



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**OPA-PA-20-005: E-Filing: GSA's Reply in Support of Motion for SJ**

2 messages

**Sandra Miller** <smiller@oagguam.org>

Mon, Aug 17, 2020 at 3:17 PM

To: admin@guamopa.com, Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

Cc: Georgette Bello Concepcion &lt;gbc@guamlaw.net&gt;, Robert Kono &lt;robert.kono@gsa.guam.gov&gt;, Marlyn Aguilar &lt;maguilar@oagguam.org&gt;

Good afternoon Jerrick,  
Attached for E-Filing is GSA's reply memo in support of its motion for summary judgment which is due today, August 17, 2020.

Thank you,  
Sandra Miller  
Assistant Attorney General

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**Office of Public Accountability Closed During PCOR1**

2 messages

**Jerrick Hernandez** <jhernandez@guamopa.com>

Fri, Aug 14, 2020 at 2:57 PM

Bcc: smiller@oagguam.org

Hafa Adai!

Beginning Monday, August 17, 2020, the Office of Public Accountability will remain closed for the duration of Governor Lourdes Leon Guerrero's declaration of Pandemic Condition of Readiness (PCOR) 1 for Guam.

In lieu of hand-delivering documents to the office, we will allow documents to be transmitted electronically to [admin@guamopa.com](mailto:admin@guamopa.com) and my email [jhernandez@guamopa.com](mailto:jhernandez@guamopa.com). We will proceed with all currently scheduled hearings virtually via Zoom Meeting unless further instructed.

If you have any questions or concerns, please feel to contact me through email. Thank you and please stay safe!

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Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA  
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216K

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**Jerrick Hernandez** <jhernandez@guamopa.com>

Tue, Aug 18, 2020 at 12:50 PM

To: Sandra Miller <smiller@oagguam.org>

Cc: Office of Public Accountability <admin@guamopa.com>, Georgette Bello Concepcion <gbc@guamlaw.net>, Robert Kono <robert.kono@gsa.guam.gov>, Marlyn Aguilar <maguilar@oagguam.org>

confirming receipt

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

<b>IN THE APPEAL OF:</b>	)	<b>DOCKET NO. OPA-PA-20-005</b>
	)	
<b>BEACH RESORT LLC</b>	)	
<b>dba THE HOTEL SANTA FE GUAM,</b>	)	<b>GSA'S REPLY MEMO</b>
	)	<b>IN SUPPORT OF MOTION</b>
<b>Appellant.</b>	)	<b>FOR SUMMARY JUDGMENT</b>
	)	
	)	

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Appellee GENERAL SERVICES AGENCY (GSA) files this Reply to Appellant's Opposition to GSA's Motion for Summary Judgment. Appellant's arguments are unsupported by the record in this matter and exhibit an attempt to confuse the issues with contentions that have no legal grounds.

1. The Contract Does not Require GSA to Give Santa Fe Written Notice of its Non-performance or a Ten-day “Contractual Right” to Cure its Deficiencies.

Santa Fe’s primary argument is that “GSA failed to comply with Section IX.A(iii) of the Contract . . . First, it failed to put Santa Fe on notice that it failed and refused to remedy any alleged deficiencies . . . Second, GSA failed to provide Santa Fe time to cure any of the alleged deficiencies . . .”<sup>1</sup> For purposes of this motion, GSA does not dispute that Santa Fe was not given advance notice for any deficiencies or provided Santa Fe time to cure the alleged deficiencies.

Santa Fe insists that there is only way to terminate its contract and that way is a termination for cause under Section IX(A)(iii). “GSA terminated Santa Fe’s contract for cause, *arguendo*, therefore only this provision applies.”<sup>2</sup> Santa Fe “relied on” the termination provision in Section IX(A)(iii) and believes that GSA is now claiming that it “is not applicable.”<sup>3</sup>

In making this argument, Santa Fe misconstrues GSA’s motion and the terms of the contract itself. GSA never said that the termination provision invoked in Section IX(A)(iii) of the contract “is not applicable.” On the contrary, the termination provision relied on by Santa Fe in Section IX(A)(iii) is completely applicable, just as all of the other terms and conditions of the contract are also applicable. Santa Fe’s

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1 Santa Fe’s *Notice of Appeal*, page 7, OPA-PA-20-005.

2 Santa Fe’s *Opposition to GSA’s Motion for Summary Judgment*, p. 5, lines 8-9, OPA-PA-20-005.

3 Santa Fe’s *Opposition to GSA’s Motion for Summary Judgment*, p. 4, line 1.

belief that Section IX(A)(iii) gives it a cause of action for protest is, however, seriously misplaced because that section is not at all helpful to its case.

