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Re: OPA-PA-21-007 Decision and Order

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Jerrick Hernandez, Auditor

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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

In the Appeal of G4S Security Systems (Guam), Inc., Appellant.	**Appeal No: OPA-PA-21-007** **DECISION AND ORDER**

To: **Purchasing Agency:**
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This procurement appeal was heard by Public Auditor Benjamin J.F. Cruz at an evidentiary hearing held on December 20 and 21, 2021. Appellant G4S SECURITY SYSTEMS (GUAM),

INC. ("G4S") was represented by Genevieve P. Rapadas, Esq. GUAM DEPARTMENT OF EDUCATION ("GDOE"), the procuring agency, was represented by James L.G. Stake, Esq. Interested Party PACIFIC DATA SYSTEMS, INC. ("PDS") was represented by Joshua D. Walsh, Esq. Interested Party TECHNOLOGIES FOR TOMORROW, INC. ("TFT") was represented by R. Marsil Johnson, Esq.

The Public Auditor has considered the procurement record, the documents submitted by the parties, the testimony and arguments made during the evidentiary hearing held herein, and the proposed findings of fact and conclusions of law filed by the parties on January 18, 2022, in reaching its decision.

FINDINGS OF FACT

Based on the record in this matter, the Public Auditor makes the following findings of fact:

1. On April 13, 2021, GDOE issued Multi-Step Invitation for Bid, IFB 026-2021 for Indoor and Outdoor Wireless Local Area Network ("WLAN") Infrastructure Installation Project (the "IFB").

2. PDS submitted a question to GDOE, asking whether each bidder was required to submit a C-68 Specialty Contractor license (for telecommunications) with its bid submission. *See* IFB, Amendment No. 4, page 2 of 3 (May 18, 2021); Procurement Record, Tab 1, G245.

3. On May 18, 2021, GDOE issued Amendment 4 to the IFB. *See* IFB, Amendment No. 4 (May 18, 2021); Procurement Record, Tab 1.

4. Amendment 4 included PDS' question (which is labeled as question "8") with a response from GDOE. The response did not state that the bidders were required to submit proof of a C-68 Specialty Contractor license with its bid submission. Specifically, GDOE provided the following response:

> GDOE Response: The project includes the furnishing and installation of network equipment to expand the wireless internet coverage in the public schools. This project is very similar to previous awarded wireless expansion projects in the public schools. The project activities does not include any structural fabrication/construction or structural alteration or repair.
>
> Bidders are responsible to be informed and knowledgeable of any regulatory requirements for this project. Bidders should be guided by any regulatory requirements issued from the federal and/or local governing entity.

See IFB, Amendment No. 4, page 2 of 3 (May 18, 2021); Procurement Record, Tab 1, G245.

5. On May 28, 2021, GDOE received bids for the IFB from TFT, G4S, PDS, and California Pacific Technical Services, LLC.

6. On July 13, 2021, GDOE selected TFT as the lowest, most responsible and responsive bidder for the IFB, to award the bid.

7. On August 10, 2021, G4S protested the award to TFT. G4S's protest was made on the basis that TFT "does not possess a Guam Contractor's License and has not submitted evidence of a valid Guam Contractor's License to perform work dictated by GDOE IFB 026-2021." *See* G4S Procurement Protest Letter (August 10, 2021).

8. On September 3, 2021, GDOE denied G4S' procurement protest on grounds that Guam procurement law requires that an IFB shall be evaluated based on requirements set forth in the IFB and that no criteria may be used in bid evaluation that are not set forth in the IFB. As the IFB did not require bidders to submit a Guam Contractor's License with their bid submission, GDOE determined that it had properly evaluated and awarded the IFB in accordance with the terms and conditions set forth in the IFB.

9. On September 17, 2021, G4S filed a procurement appeal. G4S's appeal was primarily based on its contention that a Guam Contractor's License "must have been previously

obtained to lawfully execute the terms of said IFB as a Specialty Contractor pursuant to 21 GCA Real Property CH. 70."

10. Following the commencement of the appeal before the OPA, the parties filed various motions, including a motion to dismiss by GDOE, which were all set for hearing on November 17, 2021.

11. On November 16, 2021, one day before the motion hearing commenced, G4S submitted a document signed by the Executive Director of the Contractor's License Board ("CLB") entitled "Findings & Decisions," dated November 1, 2021 ("Findings & Decisions").

12. The Findings and Decisions indicated that it was made in CLB Case Number 2021-09-03, as a result of a complaint filed against TFT by G4S on September 20, 2021.

13. On page 2 of the Findings and Decisions, it was stated that the CLB "will find TFT's [sic] in violation" of 21 G.C.A. §70108(a) for failing to obtain a license from the CLB. The Findings and Decisions did not explain how or why the CLB determined that TFT was in violation of 21 G.C.A. §70108(a). The Findings and Decisions also stated that the complaint was open.

14. At the motion hearing held on November 17, 2021, relying on the apparent validity of the Findings and Decisions, the Public Auditor denied GDOE's motion to dismiss and requested that GDOE submit evidence that would establish that TFT either had obtained the requisite licensing from the CLB or had engaged a licensed subcontractor. The Public Auditor advised the parties that, in the absence of such evidence from GDOE, the case would proceed to an evidentiary hearing.

