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 PROCUREMENT APPEALS

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FILE NO OPA-PA: 20-005

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

IN THE APPEAL OF:) DOCKET NO. OPA-PA-20-005
)
 BEACH RESORT LLC dba THE HOTEL)
 SANTA FE GUAM,) GSA'S MOTION FOR
 Appellant.) SUMMARY JUDGMENT;
) MEMORANDUM OF POINTS
) AND AUTHORITIES
)

MOTION

Appellee GENERAL SERVICES AGENCY (GSA) hereby respectfully moves for an order granting summary judgment on the issues raised by Appellant Beach Report LLC dba The Hotel Santa Fe Guam (Santa Fe) in its Notice of Appeal, OPA-PA-20-005 filed on June 23, 2020. Argument on all motions is scheduled to be held before the Hearing Officer on August 19, 2020 at 10:00 a.m.

ORIGINAL

MEMORANDUM OF POINTS AND AUTHORITY

I. FACTUAL BACKGROUND.

The undisputed facts alleged by Santa Fe, for purposes of this motion, are as follows:

In accordance with the Governor's Executive Orders No. 2020-04 (dated March 16, 2020) and No. 2020-14 (dated May 8, 2020), entry into Guam was restricted, and all inbound airline passengers were required upon arrival to serve a 14-day mandatory quarantine at a government-approved facility.¹

On May 15, 2020, GSA sent out a Request for Quotation ("RFQ") Emergency Procurement for Hotel Non-Congregate Shelters to serve as Hotel Quarantine Facilities for 14 days mandatory quarantine for all arriving passenger from Covid-19 affected areas. Santa Fe provided a quote in response to the RFQ.² GSA selected the Santa Fe as one of the quarantine facilities to house arriving passengers.³

On May 16, 2020, GSA issued Purchase Order Number P206E00310 ("PO" or "contract") to Santa Fe in the amount of \$100,000.00.⁴ The PO states on its face that it is to be "drawn on an as needed basis commencing upon receipt of purchase order and expiring on 8/16/20 or upon exhaustion of funds whichever comes first."⁵ The PO further includes and incorporates by reference twenty-seven pages of additional

¹ See, Joint Information Center (JIC) Release No. 122 (May 13, 2020).

² Exhibit E, Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

³ Exhibit A at 001 Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

⁴ Exhibit A, Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

⁵ Exhibit A at p. 001 Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

terms and conditions, each page of which was initialed and acknowledged by the Santa Fe's president, Mr. Bart Jackson.⁶

On May 27, 2020, GSA cancelled Purchase Order Number P206E00310 ("Termination Letter") retroactive to May 23, 2020.⁷ Santa Fe responded to the Termination Letter on May 29, 2020 ("May 29 Letter").⁸ When GSA terminated the contract and moved quarantined individuals from the Santa Fe retroactive to May 23, six days of the fourteen days mandatory quarantine had already passed, and there were only eight more days remaining. On June 1, 2020 Santa Fe sent a follow-up letter ("June 1 Letter") to GSA regarding the Termination Letter.⁹

On June 9, 2020, Santa Fe filed a formal protest against GSA and the Guam Homeland Security (GHS OCD¹⁰). GSA denied the protest on June 10, 2020.¹¹ Santa Fe filed this appeal on June 23, 2020.

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⁶ Exhibit A at pp. 006-032, *Santa Fe's Notice of Appeal*, OPA-PA-20-005.

⁷ Exhibit F, *Santa Fe's Notice of Appeal*, OPA-PA-20-005.

⁸ Exhibit G, *Santa Fe's Notice of Appeal*, OPA-PA-20-005.

⁹ Exhibit H, *Santa Fe's Notice of Appeal*, OPA-PA-20-005.

¹⁰ The Protest refers to the Guam Homeland Security. The contract refers to the GHS Office of Civil Defense (OCD).

¹¹ Exhibit B, *Santa Fe's Notice of Appeal*, OPA-PA-20-005.

II. LEGAL DISCUSSION

A. Summary Judgment is Appropriate Where the Undisputed Facts Fail to Support an Actionable Claim.

“Procurement appeals are governed by law and rules of procedure of the Superior Court of Guam, which include the Guam Rules of Civil Procedure [GRCP].” *Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶ 27.

Rule 56(c) of the GRCP authorizes summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See also, Hawaiian Rock Prods. Corp. v. Ocean Housing, Inc.*, 2016 Guam 4 ¶¶ 25-27 (establishing standard for summary judgment).

