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GDOE [Proposed] Findings of Facts and Conclusions of Law, and Brief re Remedies re: Appeal Case No. OPA-PA-21-007

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Hafa Adai All,

Please see attached *GDOE's [Proposed] Findings of Facts and Conclusions of Law, and Brief re Remedies re: Appeal Case No. OPA-PA-21-007*.

Kindly confirm receipt.

Thank you and stay safe.

Respectfully,

Abi T. BrennanOffice of the Superintendent, **Legal Div.**
Guam Department of Education

Guam Department of Education

2 attachments**GDOE Brief re Remedies OPA-PA-21-007.pdf**

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**GDOE Facts & Conclusions OPA-PA-21-007.pdf**

202K

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

10 In the Appeal of

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

12 G4S Security Systems (Guam), Inc.,

13 **[PROPOSED] FINDINGS OF FACTS AND**
14 **CONCLUSIONS OF LAW**

15 Appellant.

16 COMES NOW, the Appellee in the above captioned appeal, the Guam Department of
17 Education (“GDOE”), by and through its legal counsel, and submits its Findings of Facts and
18 Conclusions of Law.

19 **INTRODUCTION**

20 This matter came before the Office of the Public Auditor (“OPA”), on an appeal from
21 G4S Security Systems (Guam), Inc. (“G4S” or “Appellant”) regarding the evaluation and award
22 of GDOE Invitation for Bid (“IFB”) 026-2021 for Indoor and Outdoor Wireless Local Area
23 Network (“WLAN”) Infrastructure Installation Project to the lowest most responsive and
24 responsible bidder, Technologies for Tomorrow, Inc. (“TFT”).

25 On December 20, 2021, the OPA held its formal hearing for this appeal OPA-PA-21-007.
26 The OPA received evidence and testimony regarding the issue, if an IFB should have evaluated
27 by a criteria that was clearly not a published term and condition, here a contractor’s license. G4S

1 presented testimony from Mr. Eric Roberto [G4S Representative] and Ms. Nida Bailey [Guam
2 Contractors' License Board ("CLB") Employee]. GDOE presented testimony from GDOE
3 employees Mr. Vincent Dela Cruz and Ms. Carmen Charfauros. TFT by and through its Counsel
4 presented testimony from Mr. Daniel Coco [TFT Representative].
5

6 The OPA considered the evidence, including the testimony of witnesses and exhibits, the
7 procurement record, and the submissions placed into the record by all parties. The OPA hereby
8 enters the following Findings of Facts and Conclusions of Law. To the extent the Findings of
9 Facts may be considered Conclusions of Law, they shall be deemed Conclusions of Law. In
10 addition, to the extent Conclusions of Law stated herein may be considered Findings of Facts,
11 they shall be deemed Findings of Facts.
12

