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PROCUREMENT APPEALS

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Attorneys for Appellant

Teleguam Holdings, LLC and its wholly owned subsidiaries

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

IN THE APPEAL OF

TELEGUAM HOLDINGS, LLC AND ITS
WHOLLY OWNED SUBSIDIARIES, GTA
TELECOM, LLC; GTA SERVICES, LLC;
AND PULSE MOBILE LLC.

Appellant.

APPEAL NO. OPA-PA-13-16

**APPELLANT'S OPPOSITION TO
GUAM DEPARTMENT OF
EDUCATION'S MOTION TO DISMISS
FOR LACK OF JURISDICTION**

I. INTRODUCTION

Teleguam Holdings, LLC and its wholly owned subsidiaries, GTA Telecom, LLC; GTA Services, LLC; and Pulse Mobile, LLC (hereinafter referred to as "GTA") assert that dismissal is not proper in this case because the Office of Public Accountability has the authority to review illegal post award changes and any violations of the IFB. The OPA also has the authority based on the policies and plain language of Guam Procurement law to debar a bidder who has violated the terms of the IFB. The Guam Department of Education's ("GDOE") Motion to Dismiss should be denied in its entirety.

II. DISCUSSION

GDOE's Motion to Dismiss focuses on several procurement laws and regulations, which the OPA is required to interpret. In interpreting the language of a statute, the Court is to be guided by the statute's plain language, with reference to the specific context in which the language is used, as well as the broader context of the statute as a whole. *Fleet Servs., Inc. v. Dep't of Admin., Gov. of Guam*, 2006 Guam 6, ¶ 23. A statute's context includes looking at other provisions of the same statute and other related statutes. *Aguon v. Gutierrez*, 2002 Guam 14, ¶ 9. Notwithstanding the deference due the plain-meaning of statutory language, such language need not be followed where the result would lead to absurd or impractical consequences, untenable distinctions, or unreasonable results. *People v. Flores*, 2004 Guam 18, ¶ 18.

A. GDOE SHOULD BE ESTOPPED FROM ASSERTING THAT THE OPA LACKS JURISDICTION TO HEAR GTA'S APPEAL

GDOE should be estopped from asserting that the OPA lacks jurisdiction to hear GTA's appeal after GDOE advised GTA that it has the right to appeal the denial pursuant to § 5425(e) under the doctrine of equitable estoppel. On November 5, 2013 GDOE advised GTA, that GDOE has reviewed its protest and denies the protest entirely on the timeliness issue. GDOE further advises GTA of its right to appeal GDOE's decision pursuant to § 5425(e). *See* Exhibit A of GTA Notice of Appeal OPA-PA-13-016. Contrary to its advice, on November 26, 2013 GDOE argues in its motion to dismiss, that the OPA does not have jurisdiction to hear GTA's appeal pursuant to §5425(e). *See* GDOE's Mot. to Dismiss for Lack of Jurisdiction at 3.

Guam law provides that "whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission be permitted to falsify it." 6 GCA §5106(3).

In *Limtiaco v. Guam Fire Dept.*, the Guam Supreme Court held that the doctrine of equitable estoppel may be asserted against the government of Guam. *Limtiaco v. Guam Fire Dept.*, 2007 Guam 10, ¶ 58. The Court adopted a four element test that must be proven in an equitable estoppel analysis. First, the party to be estopped must be apprised of the facts. *Id.* Second, the party must intend that his conduct would be acted upon, or act in such a manner that the party asserting estoppel could reasonably believe that he intended his conduct to be acted upon. *Id.* Third, the party asserting the estoppel must be ignorant of the true state of the facts. And fourth, the party asserting the estoppel must rely upon the conduct to his injury. *Id.*

First, GDOE was aware of the facts surrounding GTA's protest for GDOE IFB 020-2011. In GDOE's letter dated November 5, 2013, GDOE states that "[it] reviewed [GTA's] protest denies it in its entirety on the basis that GTA failed to file a timely protest." *See* Exhibit A of GTA Notice of Appeal OPA-PA-13-016. GDOE also states that "GTA's allegations are beyond the scope of a protest", however, states that GTA has the right to appeal GDOE's denial of its protest pursuant to 5 GCA § 5425(a). *Id.*

Second, based on the information GTA received and pursuant to Section 5425 (a), GTA filed a timely protest on August 30, 2013 with the belief that GDOE would act and decide on the merits of its protest. GDOE responded to GTA's protest on November 5, 2013. In its letter, GDOE stated that GDOE has reviewed GTA's protest and denied its protest "entirely" on the basis that GTA's protest was untimely. *See* Exhibit A of GTA Notice of Appeal OPA-PA-13-016. GDOE further advised GTA of its right to its denial pursuant to 5 GCA § 5425(e). On November 19, 2013, GTA filed a timely appeal before the OPA.

