3) Conducting major repairs, installation, relocation, and replacement on central air conditions as needed and approved by GDOE prior to commencement of work, and provide labor, transportation, materials, and parts.

d. Allowable costs includes:

(1) For preventive maintenance and minor repairs, charges will be based on a fixed hourly rate to include labor, transportation, insurance, parts, and for any other reasonable expenses related to the type of maintenance work involved.

(2) For major repairs the contractor must submit a cost estimate for labor and parts prior to any work being done for review and approval by GDOE.

e. Bidder must provide a minimum of two (2) crews for installation and three (3) crews for repair and maintenance for each of the four districts (with 1 technician and 1 helper per crew or a total of ten (10) persons per district).

Exhibit F.

In order to comply with 5 GCA § 5801, JRN obtained the most recent U.S. Department of Labor Wage Determination applicable to Guam identified as Wage Determination No.: 2005-2148, Revision No. 14, dated August 19, 2010. Exhibit G. JRN prepared its bid price based on occupation code 23410 - Heating, Ventilation, and Air-Conditioning Mechanic which requires a rate of \$15.76 per hour. Additionally, pursuant to 5 GCA § 5802, all contractors are required to

provide benefits to employees working under a contract with Government of Guam. The statute mandates that all occupations listed receive health and welfare benefits, paid vacation, and paid holidays. The employers minimum contribution of approximately \$3.50 per hour must be computed on the basis of all hours worked by the service employee employed in the contract.

On September 1, 2010, JRN submitted its bid (Exhibit H) along with two other contractors, namely, J & B Modern Tech (Exhibit I) and GFS Group, LLC (Exhibit J). Bids were tabulated and the hourly rates are as follows:

	J&B Modern Tech	GFS Group, LLC	JRN
Preventive Maintenance	\$17.45	\$32.00	\$15.75
Minor Repairs	\$17.45	\$32.00	\$20.60
Major Repairs	\$16.00	\$32.00	\$20.60
Aggregate Total Based on 1500 Hours	\$76,350	\$144,000	\$85,425

Exhibit K.

On September 7, 2010, JRN sent a request for information inquiring whether GDOE deemed it proper to apply Occupation Code 23410 to the bid. Exhibit L . GDOE did not respond. Ironically, on that same day the Supply Management Administrator requested staff to obtain a breakdown of the bids to ensure that the bids comply with the U.S. DOL Wage Determination requirements; and further requested bidders to submit a breakdown before award is made. Exhibit M.

On September 10, 2010, JRN filed an agency protest with GDOE stating that the bid submitted by the J&B Modern Tech did not conform to the U.S. DOL Wage Determination requirements as required by 5 GCA §§ 5801 & 5802. Exhibit N. On October 13, 2010 GDOE rejected JRN's protest stating that 1) the lowest bidder was in full compliance with U.S. DOL Wage Determination 05-2147 (Revision 12); and 2) that the bid abstract clearly shows that the

J&B Modern Tech did not deviate or violate the provisions of 5 GCA §§ 5801 & 5802. Exhibit O. The notice also states that "by acknowledging/signing FORM E", the bidder is the lowest responsible bidder.

4. Grounds for Appeal.

a. **The bid process, and resulting bid award, is defective because GDOE did not clearly identify the specific occupations required to perform the work required.** The purpose of a specification is to serve a basis for obtaining a supply, service or construction item adequate and suitable for the territory's needs in a cost effective manner, ... thus specifications shall be drafted with the objective of clearly describing the territory's requirements. 2 GAR § 4102 (a)(1). According to item 4 of the GDOE Bid Specifications the contractor must provide a minimum of five crews for each of the four districts. The specifications state that each crew must include 1 technician and 1 helper or a total of ten (10) persons per district. Exhibit F. To ensure a fair and equitable evaluation of the applicable hourly rates GDOE should have properly identified the appropriate occupations so all bidders would be treated fairly and equitably. In this case, the specification is ambiguous because it only identified "technician" and "helper". Under the U.S. DOL Wage Determination Mechanics and Maintenance and Repair Occupations, there is more than one type of technician. GDOE's failure to identify the specific occupations required in the bid specifications could have caused the bid amounts to represent different occupation codes and thus inaccurate hourly rates. The ambiguities in the IFB specifications were not fair and equitable to all bidders in violation of 5 GCA §5001(b)(4) & (7), 2 GAR § 4102 (a)(1) and GDOE's Procurement Policy §1.2(4) & (7). Exhibit P.