13 **FINDINGS OF FACTS**

- 14 1. Mr. Dela Cruz and his team successfully completed from start to finish four (4) prior
15 services identical to this IFB, and had not required a contractor's license for the prior
16 IFBs. *See In the Appeal of G4S*, OPA-PA-21-007, Formal Hearing, Dec. 21, 2021.
- 17 2. In preparation of the publication of the IFB, Mr. Dela Cruz and his team of other
18 GDOE employees met to research and develop the specifications. *Id.*
- 19 3. Pursuant to their experience, knowledge, and research, GDOE's testimony and belief
20 was that the IFB is for the purchase and installation of finished products (wireless
21 access points, axis's, cables) and fits into the category of purchasing technology and
22 not construction. *Id* at 6:20.
- 23 4. On April 13, 2021, GDOE issued its Multi-Step IFB including its exhaustive list of
24 requirements, terms and conditions, and was received by G4S and TFT. The IFB did
25 not contain a contractor's license as a term or condition for the evaluation of the IFB.
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- 1 5. On May 18, 2021, GDOE issued Amendment 4, which clarified that a contractor's
2 license will not be included in the evaluation for the IFB. All bidders including G4S
3 signed and acknowledged Amendment 4.
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- 5 6. On May 28, 2021, GDOE received bids for the IFB from G4S and TFT.
6
- 7 7. GDOE reviewed and evaluated bids pursuant to the terms and conditions of the IFB as
8 a Multi-Step Sealed Bid, which required, bond requirements, performance, and
9 payment guarantees; Phase 1: Evaluation of Unpriced Technical Offers which
10 included a Company's Profile and Qualification Relevant to the Scope of
11 Services/Work (10 points), Past Accomplishment and Background (20 points),
12 Technical Resource (30 points), and Detailed Plan and Technical Solution including
13 completeness of clarity of the Technical Proposal and understanding of the bid
14 requirements relevant to the WLAN infrastructure installation (5 points), Product
15 compatibility with existing WLAN system in GDOE's schools (20 points), Detailed
16 plan performance plan, detailed deliverable timeline and detail technical
17 solution/proposal relevant to the scope of services/products (15 points).
18
- 19 8. GDOE reviewed and evaluated the complete bids from TFT [approximately 250
20 pages] and G4S [approximately 400 pages], documents provided demonstrated each
21 parties' responsibility and responsiveness pursuant to the terms and conditions of the
22 IFB.
23
- 24 9. Pursuant to bids received for the Multi-Step IFB, Phase II: Evaluation of Priced Bid,
25 TFT is the lowest, most responsive and responsible bidder (TFT \$1,531,820.00 vs.
26 G4S's \$1,944,000.00).
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- 1 10. On July 13, 2021, GDOE issued its evaluation and award to TFT as clearly the lowest
2 most responsible and responsive bidder for the IFB.
- 3 11. On August 10, 2021, G4S protested the evaluation and award for TFT, alleging that
4 the evaluation should have utilized a contractor's license as a term and condition,
5 despite not being published within the IFB.
- 6 12. On September 3, 2021, GDOE reviewed and later denied Appellant's protest.
- 7 13. On September 20, 2021, GDOE received the notice of receipt of appeal from the OPA.
- 8 14. On December 20, 2021, Mr. Eric Roberto for G4S testified that he knew and was
9 aware that a contractor's license was not required by the IFB, and that it was also
10 clarified by GDOE Amendment 4. *See In the Appeal of G4S*, OPA-PA-21-007,
11 Formal Hearing on Dec. 20, 2021, at 1:20.
- 12 15. On December 20, 2021, Mr. Eric Roberto for G4S testified regarding the IFB that the
13 cables, outlets, axis points, and switches are not permanent fixed parts of the schools
14 and removing those parts would not damage the [GDOE's] structure. *Id.* at 1:28-1:30.
- 15 16. On December 20, 2021, Ms. Nida Bailey for the CLB testified that a decision on
16 allegations against TFT was reached by the CLB, however not all of the CLB's
17 regulations and steps were followed; there was no formal hearing for the allegations
18 against TFT, the decision is normally issued by the CLB board but that was not
19 properly done in this case, and TFT was not provided an opportunity to respond or be
20 heard. *Id.* at 2:30-45.
- 21 27. Ms. Bailey also stated that the board decides cases and the licenses required, and that
22 no board meeting has taken place regarding this IFB and the licenses required. *Id.*
23 2:44-2:50.
- 24 28.

1 18. On December 21, 2021, Mr. Dela Cruz stated that when GDOE received the questions
2 regarding licensing, Mr. Dela Cruz did attempt to reach out to the CLB. *See In the*
3 *Appeal of G4S*, OPA-PA-21-007, Dec. 21, 2021, at 6:20-12. After Mr. Dela Cruz was
4 not able to reach the CLB, Mr. Dela Cruz attempted to research into the issue himself.
5 Pursuant to Mr. Dela Cruz's prior experience, knowledge and research Mr. Dela Cruz
6 did not believe a Contractor's License was required, however he did not waive any
7 other licenses that may be required in place of the CLB. *Id.*

9 19. On December 21, 2021, Mr. Dela Cruz outlined what TFT's bid provided pursuant to
10 the IFB that was required and demonstrated TFT's responsibility and responsiveness.
11 Mr. Dela Cruz explained that TFT's bid included TFT's Company profile that TFT
12 has been in this business similar to the IFB for 27 years, that TFT has successfully
13 completed numerous similar projects in the IT [information technology] field, and
14 TFT has worked with GDOE and other Government of Guam Agencies in similar
15 services. Mr. Dela Cruz also explained TFT's technical resources that TFT has a local
16 presence, TFT has a brand expert [Aruba Expert] the brand GDOE intended to buy,
17 and that TFT answered every single component of the IFB bid including the detailed
18 plan and technical solution portion. *Id.* at 6:20-12.

