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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of)
)
G4S SECURITY SYSTEMS (GUAM) INC.) **DOCKET NO. OPA-PA-13-013**
) **APPELLANT'S HEARING BRIEF**
)
Appellant.)
_____)

I. INTRODUCTION

Appellant G4S Security Systems (Guam) Inc. ("G4S") is appealing from the Guam Department of Education's ("GDOE") denial of G4S's protest in connection with GDOE IFB 032-2013, Design Build Fire Alarm System Upgrade/Replacement and Fire Suppression/Sprinkler System Repair for Southern High School ("the IFB"). GDOE rejected G4S's bid on this procurement because G4S did not attach an amendment and a clarification to its bid. This omission was a minor informality that should not have resulted in the rejection of the G4S bid. Alternatively, even if these omissions are found not to be a minor informality, GDOE should be estopped from asserting these omissions as grounds for deeming the G4S bid non-responsive because of the manner in which G4S was (or was not) given notice of the amendment and clarification. In addition

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to discussing these issues below, G4S will address matters relating to the funding for this procurement and a late challenge to the OPA's jurisdiction.

II. FACTS

A. Facts pertaining to the G4S protest.

GDOE issued the IFB on September 6, 2013. Submission of Procurement Record, filed Oct. 11, 2013 ("SPR") at 86. Janet Daikichy, a "runner" for G4S, picked up a copy of IFB 032-2013 on September 6, 2013. SPR 242. When Ms. Daikichy picked up a copy of the IFB, she signed the GDOE Bid Register using the G4S business e-mail address of Silas ("Sil") Kadiusang, the official at G4S who would be project manager if G4S were to be awarded the bid. SPR 242. Thus GDOE was on notice that Mr. Kadiusang's office e-mail address was the proper address for communications to G4S.

On September 9, 2013, a pre-bid conference was held for the IFB. SPR 1. Four representatives from G4S attended the pre-bid conference for this procurement and signed in on the sign-in sheet: Quin Santos; Jeremy Tereas; Randy Martin; and Silas Kadiusang. SPR 2. On the sign-in sheet for the pre-bid conference, Mr. Kadiusang provided the same G4S business e-mail address that Ms. Daikichy had previously provided on the Bid Register. SPR 2. On the sign-in sheet for the pre-bid conference, Mr. Martin provided his personal gmail address, rather than a G4S business e-mail address. SPR 2. Mr. Martin is not employed directly by G4S, and does not have a G4S business address.

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On September 10, 2013, G4S submitted questions pertaining to the IFB to GDOE. Amended Submission of Procurement Record filed Oct. 21, 2013 ("ASPR") at 319-20.

On September 11, 2013, GDOE issued Amendment No. 2 to the IFB. SPR 164-65. On September 11, 2013, GDOE attempted to send Amendment No. 2 by e-mail to all companies who obtained copies of the IFB. Submission of Agency Report filed Oct. 21, 2013 ("SAR") at 302. The subject line of the GDOE e-mail transmitting Amendment No. 2 referred to "Amendment No. 1". SAR 302. Amendment No. 2 responded, inter alia, to the following question from G4S:

Given the short time table for this bid, as built Drawings or Floor plans, on the entire campus layout, is essential in producing accurate estimates and designs. Can we have these drawing right away?

ASPR 319. The GDOE response to the above question in Amendment No. 2 was in pertinent part as follows:

Floor plans and some electrical drawings are being provided, however, the accuracy of the drawings provided is unknown. It is the Bidder's responsibility to verify all existing conditions and prepare their bids accordingly.

SPR 164. Although, as discussed below, G4S did not receive this Amendment, Mr. Kadiusang did go to the school, observe existing conditions, and take measurements before the G4S bid was finalized.

The September 11, 2013 e-mail from GDOE to the companies who obtained copies of the IFB was sent to Randy Martin at his personal e-mail address, but was not sent to any other representative of G4S at any other e-mail address. SAR 302. In particular, it was not sent to Mr.

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Kadiasang's office e-mail address, which was the only address provided by G4S to GDOE when G4S picked up the bid package.

On September 12, 2013, GDOE issued Clarification No. 2 to the IFB. SPR 167-68. On September 12, 2013, GDOE attempted to send Clarification No. 2 by e-mail to all companies who obtained copies of the IFB. SAR 304. The September 12, 2013 e-mail from GDOE to the companies who obtained copies of the IFB was sent to Randy Martin at his personal e-mail address, but was not sent to any other representative of G4S at any other e-mail address. SAR 304. In particular, this e-mail also was not sent to Mr. Kadiasang's office e-mail address, which was the only address provided by G4S to GDOE when G4S picked up the bid package.

