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IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEAL

IN THE APPEAL OF  
G4S SECURITY SYSTEMS (GUAM) INC.,  
Appellant.

Docket No. OPA-PA-13-013

**ORION CONSTRUCTION  
CORPORATION (GUAM)'S  
REMEDIES BRIEF**

Having not met its burden of proof that the Guam Department of Education (DOE) has violated any procurement law or regulation in this case, Appellant G4S Security Systems (Guam) Inc. is not entitled to any remedies and its appeal should be dismissed. However, should the Office of Public Accountability find in G4S' favor on the merits, the OPA should nonetheless ratify the contract between DOE and Orion Construction Corporation (Guam) as it is in the government's best interests. If the OPA were to find that DOE should consider termination rather than ratification, such decision must be referred to the Attorney General or remanded to DOE for a determination on the remedy.

I. The Best Interests of DOE Require Proceeding with Contract

In a post-award situation in which the contractor has not committed bad faith,<sup>1</sup> then the contract may be ratified and affirmed provided that doing so is in the best interests of the Territory; or the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonable incurred under the contract, plus a reasonable profit, prior to the termination. 5 GCA § 5452(a). Therefore pursuant to Guam law, even if the OPA decides in G4S' favor, it must still engage the best interests analysis, rather than instantly terminating a contract.

DOE's Procurement Regulations supplement section 5452, particularly the "best interests" factors. As a preliminary note, DOE's Procurement Regulations provide the standards and procedures governing the procurement, management, control and disposal of supplies and services for the Department of Education. DOE Procurement Regulations ("DOEPR") § 1.1. Those regulations therefore control the manner in which DOE procurements must be conducted, and inform bidders of the guidelines governing DOE's solicitations.

According to DOE's Procurement Regulations,

Upon finding after award that a DOE employee has made an unauthorized award of a contract or that a solicitation or contract award is otherwise in violation of law where there is no finding of fraud or bad faith, the Director of Education may ratify or affirm the contract or terminate it in accordance with this Section after consultation with the Attorney General.

DOEPR § 9.7.1.1. In the event performance on the award has begun, and the violation cannot be waived without prejudice to DOE or other offerors, DOE must make a determination of whether it is within DOE's best interests to amend, ratify, or affirm the contract. DOEPR § 9.7.1.2.(2)(c).

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<sup>1</sup> G4S has not demonstrated that Orion acted in bad faith. While G4S suggests that Orion proceeded with the contract while knowing that G4S had protested, Orion was obligated under the contract to continue work until it received notice to stop work, which was not issued until after the OPA issued its decision on November 12, 2013. If Orion failed to continue the work, it would have been in breach and jeopardized the timeline to complete the job. Thus, Orion acted in *good faith* with DOE and its contract as it continued the important work of designing a fire alarm system for Southern High School.

A "best interests" analysis involves examining, among other factors, progress made toward performing the whole contract, the Department's costs to terminate, and the possibility of obtaining a more advantageous contract by resoliciting. DOEPR § 9.7.1.2.(2)(c).

DOE's best interests are served in ratifying the contract. As was revealed during the hearing, Southern High School, where at least 1,500 people attend school or work, lacks a fire alarm system throughout its campus except in its gym and auditorium. This is in violation of fire codes, not to mention quite precarious for those present at the campus every weekday. Orion has already completed the design phase of the contract and is prepared to move forward with installation; whereas for this design-build contract, a new contractor would have to start from scratch in preparing its design and all associated work for preparing for the construction phase. This will be at least several months of delay.

While a fire may be an unlikely event, the safety and lives of 1,500 people should not be jeopardized by any further delay. While G4S compares not having a fire alarm system to not having air conditioners, there is an important distinction. Unlike the situation of not having air conditioners which may be inconvenient and uncomfortable, having a fire in any part of a large high school campus in which there is no fire alarm system throughout all classrooms, the cafeteria, the library, the student center, nurse and counseling buildings, and the administration building, poses a grave danger to every single person at Southern High School.

The government's best interests are also served in ratifying the contract because DOE has limited funds to complete this project, and is already obligated to compensate Orion for the work done to date. According to Armando Acosta's testimony, up until it received notice to stop work due to the OPA's decision to void the contract, Orion had completed the design phase, or, 15-20% of the value of the contract. Based on the full contract value of \$499,980.00, this roughly

amounts to \$75,000 to \$100,000, which DOE will be faced with in a termination claim to be filed by Orion. DOE's Supply Management Administrator, Marcus Pido, testified that DOE believed it would be obligated to pay Orion for the work it has done to date. This would be on top of whatever DOE would pay to a new contractor. Given that there is a difference of just \$22,286.35 between G4S' bid and Orion's bid, which is less than 5% between the two bids, DOE simply does not have the funds to pay up to \$100,000 more than what it needs to pay under for a new fire alarm system.