Third, in its November 5, 2013 letter GDOE advised GTA of its interpretation of the Guam Procurement Law wherein GDOE informed GTA of its rights to appeal GDOE's denial of its protest. Based on GDOE's assertion, GTA timely filed its appeal before the OPA. Now in its

motion to dismiss, GDOE states that the Guam procurement law does not provide the OPA with jurisdiction to hear GTA's appeal. GDOE failed to properly inform GTA of its rights pursuant to the Guam procurement law and regulations.

Fourth, had GDOE advised GTA earlier of its position on the proper appeal method, GTA would not have filed an appeal before the OPA instead GTA could have filed an action in Superior Court. GTA relied on GDOE's assertion that GTA had the right to appeal to the OPA. *See* Exhibit A of GTA Notice of Appeal OPA-PA-13-016.

Accordingly, GDOE should be estopped from now claiming that the OPA lack jurisdiction to hear GTA's appeal after advising GTA that it has a right to appeal to the OPA.

B. OPA HAS THE AUTHORITY TO ADDRESS ILLEGAL POST AWARD CHANGES AND VIOLATIONS OF THE IFB

While GDOE claims that the OPA lacks jurisdiction over a contract once awarded, the Guam Procurement law contemplates remedies where after an administrative or judicial determination is made as to whether a solicitation or award has violated the law. *See generally* §§ 5450 - 5452. In fact, the Comment to § 5450 states that:

this part applies only after a solicitation or award had been actually made or, in the case of an award, in such a stage as to be beyond the general scope of negotiation or review. It does not apply say, a review by the Attorney General, who determines, in the course of his normal review, that the proposed action would be in violation if it were to be made.

5 GCA § 5450 cmt.

The OPA has also held differently. In OPA-PA-11-002, the OPA held that the post-award purchase orders issued by GDOE increased the P/O quantities of the machines in excess of the matching quantities stated in the IFB. The OPA exercised its jurisdiction and found that an invitation for bids must include all contractual terms and conditions applicable to the procurement. *See e.g.*, 5 GCA § 5211(b) and Chapter III, Section 3.9.3.2, DOE Procurement

Regulations. Additionally, the successful bidders for DOE solicitations have responsibilities concerning guarantees of the equipment, labor, workmanship, and performance. Chapter III, Section 3.28, DOE Procurement Regulations. In OPA-PA-11-002, the OPA ultimately found that the post award purchase orders were void and that the parties remained bound to the contractual terms and conditions set forth in the IFB.

Here, the terms and conditions of the IFB are clear and Pacific Data Systems ("PDS") was required to comply with all specifications and other requirements. *See* GDOE IFB 020-2011 at 14. PDS, however, was unable to perform to the bid specifications and within the specified time. Despite PDS' default under the IFB, GDOE allowed PDS to provide "temporary services" without a competitive bid process. The post award "temporary services" is the same situation as the post award purchase orders that the OPA exercised jurisdiction over in OPA-PA-11-002. Thus, the OPA clearly has jurisdiction over any post award services that are in violation of the IFB.

When a bidder protests a modification to a contract awarded, the tribunal must examine whether the change materially departs from the original solicitation. *Northrop Grunman Corp. v. U.S.*, 50 Fed. Cl. 443, 465 (2001). Here, the "temporary services" represent work that was awarded without competition. The change to the previously awarded IFB falls outside the scope of the original solicitation. Thus, the OPA has the jurisdiction to determine these issues as it has done in the past.

Additionally, GDOE's argument that the OPA does not have jurisdiction to hear matters regarding any bid after the solicitation or bid has been awarded is erroneous based on the plain language of 5 GCA § 5425(a). That section states, any actual bidder who may be aggrieved in connection with the award of a contract may protest to the head of a purchasing agency. 5 GCA § 5425(a). As stated in the Appeal, GTA is an aggrieved bidder in connection with the award of

the IFB to PDS because (1) PDS was never the most responsible bidder because it was unable to perform to the bid specifications and within the specified time; (2) PDS failed to comply with all of the conditions of the IFB; and (3) GDOE allowed PDS to provide "temporary services" without a competitive bid process. Each of these reasons deprived GTA the benefit of the contract and the ability to compete for the "temporary services" issued by GDOE. For these reasons and the reasons in the Appeal, GTA is an aggrieved bidder with legitimate protests under 5 GCA § 5425(a). Because GDOE denied GTA's protest, the OPA has jurisdiction over this matter under 5 GCA § 5425(e).