19 20. Mr. Dela Cruz also stated that to the best of his knowledge, the wireless access points,
20 switches and cables are not permanent parts of the structure. *Id.* at 28. In addition, the
21 products in this IFB can be removed and replaced without any issues to the physical
22 structure and that the work for the IFB would not require building a structure or taking
23 down a structure. *Id.* at 28-30. Mr. Dela Cruz also stated that no permits were needed
24 for the similar services to this IFB in the past, no building permits were required for
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1 prior services, and no additional building review was done or required by other
2 agencies following the completion of the past similar IFBs. *Id.* at 31.

- 3 21. On December 21, 2021, Mr. Coco testified to TFT's expertise, ability, and past
4 successful completion of similar services to the IFB. Mr. Coco also testified that the
5 IFB subject of this appeal is installing cables and axis points, and that majority of the
6 IFB is selling computer parts and not labor. *Id.* at 52. Mr. Coco testified of his
7 \$1,531,820.00 bid, approximately \$1.3 million is the selling of parts, and the
8 approximate .2 million [\$200,000] is for labor of the IFB. *Id.*

10 CONCLUSIONS OF LAW

11 A. Timeliness.

- 12 1. Title 2 GAR Div. 4 §12104(c)(9) states the Public Auditor has the right to raise the
13 issue of jurisdiction *sua sponte* at any time and shall do so by an appropriate order.
14
- 15 2. Guam Procurement Law states a protest shall be submitted in writing within fourteen
16 (14) days after such aggrieved person knows or should know of the facts giving rise
17 thereto. 5 GCA §5425(a).
- 18 3. The Guam Supreme Court held that 5425(a) speaks not in terms of what is being
19 protested but in terms of knowledge of the facts giving rise to a protest, and that
20 therefore, a protest filed more than 14 days after the disappointed offeror or bidder had
21 notice of the grounds for the protest is barred as untimely. This is true even if no
22 contract has yet been awarded, even if the protest was filed within 14 days of the
23 agency's selection of bidders or offerors, and even if the protestant did not
24 subjectively understand or appreciate the ground for protest. *See DFS Guam L.P. v.*
25 *The A.B. Won Pat International Airport Authority, Guam*, 2020 Guam 20 ¶ 87.
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- 1 4. On April 13, 2021, GDOE issued its IFB that did not require a Contractor's License,
2 and on May 18, 2021, GDOE clarified again that a Contractor's License was not
3 required for the IFB.
- 4 5. Appellant G4S has confirmed their knowledge numerous times that G4S was aware
5 and knew that a Contractor's License was not required for the IFB evaluation, and
6 G4S also signed and acknowledged the May 18 clarification from GDOE.
- 7 6. On July 29, 2021, G4S protested the IFB stating that the evaluation should have
8 included a Contractor's License, approximately **107 days** after the IFB was published
9 and **72 days** after the Amendment 4 directly stated a Contractor's License would not
10 be included in the evaluation of the IFB. G4S throughout this proceeding and on the
11 record has admitted to this knowledge. G4S's decision to lie in wait far beyond the
12 fourteen (14) days from when G4S admittedly knew that a Contractor's License was
13 not a term and condition of the IFB evaluation is in direct violation of section 5425(a)
14 and the binding *DFS Guam L.P.* case.
- 15 7. G4S's protest that a Contractor's license should have been included into the IFB
16 evaluation process is far beyond the fourteen (14) days when G4S clearly and
17 admittedly knew that it was not, and is therefore untimely.