15. As GDOE did not submit the requested evidence, the case proceeded to an evidentiary hearing on December 20 and 21, 2021. At the hearing, G4S called Nida Bailey, Investigation Supervisor for the CLB, to testify. During her direct examination, Ms. Bailey testified that: "The Board are [sic] the one that's making the decision for the cases . . . the Board

is the one that decides the case." Audio of Formal Hearing - December 20, 2021, Testimony of Nida Bailey (1:44:45 to 1:44:59).

16. During cross-examination, Ms. Bailey confirmed that it is the CLB who makes the decision, not her:

> Johnson: And you said during your direct examination that the Board decides the cases right?
> Bailey: Yes.
> Johnson: You don't decide the cases do you?
> Bailey: I don't decide them.

See Audio of Formal Hearing - December 20, 2021, Testimony of Nida Bailey (2:53:09 to 2:53:29).

17. Ms. Bailey went on to testify during cross-examination that the Board had not met since August 2021 and that there had been no hearing before the Board on G4S' complaint against TFT. Audio of Formal Hearing - December 20, 2021, Testimony of Nida Bailey (2:28:35 to 2:29:30).

18. When asked by the Public Auditor to describe how the Executive Director reached the decisions set forth in the Findings and Decisions, Ms. Bailey was unable to provide a clear answer. Audio of Formal Hearing - December 20, 2021, Testimony of Nida Bailey (beginning at 2:42:20).

19. The Findings & Decisions states, under the subheading "Decisions," that "[y]our Complaint is open." During her testimony, Ms. Bailey explained that this means that the Findings & Decisions is not a final decision:

> Bailey: I believe on the decision that was signed by the director. We did not close the case, because according to Mr. Mesa, the project is not awarded yet.
> Johnson: So it's not a final decision?

Bailey: The final decision would be probably when the project will be awarded.

See Audio of Formal Hearing - December 20, 2021, Testimony of Nida Bailey (2:33:31 to 2:33:58).

CONCLUSIONS OF LAW

1. Guam's procurement law provides that a "protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." 5 G.C.A. §5425(a).

2. The Supreme Court of Guam has noted that "[c]ourts have consistently rejected [the] argument that a party becomes 'aggrieved' for purposes of a procurement protest 'only when it loses the potential business, that is, when a bidder learns that it was not awarded a contract.'" DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 Guam 20, ¶85

3. In this case, the bidders were all made aware that GDOE would not require proof that a bidder held a C-68 Specialty Contractor's License with its bid submission by May 18, 2021. G4S did not file its protest within fourteen (14) days of May 18, 2021. Instead, G4S filed its protest on August 10, 2021. Therefore, pursuant to 5 G.C.A. § 5425(a), G4S's procurement protest was untimely.

4. In JMI-Edison v. Guam International Airport Authority, OPA Appeal No. OPA-PA-21-010, Decision and Order (Feb. 3, 2022) ("JMI case"), the appellant argued that the successful offeror should have been found to be non-responsible, in that the offeror lacked a license from the CLB. Prior to a hearing on pending motions in the case, an officer of the appellant emailed the Executive Director of the CLB and requested that he issue, as CLB Findings and Decisions, a draft document prepared by the appellant which would help the appellant's case in the appeal. The draft document stated that the offeror needed to be licensed by the CLB in order

to perform the scope of work under the RFP in question. The Executive Director put the appellant's requested "Findings and Decisions" on CLB letterhead and appellant submitted the Findings and Decisions to the OPA. After the successful offeror submitted evidence as to how appellant obtained the Findings and Decisions, the OPA dismissed the appeal. The OPA found that the appellant's submission of the Findings and Decisions as a purported independent neutral administrative action was a fraud on the tribunal.

5. The document at issue in the instant case states that it represents "Findings and Decisions" by the CLB. However, "concurrence of four members of the CLB Board is necessary for the validity of any of its actions". 21 G.C.A. §70102(b). The CLB's Executive Director "shall act only with the advice and consent of the Board." 21 G.C.A. §70104(a).

6. While it is unclear how and why the Executive Director came to issue the Findings and Decisions submitted in this case, the OPA is concerned about the probity and reliability of that document, given the misconduct in the JMI case.[1]

CONCLUSION

Based on the foregoing, the Public Auditor makes the following determinations:

1. G4S' appeal is hereby DISMISSED WITH PREJUDICE.

2. The parties shall bear their respective costs and attorneys' fees.

This is a Final Administrative Decision for Appeal No. OPA-PA-21-007. The Parties are hereby informed of their right to appeal the Hearing Officer's Decision to the Superior Court of Guam in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties

[1] It has recently been reported that the Executive Director has since resigned his position. *See* Orsini Resigns; Adelup: OPA report troubling, Guam Daily Post (Feb. 5, 2022); https://www.postguam.com/news/local/orsini-resigns-adelup-opa-report-troubling/article_9feaaed4-8583-11ec-a96c-932f73497ce3.html

and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at www.opaguam.org.

SO ORDERED this 9th day of February 2022 by:

Benjamin J. F. Cruz
Public Auditor of Guam

Gmail

Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-21-007 Decision and Order

Jerrick Hernandez <jhernandez@guamopa.com> Wed, Feb 9, 2022 at 11:55 AM
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Hafa Adai,

Please see attached Decision and Order for OPA-PA-21-007. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Regards,

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