b. **The bid process, and resulting bid award, is defective because GDOE did not clearly identify the specific requirements for each crew.** According to item 4

of the GDOE Bid Specifications the bidder must provide a minimum of five (5) crews for each of the four districts. Each crew must include 1 technician and 1 helper *or* a total of ten (10) persons per district. Exhibit F. However, these specifications are ambiguous because the specifications can be interpreted in two ways. The specification can be interpreted to require that each bidder have 5 crews and that each crew consists of one (1) technician and one (1) helper. The specifications can also be interpreted to allow a bidder to have 5 crews without a technician so long as each district has a total of 10 persons for each of the four districts. Thus bidders could present bids employing a variety of occupations listed on the wage determination which is not in the best interest of the Territory because it does not ensure the fair and equitable treatment of all persons who deal with the procurement system or provide safeguards for the maintenance of a procurement system of quality and integrity thus violating 5 GCA §5001(b)(4) & (7), 2 GAR § 4102 (a)(1), and GDOE's Procurement Policy §1.2(4) & (7). Exhibit P.

c. **The bid process, and resulting bid award, is defective because GDOE did not clearly identify the components of the hourly rate used as a basis for awarding the bid.** According to Section 1 of Public Law 26-111, the lack of minimum standards sets an insecure and uneven playing field for businesses wishing to do business with the government of Guam in the service area, thus as mandated in the law, all businesses wishing to do business with the government of Guam shall pay such employees in accordance with the wage determination for Guam issued and promulgated by the U.S. DOL for all labor employed in the direct delivery of services to the government of Guam. Exhibit Q. In addition to paying the prevailing rate, all contractors are also required to provide health and welfare benefits, paid vacation, and a minimum of 10 paid holidays per year. In this case, the sole basis for GDOE awarding the contract is based on an hourly rate that does not clearly identify the components and as a result makes it impossible for an evaluator to determine if the bids comply with statute.

Exhibit R. After receiving JRN's September 7, 2010 request for clarification as to whether these benefits were to be included in the bid (Exhibit L) the Supply Management Administrator recognized that the bids submitted did not allow GDOE to determine if the bidders were in compliance with the law and requested that all bidders provide a breakdown of the rates prior to awarding of the contract. Exhibit M. JRN did not receive a request to submit a breakdown. Absent the proper mechanism that clearly identifies the base rate, health and welfare, vacation, and holiday components, GDOE cannot determine if any of the bidders fully comply with 5 GCA §§ 5801 & 5802 as required by the bid specifications on FORM E.

d. **The bid award is defective because J&B Modern Tech failed to be a responsive bidder by not complying with 5 GCA §§ 5801 & 5201.** Assuming, the proper occupation codes were indicated in the bid specifications identified Occupation Code 23410 for a Heating, Ventilation, and Air-Conditioning Mechanic is entitled to \$15.76 per hour; and a laborer (Occupation Code 23580) is entitled \$10.35 per hour. Exhibit G. Benefits would add an additional \$5.54 to the rate for a technician and \$4.34 to the rate for a helper. Thus the bidder would be required to bid \$21.30 as a minimum rate for a technician and \$14.69 per hour as a minimum rate for a helper or an average of \$17.61 per hour. Based on this review, J&B Modern Tech highest hourly bid of \$17.45 is less than the average, of \$17.99 per hour. J&B Modern Tech could not be determined to be a responsive bidder.

e. **The bid award is defective because GDOE had reason to suspect J&B Modern Tech's bid submission was not in full compliance with 5 GCA §§ 5801 & 5802 but did not conduct a responsibility inquiry prior to awarding the contract.** It is serious error and grounds for cancelling or terminating an award, if an agency had reason to suspect that an issue affecting a bidder's determination of responsibility exists and did not conduct a responsibility inquiry prior to awarding a contract. In the Appeal of Latte Treatment