18 **B. Competitive Sealed Bidding (Invitations for Bid).**

- 19 8. Title 5 GCA §5211(e) Competitive Sealed Bidding states bids shall be evaluated based
20 on the requirements set forth in the Invitation for Bids, the Invitation for Bids shall set
21 forth the evaluation criteria to be used, and no criteria may be used in bid evaluation
22 that are not set forth in the Invitation for Bids.
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- 1 9. Guam Procurement Law also states that the IFB shall set forth the requirements and
2 criteria which will be used to determine the lowest responsive bidder, and no bid shall
3 be evaluated for any requirement or criterion that is not disclosed in the IFB. *See* 2
4 GAR Div. 4 §3109(n)(1).
- 5
- 6 10. Title 5 GCA §5211(g) states the contract shall be awarded to the lowest responsible
7 bidder whose bid meets the criteria set forth in the IFB.
- 8
- 9 11. Guam Procurement Law states that a responsible bidder is a person who has the
10 capability in all respects to perform fully the contract requirements, and the integrity
11 and reliability which will assure good faith performance; while a responsive bidder
12 means a person who has submitted a bid which conforms in all material respects to the
13 IFB. *See* 5 GCA §§5201(f) & (g).
- 14
- 15 12. Section 3.2 of the IFB states the requirements for responsibility and responsiveness,
16 and that they will be determined based on compliance with the requirements of the
17 IFB. *See* Procurement record at 20-21.
- 18
- 19 13. Despite G4S's efforts to bypass and ignore the overwhelming evidence of TFT's
20 responsibility and responsiveness, pursuant to a review of the record and bids
21 submitted, TFT is the lowest responsible bidder whose bid meets the criteria set forth
22 in the IFB. TFT's submission contains approximately 250 pages of documents that
23 thoroughly demonstrates their responsibility and responsiveness including their
24 Company Profile, Technical Resources, Detailed Plan and Technical Solution.
- 25
- 26 14. G4S's unsupported argument to evaluate and award based on criteria that is not
27 published in the IFB directly violates the law, specifically, 5 GCA §§5211(e) & (g)
28 and 2 GAR Div. 4 §3109(n)(1).

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- 15. G4S has failed to provide legal authority that would allow for a Contractor’s License to now be utilized in the evaluation and award of the IFB.
- 16. G4S has failed to provide legal authority that a C68 license is required for the IFB. Instead, the testimony from Mr. Roberto (G4S), Mr. Dela Cruz (GDOE), and Mr. Coco (TFT), all contradicted G4S’s position because all parties agreed that the services intended for the IFB does not require work to the permanent [GDOE] structures.
- 17. G4S has failed to provide any legal authority that would prohibit TFT from obtaining any and all licenses required for the IFB.
- 18. The OPA has previously held that a Contractor’s License is not required for an IFB where an IFB did not require bidders to submit proof of licensure with their Bids. *See In the Appeal of PDS*, OPA-PA-015-012, at 7 ¶ 1. Similarly, GDOE IFB 026-2021 did not require a Contractor’s License for submission of bids.
- 19. In addition, other courts have upheld evaluations and awards of IFBs that are similar to this case, where protesters demand improper consideration of certain licenses that are not requirements or criteria published within an IFB’s terms and conditions. *Compare with Kyorkin Construction, Inc.*, B-226238 (1987); *Hap Construction, Inc.*, B-278515 (1998); *Interstate Industrial Incorporated*, B-241974 (1990); and *American Mutual Protective Bureau*, B-208067 (1982).

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CONCLUSION

Guam Procurement Law strictly prohibits the evaluation and award of an IFB, by criteria not published within the IFB [here a Contractor’s License], this has been litigated and upheld by the Guam OPA as well as by the Federal Government Accountability Office (“GAO”). In light of the findings of fact and conclusions of law, the Public Auditor Orders that this appeal be dismissed with prejudice in its entirety.

Respectfully submitted this 18th day of January 2022.

GUAM DEPARTMENT OF EDUCATION

By: 

JAMES L.G. STAKE
Legal Counsel