



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

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**In the Appeal of G4S Security Systems (Guam), Inc.; Appeal No. OPA-PA-21-007**

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Tammy Reyes &lt;treyes@calvofisher.com&gt;

Tue, Jan 18, 2022 at 5:02 PM

To: "Jerrick Hernandez (jhernandez@guamopa.com)" <jhernandez@guamopa.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>, "James L.G. Stake" <jlgstake@gdoe.net>, Legal Admin <legal-admin@gdoe.net>, "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Genevieve P. Rapadas" <grapadas@calvofisher.com>, Rodney Jacob <rjacob@calvofisher.com>, Thyrza Bagana <tbagana@guamopa.com>

Dear All,

Resending to include Mr. Jerrick Hernandez. Ms. Bagana was copied in the original email. Please confirm receipt. Thank you.

Regards,

Tammy L. Reyes

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**From:** Tammy Reyes**Sent:** Tuesday, January 18, 2022 4:58 PM**To:** 'R. Marsil Johnson'; 'James L.G. Stake'; 'Legal Admin'; 'Joshua D. Walsh'; Genevieve P. Rapadas; Rodney Jacob; 'Thyrza Bagana'**Subject:** In the Appeal of G4S Security Systems (Guam), Inc.; Appeal No. OPA-PA-21-007

Dear Mr. Hernandez,

Please see attached submission of ***Appellant G4S Security Systems (Guam) Inc.'s [Proposed] Findings of Fact and Conclusions of Law*** to be filed in the above-referenced action. Please confirm receipt. Thank you.

Regards,

Tammy L. Reyes

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 **Appellant G4S Security Systems (Guam) Inc.'s [Proposed] Findings of Fact and Conclusions of Law.pdf**  
100K

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10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**  
11 **PROCUREMENT APPEALS**

12 In the Appeal of

13 G4S Security Systems (Guam), Inc.,

14 Appellant.

15 **Appeal No. OPA-PA-21-007**

16 **APPELLANT G4S SECURITY SYSTEMS**  
17 **(GUAM), INC.'S PROPOSED FINDINGS**  
18 **OF FACT AND CONCLUSIONS OF LAW**

1 **I. INTRODUCTION**

2 This matter came before the Office of Public Accountability (“OPA”), on appeal filed by  
3 Appellant G4S Security Systems (Guam), Inc. (“Appellant” or “G4S”) for formal hearing on  
4 December 20 and 21, 2021. Attorney Genevieve P. Rapadas appeared on behalf of G4S; Attorney  
5 James L.G. Stake appeared on behalf of Appellee Guam Department of Education (“GDOE”);  
6 Attorney Joshua D. Walsh appeared on behalf of Interested Party Pacific Data Systems, Inc.  
7 (“PDS”); and Attorney R. Marsil Johnson on behalf of Interested Party Technologies for  
8 Tomorrow, Inc. (“TFT”).

9 The OPA has considered the evidence, including the testimony of witnesses and exhibits  
10 admitted into evidence, the procurement record maintained and the submissions placed into the  
11 record by the parties. The OPA has further considered the written arguments and proposed  
12 Findings of Fact and Conclusions of Law submitted by counsel for the parties. The OPA now  
13 issues the following Findings of Fact and Conclusions of Law.

14 **FINDINGS OF FACT**

15 1. On April 13, 2021, GDOE issued its Multi-Step IFB 026-2021 for Indoor and  
16 Outdoor Wireless Local Area Network (“WLAN”) Infrastructure Installation Project (the “IFB”).  
17 (Procurement Record (“PR”) G001-252.)

18 2. GDOE issued the procurement to expand the Wireless Local Area Network  
19 (WLAN) Infrastructure at twenty-six (26) elementary schools, eight (8) middle schools and  
20 (6) high schools. (PR at G004.)

21 3. The WLAN installation to expand WLAN Infrastructure at forty (40) GDOE’s  
22 public school would primarily consist of: a) furnish and Install Indoor and Outdoor Wireless  
23 Access Point (WAP) and PoE edge Switch hardware; b) furnish and install required data cables,  
24 patch cable and conduit; c) test and validate WAPs; and d) furnish all supplies, materials and  
25 labor required to complete the installation for a turn-key solution. (*Id.*) The scope of work of the  
26 IFB involves the installation of associated cable and wiring. (*Id.*; Testimony of Daniel Coco;  
27 Testimony of Eric Roberts; Testimony of Nida Bailey.)  
28

1 4. The IFB contained the following provisions:

2 • 3.2.2. DETERMINATION OF RESPONSIBILITY

3 Responsibility of a bidder will be determined in accordance with 2 GAR Div. 4  
4 §3116. Bidders should be prepared to promptly provide to GDOE Information  
5 relating to the bidders responsibility. Such information may include but is not  
6 limited to documentation of financial, personnel, and other resources;  
7 expertise; or records of performance. Failure of a bidder to comply with a  
8 request by GDOE for information relating to responsibility may result in a  
9 determination that a bidder is not responsible and therefore disqualified from  
10 an award.