Finally, while the evidence showed that a G4S representative received the amendment and clarification, if the OPA determines that DOE failed to notify G4S of the amendment and clarification and therefore the solicitation process was flawed, it must still ratify and affirm the contract with Orion rather than have DOE reissue the solicitation. Given the short time frame in which DOE has to commit these funds (assuming that legislation passes allowing DOE to commit the funding), the best interests of DOE and its students require the installation of a fire alarm system without the delay of a new solicitation.

## II. Whether the OPA may terminate the contract

As Orion noted in its Notice of Judicial Proceeding, the Guam Supreme Court is currently entertaining the issue of whether the OPA has jurisdiction to terminate contracts. *See Xerox Corp. v. The Office of Public Accountability*, Sup. Ct. Guam CVA13-018. The remedies available to G4S involve the question whether the OPA has jurisdiction to void or terminate the DOE-Orion contract.

### A. The OPA Does Not Have Jurisdiction to Terminate the DOE-Orion Contract

According to Guam procurement law, the OPA's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of the Procurement Law. 5 GCA § 5703. The OPA may exercise administrative review over DOE procurements. *Town House*

*Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ("*Town House*") ¶ 19. To act consistently with the integrity of the procurement process, the OPA must follow the procedures established by the DOE Procurement Regulations, including terminations. Even if those regulations do not specifically refer to the OPA, DOE's Procurement Regulations relate specifically to "*administrative and judicial review.*" DOEPR § 9.5.1 (emphasis added). Accordingly DOE's Procurement Regulations govern how the OPA handles this matter. DOEPR § 9.5.1.

At a minimum, the DOEPR requires the OPA to consult with the Attorney General before making any decision to terminate a contract. DOEPR § 9.7.1.1. If this case were to proceed on appeal to the Superior Court of Guam, the Territory of Guam becomes a party. 5 GCA § 5480; *Town House*, 2012 Guam 25. The Attorney General must therefore be informed and consulted with about the risks of such further litigation or a termination claim. The purpose of the consultation with the Attorney General is to assess on the associated termination costs including the cost and risk of further litigation. This falls under one of the "best interests" factors: "the Department's costs to terminate." DOEPR § 9.7.1.2.(2)(c)(i). This is a foremost responsibility of the Attorney General, who must be "diligent in protecting the rights and properties of the government of Guam." 5 GCA § 30109(f).

The OPA's statute also has two important limitations connected with whether it may terminate a government contract. First, the OPA has the statutory obligation to "report to the Attorney General of Guam for prosecution of violations of law regarding violations coming to the Public Auditor's attention, where such violations pertain to the expenditures of funds and property of the Government of Guam . . . ." 1 GCA § 1908(h). Section 1908 reinforces that the OPA must consult with the Attorney General and cannot make an independent decision to terminate a contract.

Second, the "Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam." 2 GAR Div. 4 § 12103(a). The decision to terminate a contract involves financial decisions by the government of Guam, such as how much the government will owe a contractor whose contract has been terminated. In this instance, DOE's Procurement Regulations provide a contractor whose contract has been terminated the right to claim actual costs plus a reasonable profit. DOEPR § 9.7.1.3. The OPA cannot make this financial decision on behalf of the agency as section 12103(a) prohibits it.

What the OPA does have jurisdiction over are "appeals of decisions that arise under 5 GCA § 5425(c), as provided for in 5 GCA § 5425(e)." 1 GCA § 1908(k). Section 5425(e) relates to decisions issued by an agency on a procurement protest; section 5425(c) states that appeals of such protests "may be appealed by the protestant, to the Public Auditor." In such cases, if an agency decides to terminate a contract, the OPA can affirm or reverse that decision based on the agency's compliance with the requirements for terminating a contract. However, the OPA does not have the authority to terminate on its own.

Thus, if the OPA determines that a procurement violation has occurred, it must either consult with the Attorney General before determining to terminate, or it must remand this decision to DOE to make a remedy determination in compliance with its regulations.

B. The OPA should rescind its decision voiding the contract.

In its November 12, 2013 Decision and Order, the OPA voided the Orion-DOE contract without utilizing the "best interests" analysis mandated by the DOEPR, and thus, the OPA should rescind its decision voiding the contract. As explained above, if the OPA does engage the best interests analysis, it should conclude that DOE's best interests are served by continuing the contract.

III. Conclusion

As the lack of a fire alarm system poses a great deal of risk to the health and safety of Southern High School's students, faculty, staff, and guests to the campus, and as Orion has already completed its design of the fire alarm system and is entitled to be compensated for that work, it is in DOE's best interests to ratify the contract with Orion.

Should the OPA believe that DOE has violated any procurement regulation, it must either consult with the Attorney General, or remand this decision to DOE to make the determination of whether to ratify or terminate in compliance with DOE's procurement regulations.

DATED: Hagåtña, Guam, 4 December 2013.

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