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In the Appeal of G4S Security Systems (Guam) Inc.; OPA-PA-21-007

Claire Pollard <cpollard@rwtguam.com> Thu, Oct 14, 2021 at 4:22 PM
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached *Comments on Agency Report* to be filed in the above referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

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2 attachments

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of G4S Security Systems (Guam) Inc., Appellant.	**APPEAL NO: OPA-PA-21-007** **COMMENTS ON AGENCY REPORT**

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Interested Party Pacific Data Systems, Inc. (PDS) ("PDS" or "Interested Party") submits its Comments on the Agency Statement and Report submitted by the Guam Department of Education ("GDOE") to the Office of Public Accountability on October 4, 2021. These comments are submitted to address the positions taken by GDOE in its Agency Report and Statement regarding GDOE Multi Step Invitation for Bid ("IFB") 026-2021 for Indoor and Outdoor Wireless Local Area Network ("WLAN") Infrastructure Installation Project issued on April 13, 2021.

II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.

The Guam Department of Education ("GDOE") issued the above Invitation for Bid on April 13, 2021. Four bidders, Technologies for Tomorrow Inc. ("TFT"), California Pacific Technical Services LLC, Pacific Data Systems, Inc. ("PDS") and G4S Security System (Guam) Inc ("G4S"). submitted bids in response to the GDOE Bid invitation. On July 13, 2021, GDOE sent Bid Status Notification recommending an award to TFT. A contemporaneous Notice of Award was issued that explained how the award was conditional, and provided no rights to TFT until a final contract was executed.[3] Because TFT was selected for award despite being non-responsive to the bid by failing to have a valid contractor's license, G4S submitted an agency level protest on July 29, 2021, of the award notice designating GTA for award. On September 3, 2021, the Agency denied the protest. G4S's appeal to the OPA followed. GDOE provided no notice of the G4S protest or appeal to PDS.

B. GDOE'S AGENCY REPORT AND STATEMENT DO NOT CONTEST THAT TFT LACKS A VALID CONTRACTOR'S LICENSE, OR THAT THE SCOPE OF WORK CONTEMPLATED BY THE IFB REQUIRED A CONTRACTOR'S LICENSE.

GDOE describes the work it is procuring as "infrastructure installation." Procurement Record, 284. On Guam, a "contractor" needing a contractor's license is defined as "any person who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad,

[3] Both the Award recommendation and notice of award were attached as exhibits to the Notice of Appeal filed by G4S on September 17, 2021.

excavation or other structure, project development or improvement or do any part thereof, including the erection of scaffolding or other structure of works in connection therewith for another person for a fee." 21 G.C.A. § 70100(b). Contractors working on Guam may not do so, or even present themselves as being able to do so, "without a license previously obtained under and in compliance with this Chapter and the rules and regulations of the Contractor's License Board (CLB)." 21 G.C.A. § 70108(a). Since TFT does not have "the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance," TFT is a non-responsible offeror. 5 GCA § 5201(f).

GDOE does not contest that TFT does not have a valid contractor's license. GDOE Agency Statement, 2. GDOE also does not contest that the terms and conditions of the IFB require responsive offerors to be knowledgeable and observe "federal and local laws, codes, ordinances, and regulations, which, in any manner, affect those engaged or employed in the work, or the material or equipment, used in or upon the site, or in any way affect the conduct of the work." Procurement Record, 024, IFB Terms and Conditions, § 4.2. GDOE also does not contest that offerors must be appropriately licensed. Procurement Record, 024, IFB Terms and Conditions, § 4.4. Once the proposals of the offerors were received, and at least after G4S's protest was lodged, GDOE should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. *See* 5 G.C.A. 5201(g) ("Responsive Bidder means a

person who has submitted a bid which conforms in all material respects to the Invitation for Bids."). Rather, DOE explains that the law prohibits it from making such an examination, since 5 GCA §5211(e) mandates that "No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids." GDOE Agency Statement, 3, *citing* 5 GCA §5211(e). GDOE, in merely confining itself to the contents of the bid envelope, has ignored its obligation to determine if TFT, by submitting a bid for contracting work despite not having a contractor's license, is in fact a non-responsive and non-responsible offeror.

Guam law makes it plain that GDOE's contracting officer is required to make a responsibility determination based on standards that are not specifically in the bid envelope. *See,* 5 GCA § 5230; 2 GAR § 3116. (setting factors to consider such as "*appropriate* financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them" as well as "a satisfactory record of integrity"). GDOE is also ignoring the mandate to make sure that "Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible." 2 GAR § 3116 (b)(4). GDOE's Agency report confirms that, while being made aware of the possibility that TFT has submitted a bid for contracting work despite not having a contractor's license, GDOE has taken the position that the issue was not for GDOE, or the OPA, to resolve. Agency Statement, 3. GDOE is wrong, as the agency can only make an award to a responsive and responsible offeror, and was required to move beyond the TFT bid envelope to make that determination.

C. DOE'S NOTICE PROCEDURES AND RECORD SUBMISSION VIOLATES LAW.

Guam law mandates that "The Chief Procurement Officer... shall give notice of the Appeal to the contractor if award has been made or, if no award has been made, **to all Interested Parties**; shall instruct said parties to communicate directly with the Public Auditor regarding the status of the Appeal, and directly with the procurement officer as allowed by law regarding the protested procurement action; and shall communicate to the Public Auditor the identities and addresses of said parties." 2 GAR § 12104(c)(2) (emphasis added). Here, GDOE intentionally omitted providing notice to any party other than TFT regarding the appeal. *See,* GDOE Notice of Interested Parties, September 27, 2021.[4] This omission has materially prejudiced PDS, as it has not been provided with a copy of the procurement record, or any other papers or filings in this case, until PDS entered its formal appearance in the matter after independently learning of the G4S appeal.

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[4] PDS reserves its right to supplement these comments once having the full opportunity to review the procurement record produced in this matter but not provided to PDS by GDOE.

III. CONCLUSION

GDOE issued an IFB that was designated for award to a bidder offering to do contractor work without a valid contractor's license. GDOE's Agency report and accompanying statement does not alter the reality of this error.

Submitted this 14th day of October, 2021.

RAZZANO WALSH & TORRES, P.C.

By: _____
JOSHUA D. WALSH
Attorneys for Interested Party PDS