GSA is entitled to summary judgment in this appeal because there are no factual issues in dispute which require resolution by the Hearing Officer, and the claims made by Santa Fe fail as a matter of law.

B. The Purchase Order with Santa Fe was Terminated Based Upon Santa Fe’s Default and Failure to Perform.

1. The Purchase Order does not require GSA to give Santa Fe written notice of its non-performance.

In its Termination Letter to Santa Fe on May 27, GSA listed several failures and violations that prompted the agency to cancel the PO for cause, including the failure of Santa Fe to provide fully furnished rooms and adequate meals, as well as

the lack of basic housekeeping supplies, linens, and sanitization items.¹² Santa Fe's protest argued that "most, if not all, of the reasons the contract was terminated are false."¹³ Santa Fe also argued that "[a]s per Section 9(iii) of the contract, any specific concerns or discrepancies were required to be communicated to the hotel in WRITING."¹⁴

Santa Fe misinterprets of the contract and the law. Section IX of the terms and conditions attached to the PO contains the provisions governing early termination. Section IX(A)(iii) specifically allows GSA the option to terminate the contract for cause in the event of Santa Fe's default or non-performance:

If the Hotel refuses or fails to perform any of the provisions of this contract. . .the Procurement Officer *may* notify the Hotel in writing of the delay or non-performance, and if not cured in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the Hotel's right to proceed with the contract . . .¹⁵

The use of the word "*may*" in Section IX(A)(iii) is permissive and does not mandate or otherwise obligate GSA to give advance written notice of the non-performance. *See*, 5 GCA 5030(m) ("May denotes the permissive"); *also* 1 GCA § 715(h)(9) ("*Shall* is mandatory and '*may*' is permissive."). The Procurement Officer therefore had the discretion to decide whether to notify the hotel of the deficiencies and as a matter of law, was not required to communicate the discrepancies in writing.

¹² Exhibit F, Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

¹³ Exhibit I, Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

¹⁴ Exhibit I, Santa Fe's *Notice of Appeal*, OPA-PA-20-005.

¹⁵ Exhibit A, page 011, Santa Fe's *Notice of Appeal*, OPA-PA-20-005

2. Neither the Purchase Order Nor the Law Grants Santa Fe a Ten-Day “Contractual Right” to Cure its Deficiencies.

In its June 1, 2020 letter to GSA, Santa Fe stated that it was “invoking our contractual right to a 10-day cure period, as provided in the contract, section IX (iii).”¹⁶ For the same reason that the permissive language of Section IX(A)(iii) did not obligate GSA to provide Santa Fe with written notice of its deficiencies, nothing in the section likewise grants Santa Fe a “contractual right” to cure its deficiencies.

“There is no statutory right to cure . . .” *Basil Food Industrial Services v. Territory of Guam, General Services Agency, Department of Administration, and the Office of Public Accountability*, FINDINGS OF FACT AND CONCLUSIONS OF LAW: PLAINTIFF’S REQUEST FOR JUDICIAL REVIEW OF OPA’S DECISION ISSUED ON OCTOBER 27, 2016, CV0995-16, ¶ 6 (Super. Ct. Guam Sept. 4, 2018). To the extent that a right to cure exists, the right would have to have been granted by the language of the contract itself. “We look at the contracts to determine the terms that govern. If the language is clear and explicit and does not involve an absurdity, the plain language controls. *Basil Food Indus. Servs. Corp. v. Guam*, 2019 Guam 29, ¶15 *citing* 18 GCA § 87104 (language of a contract governs its intention).

The clear language of Santa Fe’s contract at Section IX(A)(iii) is not that Santa Fe has a ten-day right to cure, but rather that the Procurement Officer has the option whether to allow Santa Fe to cure. As authorized for by the contract, GSA exercised

¹⁶ Exhibit H, Santa Fe’s *Notice of Appeal*, OPA-PA-20-005.

its discretion and declined to give the hotel written notice and to allow for a cure. As a matter of law, the termination of the contract was proper and must be sustained.

3. The Public Health Emergency Mandated an Immediate Response That Made a Ten-Day Cure Impractical.

Under the *Islan Guåhan Emergency Health Powers Act*, Guam law requires that when persons are quarantined, the premises used for isolation must be maintained in a safe and hygienic manner to minimize the transmission of infection. 10 GCA § 19604(b)(7). Additionally, quarantined persons must have their needs addressed “in a systematic and competent fashion,” including providing adequate food. 10 GCA § 19604(b)(6).

