



Jerrick Hernandez <jhernandez@guamopa.com>

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

Claire Pollard <cpollard@rwtguam.com>
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Wed, Nov 3, 2021 at 3:28 PM

Dear Mr. Hernandez:

Please see the attached document below 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

RAZZANO WALSH & TORRES, P.C.
139 Murray Blvd. Ste. 100
Hagatna, Guam 96910
(T): 989-3009
(F): 989-8750

 **11.3.21 Omnibus Opposition to Motions.pdf**
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RAZZANO WALSH & TORRES, P.C.

JOSHUA D. WALSH
EDWIN J. TORRES
139 MURRAY BLVD.
HAGATNA, GUAM 96910
TEL: (671) 989-3009
jdwalsh@rwtguam.com
etorres@rwtguam.com

Attorneys for Pacific Data Systems, Inc.

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

G4S Security Systems (Guam) Inc.,

Appellant.

DOCKET NO. OPA-PA-21-007

OMNIBUS OPPOSITION TO

- 1) MOTION DISMISS FOR FAILURE TO STATE A CLAIM**
- 2) MOTION TO DISMISS FOR LACK OF JURISDICTION**
- 3) MOTION TO EXCLUDE THIRD PLACE BIDDER (PDS) FROM THIS APPEAL PROCESS**

I. INTRODUCTION

On September 17, 2021, G4S Security Systems (Guam), Inc., (G4S) appealed the decision of the Guam Department of Education (“GDOE”) denying G4S’s agency level protest of GDOE bid invitation GDOE IFB 026-2021 (the “IFB”). The IFB was seeking contractors to provide wireless local area network infrastructure installation. G4S had protested the intended award to Technologies for Tomorrow (“TFT”), since that entity was selected for award despite not having appropriate contractor licensing. Pacific Data Systems (“PDS”), an offeror on the IFB like TFT

Pacific Data Systems (“PDS”), an offeror on the IFB like TFT and G4S, entered its appearance in this matter, through its counsel, on October 1, 2021.

On October 27, 2021, GDOE filed separate motions seeking to dismiss the appeal because of (1) an alleged failure to state a claim (“Motion1”), and (2) the alleged lack of jurisdiction of the Office of Public Accountability (“OPA”) to review the merits of G4S’s claim (“Motion 2”). GDOE has also moved to exclude PDS from these proceedings. This omnibus opposition is submitted to address the failings of GDOE’s arguments in its three motions.

A. OPPOSITION TO MOTION TO DISMISS FOR FAILURE TO STATE A VALID CLAIM AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

GDOE contends that this matter must be dismissed since this “is not a procurement issue.” Motion, 2. (emphasis in original). Instead, GDOE claims that the question of whether or not TFT is a responsive offeror is best left to the Contractor’s License Board, since licensing issues are “investigated and enforced by the Guam Contractors Board, not the OPA.” Motion, 2, citing, 21 GCA Chapter 70. GDOE concludes that G4S, then, has “fail[ed] to state a valid claim” as a result. Motion1, 3. GDOE regurgitates its position in a second motion that the question about whether or not TFT is licensed by the contractor’s licensing board “is not a procurement issue.” Motion 2, 2. Even though this matter is before the OPA on an appeal from an agency protest denial, the agency argues that the matter must be dismissed “for lack of subject matter jurisdiction.” Motion 2, 4.

GDOE denied G4S’s protest on the ground that a contractor’s license was not required for completing the job. See, Response to Protest Letter Received on August

10, 2021, attached to the G4S Notice of Appeal. 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 G.C.A. § 5201(F). Since it could not show a license that the scope of work of the IFB requires, TFT is also non-responsive. Despite these procurement related challenges tied to a bidder's responsiveness and responsibility, GDOE claims that the Office of Public Accountability ("OPA") is without jurisdiction to proceed over this matter. To make this argument, GDOE relies upon the statutes that define the power of the Guam Contractor's License Board (GCLB) and the decade old precedent of *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, OPA-PA-10-008. Neither source of law stands for the propositions advanced by GDOE.

B. GUAM'S CLB STATUTES DO NOT PREVENT THE OPA FROM DE NOVO REVIEW OF WHETHER OR NOT GDOE'S BID PROCESS AND AWARD SELECTION COMPLIED WITH LAW AND THE TERMS OF ITS OWN PROCUREMENT.

Guam's Contractor licensing laws make it clear that TFT — the offeror slated for award in this procurement — would be "contractor" under the law that requires a contractor's license if TFT is "undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, 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).