11 Pursuant to 5 GCA §5201(g), responsiveness of a bidder will be determined by  
12 compliance with the requirements of this IFB. (PR at G021);

13 • 3.2.5. SPECIAL PERMITS AND LICENSES

14 The Bidder shall, at its own expense, procure all permits, certificates, and  
15 licenses and give all notices and necessary reports required by law for this IFB.  
16 Failure to maintain required licenses or permits shall be grounds for immediate  
17 termination of the contract. (*Id.* at G021);

18 • 4.3. LAWS TO BE OBSERVED

19 The Bidder should be familiar with federal and local laws, codes, ordinances,  
20 and regulations, which, in any manner, affect those engaged or employed in the  
21 work, or the material or equipment, used in or upon the site, or in any way  
22 affect the conduct of the work. No misunderstanding or ignorance on the part  
23 of the Bidder will, in any way, serve to modify the provision of the contract.  
24 (*Id.* at G024);

25 • 4.4. LICENSE TO CONDUCT BUSINESS ON GUAM; POLICY OF LOCAL  
26 PROCUREMENT

27 Bidders providing supplies or services pursuant to this IFB are subject to  
28 licensure requirements in accordance with 5 GCA §5008. Inquiries about  
obtaining a Guam business license should be directed to the Guam Department  
of Revenue and Taxation.

Preferential selection of a bidder licensed to do business on Guam and that  
maintains an office or other facility on Guam for an award pursuant to this IFB  
may be made in accordance with 5 GCA §5008. **GDOE Procurement Form  
005 must be completed and included with the Bid.** (*Id.* at G024.)

5. On May 18, 2021, GDOE issued Amendment 4 to the IFB. Amendment 4 provided  
the following:

8. Given the scope of work to be performed by the Bidder at each of the  
GDOE school sites, GDOE Bidder requirements for similar projects (example:  
GDOE IFB-006-2021), and applicable Guam law related to Contractor's

1 Licensing, please confirm the requirement for the Bidder to have a Guam  
2 Contractor's license with a telecommunications specialty (C-68) and for  
evidence of this license to be provided with the bidder's submission.

3 ***GDOE Response: The project includes the furnishing and installation of***  
4 ***network equipment to expand the wireless internet coverage in the public***  
5 ***schools. This project is very similar to previous awarded wireless expansion***  
6 ***projects in the public schools. The project activities does [sic] not include***  
7 ***any structural fabrication/construction or structural alteration or repair.***

8 ***Bidders are responsible to be informed and knowledgeable of any regulatory***  
9 ***requirements for this project. Bidders should be guided by any regulatory***  
10 ***requirements issued from the federal and/or local governing entity.***

11 (PR at G244-252 (emphasis added).)

12 6. GDOE received bids for the IFB from G4S, TFT, PDS and California Pacific  
13 Technical Services, LLC. (*Id.* at G516-518.)

14 7. GDOE conducted an evaluation of the unpriced technical offers of the bidders.  
15 (*Id.* at G516-517.) GDOE's evaluation only included the named bidders and not any  
16 subcontractors that were identified in their proposals. (Testimony of Carmen T. Charfauros.)

17 8. TFT had the lowest monetary bid on the IFB. (PR at G518.) If TFT were to be  
18 awarded the IFB, TFT (and not any of its subcontractors) would enter into the contract with  
19 GDOE. (Testimony of Daniel Coco.)

20 9. G4S was the second lowest bidder on the IFB. (PR at G518.)

21 10. GDOE provided Notice of the Award ("Notice of Award") on the IFB to TFT on  
22 July 13, 2021. (*Id.* at G549.) The Notice Award stated that "this award is conditioned upon the  
23 successful execution and final approval of the contract by all parties required by Guam law." (*Id.*)

24 11. G4S submitted a Sunshine Act Request to GDOE on July 20, 2021 requesting  
25 copies of "all award notice(s), award(s), contract(s), purchase order(s), Responsible Management  
26 Employee (RME), a copy of Technologies of Tomorrow Contractors License and bid packet  
27 submittal pertaining to Guam Department of Education Multi-Step Invitation For Bid No. 026-  
28 21." (Appellant Ex. 2.)

12. GDOE responded to G4S's Sunshine Act Request on July 27, 2021 and provided  
copies of a Memo to File regarding Proprietary Data, the Technical Award to TFT, TFT's Price

1 Bid and TFT's Unpriced Technical Offer on July 28, 2021. The documents provided by GDOE  
2 indicated that TFT did not provide proof of a valid Contractors License or a valid C68 Specialty  
3 License from the Guam Contractors License Board ("GCLB") in responding to the ITB.  
4 (Appellant Ex. 3.)

5 13. G4S protested the award to TFT on July 29, 2021 ("G4S's Protest"). (PR at G554.)  
6 G4S's Protest alleged the following:

7 G4S would like to officially protest the Notice of Award for solicitation Bid  
8 No. GDOE IFB 026-2021 Indoor and Outdoor Wireless to Technologies for  
9 Tomorrow Inc. on the basis that said company ***does not possess and has not***  
10 ***submitted*** evidence of a valid Guam Contractors License to perform the work  
dictated by GDOE IFB 026-2021.

11 (*Id.* (emphasis added).)

12 14. GDOE denied G4S's protest on September 3, 2021 ("GDOE's Denial of Protest")  
13 on the basis that "the IFB and its published terms and conditions did not require the submission of  
14 a Guam Contractors License in the bid submission." (PR at G555.)

15 15. In GDOE's Denial of Protest, GDOE did not include as a basis for denial that  
16 G4S's protest was untimely and instead addressed the merits of G4S's protest. (*Id.*; Testimony of  
17 Eric Roberts.)

18 16. On September 17, 2021, G4S submitted a Consumer Complaint to the GCLB on  
19 that ground that GDOE provided notice of intent to award TFT the work under the IFB even  
20 though neither TFT nor any of its listed partners appears to hold a Contractors License on Guam.  
21 (Appellant Ex. 6.)

