



Jerrick Hernandez <jhernandez@guamopa.com>

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## In the Appeal of Guam Pacific Enterprise, Inc. re: Appeal Case No. OPA-PA-22-001

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**Abmer T. Brennan** <atbrennan@gdoe.net>

Wed, Feb 9, 2022 at 4:33 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>, Thyrsa Bagana <tbagana@guamopa.com>, vduenas@guamopa.com, GPE INC <guampacific@gmail.com>

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

Hafa Adai All,

Please see attached *GDOE's Agency Statement and Agency Report* re: Appeal Case No. OPA-PA-22-001.

Kindly confirm receipt.

Thank you and stay safe.

Respectfully,

**Abi T. Brennan**

Office of the Superintendent, **Legal Div.**  
Guam Department of Education

Guam Department of Education

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### 2 attachments



**Agency Report OPA-PA-22-001 (IFB 002-2022).pdf**  
261K



**Agency Statement OPA-PA-22-001 (IFB 002-2022).pdf**  
586K

1 **GUAM DEPARTMENT OF EDUCATION**

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

10 In the Appeal of

11 APPEAL CASE NO. OPA-PA-22-001

12 Guam Pacific Enterprises Inc.

13 **AGENCY STATEMENT**

14 Appellant.

15 COMES NOW the Guam Department of Education (“GDOE”), by and through its Legal  
16 Counsel, and files its Agency Statement pursuant to 2 GAR Div. 4 §12105(g), in response to the  
17 appeal from Guam Pacific Enterprises Inc. (“GPE” or “Appellant”) of GDOE Invitation for Bid  
18 (“IFB”) 002-2022, for High Efficiency Particulate Absorbing (“HEPA”) Filtration System and  
19 Maintenance.

20 **I. RELEVANT BACKGROUND**

21 On October 28, 2021, GDOE issued IFB 002-2022 for HEPA Filtration System and  
22 Maintenance (hereafter referred to as the “IFB”). On November 10, 15, and 17, 2021, Appellant  
23 GPE sent three (3) separate emails in protest of the IFB. On January 14, 2022, GDOE issued its  
24 denial of Appellant’s protest. On January 26, 2022, GDOE received the notice of receipt of  
25 appeal from the Office of Public Auditor (“OPA”). The following is GDOE’s agency statement  
26 in response to Appellant’s appeal regarding GDOE’s authority to prepare and issue specifications,  
27 including delivery, and the requirement of a bid bond.  
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1           **II. GUAM PROCUREMENT LAW MANDATES THAT GDOE SHALL PREPARE**  
2 **AND ISSUE THE SPECIFICATIONS IN AN INVITATION FOR BID.**

3           The issue before the OPA is whether GDOE has the authority to prepare and issue  
4 specifications in a procurement to meet GDOE’s critical needs of supplies and services. Guam  
5 Procurement law clearly and directly answers this issue. Title 5 GCA Section 5262(a) states the  
6 Chief Procurement Officer **shall** prepare, issue, revise, maintain and monitor the use of  
7 specifications for supplies and services required by the Territory.

8           As stated in the IFB, GDOE is seeking to purchase the HEPA Filtration System in order to  
9 support air quality in every classroom, office and enclosed common area (cafeterias, gyms,  
10 libraries, etc.). *See* Section 2.2. Purpose, Procurement Record at 5.

11           Therefore, in accordance with Guam Procurement Law and section 5262(a), the GDOE  
12 Chief Procurement Officer **shall** prepare and issue the specifications for supplies and services as  
13 required for the HEPA Filtration System. *See* 5 GCA §5262(a). GDOE did prepare and issue  
14 such specifications as set forth in section 5262(a).

15           Appellant argues that the IFB is required to be developed by Architects and Engineers.  
16 *See* Appellant’s Appeal at 1 ¶ 2. Appellant fails to provide any legal authority that supports this  
17 argument. In addition, the law cited by Appellant is completely unrelated to their argument.<sup>1</sup> *See*  
18 5 GCA §5266.