The permissive language of Section IX(A)(iii), which Santa Fe agreed to when it signed the contract, is clear and unambiguous. GSA is allowed the discretion to terminate for cause, and nothing in the section grants Santa Fe a “contractual right” to notice or a chance to cure. In fact, Santa Fe *admits* that Section IX(A)(iii) is discretionary: “While GSA may have the discretion to determine whether or not to it should give Santa Fe 10 days to cure, said discretion must be exercised in good faith . . .”<sup>4</sup>

Under the plain language of the contract and, as discussed below, because there is no evidence that GSA acted in anything other than good faith, summary judgment in favor of GSA is warranted as a matter of law.

**2. GSA Acted in Good Faith in Administering the Contract.**

Santa Fe posits that GSA did not act in good faith when terminating the contract by pointing out that two days prior to the termination, GSA had “already entered into the exact same contract as Santa Fe’s with another hotel on May 21, 2020, as if it anticipated terminating Santa Fe’s Contract, which had only begun on May 19, 2020.”<sup>5</sup>

Guam Procurement law requires that “all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith.”<sup>5</sup> GCA

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<sup>4</sup> Santa Fe’s *Opposition to GSA’s Motion for Summary Judgment*, p. 5, lines 10-12.

<sup>5</sup> Santa Fe’s *Opposition to GSA’s Motion for Summary Judgment*, p. 4.

§5003. The “[c]ovenant of Good Faith and Fair Dealing is a mechanism for contract interpretation to ensure equity, requiring that every contract must be executed in good faith.” *Pacific Dining LLC v. Quality Distributors*, DECISION AND ORDER (MOTION FOR SUMMARY JUDGMENT), at p. 8, (Super. Ct. Guam Jan. 11, 2013), CV0559-12.

Santa Fe’s questioning of GSA’s motives is unavailing. The hotel’s deficiencies were noted in a walk through on May 23, 2020, conducted by the Office of Homeland Security Office of Civil Defense (OHS OCD) and the National Guard, and referenced in the termination letter to Santa Fe.<sup>6</sup> OHS OCD is a contracting party, and its findings are not just merely those of an uninterested “third-party.”<sup>7</sup>

GSA first learned about the deficiencies discovered by OHS OCD on May 23, 2020, which is *two days after* the contract with the “other hotel” was signed on May 21, 2020. The contract with the other hotel could not have been signed in anticipation of terminating the Santa Fe contract if the issues with Santa Fe were not known on May 21 and were not even discovered until May 23rd.

Santa Fe’s insinuation that GSA signed a contract with another hotel on May 21 because it had a plan to terminate Santa Fe and needed an alternative hotel to be standing by is nothing more than unsubstantiated suspicion and speculation, neither of which are sufficient to defeat a motion for summary judgment. *See, S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982) (“a party cannot manufacture a genuine issue of material fact merely by

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6 Exhibit F, Santa Fe’s *Notice of Appeal*, OPA-PA-20-005.

7 Santa Fe’s *Opposition to GSA’s Motion for Summary Judgment*, p. 4 line 16.

making assertions in its legal memoranda”); *Burch v. Regents of the Univ. of Cal.*, 433 F.Supp.2d 1110, 1126 (E.D. Cal. 2006) (plaintiff cannot successfully oppose defendants’ motion for summary judgment with mere suspicions and undocumented arguments).

Santa Fe was aware that its hotel was not the only property selected as part of the emergency procurement and that other hotels were also being used as a quarantine facility. The emergency Request for Quotation (“RFQ”) seeking hotel quarantine facilities for all arriving passenger from Covid-19 affected areas was a public solicitation sent to numerous island hotels in May 2020. Santa Fe’s quote included an “Unoccupied Holding (Reserve) Room Rate”<sup>8</sup> that the government would pay regardless of whether the room was occupied. GSA included this option to ensure that there were enough rooms available at any given time. The government was not aware how many passengers were arriving each day and needed to be prepared to house all passengers who were required to serve the 14-day mandatory quarantine.<sup>9</sup>

If anything, GSA exercised good faith by keeping the passengers at Santa Fe for six days even though there were issues with the facility. The decision to move the passengers to another hotel was not made lightly. The transfer of passengers from one hotel to another took an enormous amount of effort and resources because it was not as simple as just loading everyone into a tour bus and moving their baggage. The procedure to move and expose potentially Covid-infected passengers during this

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<sup>8</sup> Exhibit E, Santa Fe’s *Notice of Appeal*.

<sup>9</sup> *See*, Joint Information Center (JIC) Release No. 122 (May 13, 2020).

public health emergency required heightened health and security protocols to protect the passengers, the personnel involved, and members of the public. Santa Fe's claim that GSA did not practice good faith is an attempt to distract from the real issues at the hotel and the fact that GSA properly terminated the contract.