22 17. On November 1, 2021, the GCLB issued its Findings and Decisions on G4S's  
23 Consumer Complaint. (Appellant Ex. 7.)

24 18. TFT does not hold any Contractors Licenses from the GCLB. (Testimony of  
25 Daniel Coco; Testimony of Nida Bailey.) TFT did not hold any Contractors Licenses from the  
26 GCLB at the time it submitted its bid to the IFB. (*Id.*)

27 19. TFT was incorporated under the laws of the State of Florida and is registered to do  
28 business on Guam as a Foreign Corporation. (Appellant Ex. 9; Testimony of Daniel Coco.)



1 (h) of this Section, may be appealed by the protestant, to the Public Auditor within fifteen (15)  
2 days after receipt by the protestant of the notice of decision.” 5 GCA § 5425(e).

3 **A. A C-68 Telecommunications Specialty License from the GCLB is required to**  
4 **Perform the Work Called for Under the IFB.**

5 4. Under Title 21, Chapter 70 of the Guam Code Annotated (the “Guam Contractors  
6 Code”), which governs the licensing and operation of contractors on Guam, “Contractor” is  
7 defined as “any person who undertakes to construct, alter, repair, add to, subtract from, improve,  
8 move, wreck or demolish any building, highway, road, railroad, excavation *or* other structure,  
9 project development *or* improvement or do any part thereof, including the erection of scaffolding  
10 *or* other structure of works in connection therewith for another person for a fee.” 21 GCA  
11 § 70100(b).

12 5. The Guam Contractors Code and GCLB’s Rules and Regulations provide for three  
13 broad classifications of licenses, each with their own sub-classifications – General Engineering  
14 Contractor (“A” License); General Building Contractor (“B” License) and; Specialty Contractor  
15 (“C” License). 21 GCA § 70106; (Appellant Exhibit 8.) “A *General Building Contractor* is a  
16 contractor whose principal contracting business is in connection with any structure built, being  
17 built *or* to be built, for the support, shelter and enclosure of persons, animals, chattels *or* movable  
18 property of any kind, requiring in its construction the use of more than two (2) unrelated building  
19 trades *or* crafts, *or* to do *or* superintend the whole *or* any part thereof.” 21 GCA § 70106(c).  
20 “A *Specialty Contractor* is a contractor whose operations as such are the performance of  
21 construction work requiring special skill and whose principal contracting business involves the  
22 use of specialized building trades *or* crafts.” 21 GCA § 70106(d).

23 6. In turn, the Specialty Contractor, “C” License classification has several sub-  
24 classifications including C-68 which covers Communications/Telecommunications Contractors.  
25 As defined in the Rules and Regulations, “A Communications/Telecommunications Contractor  
26 installs, services, repairs and maintains all types of communication. (Appellant Ex. 8, p. 17.)  
27 These systems include, but are not limited to telephone systems, sound systems, cable television  
28

1 systems, closed-circuit video systems, satellite dish antennas, computer repair, computer  
2 networking and data systems. Including the associated cabling, wiring, or fiber optics.” (*Id.*)

3 7. In addition to holding a valid license to perform specific contracting work, a  
4 licensee must also employ a Responsible Management Employee (“RME”) who is “the individual  
5 responsible for the direct management of the contracting business of the licensee.” 21 GCA  
6 § 70100(g). An RME “must be licensed [and t]he Corporation, Partnership or Joint Venture which  
7 employs him must be also licensed as a contractor.” Additionally, among other requirements, the  
8 RME must be a “bona fide employee principally employed by the licensee” and “[i]n residence in  
9 the Territory of Guam during the period in which the license is in effect or during the period a  
10 project is under construction.” *Id.*; *see also* 21 GCA §70106(e).

11 8. ***Scope of Work under the IFB.*** The evidence presented demonstrates that the work  
12 called for under the IFB requires that the party performing the work have a valid C-68 Specialty  
13 License to perform the work called for under the IFB.

14 9. In setting forth the purpose of the work at issue, the IFB states:

15 [GDOE] is seeking a vendor that is capable in expanding the Wireless Local  
16 Area Network (WLAN) infrastructure at twenty-six (26) elementary schools,  
17 eight (8) middle schools and six (6) high schools.

18 The WLAN installation to expand WLAN infrastructure at forty (40) GDOE’s  
19 public school [sic] will primarily consist of: a) **furnish and install** Indoor and  
20 Outdoor Wireless Access Point (WAP) and PoE edge Switch hardware; b)  
21 **furnish and install** required data cables, patch cable and conduit; c) test and  
22 validate WAPs; and d) furnish all supplies, materials and labor required to  
23 complete the installation for a turn-key solution.

24 (PR at G004 (emphasis added).)

25 10. The IFB then provides descriptions of the technical specifications and scope of  
26 services for each component of the work which includes the installation of numerous cables and  
27 conduits including in walls and ceilings, configuration of wireless networks, and mounting of  
28 numerous wireless access points. (*See generally*, G001-252 [IFB § 2.3].)

11. On November 1, 2021, the GCLB issued its Findings and Decisions on G4S’s  
Consumer Complaint. In its Finding and Decisions, the GCLB definitively stated that the  
“[GCLB] will find TFT in violation of this public law 21 GCA § 70108(a) without obtaining a

1 contractor license C68 Communications/Telecommunications: (Contractors installs, services,  
2 repairs and maintains all types of communications. These systems include, but are not limited to  
3 telephone systems, sound systems, cable television systems, closed-circuit video systems, satellite  
4 dish antennas, computer repair, computer networking and data systems. Including the associated  
5 cabling, wiring, or fiber optic repairs.” (Appellant Ex. 7.)