GDOE argues that since contractor licensing is provided by the CLB, any review of the TFT's non-responsiveness or non-responsibility tied to its lack of an appropriate contractor's license can only be done under the auspices of the CLB itself. GDOE urges, without authority, for the OPA to read an exclusive jurisdictional limit where none exists. GDOE is wrong. While Guam's CLB statutes do provide for a complaint mechanism to address violations, the CLB is not some exclusive bar preventing review by the OPA of an agency's intended award to a contractor. The CLB's investigation statute reveals no exclusive or mandatory forum requirement, and explains that "The Contractors License Board *may* investigate, classify and qualify applicants for contractor's licenses, and investigate for compliance with the rules and regulations of the Board and the provisions of this Chapter." 21 G.C.A. § 70109. (emphasis added). Here, the Guam legislature has declined to do what GDOE urges, i.e., create a statutory requirement that *only* the CLB can touch on issues related to a contractor's licensing. This is not the law. *See, e.g. Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) (explaining, in the context of federal and state court subject matter jurisdiction, the presumption of concurrent jurisdiction unless a specific statute clearly divests jurisdiction from one body in favor of another).

Rather than prevent the OPA from reviewing the question of TFT's responsiveness *vis a vis* its lack of a contractor license, a review of Guam law demonstrates the OPA's broad jurisdictional scope. The Supreme Court of Guam has illuminated that broad jurisdiction of the Public Auditor's office, and clarified that Guam's legislature has given the "OPA the power to determine whether a bid award is in accordance with the terms and conditions of a bid solicitation." *Data Mgmt. Res., LLC v. Off. of Pub. Accountability*, 2013 Guam 27 (Guam Nov. 22, 2013). More, this is in keeping with the broad sweep of authority given to the public auditor. The public auditor is tasked with sitting in appeal over agency protest decisions. 5 G.C.A. § 5425(e). Part of the duties of the public auditor include the mandate to "determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation." 5 G.C.A. § 12112; 2 G.A.R. Div. 4 § 12112. Since G4S has here protested the ability of TFT to be responsive to a bid that specifies that all Guam licensing laws must be followed, and the scope of work implicates a contractor license, the OPA's review of such an issue is completely appropriate.

Here, G4S protested both the responsiveness and the responsibility of TFT in offering to do work that, if done without a contractor's license, would be in violation of law. This is key, because **the bid specifications from GDOE required that all bidders seeking an award should be familiar and comply "with federal and local laws, codes, ordinances, and regulations, which, in any manner,**

affect those engaged or employed in the work.” IFB Terms and Condition, §4.3.

GDOE ignored reviewing that matter, or TFT’s compliance with law, and denied the protest. The full appellate review of that protest, and the grounds for denial, are properly within the ambit of the OPA. Determining if GDOE’s selection of TFT, despite TFT’s failure to meet the requirement of the solicitation to comply with all laws — laws that include proper CLB licensing — is properly before the OPA.

The OPA’s other powers also militate toward allowing the review that PDS seeks here. The Public Auditor has the power to promote the integrity of the procurement process and the purposes of Guam’s procurement laws. *See* 5 G.C.A. § 5703 (“The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 G.C.A. Chapter 5.”). The Public Auditor has the power to review and determine “any matter properly submitted” to him, 5 G.C.A. § 5703, and reviews *de novo* denials of protests in connection with the solicitation or award or award of a contract. *See* 5 G.C.A. § 5425(e). Further, in the regime of procurement, the OPA holds powers akin to a court, since Guam law allows procurement matters brought before a court to be, without limitation, remanded to the OPA. *See* 2 G.A.R. § 12103(b). Simply put, the OPA has been presented with a procurement appeal of an agency denial of a bid protest. Such an appellate review is the proper province of the OPA, even if the merits of that review — TFT’s need for licensing — touch upon the non-exclusive investigative powers of

another government agency. The “subject matter jurisdiction” limits articulated by GDOE simply do not exist.

C. IN THE APPEAL OF JRN AIR CONDITIONING & REFRIGERATION, INC., OPA-PA-10-008 IS NOT A BAR TO THE REVIEW PDS SEEKS, AND THE OPA HAS PREVIOUSLY ENGAGED WITH THE ISSUE OF APPROPRIATE CLB LICENSING.

GDOE also argues that *In the Appeal of JRN Air Conditioning & Refrigeration, Inc.*, OPA-PA-10-008 (*JRN Air Conditioning*), provides some sort of *stare decisis* bar depriving the OPA of jurisdiction here. The case does no such thing. In *JRN Air Conditioning*, the appellant raised the responsiveness of an offeror who was not in compliance with 5 G.C.A. §5801 and § 5802 — statutes that mandate that those who contract with the Government of Guam follow established wage and benefit levels. OPA explained that it did not have jurisdiction to **enforce** the provisions of those statutes or to violations of the wage laws. The OPA explained that the offeror’s “failure to comply” with the law was not an issue for the OPA. Notably, the OPA did proceed with a review of the **responsiveness** of offerors *vis a vis* inclusion of the wage determination. The matter was not dismissed, as is suggested by GDOE. Here, the appellant is not asking for the OPA to punish, as the CLB can, TFT for its operations without a license. Rather, the Appellant has appealed GDOE’s failure to assure that TFT’s bid complied with all terms of the bid requirements, including the requirement of compliance with law and appropriate licensing. The failure to comply with law was ignored by GDOE, as was any review by GDOE of how that failure to comply with law rendered TFT a non-responsible offeror. Such a review is properly within the province of procurement appellate

review, and such a review has been performed by the OPA in the past in response to a similar protest regrading CLB licensing. *See, e.g., In the Appeal of Pacific Data Systems Inc.*, OPA -PA 15-012, Decision, (January 13, 2016), pg. 7 (analyzing whether awardee “had a contractor's license material to the procurement” based upon evidence presented at the merits hearing on the matter.).

