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GDOE Replies to Oppositions re: Appeal Case No. OPA-PA-21-007

Abmer T. Brennan <atbrennan@gdoe.net>

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Cc: Legal Admin <legal-admin@gdoe.net>

Hafa Adai All,

Please see GDOE's Replies to Oppositions re: OPA-PA-21-007. Respectfully requesting for confirmation of receipt and to include legal-admin@gdoe.net for future correspondence regarding this appeal.

Si Yu'os Ma'ase.

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3 attachments

GDOE Reply to Op Motion to Exclude OPA-PA-21-007 111021.pdf
346K



GDOE Reply to Op Motion to Dismiss Lack of SMJ OPA-PA-21-007 111021.pdf
448K



GDOE Rep to Op re Valid Claim OPA-PA-21-007 111021.pdf
282K

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8 **OFFICE OF THE PUBLIC AUDITOR**
9 **PROCUREMENT APPEALS**

10 In the Appeal of

APPEAL CASE NOS.: OPA-PA-21-007

11 G4S Security Systems (Guam) Inc.,

**REPLY TO OPPOSITION TO MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

12 Appellant.

13 **I. INTRODUCTION**

14 On April 13, 2021, GDOE issued its Multi-Step IFB 026-2021 for Indoor and Outdoor
15 Wireless Local Area Network (“WLAN”) Infrastructure Installation Project (hereinafter referred
16 to as the “IFB”). On May 28, 2021, GDOE received bids for the IFB from G4S Security Systems
17 (Guam) Inc. (hereafter referred to as “Appellant”) and Technologies for Tomorrow Inc. (hereafter
18 referred to as “TFT”). On July 13, 2021, GDOE awarded to TFT as the lowest, most responsible
19 and responsive bid for the IFB. On August 10, 2021, Appellant protested the award made to TFT
20 based on the claim that TFT supposedly does not have a valid Guam Contractors License to
21 perform service, maintain and/or install structured cabling on Guam. On September 3, 2021,
22 GDOE issued its denial of Appellant’s protest. On September 20, 2021, GDOE received the
23 notice of receipt of appeal from the Office of Public Auditor (OPA). The following is GDOE’s
24 reply to the opposition to GDOE’s motion to dismiss for lack of subject matter jurisdiction.
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1 **II. THE ISSUE BEFORE THE OPA DOES NOT INVOLVE TERMS AND**
2 **CONDITIONS OF THE IFB, IS PROHIBITED BY GUAM LAW FROM BEING**
3 **CONSIDERED IN THE EVALUATION AND AWARD, AND IS OUTSIDE THE**
4 **JURISDICTION OF THE OPA.**

5 The Public Auditor shall determine whether a decision on the protest of method of
6 selection, solicitation or award of a contract, or entitlement to costs is in accordance with the
7 statutes, regulations, and the terms and conditions of the solicitation. *See* 2 GAR Div. 4 §12112.
8 Here, Appellant, and Third Party Bidder (PDS), are improperly attempting to challenge a properly
9 awarded IFB, by asking the OPA to undermine GDOE's evaluation and award based on terms
10 that are not included anywhere within the IFB. *See* Procurement Record at 1-252. However,
11 Guam Procurement law does not allow this, and therefore this appeal should be dismissed. *See* 2
12 GAR Div. 4 §12112.

13 Guam Procurement Law states an IFB shall be evaluated based on the requirements set
14 forth in the IFB, that the IFB shall set forth the evaluation criteria to be used, and that no criteria
15 may be used in bid evaluation that are not set forth in the IFB. *See* 5 GCA §5211(e). In addition,
16 the contract shall be awarded to the lowest responsible bidder whose bid meets the criteria set
17 forth in the IFB. *See* 5 GCA §5211(g). Guam Procurement Law states that a responsible bidder
18 is a person who has the capability in all respects to perform fully the contract requirements, and
19 the integrity and reliability which will assure good faith performance; while a responsive bidder
20 means a person who has submitted a bid which conforms in all material respects to the IFB. *See*
21 5 GCA §§5201(f) & (g). Guam Procurement Law also states that the IFB shall set forth the
22 requirements and criteria which will be used to determine the lowest responsive bidder, and no
23 bid shall be evaluated for any requirement or criterion that is not disclosed in the IFB. *See* 2
24 GAR Div. 4 §3109(n)(1). Section 3.2 of the IFB states the requirements for responsibility and
25 responsiveness, and that they will be determined based on compliance with the requirements of
26 the IFB. *See* Procurement record at 20-21. Therefore, consistent with the terms and conditions of
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1 the IFB and Guam Procurement law, GDOE properly determined responsibility and
2 responsiveness and correctly evaluated and awarded the IFB. *See* 5 GCA §5211; *see also*
3 Procurement record at 516-521.