6 12. TFT argued and attempted to present testimony at the hearing to demonstrate that  
7 the IFB does not require a license from the GCLB because the scope of work does not include  
8 construction work. TFT asserts that because the IFB does not involve any construction work, the  
9 winning bidder does not need a license from the GCLB<sup>1</sup>. TFT also asserts that if a license was  
10 required from the GCLB, a C-15 license is sufficient. The OPA disagrees.

11 13. At the hearing, GCLB Investigator Supervisor Ms. Bailey testified that the number  
12 one role of the GCLB is to protect the public and to ensure to consumers are protected from  
13 unqualified individuals who may be trying to perform contract work.

14 14. More importantly, Ms. Bailey testified that a GCLB license would be required to  
15 perform the work called for by the IFB. Ms. Baily testified that, specifically, a C-68 Specialty  
16 (Telecommunications) License would be required and a C-15 License would not be sufficient.  
17 She further testified that it is the number one requirement for a contractor to have an RME and  
18 that both the RME and his or her employer have to be licensed separately. She testified that this is  
19 for all work to be done on Guam.

20 15. The standard for reviewing an agency’s construction of a statute under Guam law  
21 is the same as was established by the United States Supreme Court in *Chevron, U.S.A., Inc. v.*  
22 *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *GMHA v. Civ. Serv. Comm.*  
23 *(Chaco)*, 2015 Guam 18 ¶ 13; *see also Guerrero v. Santo Thomas*, 2010 Guam 11 ¶¶ 39-40  
24 (“We afford deference to an agency’s interpretation of a statute when the agency has specialized  
25 knowledge in the area, but accord the agency interpretation less weight where technical

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26 <sup>1</sup> The testimony of TFT’s representative Daniel Coco was inconsistent on this position and not based on any  
27 consultation with the GCLB. It was also directly contradicted by the testimony of GCLB Investigator Supervisor and  
28 Eric Roberts as more fully described in this section.

1 knowledge is not necessary in interpreting a statute.”); *Carlson v. Guam Telephone Authority*,  
2 2002 Guam 15 ¶¶ 17-18; *Ada v. Guam Telephone Authority*, 1999 Guam 10 ¶ 10.

3 16. When a statute is silent or ambiguous, the court should defer to the agency’s  
4 reasonable interpretation. 2015 Guam 18 ¶ 13. “[T]he standard of review for an agency’s factual  
5 findings is the substantial evidence standard.” 2015 Guam 18 ¶ 15. This standard is “extremely  
6 deferential” and must be upheld “unless the evidence presented would *compel* a reasonable  
7 factfinder to reach a contrary result.” *Id.* at ¶ 16.

8 17. According to Guam Supreme Court precedent, the OPA applies deference to the  
9 GCLB’s reasonable interpretation and application of the GCLB statutes and regulations and finds  
10 that the work called for under the IFB required a license from the GCLB to perform the work.  
11 Specifically, a C-68 Telecommunications Specialty License is required. A C-15 License is  
12 insufficient.<sup>2</sup>

13 18. As the agency tasked with protecting the public from unqualified contractors and  
14 who has specialized knowledge of the specific licenses for which different type of work is  
15 required, the OPA find that the GCLB, and not TFT, is in the best position to interpret the  
16 GCLB’s rules and regulations and the application of those rules and regulations.

17 19. This finding is supported by the testimony of G4S’s representative, Mr. Eric  
18 Roberts, and TFT’s representative, Mr. Daniel Coco, who testified that the scope of work  
19 included installation of cabling and wiring. There is no evidence in the record that would compel  
20 a contrary result.

21 **B. The Terms and Conditions of the IFB Required Bidders to Hold a Valid**  
22 **Contractors License and C-68 Specialty License from the GCLB which**  
23 **GDOE Failed to Address in Its Denial of G4S’s Protest**

24 20. GDOE denied G4S’s protest on the basis that, *inter alia*, “the IFB and its published  
25 terms and conditions did not require the submission of a Guam Contractors License in the bid  
26 submission.” (PR G555.) However, G4S protested the award not only on the basis that TFT had

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27 <sup>2</sup> Ms. Bailey further testified that there would not be differing opinions as to whether and what license was required  
28 within her investigation division at the GCLB.

1 not submitted evidence of a valid Guam Contractors License to perform the work dictated by the  
2 IFB but more importantly, that TFT does not possess the required licenses.

3 21. Even if the IFB's terms and conditions do not explicitly call for *submission* of  
4 specific licenses, they clearly required bidders to have the licenses necessary to perform the work  
5 and be awarded the bid:

- 6 • Section 3.2.5. Special Permits and Licenses - "The Bidder shall, at its own  
7 expense, procure all permits, certificates, and licenses and give all notices and  
8 necessary reports required by law for this IFB. Failure to maintain required  
9 licenses shall be grounds for immediate termination of the contract." (PR at  
10 G021.)
- 11 • Section 4.3. Laws to be Observed - "The Bidder should be familiar with federal  
12 and local laws, codes, ordinances, and regulations, which, in any manner,  
13 affect those engaged or employed in the work, or the material or equipment,  
14 used in or upon the site, or in any way affect the conduct of the work. No  
15 misunderstanding or ignorance on the part of the Bidder will, in any way, serve  
16 to modify the provision of the contract." (PR at G024.)
- 17 • Section 4.4. License to Conduct Business on Guam; Policy of Local  
18 Procurement - "Bidders providing supplies or services pursuant to this IFB are  
19 subject to licensure requirements in accordance with 5 GCA § 5008." (*Id.*)