Randy Martin was out sick when the above-referenced September 11, 2013 and September 12, 2013 e-mails were sent, and did not check his personal e-mail account before the bid opening. Nobody from G4S saw the above-referenced September 11, 2013 and September 12, 2013 e-mails before the bid opening. GDOE did not receive any acknowledgement of receipt of these e-mails from G4S, even though G4S had acknowledged receipt of earlier communications concerning this procurement. *See* SPR 59 (Amendment Acknowledgment Form). Lacking the information in Clarification No. 2 and Amendment No. 2, G4S built an extra margin of error into its bid to cover any unknown risks or uncertainties that might have been addressed by those documents.

The bid opening for the IFB took place on September 16, 2013. *E.g.*, SPR 198. G4S submitted a bid in the amount of \$477,693.65. SPR 35. Amendment No. 2 and Clarification No. 2 were not attached to the G4S bid. There was one other bid submitted, by Orion Construction

Corporation (Guam) ("Orion"), in the amount of \$499,980.00. SPR 67. Amendment No. 2 and Clarification No. 2 were attached to the Orion bid. SPR 79-80, 82-83.

Later on the day of the bid opening, September 16, 2013, GDOE transmitted a document to G4S entitled "Bid Status" to G4S, stating that the G4S bid was rejected due to failure to submit "Clarification No. 2 and Amendment No. 2" within its bid documents. SPR 205.

On September 16, 2013, G4S served a protest in connection with the IFB to GDOE. SAR 247. On September 19, 2013, the Supply Management Administrator of GDOE denied the protest. SAR 296-297. The very same day, GDOE issued a "Notice to Lift Stay of Procurement" in which GDOE stated, "GDOE has responded to the protest and no appeal has been filed." SAR 250. On or about September 20, 2013, GDOE entered into an Agreement for Construction Services Between GDOE and Orion for Services Pursuant to GDOE IFB 032-2013. SAR 285.

On October 3, 2013, G4S filed a Notice of Appeal of the denial of its protest. On November 12, 2013, the OPA issued a Decision and Order holding that the statutory procurement stay remained, and remains, in effect, and that GDOE's award of the contract to Orion is void.

B. Facts relating to funding for this procurement.

The IFB is funded with moneys from ARRA grants through the Adequate Education Act Trust. Pursuant to both Public Law 31-234 and requirements of the United States Department of Education, the funds for this procurement were required to be obligated by September 30, 2013.

The United States Department of Education has issued an extension to GDOE until January 31, 2013 for the obligation of any funds remaining in the Trust after September 30, 2013. There is a

bill pending in the Guam Legislature, Bill No. 209-32, to amend Public Law 31-234 so that appropriations inclusive of the funds for this procurement would expire if not obligated by January 31, 2014, the same extended deadline set by USDOE.

C. **Fact relating to Orion's challenge to OPA jurisdiction.**

On November 25, 2013, interested party Orion Construction Corporation (Guam) ("Orion") gave notice of a judicial proceeding purportedly concerning the procurement at issue in this appeal. There is no judicial proceeding concerning IFB 032-2013 that would operate to divest the OPA of its jurisdiction in this matter. Orion's notice referenced an unrelated matter concerning a wholly separate procurement and different parties, Xerox Corp. v. The Office of Public Accountability, Guam S. Ct. CVA 13-018.

III. **LEGAL ARGUMENT**

A. **G4S was not given proper notice of Amendment No. 2 and Clarification No. 2.**

GDOE deemed the G4S bid nonresponsive solely due to the fact that "Clarification No. 2" and "Amendment No. 2" were not attached to its bid. G4S should not have been penalized in this manner because GDOE was largely responsible for this omission.

When G4S picked up the bid package for this procurement, it provided GDOE with the business e-mail address for the G4S project manager, Mr. Kadiusang. Subsequently four persons from G4S, including Mr. Kadiusang, attended the pre-bid conference. When the persons affiliated with G4S signed in, the lead company representative gave his official company e-mail address while another person affiliated with G4S gave only his personal gmail address. Thus Silas

Kadiasang gave his e-mail address as sil.kadiasang@gu.g4s.com, obviously a G4S business address.

Randy Martin gave his e-mail address as randyvmartin@gmail.com, a personal e-mail address.

When GDOE e-mailed Clarification No. 2 and Amendment No. 2 to prospective bidders, it did not send these e-mails to the address provided when G4S picked up the bid package. GDOE did not send the e-mails to everyone from G4S who signed in at the pre-bid conference. The information was sent to only one person. In selecting a single recipient affiliated with G4S to send this information to, GDOE did not send it to someone with a company "gu.g4s.com" e-mail address. Instead, it was sent only to the personal "gmail.com" address of one individual, Randy Martin.