Based on the above, GDOE and PDS violated the agreement post award because they changed the terms and conditions applicable to the procurement. GDOE also failed to properly determine whether PDS was a responsible bidder.

C. OPA HAS DEBARMENT AUTHORITY

Guam's Procurement Law, however, sets forth its purposes and policies: "to provide for increased public confidence in the procedures followed in public procurement;" "to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;" and "to provide safeguards for the maintenance of a procurement system of quality and integrity." *See* 5 GCA § 5001. The OPA's jurisdiction is to promote the integrity of the procurement process. 5 GCA § 5703. Without a doubt, the debarment of vendors who jeopardize a government agency's funding and fail to comply with contractual terms, are grounds for debarment.

GDOE advocates for a prohibition of any administrative review of a decision not to debar a contractor. Pointing to section 5 GCA § 5705(c), GDOE states that the OPA's review is only over whether a debarment or suspension was in accordance with the statutes, regulations and best interests of the government, and that the OPA may not issue a debarment on its own.

Under recent Guam Supreme Court precedent, the OPA has been held to have general implied authority to promote the integrity of the procurement process. *Data Mgmt. Res. LLC v. Office of Pub. Accountability*, 2013 Guam 27 ¶¶ 33-34. In that case, the Supreme Court found that the OPA did not have the express authority to appeal a case from the Superior Court to the Supreme Court, but that it still had the implied authority to do so. The OPA may find here as well that it has implied authority over debarment proceedings under the umbrella of its jurisdiction to promote the integrity of the procurement process.

Moreover, it is clear that GTA meets the standard required to bring a debarment action before the OPA. Guam Procurement law allows a member of the public to ask for action to debar or suspend a contractor. When such a request is made, the statute then requires that an "investigation of each petition shall be conducted promptly and a written report should be made of findings of fact and action taken." 5 GCA § 5426(f). GDOE violated section 5426(f) by not conducting such an investigation. The plain language of section 5426(f) required GDOE to investigate GTA's petition to debar PDS and write a report of its findings. GDOE's failure to do so prompted GTA to file an appeal with the OPA.

Even setting that issue aside, the OPA has the jurisdiction to review a decision under section 5426 when brought by a person aggrieved by DOE's action (or inaction) on a petition for debarment. 5 GCA § 5705(a). "The Public Auditor shall decide whether, or the extent to which, the debarment or suspension was in accordance with the statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair." 5 GCA § 5705(c). Section 5705(b) and 5426(f) shed light on who may appeal GDOE's decision, or lack thereof. Section 5705(b) states that **the aggrieved person** shall file his/her appeal with the Public Auditor. Here, GTA is clearly the aggrieved person because GDOE failed to investigate GTA's petition and a write a report of its findings of fact and action taken pursuant to section

5426(f). Thus, GTA has the right to appeal GDOE's decision to the OPA based on the plain language of sections 5705(b) & (c) when read together.

Further, section 5426(f) states that **any member of the public may petition** the head of a purchasing agency to take action to debar or suspend. 5 GCA § 5426(f) (emphasis added). The plain reading of section 5426(f) indicates that anybody can request an agency, such as GDOE, to take action to debar a bidder that is in default and violates the terms of the agreement. GTA clearly falls within this category, and it would be absurd to believe that somebody can protest for debarment of a bidder in default but cannot have that decision, or lack thereof, reviewed by the OPA.


The absurd result and consequence of GDOE's interpretation of the OPA's jurisdiction over debarment proceedings is that GDOE would never be subject to any sort of review for either failing to do an investigation, or deciding not to debar a vendor, either by the OPA or even the Superior Court of Guam. This unilateral and reviewable power directly contradicts the goals of the procurement law to increase public confidence in the procurement system, to ensure that the government is acting with integrity, and to instill fairness in the system.

III. CONCLUSION

Based on the foregoing, the OPA retains jurisdiction and the motion to dismiss should be denied.

DATED: Hagåtña, Guam, December 17, 2013.

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owned subsidiaries