20 22. Likewise, the Sample Contract attached to the IFB, is unequivocal that the bidder  
21 awarded the contract must be licensed to perform the work required and must disclose anything  
22 affecting its ability to perform the work to GDOE:

- 23 • Section XIX. Compliance with Laws. A. In General - "The Contractor shall  
24 comply with all U.S. and Guam laws, statutes, regulations and ordinances  
25 applicable to this Agreement. The Contractor represents and warrants that it is  
26 fully licensed to do business in Guam to render the services to be provided  
27 herein." (PR at G563.)
- 28 • Section XXV. Disclosure - "The Contractor hereby represents that it has  
disclosed to GDOE all matters regarding Contractor which if not disclosed to  
GDOE would materially affect GDOE's decision to enter into this Agreement  
with Contractor." (PR at G567.)

29 23. Finally, in responding to questions from PDS incorporated into Amendment 4 to  
30 the IFB, GDOE took the position that a C-68 Specialty License was required:

- 31 8. Given the scope of work to be performed by the Bidder at each of the  
32 GDOE school sites, GDOE Bidder requirements for similar projects

1 (example: GDOE IFB-006-2021), and applicable Guam law related to  
2 Contractor's Licensing, please confirm the requirement for the Bidder to have  
3 a Guam Contractor's license with a telecommunications specialty (C-68) and  
4 for evidence of this license to be provided with the bidder's submission.

5 ***GDOE Response: The project includes the furnishing and installation of***  
6 ***network equipment to expand the wireless internet coverage in the public***  
7 ***schools. This project is very similar to previous awarded wireless expansion***  
8 ***projects in the public schools. The project activities does [sic] not include***  
9 ***any structural fabrication/construction or structural alteration or repair.***

10 ***Bidders are responsible to be informed and knowledgeable of any regulatory***  
11 ***requirements for this project. Bidders should be guided by any regulatory***  
12 ***requirements issued from the federal and/or local governing entity.***

13 (PR at G243-252.)

14 24. Accordingly, based on these provisions, the IFB is clear that a C-68  
15 Telecommunications Specialty Contractors License from the GCLB is necessary to bid on and  
16 perform the work that GDOE was to contract for.

17 **C. The Terms and Conditions of the IFB Required GDOE to Evaluate whether**  
18 **TFT was Licensed to Perform the Work Called for in the IFB**

19 25. Once the bids were received, GDOE was required under the terms of the  
20 solicitation to conduct a responsibility determination of the bidders. (PR at G021 (IFB § 3.2.2.)

21 26. ***Responsibility vs. Responsiveness.*** There is a legal distinction between whether a  
22 ***bidder is responsible*** and whether a ***bid is responsive***. Responsibility goes to the personal quality  
23 of the bidder while responsiveness goes to the elements of a bid in comparison to the published  
24 terms of the solicitation. *See Great W. Contractors, Inc. v. Irvine Unified Sch. Dist.*, 187 Cal.  
25 App. 4th 1425, 1450-57, *as modified* (Sept. 30, 2010), *opinion supplemented on denial of*  
26 *reh'g*, No. G041688, 2010 WL 3789323 (Cal. Ct. App. Sept. 30, 2010) (examining the difference  
27 between responsibility and responsiveness). This distinction is set forth in both the IFB and the  
28 Procurement Law.

29 27. Guam's Procurement Law defines a "Responsible Bidder" as "a person who has  
30 the capability in all respects to perform fully the contract requirements, and the integrity and  
31 reliability which will assure good faith performance." 5 GCA § 5201(f).

1           28.     In contrast, “Responsive Bidder” is defined as “a person who has submitted a bid  
2 which conforms in all material respects to the Invitation for Bids.” 5 GCA § 5201(g).

3           29.     This distinction between responsibility and responsiveness is also drawn in the  
4 award provision of the Procurement Law which states, “The contract shall be awarded with  
5 reasonable promptness by written notice to the lowest *responsible bidder* whose bid *meets the*  
6 *requirements and criteria set forth in the Invitation for Bids ...*” 5 GCA § 5211(g) (emphasis  
7 added).

8           30.     In accord with the Procurement Law, the IFB provides that “Responsibility of a  
9 bidder will be determined in accordance with 2 GAR Div. 4 §3116. Bidders should be prepared to  
10 promptly provide GDOE information relating to bidder’s responsibility.” (PR at G021.)

11           31.     2 GAR Div. 4 §3116 in turn provides factors to be considered in determining  
12 whether the standard has been met including whether a bidder has:

13                   (i) available the appropriate financial, material, equipment, facility, and  
14                   personnel resources and expertise, or the ability to obtain them, necessary to  
15                   indicate its capability to meet all contractual requirements;

16                   (ii) a satisfactory record of performance;

17                   (iii) a satisfactory record of integrity;

18                   (iv) *qualified legally to contract with the territory*; and

19                   (v) *supplied all necessary information in connection with the inquiry*  
20                   *concerning responsibility.*

21           2 GAR Div. 4 §3116(b)(2)(A) (emphasis added).