Amendment No. 2 was dated September 11, 2013 and Clarification No. 2 was dated September 12, 2013. The bid opening was on September 16, 2013. As (bad) luck would have it, Randy Martin was ill and did not check his personal gmail account for a few days and did not see Amendment No. 2 before the bid opening. GDOE did not receive any confirmation that G4S had received these e-mails, even though G4S had acknowledged previous amendments and clarifications. GDOE did not follow up on the lack of such confirmation for the September 11 and September 12 e-mails.

GDOE's e-mail conveying "Amendment 2" mislabeled the attachment as "Amendment 1". Even if someone at G4S had seen the relevant e-mail on time, he or she would not have known the attachment included a new second amendment, so he or she might not have opened the attachment.

In short, GDOE's acts and omissions were a substantial reason why the missing amendment and clarification were not received in time at the G4S office and thus were not included in the G4S

bid. GDOE should therefore be estopped from asserting this omission as grounds for deeming the G4S bid nonresponsive. *Cf. Jessup v. Cattle Center, Inc.*, 259 Cal. App. 2d 434, 439 (1968) (doctrine of estoppel rests on principle that "when one of two innocent persons must suffer a loss, the loss must be borne by the one whose conduct, acts or omissions brought about the injury").

B. The G4S bid should not have been rejected due to a minor informality.

The Guam Procurement Regulations provide that a procurement official should waive, or allow a bidder to correct, minor informalities that (1) are matters of form, rather than substance, or are insignificant mistakes, and (2) can be waived or corrected without prejudice to other bidders because there is no effect on price, quantity, quality, delivery, or contractual conditions. 2 GAR §3109(m)(4)(B). *Accord* GDOE Procurement Regulation 3.9.13.4. This waiver should apply here. The omission of a last-minute clarification and waiver from G4S's bid was such a minor informality that could have been waived or easily corrected without prejudice to other bidders.

GDOE has submitted a letter dated October 10, 2013 from competing bidder Orion Construction Corporation ("Orion"). ASPR 246. Orion contended G4S was able to submit a lower bid than Orion solely because G4S did not have and did not consider Clarification No. 2 and Amendment No. 2. Orion offers no explanation why this would be the case. The opposite is true. Lacking the information in Clarification No. 2 and Amendment No. 2, G4S had to build an extra margin of error into its bid to cover any unknown risks or uncertainties that might have been addressed by those documents.

GDOE has asserted that Amendment No. 2 was material because it allegedly responded, inter alia, to the question from G4S requesting floor plans and as built drawings and describing such plans and drawings as “essential in producing accurate estimates and designs”. The answer to this question may have been “essential” and material to the bid submissions if the question had in fact been answered. Instead, the actual GDOE response to this question in Amendment No. 2 stated the accuracy of such plans and drawings as were provided “is unknown”. In other words, both Orion, which received Amendment 2 in time, and G4S, which did not, were left to assume the same risk of “unknown” conditions when preparing their respective bids. Meanwhile, G4S mitigated any effect from its failure to receive plans and drawings, accurate or otherwise, by inspecting and measuring actual conditions at the school before finalizing its bid.

The omission of Clarification No. 2 and Amendment No. 2 from G4S's bid is an “insignificant mistake”, which resulted in large part from GDOE's decision to send this mislabeled information only to the personal e-mail account of just one of the four G4S representatives present at the pre-bid conference, rather than to the office e-mail address provided when G4S picked up the bid package. The omission “can be waived or corrected without prejudice to other bidders because there is no effect on price, quantity, quality, delivery, or contractual conditions” since the only effect on G4S's bid was for G4S to build an extra margin into its bid price to cover this lack of information. G4S does not dispute that it would be bound by Clarification No. 2, Amendment No. 2, and the price given in its bid. Pursuant to 2 GAR §3109(m)(4)(B) and/or GDOE Procurement

Regulation 3.9.13.4, GDOE should have waived, or permitted G4S to correct, this minor informality in the G4S bid on GDOE IFB 032-2013.

C. This appeal has not been rendered moot by funding issues.

G4S acknowledges that there are serious issues pertaining to the continued availability of funding for the procurement for the IFB. At the time this brief is being drafted, those issues are unresolved. It would be premature to deem this appeal mooted by funding issues which hopefully will be resolved in a manner which preserves both the IFB and this appeal.

The IFB was funded with moneys from the Adequate Education Act Trust, a Trust created by local law for the management of certain funds received from the United States Department of Education ("USDOE"). Previously, both USDOE and local law required that the funds be obligated by September 30, 2013. The local statute setting that deadline was Guam Public Law 31-234.

On September 26, 2013, the USDOE granted GDOE an extension until January 31, 2014 to obligate the funds. A bill pending in the Guam Legislature, Bill No. 209-32 would amend Public Law 31-234 so that the relevant appropriations would expire if not obligated by January 31, 2014, the same extended deadline set by USDOE.