19           Rather, Guam Procurement Law is clear, GDOE not only has the authority but it is  
20 GDOE’s Chief Procurement Officer that **shall** prepare and issue the specifications for supplies  
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22           <sup>1</sup> Appellant’s allegations in this appeal consist of broad sweeping blanket statements and citations  
23 to unrelated laws, without any legal relationship drawn between the two. To be clear, there is no  
24 connection between Appellant’s meritless arguments and the unrelated laws cited. In addition,  
25 the Guam OPA has recently dismissed with prejudice an Appeal by the Appellant GPE, for the  
26 unauthorized practice of law and in an effort to protect the integrity of the procurement process  
27 and the purposes of the Procurement Law. *See In the Appeal of Guam Enterprise Inc.*, Decision  
28 & Order, OPA-PA-21-011. This case is analogous to OPA-PA-21-011, and therefore warrants  
being dismissed with prejudice as well. *Id.*

1 and services as required for this IFB. *See* 5 GCA §5262(a). Therefore, in accordance with Guam  
2 Procurement Law, GDOE properly prepared and issued the specifications for this IFB and this  
3 Appeal should be denied in its entirety.

4 **III. GUAM PROCUREMENT LAW PROVIDES GDOE THE AUTHORITY TO**  
5 **PREPARE AND ISSUE DELIVERY SPECIFICATIONS FOR AN IFB.**

6 The second issue before the OPA is whether GDOE has the authority to prepare and issue  
7 a delivery specification for an IFB. Guam Procurement Law states “specifications” means any  
8 description of any requirement for inspecting, testing or preparing a supply, service or  
9 construction item for delivery. *See* 5 GCA §5260. In addition, it is the Chief Procurement  
10 Officer that **shall** prepare, issue, revise, maintain and monitor the use of specifications for  
11 supplies and services required by the Territory. *See* 5 GCA §5262. Also regarding Competitive  
12 Sealed Bids (IFBs), Bids shall be evaluated based on the requirements set forth in the Invitation  
13 for Bids, which may include criteria to determine acceptability such as inspection, testing, quality,  
14 workmanship, **delivery** and suitability for a particular purpose, the IFB shall set forth the  
15 evaluation criteria to be used, and no criteria may be used in bid evaluation that are not set forth  
16 in the IFB. *See* 5 GCA §5211(e). Section 3.2.7 Delivery of Goods of the IFB, indicates a  
17 delivery specification for the purpose of providing a HEPA Filtration System to GDOE. *See*  
18 Procurement Record at 9. Therefore, pursuant to Guam Procurement Law, GDOE has the  
19 authority to prepare and issue a specification (Section 3.2.7) that includes delivery for an IFB, and  
20 it is the Chief Procurement Officer’s legal duty, not potential bidders. *See* 5 GCA §5211(e).

21  
22 Appellant’s argument here is that they do not approve of the delivery date, and believe  
23 bidders should create this specification. However, Appellant fails to provide any legal authority  
24 to support their position or actual evidence of any violation of law. Instead, Appellant provides a  
25 blanket citation to the Purposes and Requirement of Good Faith sections of the procurement code  
26 without any evidence or relation drawn to their erroneous legal conclusions.

1 In addition, and not referenced by the Appellant, section 3.2.11 provides bidders with the  
2 viable option and possibility of a reasonable extension of time for delivery. *See* Procurement  
3 Record at 10. This is important because it provides flexibility regarding the delivery  
4 specification.

5 Therefore, Guam Procurement Law mandates that GDOE's Chief Procurement Officer  
6 **shall** prepare and issue specifications including delivery for GDOE's IFBs, thus this appeal  
7 should be denied in its entirety and dismissed. GDOE did comply with this mandate and prepare  
8 and issue a delivery specification in accordance with the law.