4 Appellant and Third Place Bidder Pacific Data Systems, Inc. (PDS) improperly challenge
5 the IFB by attempting to introduce a new claim that was **clearly not published within the IFB**.
6 *See* Procurement record at 1-252. Guam Procurement Law does not allow this. *See* 5 GCA
7 §5211. Appellant’s claim regarding a Guam Contractor’s License is clearly not within the terms
8 and conditions of the IFB, is not method of selection, solicitation or award of a contract, or
9 entitlement to costs. *See* 2 GAR Div. 4 §12112. Appellant and PDS should not be allowed to
10 improperly raise this issue before the OPA. Guam Procurement Law and the published terms and
11 conditions of the IFB provide direct authority, contradicting their position, and therefore this
12 matter should be dismissed.

13 PDS cites *In the Appeal of Pacific Data Systems, Inc. (PDS)*, OPA-PA-15-012, where
14 PDS appealed an award to G4S claiming that G4S failed to submit a Guam Contractor’s License.
15 That case is distinguishable. In that case, the OPA **denied** PDS’s protest because the IFB did
16 **not require Bidders to submit proof of licensure contemporaneously with their Bids and**
17 **therefore PDS failed to establish that G4S’s Bid must be rejected as non-responsive for**
18 **failing to submit a valid contractor’s license required to meet the bid terms and conditions**
19 **of Guam law.**¹ *Id.* at 7. *In the Appeal Pacific Data Systems, Inc.* is distinguishable because that
20 IFB provided, “Bidders are cautioned that the Government will not consider for award any offer
21 submitted by a bidder who has not complied with the Guam Licensing Law.” *Id.* at 7. Here, a
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24 ¹ In *In the Appeal of Pacific Data Systems, Inc.*, the OPA held that G4S had used subcontractors for its
25 projects and would be using subcontractors for this project, that the IFB did not prohibit Bidders from
26 subcontracting work, and that PDS itself subcontracted work as well. *Id.* at 9. Guam Procurement Law
27 and GDOE’s IFB also allow for subcontracting. *See* 5 GCA §5211; *see also* Procurement record at 133.
28 *In the Appeal of Pacific Data Systems, Inc.*, supports dismissal of this case because the OPA has
acknowledged the acceptability of subcontracting under similar circumstances found here in this case.

1 Guam Contractor's License was not mentioned anywhere within the terms and conditions of
2 GDOE's IFB. Therefore this case is distinguishable and this matter should be dismissed in its
3 entirety. *Id.*

4 PDS also cites *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, OPA-PA-10-
5 008. There, the Public Auditor held that it did not have jurisdiction to decide issues regarding
6 whether the Appellee J&B violated the labor laws. *Id.* at 15. Analogous to this case, the OPA
7 also does not have the jurisdiction to determine compliance with Title 21 GCA Chapter 70, and a
8 Guam Contractors License was not a published term and condition within GDOE's IFB. *See* 5
9 GCA §5211; *see also* Procurement record 1-252. In *In the Appeal of JRN Air Conditioning &*
10 *Refrigeration, Inc.*, the OPA did review matters **that were explicitly published within the IFB.**
11 *Id.* at 15. PDS fails to acknowledge this critical distinguishable fact in their opposition. Here, a
12 Guam Contractor's License was not a published criteria in the IFB terms and conditions, and thus
13 Appellant and PDS are improperly asking the OPA to undermine based on terms not within the
14 IFB and outside the OPA's jurisdiction. Therefore, *In the Appeal of JRN Air Conditioning &*
15 *Refrigeration, Inc.*, supports the dismissal of this case, and GDOE respectfully requests that the
16 OPA dismiss this case.

17 **III. THE GUAM CONTRACTORS LICENSE BOARD DETERMINES**
18 **COMPLIANCE REGARDING A GUAM CONTRACTORS LICENSE, NOT THE OPA.**

19 Guam Law specifically authorizes the Guam Contractors License Board to determine
20 compliance regarding a Guam Contractor's License. *See Generally* 21 GCA Chapter 70.
21 Appellant and PDS make numerous citations to Title 21 GCA Chapter 70. However, Guam Law
22 is clear. It is the Guam Contractors License Board that **shall enforce Chapter 70 and rules and**
23 **regulations adopted pursuant thereto.** *See* 21 GCA §70103(c).
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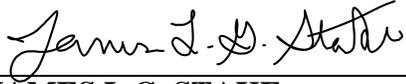
25 Therefore, because a Guam Contractor's License was never included within the terms and
26 conditions of the IFB and Guam Procurement Law prohibits evaluation and award based on non-
27 published criteria, this issue is not properly before the OPA.

1 **IV. CONCLUSION**

2 For these reasons, GDOE respectfully requests that the OPA dismiss this appeal in its
3 entirety for lack of subject matter jurisdiction.

4 Respectfully submitted this 10th day of November, 2021.

5 **GUAM DEPARTMENT OF EDUCATION**

6 By: 
7 **JAMES L.G. STAKE**
8 *Legal Counsel*