Because the Guam Legislature has not yet acted upon Bill No. 209-32, there is uncertainty as to the issues in this appeal. If Bill No. 209-32 is not enacted into law, then the appropriation for funding for IFB 032-2013 is gone. In that case, this appeal might well be moot.

If Bill No. 209-32 is enacted into law, there are two possibilities. Since Bill No. 209-32 simply amends an existing deadline rather than set forth a new appropriation, it may apply *nunc pro*

tunc to negate any lapse of funding by the prior deadline. In that case, this appeal should go forward on the existing record as if there were no intervening lapse of funds. Alternatively, if Bill No. 209-32 is construed as allowing new obligations of funds that had lapsed on September 30, 2013, then the funding may have lapsed and this appeal may be moot in whole or in part. Under this second alternative, GDOE could issue a new IFB for the project.

If the Guam Legislature does not act either way on Bill No. 209-32 before the scheduled hearing date in this appeal, then the OPA and the parties to the appeal will still be in the dark as to whether a hearing and decision in this appeal will resolve necessary issues or ultimately prove to be a moot exercise. Nonetheless, it may be appropriate to go forward with the hearing in this matter in case subsequent legislative action revives this procurement with insufficient time remaining to restart the appeal process.

D. There is no judicial proceeding that would divest the OPA of jurisdiction.

As noted above, interested party Orion very recently gave notice of a judicial proceeding purportedly concerning the procurement at issue in this appeal. Orion's notice is based on a bizarre and erroneous interpretation of 2 GAR Div. 4 §12103(b). There is no judicial proceeding concerning IFB 032-2013 that would operate to divest the OPA of its jurisdiction in this matter.

Section 12103(b) provides in pertinent part, "If an action *concerning the procurement under Appeal* has commenced in court, the Public Auditor shall not act on the Appeal except to notify the parties and decline the matter due to Judicial involvement." (Emphasis added.) The procurement under appeal is **not** the subject of any pending judicial proceeding. Orion does not even allege that

it is. Instead, Orion contends, without documentation, that an issue in the current appeal is also being litigated in an unrelated matter concerning a wholly separate procurement and different parties, Xerox Corp. v. The Office of Public Accountability, Guam S. Ct. CVA 13-018.

The plain language of 2 GAR Div. 4 §12103(b) has been construed as divesting the OPA of jurisdiction when a specific procurement that is the subject of an OPA appeal is also the subject of a court proceeding. *See In the Appeal of DFS Guam L.P.*, Guam OPA Appeal No. OPA-PA-13-006, Order Staying Appellant's Appeal at p. 2 (June 5, 2013). Orion now suggests that section 12103(b) should be construed as divesting the OPA of jurisdiction over an appeal whenever there is a case pending in a court involving a separate, unrelated procurement that may involve similar legal issues. This could include not only cases in the Superior Court of Guam and the Supreme Court of Guam, but also possibly cases in the United States District Court of Guam, the United States Ninth Circuit Court of Appeals, and the United States Supreme Court. Since there will probably always be some case on one or more of these courts' dockets involving issues in some way similar to any pending OPA appeal, Orion seeks to deprive the OPA of its ability to hear almost any procurement appeal.

There is also reason for concern about Orion's position that the OPA cannot terminate contracts awarded in flagrant violation of the procurement stay. This current case is not an isolated incident. In recent months there has been a chronic problem with agencies routinely flouting the law by awarding contracts in plain and open violation of the procurement stay. *See, e.g., In the Appeal of G4S Security Systems (Guam) Inc.*, OPA-PA-013 (D & O, Nov. 12, 2013); In the Appeal of JMI Edison, OPA-PA-13-009 (Decision, Nov. 4, 2013); In the Appeal of K Cleaning Services,

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OPA-PA-13-004 at p. 7 (Decision, Oct. 28, 2013); In re Appeal of JMI Edison, OPA-PA-13-010 (Order, Sept. 20, 2013). Orion seeks to reopen the door to such illegal conduct.

Even if 2 GAR Div. 4 §12103(b) might very arguably be open to the strained construction proffered by Orion, this issue can be resolved by standard rules of statutory construction. Statutes and regulations should not be construed in an absurd manner inconsistent with their intent and purpose. *See, e.g., Villalon v. Hawaiian Rock Products, Inc.*, 2001 Guam 5, ¶24. The reference to “an action concerning the procurement under Appeal” in section 12103(b) should not be construed as depriving the OPA of the power to act just because there is a pending court case involving a wholly unrelated procurement but some similar issue. Section 12103(b) should be limited to court actions involving the same procurement that is the subject of the OPA appeal.

IV. CONCLUSION

GDOE improperly rejected the G4S bid because of an omission which was a minor informality and which resulted in large part because of GDOE's carelessness. GDOE should be ordered to consider the G4S bid for IFB 032-2013.

Respectfully submitted,

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Date: November 27, 2013

By:



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