9 **IV. GUAM PROCUREMENT LAW REQUIRES BID SECURITY FOR THIS IFB,**  
10 **AND APPELLANT'S UNSUPPORTED ARGUMENT WOULD REQUIRE GDOE TO**  
11 **BREAK THE LAW.**

12 The third issue before the OPA is whether a bid security is required for this IFB. Title 5  
13 GCA section 5212 states, bid security shall be required for all competitive sealed bidding (IFBs)  
14 for the procurement of supplies or services when the total price is estimated by the Chief  
15 Procurement Officer to exceed Twenty-Five Thousand Dollars (\$25,000.00). In addition, Guam  
16 Procurement Law applies to every expenditure of public funds irrespective of their source,  
17 including federal assistance funds. *See* 5 GCA §5004(b).

18 Therefore, because this IFB is estimated to exceed Twenty-Five Thousand Dollars  
19 (\$25,000.00), and because section 5212 applies to all procurements including federally funded  
20 procurements, GDOE is mandated by Guam Law to require bid security for this IFB. *See* 5 GCA  
21 §§ 5212 & 5004(b).

22 Appellant fails to provide any law at all that section 5212 conflicts with, local or federal.  
23 Rather, Appellant provides another blanket reference to "Buy American Act provisions,  
24 Executive Order of Pres Trump and Executive Order of President Biden (Section 1 and 3 of  
25 Executive Order 14005)" and a general reference to 5 GCA §5501 Federal Funds, with no  
26 connection between their confusing argument and the law. Appellant referenced laws that are  
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1 completely devoid of support for any violation regarding bid security, **or any reference at all**  
2 **specific to bid securities.**

3 In addition, Executive Order 14005 applies to federal procuring agencies, while GDOE is  
4 a territory of the United States and not a federal procuring agency, and therefore Executive Order  
5 14005 is not binding on GDOE. *See* Executive Order 14005 §1; *see also* 44 U.S.C. § 3502(1)(C)  
6 (Executive Order 14005 states it applies to Federal Procurements and states that an “agency”  
7 means any authority of the United States that is an “agency” under section 3502(1) of title 44,  
8 United States Code, other than those considered to be independent regulatory agencies, as defined  
9 in section 3502(5) of title 44, United States Code. Title 44 of the U.S. Code Section 3502(1)(C)  
10 states **an agency does not include the governments of the District of Columbia and of the**  
11 **territories and possessions of the United States,** and production activities.).

12 Therefore, Guam Procurement Law clearly requires a bid security to be included for this  
13 IFB and is binding on GDOE. *See* 5 GCA §5212. In addition, a bid security does not conflict  
14 with local or federal laws made known to GDOE, and Appellant has failed to reference or provide  
15 any actual evidence or laws that state otherwise. For these reasons, this appeal should be denied  
16 and dismissed in its entirety.

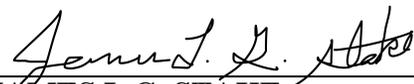
17 Lastly, Appellant improperly argues, “DOE should not inform other Bidder that if it is  
18 assemble in USA but made in Foreign Country it qualifies for Buy American Act.” *See*  
19 Appellant’s Notice of Appeal at 3 ¶ 1. Appellant provides zero legal authority in support of this  
20 novel and flawed argument and **does not address at all its effect and application in light of the**  
21 **legally required “stay.”** This procurement is “stayed” because of this protest and appeal and  
22 GDOE shall not proceed further. *See* 5 GCA §5425(g). For these reasons, this appeal should be  
23 denied and dismissed in its entirety.  
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In conclusion and for the aforementioned reasons, GDOE respectfully requests that this Appeal be denied in its entirety and dismissed with prejudice.

Dated: February 9, 2022

Respectfully submitted,  
**GUAM DEPARTMENT OF EDUCATION**

By:   
**JAMES L.G. STAKE**  
*Legal Counsel*