Center, Inc., OPA-PA-08-008. GDOE states that JRN's protest was rejected because a J&B Modern Tech's declaration on Form E is sufficient to determine whether J&B Modern Tech is a responsible bidder. Submission of Form E is more appropriately a determination of responsiveness and not of responsibility. While J&B Modern Tech may be responsive by submitting Form E, the issue is whether the J&B Modern Tech is in compliance with 5 GCA §§ 5801 & 5802 which is an issue of responsibility. On September 7, 2010, the same day JRN sent a request for clarification on the wage determination and benefits issue, the Supply Management Administrator requested his staff to obtain a breakdown of the bids to ensure that they all comply with the Wage Determination law. In the same note, the administrator notes, that J&B Modern Tech's bid "seems very low." Exhibit M. The Administrator instructed staff to request that all bidders submit the breakdown before any award is given. JRN did not receive such a request. There is no indication that GDOE made an effort to further make a determination of responsibility prior to issuing the Purchase Order. Failure to determine whether a bidder is responsible at the time of award not only violates the Guam procurement laws but also decreases the public's confidence in the procedures set forth by law. Such action also violates 5 GCA §5001(b)(3) and GDOE's Procurement Policy §1.2 (3). Exhibit P.

f. **The bid award is defective because GDOE use of Wage Determination 2005-2148 (Revision 12) to determine compliance with 5 GCA §§5801 & 5802 was erroneous.** According to 5 GCA §§5801, the contractor shall use the most recent issue of the wage determination made by the U.S. DOL at the time the contract was awarded. GDOE admits in its rejection letter that it used WD-05-2147 (Rev. 12) to determine if J&B Modern Tech was in compliance with the statute. The award was made to J&B Modern Tech on October 15, 2010. The most recent issue of the wage determination is WD-05-2148 (Rev 14) and not WD-05-2147 (Rev. 12). Applying the wrong wage determination could as it has in this

case, lead to the wrong determination and thus the awarding of a contract in violation of the procurement law.

5. Ruling Requested.

JRN asks that J & B Modern Tech's bid be deemed non-compliant with 5 GCA §§ 5801 & 5802 and the award to J&B Modern Tech be declared null and void, and terminated.

JRN asks that the bid award be stayed as required by law until this protest is resolved, 5 G.C.A. § 5425(g).

JRN also asks that the GDOE address the shortcomings in the IFB and reissue and IFB addressing the concerns presented above.

Finally, JRN asks that it be allowed reimbursement of its costs incurred in preparing this Protest, 5 G.C.A. § 5425(h).

6. Supporting exhibits are attached as Exhibits A through R.

7. GDOE's decision denying the protest awarding the bid is attached hereto as Exhibit O.

8. JRN requests a hearing.

DATED: Hagåtña, Guam, October 28, 2010.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
Attorneys for Appellant
JRN Air Conditioning & Refrigeration, Inc.


VERIFICATION

GUAM U.S.A.,)
)
Municipality of Hagåtña,)

I, Geraldine Nucum, am Vice President/Treasurer of JRN Air Conditioning & Refrigeration, Inc. and am authorized to make this verification.

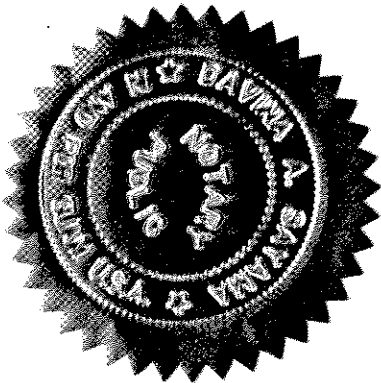
I have read the foregoing Procurement Appeal and, to the best of my knowledge, the information stated therein is true and correct.

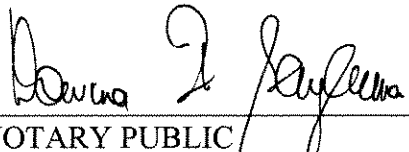
I declare under penalty of perjury that the foregoing is true and correct and this verification was executed on this 28th day of October, 2010.



GERALDINE NUCUM

SUBSCRIBED AND SWORN to before me, a Notary Public, in and for Guam U.S.A., by GERALDINE NUCUM, as Vice President/Treasurer of JRN Air Conditioning & Refrigeration, Inc., this 28th day of October, 2010.





NOTARY PUBLIC

DAVINA A. SAYAMA
NOTARY PUBLIC
In and for Guam, U.S.A
My Commission Expires: May 23, 2014
My Commission No.: NP10-0033P
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