3. All the Early Termination Clauses of Section IX of the Contract are Applicable.

Santa Fe mistakenly argues that since "GSA terminated Santa Fe's contract for cause, *arguendo*, therefore only this provision [Section IX(A)(iii)] applies."<sup>10</sup> It further states that "[t]o allow GSA to now in hindsight through [sic] everything on the wall and see what sticks renders these provisions meaningless and illusory."<sup>11</sup>

The forward to Section IX of the contract clearly states that "GHS OCD reserves the right to cancel this Agreement, prior to its completion for *any* reason, *including, but not limited to*, the following . . ."<sup>12</sup>. Additionally, Section XIII of the contract clearly states that "*No waiver by any party of any right on any occasion shall be construed as a bar to or waiver or any right or remedy on any future occasion.*"<sup>13</sup> This clause means exactly what it says, which is that even though GSA invoked one method of contract termination, nothing bars or waives GSA right to also invoke the other contract termination clauses. "Interpretation of a contract to determine what is intended by its various provisions is properly done by considering

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10 Santa Fe's *Opposition to GSA's Motion for Summary Judgment*, p. 5.

11 Santa Fe's *Opposition to GSA's Motion for Summary Judgment*, p. 5.

12 Exhibit A, p. 11, Santa Fe's *Notice of Appeal*.

13 Exhibit A, p. 15, Santa Fe's *Notice of Appeal*.

the contract as a whole and not by considering a particular part of the contract in isolation.” *Bank of Guam v. Flores*, 2004 Guam 25, ¶ 10.

In any event, the applicability of the other termination clauses makes little difference here because as Santa Fe admits, GSA had the discretion to terminate the contract for cause pursuant to Section IX(A)(iii) of the contract.

**4. Santa Fe Failed to Meet the Standards Required for a Quarantine Facility.**

Santa Fe states that “the fact that the procurement was done under an emergency declaration by the Governor does not exempt GSA from abiding by the terms of the Contract and Guam Procurement Law.”<sup>14</sup> Guam Procurement Law authorizes the Chief Procurement Officer to “make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions . . .” 5 GCA § 5215. An emergency exists when “a condition posing an imminent threat to public health, welfare, or safety which could not have been foreseen through the use of reasonable and prudent management procedures . . .” 5 GCA § 5030(x).

Santa Fe’s failure to recognize the severity of the public health emergency is disturbing. This emergency is unlike any other situation that has faced the island. Santa Fe was not contracted to just be a hotel for transiting airline passengers, but as a pandemic quarantine facility for individuals who were potentially carrying a

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<sup>14</sup> Appellant’s *Opposition to GSA’s Motion for Summary Judgment*, p. 7.

highly contagious and deadly disease. Under the Emergency Health Powers, the government has a legal duty to make sure that quarantine facilities meet certain minimum conditions, not the least of which is that the premises must be maintained in a safe and hygienic manner. 10 GCA § 19604(b)(7). Moreover, quarantined persons must be provided with adequate food, shelter, and a means of communication. 10 GCA § 19604(b)(6).

When it became clear that Santa Fe was unqualified to be a quarantine facility, GSA and the government were legally authorized (and required) by the Emergency Health Powers Act to “use every available means to prevent the transmission of infectious disease [i.e., Covid-19] and to ensure that all cases of contagious disease are subject to proper control and treatment.” 10 GCA § 19601. This meant taking care of the quarantined passengers by moving them to a new facility that could provide for their needs.

When it comes to public health matters, time is of the essence. As already discussed, GSA did not fail to abide by the terms of the contract and the Procurement Law. GSA contracted for a quarantine facility, and Santa Fe failed to meet the criteria legally required to be one. The Emergency Health Powers Act and the Governor’s declaration of a public health emergency supported GSA’s decision to protect the health, safety and welfare of the quarantined passengers and the general public by immediately terminating the contract with Santa Fe without further delay or excuse.

**CONCLUSION**

The undisputed evidence establishes that GSA properly exercised its discretion and contractual right to terminate the purchase order contract with Santa Fe. Nothing in the contract or the Procurement law requires GSA to give Santa Fe advance written notice of its deficiencies or to give it ten days to cure deficiencies that should never have been present in a quarantine facility in the first place. GSA's actions were all performed in good faith, and GSA is entitled to summary judgment against Appellant Santa Fe as a matter of law.

Respectfully submitted this 17th day of August, 2020.

**OFFICE OF THE ATTORNEY GENERAL**  
**Leevin Taitano Camacho, Attorney General**

By:



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**SANDRA CRUZ MILLER**  
Assistant Attorney General