22           32.     As such, the IFB recognizes that the determination of responsibility goes beyond  
23 the terms of the IFB to examine a bidder’s character, quality and capability. In contrast, the IFB  
24 provides, “Pursuant to 5 GCA §5201(g), responsiveness of a bidder will be determined by  
25 compliance with the requirements of this IFB.” (PR at G021.)

26           33.     Accordingly, contrary to GDOE’s assertions, determination of a bidder’s  
27 responsibility is not tied to the published terms of the solicitation.  
28

1           **D.     GDOE Improperly Determined that TFT was a Responsible Bidder.**

2           34.     Under the Guam Contractors Code, no person “shall act, or assume to act, or  
3 advertise, as a general engineering contractor, a general building contractor or a specialty  
4 contractor *without a license previously obtained* under and in compliance with this Chapter and  
5 the rules and regulations of the Contractors License Board (CLB).” 21 GCA § 70108(a)  
6 (emphasis added).

7           35.     Similarly, Guam’s Consumer Protection Act prohibits false, misleading, or  
8 deceptive acts or practices including “[k]nowingly selling or *offering to sell* goods or services  
9 which the seller thereof *is not licensed to sell* or offer for sale.” 5 GCA § 32201(b)(22) (emphasis  
10 added).

11          36.     TFT has never held and does not currently hold any contractors licenses on Guam.  
12 (Testimony of Daniel Coco; Testimony of Nida Bailey.)

13          37.     TFT does not have a service license from the Guam Revenue and Taxation despite  
14 its admission that the scope of work under the IFB calls for the provision of services. TFT is only  
15 licensed as a retail operator for the sale of computer hardware and software. (Appellant Ex. 10;  
16 Testimony of Daniel Coco.)

17          38.     As such, TFT was not “qualified legally to contract with the territory” when it bid  
18 on the IFB or was awarded the contract and violated provisions of the Guam Contractors Code  
19 and Consumer Protection Act by even bidding on the IFB and offering its services in the first  
20 instance.<sup>3</sup>

21          39.     Although procuring government agencies may impose upon bidders the condition  
22 that they be aware of and follow all applicable Guam laws and regulations, a procuring agency

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23 <sup>3</sup> Furthermore, in its bid, TFT applied for the local procurement preference under the Procurement Law, 5 GCA  
24 § 5008, certifying that it is a “business licensed to do business on Guam” and that does “a substantial portion of its  
25 business on Guam.” (PR at G 461.) Notably, TFT is registered with the Department of Revenue and Taxation as a  
26 foreign corporation based out of Pensacola, Florida. (Appellant Ex. 10.) TFT admitted at the hearing that it only  
27 performs approximately 20% of its business on Guam and does not have a dedicated office on Guam. (Testimony of  
28 Daniel Coco.) Therefore, TFT was not actually entitled to the local preference under 5 GCA § 5008. Yet, GDOE did  
not even question the veracity of TFT’s submission when it was reviewing its bid or making a responsibility  
determination which is integral to protecting the public fisc. And this further demonstrates TFT’s reckless disregard  
of Guam law.

1 should similarly know what information is required of bidders to perform a proper responsibility  
2 determination. Here, GDOE failed to inform itself of such requirements.

3 40. Pursuant to the terms of the IFB and 2 GAR Div. 4 §3116, it is clear that GDOE  
4 did not conduct a proper evaluation as to the responsibility of the bidders as required by Guam  
5 law. Had it done so, it would have determined that TFT was not legally qualified to contract with  
6 the Government of Guam (and never was under prior contracts with GDOE) or, at the very least,  
7 evaluated whether TFT supplied all information necessary to perform this evaluation.

8 41. Furthermore, GDOE testified that when it performed its responsibility evaluation,  
9 it did not consider any of TFT's subcontractors. (Testimony of Carmen T. Charfauros.) Thus,  
10 even assuming that RadioCom was identified in TFT bid submission (which it was not) and had  
11 the specific necessary license from the GCLB, it would not have been included in GDOE's  
12 evaluation. (*Id.*)

13 42. Accordingly, GDOE should have conducted an evaluation under the IFB and 2  
14 GAR Div. 4 §3116 but did not. Has it conducted the proper evaluation, it should have considered  
15 TFT non-responsible and rejected its bid outright.

16 43. Awarding a government contract to such a non-responsible bidder undermines the  
17 integrity that the procedures of Guam's Procurement Law were meant to serve, particularly for  
18 the type of work at issue here which affects our island's schools and children.<sup>4</sup> *See* 5 GCA § 5625  
19 ("Public employees must discharge their duties impartially so as to assure fair competitive access  
20 to governmental procurement by responsible contractors. Moreover, they should conduct  
21 themselves in such a manner as to foster public confidence in the integrity of the territorial  
22 procurement organization.")

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26 <sup>4</sup> Furthermore, Ms. Bailey testified that under Guam's Public Law 30-11, the GCLB is authorized to issue a violation  
27 penalty to those who are found to be in violation of its enabling legislation and rules and regulations. (Testimony of  
28 Nida Bailey.) If TFT were awarded the contract for the IFB and it were later found to be in violation of the GCLB's  
rules and regulations, that would certainly not be in the public interest.

1           **E.     TFT Itself is Required to Be Licensed by the GLCB to Perform the Scope of**  
2           **Work and Enter into a Contract with GDOE under the IFB.**

3           44.     At the hearing, Ms. Bailey testified that as the primary contractor entering into a  
4 contract with GDOE, TFT, itself would be required to be licensed by the GCLB. (Testimony of  
5 Nida Bailey.)