Because of the quarantine emergency, GSA found it was necessary to immediately terminate the contract based on the hotel’s deficiencies because it was not feasible to consider giving Santa Fe the time to cure. The government’s primary goal was to implement “community mitigation strategies” and “further prevent the transmission of COVID-19”¹⁷ by assuring that the quarantine requirements in the Emergency Health Powers Act were in place at all times. Given that there were only eight quarantine days remaining for the passengers who were transferred out of the Santa Fe on May 24, waiting ten days for the hotel to cure its deficiencies was futile and would have posed a hardship on the quarantined passengers.

¹⁷ Executive Order No. 2020-04, *Relative to Responding to Confirmed Cases of Novel Coronavirus (COVID-19)*.

C. Termination was in the Best Interest of the Government.

In addition to termination for cause and for convenience, Section IX(A)(ii) also permits GSA to terminate the contract if it is in its best interests to do so: “GHS OCD may terminate this Agreement based upon a determination that such termination is the best interests of the Government. . . Circumstances for termination under this clause include but are not limited to Hotel’s successful completion of services under this Agreement *to the satisfaction of GHS OCD.*” (Emphasis added).

As discussed *supra*, Santa Fe was contracted as a quarantine facility under the Emergency Health Powers Act and the passengers were persons subject to mandatory legal quarantine. Under the Act at 10 GCA Sections 19604(b)(6) and (b)(7), Guam law requires that the quarantine facilities meet a health standard that minimizes the transmission of infection and competently meets the needs of quarantined persons who are placed at the facility by the government.

It was not only in the government’s best interest to ensure that a selected quarantine facility complied with the standards of the Emergency Health Act so that passengers could remain safely quarantined for fourteen days, but it was also its legal obligation and duty to enforce the Act and remove passengers if it believed that the standards were not being met. In this respect, the best interests of both the government and the passengers are aligned.

When GSA terminated the contract and moved quarantined individuals from the Santa Fe hotel, it did so because it was dissatisfied with the state of the facility and services that were being provided. If this matter goes to a hearing, GSA will

present evidence showing that many of the quarantined individuals complained to GHS OCD and expressed their dissatisfaction with the hotel.

D. The Purchase Order can be Terminated for Convenience.

Santa Fe argues that it was “not aware that there were concerns as to its compliance with the terms of the purchase order and agreement.”¹⁸ Even if this was true, GSA nevertheless reserved the right to unilaterally “to cancel or terminate [the contract] prior to its completion for *any* reason” including Termination for Convenience (Section IX(A)(iv)).

Santa Fe mistakenly argues that these “other termination provisions” are not applicable in this case.¹⁹ Santa Fe does not get to dictate what clauses GSA can or cannot invoke to cancel a contract. “In interpreting a clause of a contract to determine the intent of the contract to determine the intent of the contracting parties, whenever possible, the express language of the contract should control.” *In the Appeal Of, Basil Food Industrial Services*, OPA-PA-16-006 ¶ 6 (Oct. 27, 2016) quoting *Camacho v. Camacho*, 1997 Guam 5 ¶33.

Here, the express language of Section IX(A)(iv) says that the contract may be terminated “when the interests of GHS OCD so require . . . in whole or in part, for the convenience of GHS OCD.”²⁰ To this end, the contract only required that “written

¹⁸ Santa Fe’s *Notice of Appeal*, page 3, OPA-PA-20-005.

¹⁹ Appellant’s Comment on Agency Report, page 10, OPA-PA-20-005.

²⁰ Exhibit A at p. 012, Santa Fe’s *Notice of Appeal*, OPA-PA-20-005.

notice of the termination” be given,²¹ which was done. The language of the contract at Section IX is clear regarding the Government’s ability to terminate.

CONCLUSION

The undisputed evidence establishes that GSA properly exercised its discretion and contractual right to terminate the purchase order, and that there was no obligation to give Santa Fe advance written notice of its deficiencies or to allow it ten days to cure. Appellee GSA is therefore entitled to summary judgment against Appellant Santa Fe as a matter of law.

Even without cause, GSA was entitled to terminate the contract because it was in its best interest to move quickly due to the COVID-19 public health emergency in order to protect the health and lives of the quarantined passengers, and ultimately of the community. Finally, the law and the contract permit GSA to terminate the contract for convenience and without explanation.

For all the foregoing reasons, GSA submits that there are no factual disputes to be resolved and that summary judgment should be granted.

Respectfully submitted on this 3rd day of August, 2020.

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By: 

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²¹ Exhibit A at p. 012, Santa Fe’s *Notice of Appeal*, OPA-PA-20-005.