D. OPPOSITION TO MOTION TO EXCLUDE THIRD PLACE BIDDER (PDS) FROM THIS APPEAL PROCESS

GDOE has also advanced the novel argument that PDS, despite being a competing offeror in this procurement, must be excised from these proceedings. Motion 3, 2. Exclusion of PDS is appropriate, in the view of GDOE, because “PDS is not the protestant and not the appellant in this appeal.” Motion 3, *citing*, 5 G.C.A. §5703(e) (emphasis removed). GDOE’s position, and citation to 5 G.C.A. §5703(e), is wholly misplaced. 5 G.C.A. §5703(e) makes it clear that the OPA is to “Regulate the course of the hearing and conduct of participants therein.” However, GDOE ignores the following statutory command that the OPA is also to “**Consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant or appellant.**” 5 G.C.A. §5703(j). In this case, there is no doubt that PDS, while not the appellant, was a competing bidder of the appellant, G4S. *See*, PDS Notice of Appeal, 2. The law makes it clear that PDS, as a competing bidder, offeror, or contractor of the protestant or appellant, is properly before the OPA and can offer “testimony and evidence.” 5 G.C.A. §5703(j). GDOE’s motion is not only unsupported by law, but directly contradictory of the instructions given by the Guam Legislature on who properly can participate in these appeal proceedings.

GDOE also claims that PDS, as a bidder whose price was ranked third in this flawed procurement, lacks standing to participate in the appeal before the Office of Public Accountability (“OPA”). To make this argument, GDOE relies upon *In re A.B. Won Pat Int'l Airport Auth., Guam*, 2019 Guam 6, and the Supreme Court of Guam’s discussion regarding a party’s standing in court for litigation involving the sealing of records under Guam’s Open Government law. In that case, the Court confirmed that “Although we are not bound by the standing requirements applicable to federal courts of limited jurisdiction under Article III of the United States Constitution,’ we have repeatedly found that the ‘traditional standing requirements’ expressed in Article III nevertheless apply to claims asserted in Guam's courts.” *In re A.B. Won Pat Int'l Airport Auth., Guam*, 2019 Guam 6, ¶ 16. Without citation to any procurement precedent, GDOE asserts that PDS does not meet these traditional standing requirements since GDOE’s price was third in line for potential award. Motion, 2. GDOE misapprehends the law.

In making its argument, GDOE first ignores the fact that the instructions in *In re A.B. Won Pat Int'l Airport Auth.* are limited to “to claims asserted in Guam's courts.” *In re A.B. Won Pat Int'l Airport Auth., Guam*, 2019 Guam 6, ¶ 16. Second, GDOE ignores the fact that the Guam Legislature has specifically conferred upon aggrieved bidders the ability to bring Agency level protests of solicitations, and for competing bidders of the aggrieved appellant to submit testimony and evidence.


See, 5 G.C.A. § 5703(j). Because of these statutory pathways to the OPA, GDOE's reliance upon the standing instructions directed to "Guam's courts" is misplaced.¹

II. CONCLUSION

GDOE urges the OPA to dismiss G4S's appeal based singularly upon its belief that reviewing whether or not TFT can legally perform is somehow beyond the reach of the OPA. The OPA should reject GDOE's invitation, and move this matter forward, with the participation of PDS, to an analysis of the merits of the G4S's protest.

Submitted this 3rd day of November, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
EDWIN J. TORRES
Attorneys for Pacific Data Systems, Inc.

¹ Even if *In re A.B. Won Pat Int'l Airport Auth.* were instructive on the standing of PDS to participate in a protest and subsequent OPA appeal, that case explicitly recognizes the role the legislature plays in shaping, through statutes, standing within which to bring a case. The court explained that "we do not suggest that our prior caselaw regarding 'statutory standing' is no longer good law. Rather, we clarify that the doctrine we have referred to in our jurisdiction as 'statutory standing' establishes that the legislature may impart a judicially-cognizable injury upon a particular class of persons to establish an injury in fact where one would otherwise have been too abstract under a constitutional-standing inquiry." *In re A.B. Won Pat Int'l Airport Auth.*, Guam, 2019 Guam 6, ¶ 20.