6           45.     As set forth above, at paragraphs 15 and 16, an agency’s interpretation of the  
7 statute it is charged with administering is entitled to deference.

8           46.     As the entity entering into a contract with GDOE, TFT is ultimately responsible  
9 for the work performed for the IFB. (Testimony of Daniel Coco; Testimony of Carmen T.  
10 Charfauros; Testimony of Nida Bailey.) Therefore, for this reason and based on the foregoing, the  
11 OPA finds that TFT is required to hold the required license by the GCLB itself and may not rely  
12 on licenses held by subcontractors, including RadioCom.

13           47.     Thus, TFT’s bidding on the IFB and purporting to enter into a contract with GDOE  
14 under the IFB without obtaining the necessary licenses is in violation of the law. *See* 21 GCA  
15 § 70108(a); 5 GCA § 32201(b)(22).

16           **F.     TFT Cannot Be Considered a Responsible Bidder by Applying for the**  
17           **Necessary Licenses after the Fact.**

18           48.     GDOE has cited to four cases from the federal Government Accountability Office  
19 to assert that where a solicitation contains a general licensing requirement, but does not require  
20 that a successful bidder possess any specific license, the contracting officer is free to make an  
21 award without considering whether the bidder is licensed under state law – *Kyorkin Construction,*  
22 *Inc.*, B-226238 (1987); *HAP Construction, Inc.*, B-278515 (1998); *Interstate Industrial*  
23 *Incorporated*, B-241974 (1990); *American Mutual Protective Bureau*, B-208067 (1982). All of  
24 these cases are plainly distinguishable in that they deal with *federal* procurements before the  
25 Government Accountability Office (“GAO”) and deal with laws, regulations, and policy  
26 considerations specific to *federal* procurements.

27           49.     For example, in *Kyorkin Construction, Inc.*, the GAO found that a state  
28 contractor’s license was not required prior to award because “contracting officers generally are

1 not competent to pass upon the question of whether a particular state license is legally required  
2 *for the performance of federal work.*” (emphasis added). Similarly, in *Interstate Industrial*  
3 *Incorporated*, the GAO found that “[a] contractor’s compliance with state requirements is a  
4 matter for resolution by the contractor and the state authorities, *not federal officials, since federal*  
5 *procurement officials are generally not in a position to know what is required by state and local*  
6 *licensing requirements.*” (emphasis added.)

7 50. Those same policy considerations are not present here where the IFB was issued  
8 by a Government of *Guam* agency familiar with *Guam’s* laws, was issued pursuant to *Guam’s*  
9 laws, including the Procurement Law and Contractors Code, and was bidding out work to be  
10 performed on *Guam* schools. In contrast to federal agencies, GDOE is presumably familiar with  
11 Guam law and has every interest to ensure not just that it is receiving the lowest price but that its  
12 prospective contractors are duly licensed and capable of performing the work required in  
13 conformance with Guam law. State courts addressing this issue in the context of local  
14 procurements have upheld determinations that bidders are ineligible to bid or receive contracts or  
15 non-responsible where the bidder does not have the state license necessary to perform the work.  
16 *See, e.g., McKay Const. Co. v. Ada Cty. Bd. of Cty. Comm’rs*, 99 Idaho 235, 239 (1978);  
17 *Lemoine/Brasfield & Gorrie Joint Venture, LLC v. Orleans Parish Criminal Sheriff’s Office*, 63  
18 So. 3d 1068, 1073-74 (La. Ct. App. 4th Cir. 2011), *writ denied*, 63 So. 3d 1041 (La. 2011); *M &*  
19 *B Const. v. Yuba Cty. Water Agency*, 68 Cal. App. 4th 1353, 1362-63 (1999). Some states,  
20 including California, have gone so far as statutorily prohibiting unlicensed persons from being  
21 awarded public contracts subject to citations and fines for the public entity. *See* Cal. Bus. & Prof.  
22 Code § 7028.7.

23 51. The OPA also seeks to address a prior procurement appeal, *In the Appeal of*  
24 *Pacific Data Systems, Inc.*, OPA-PA-15-012, in which an award to G4S was protested on grounds  
25 that, *inter alia*, G4S failed to submit proof of licensure contemporaneously with its bid. *See In the*  
26 *Appeal of Pacific Data Systems, Inc.*, OPA-PA-15-012, Decision dated January 13, 2016 at p. 7.  
27 The protest appeal was denied as G4S was able to present evidence that it was properly licensed  
28 to perform the work called for in the contract. *Id.* G4S had the necessary licenses *at the time* of

1 the award and *at the time* it submitted its bid and was therefore, both responsive and responsible.  
2 *Id.* The obvious difference with the case at hand is that TFT was not properly licensed at the time  
3 it submitted its bid nor at the time of the award nor at the time of the hearing which as set forth  
4 above is a violation of Guam law. However, G4S is and was at the time of the bid. (Testimony of  
5 Eric Roberts.) Therefore, *Pacific Data Systems* is inapplicable.

6 52. Accordingly, GDOE is wrong and TFT may not retroactively cure its non-  
7 responsibility particularly as the Guam Contractors Code specifically provides that a Contractors  
8 License from the GCLB should be obtained *prior to* a person acting or assuming to act as a  
9 contractor as set forth above. 21 GCA § 70108(a).

10 53. This is supported by the testimony of Ms. Bailey who definitively stated that it  
11 would be a violation of 21 GCA § 70108 if someone were to sell construction work to people on  
12 Guam if they were not licensed by the GCLB and that before anyone can sell the construction  
13 work, they would have to have a GCLB license.

14 54. Based on the foregoing, GDOE's intent to award the IFB to TFT is in violation of  
15 the law.

16 **G. G4S's Protest is Timely**

17 55. Pursuant to 5 GCA § 5425(a):

18 Any actual or prospective bidder, offeror, or contractor who may be aggrieved  
19 in connection with the method of source selection, solicitation or award of a  
20 contract, may protest to the Chief Procurement Officer, the Director of Public  
21 Works or the head of a purchasing agency. The protest shall be submitted in  
writing within fourteen (14) days after such aggrieved person knows or should  
know of the facts giving rise thereto.

22 56. G4S submitted a Sunshine Act Request to GDOE on July 20, 2021 requesting  
23 copies of "all award notice(s), award(s), contract(s), purchase order(s), Responsible Management  
24 Employee (RME), a copy of Technologies of Tomorrow Contractors License and bid packet  
25 submittal pertaining to Guam Department of Education Multi-Step Invitation For Bid No. 026-  
26 21." (Appellant Ex. 2.)

27 57. GDOE responded to G4S's Sunshine Act Request on July 27, 2021 and provided  
28 copies of a Memo to File regarding Proprietary Data, the Technical Award to TFT, TFT's Price

1 Bid and TFT's Unpriced Technical Offer on July 28, 2021. The documents provided by GDOE  
2 indicated that TFT did not provide proof of a valid Contractors License or a valid C68 Specialty  
3 License from the Guam Contractors License Board ("GCLB") in responding to the ITB.  
4 (Appellant Ex. 3.)

5 58. G4S protested the award to TFT on July 29, 2021 on the basis that TFT "does not  
6 possess and has not submitted evidence of a valid Guam Contractors License to perform the work  
7 dictated by GDOE IFB 026-2021." (PR at G554.)

8 59. There is no question that G4S is protesting the award to TFT because TFT is not  
9 properly licensed under Guam law.

10 60. G4S submitted its protest within 14 days of learning that TFT did not submit proof  
11 of the necessary licenses and therefore, its protest was timely.

12 61. Furthermore, in its denial of G4S's protest, GDOE directly addressed the merits of  
13 G4S's protest and never raised any argument that the protest was not timely pursuant to the Guam  
14 Procurement Law. *See* 2 GAR, Div. 4 § 9101(c)(1) ("Protests filed after the 14 day period shall  
15 not be considered."); 5 GCA § 5425. Accordingly, even if G4S's protest were untimely, which it  
16 was not, it cannot be raised by TFT (the purported winning bidder to the IFB and not the  
17 procuring agency) or now raised by GDOE. *See Howard v. F.A.A.*, 17 F.3d 1213, 1217 (9th Cir.  
18 1994) (finding that because the agency considered the merits of a procedurally deficient claim, the  
19 purposes behind the exhaustion requirement have been satisfied such that the merits of the claim  
20 could be considered by the court).

## 21 REMEDIES

### 22 A. The IFB Should be Awarded To G4S

23 Pursuant to 5 GCA Section 5451:

24 If prior to award it is determined that a solicitation or proposed award of a contract is  
25 in violation of law, then the solicitation or *proposed award* shall be:

26 (a) cancelled; or

27 (b) revised to comply with the law.

28 (emphasis added); 2 GAR Div. 4 §9105.

1 Here, although GDOE had issued a notice of intent to award, no award has been issued to  
2 TFT, therefore Section 5451 applies. In light of the Findings of Fact and Conclusions of Law, the  
3 OPA should revise the proposed award to comply with the law by awarding the IFB to the lowest  
4 responsible and responsive bidder – G4S.

5 **B. G4S Is Entitled to Costs**

6 Pursuant to 5 GCA Section 5425(h):

7 In addition to any other relief or remedy granted under Subsection (c) or (e) of this  
8 Section or under Subsection (a) of § 5480 of this Chapter, including the remedies  
9 provided by Subarticle B of Article 9 of this Chapter, when a protest is sustained, the  
10 protestant shall be entitled to the reasonable costs incurred in connection with the  
11 solicitation and protest, including bid preparation costs, excluding attorney’s fees, if:  
(1) the protestant should have been awarded the contract under the solicitation but  
was not ....

12 As the lowest responsible and responsive bidder, G4S should have been awarded the IFB.  
13 Accordingly, G4S is entitled to reasonable costs incurred in connection with the solicitation and  
14 Protest including G4S’s bid preparation costs and any costs associated with the filing of the  
15 protest and the appeal of the denial of its protest, excluding attorney’s fees.

16 **CONCLUSION**

17 Therefore, it is hereby ordered:

18 (1) The Public Auditor shall have the power to review and determine de novo any  
19 matter properly submitted. 5 GCA § 5703(a);

20 (2) That GDOE’s notice of intent to award Multi-Step IFB 026-2021 for Indoor and  
21 Outdoor Wireless Local Area Network (“WLAN”) Infrastructure Installation Project is in  
22 violation of the Procurement Law;

23  
24 //

25 //

26 //

27

28

1 (3) That GDOE award IFB 026-2021 to G4S as the lowest responsible and responsive  
2 bidder to the IFB;

3 (4) The G4S is awarded reasonable costs.  
4

5 **Respectfully submitted** this 18th day of January, 2022.

6 **CALVO FISHER & JACOB LLP**  
7 *Attorneys for Appellant*  
8 *G4S Security Systems (Guam), Inc.*

9 By:   
10 **GENEVIEVE P. RAPADAS**