



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of G4S Security Systems (Guam) Inc.; OPA-PA-21-007

Claire Pollard <cpollard@rwtguam.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: tbagana@guamopa.com, vduenas@guamopa.com, "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached *Trial Brief* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 989-3009

(F): 989-8750



12.3.21 PDS Trial Brief.pdf

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RAZZANO WALSH & TORRES, P.C.

JOSHUA D. WALSH
SUITE 100, 139 MURRAY BLVD.
HAGÁTÑA, GUAM 96910
TELEPHONE: (671) 989-3009
FACSIMILE: (671) 989-8750

*Counsel for Interested Party
Pacific Data Systems, Inc.*

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

G4S Security Systems (Guam) Inc.,

Appellant.

APPEAL NO: OPA-PA-21-007

TRIAL BRIEF

I. INTRODUCTION

Interested Party Pacific Data Systems, Inc. (PDS) ("PDS" or "Interested Party") submits this Trial Brief in conformance with the Order of the Office of Public Accountability ("OPA") issued on October 25, 2021. Appellant G4S Security Systems (Guam) Inc. has protested GDOE Multi Step Invitation for Bid ("IFB") 026-2021 for Indoor and Outdoor Wireless Local Area Network ("WLAN") Infrastructure Installation Project issued on April 13, 2021.

This Trial Brief will assist the OPA in addressing the following list of issues to be resolved in this consolidated Appeal:

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

- of work that requires performance by a contractor properly licensed by the Guam Contractors Licensing Board?
2. Did the IFB, in specifying that an offeror comply with all applicable Guam licensing laws, require that an award can only be made to an offeror with a suitable Guam Contractor's license?
 3. Did the Department of Education violate Guam procurement law to the extent that the IFB did not require that an offeror have a Guam Contractor's license?
 4. Does Technologies for Tomorrow Inc. ("TFT") have a valid and suitable Guam Contractor's License?
 5. Was TFT a responsive offeror under the IFB?
 6. Was TFT a responsible offeror under the IFB?

II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

The Guam Department of Education ("GDOE") issued the above Invitation for Bid on April 13, 2021. Four bidders, Technologies for Tomorrow Inc. ("TFT"), California Pacific Technical Services LLC, Pacific Data Systems, Inc. ("PDS") and G4S Security System (Guam) Inc ("G4S") submitted bids in response to the GDOE Bid invitation. On July 13, 2021, GDOE sent Bid Status Notification recommending an award to TFT. A contemporaneous Notice of Award was issued that explained how the award was conditional, and provided no rights to TFT until a final contract was executed.¹ Because TFT was selected for award despite being non-responsive to the bid by failing to have a valid contractor's license, G4S

¹ Both the Award recommendation and notice of award were attached as exhibits to the Notice of Appeal filed by G4S on September 17, 2021.

submitted an agency level protest on July 29, 2021, of the award notice designating GTA for award. On September 3, 2021, the Agency denied the protest. G4S's appeal to the OPA followed. GDOE provided no notice of the G4S protest or appeal to PDS. Following Motion practice, G4S provided the Findings and Decisions of the Guam Contractors Licensing Board to the OPA and parties. Those CLB conclusions confirmed that TFT does not hold a contractor's license on Guam, and that TFT is in violation of Guam law by not obtaining a C-68 License for the performance of the work contemplated under the IFB.

A. TFT LACKS A VALID CONTRACTOR'S LICENSE AND THE SCOPE OF WORK CONTEMPLATED BY THE IFB REQUIRES A CONTRACTOR'S LICENSE.

The essential facts of this appeal have been resolved by the CLB's determination of November 1, 2021, that TFT has no license and needs a C-68 license to perform under the IFB. But, even without the CLB determination, the procurement record exposes the non-responsible and non-responsive nature of TFT.

GDOE describes the work it is procuring as "infrastructure installation." Procurement Record, 284. On Guam, a "contractor" needing a contractor's license is defined as "any person who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project development or improvement or do any part thereof, including the erection of scaffolding or other structure of works in connection therewith for another person for a fee." 21 G.C.A. § 70100(b). Contractors working on Guam may not do so, or even present themselves as being able to do so, "without a license previously obtained under and in compliance with

this Chapter and the rules and regulations of the Contractor's License Board (CLB)." 21 G.C.A. § 70108(a). Since TFT does not have "the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance," TFT is a non-responsible offeror. 5 GCA § 5201 (f).

GDOE does not contest that TFT does not have a valid contractor's license. GDOE Agency Statement, 2. The terms and conditions of the IFB require responsive offerors to be knowledgeable and observe "federal and local laws, codes, ordinances, and regulations, which, in any manner, affect those engaged or employed in the work, or the material or equipment, used in or upon the site, or in any way affect the conduct of the work." Procurement Record, 024, IFB Terms and Conditions, § 4.2. The IFB also requires that offerors must be appropriately licensed. Procurement Record, 024, IFB Terms and Conditions, § 4.4. Once the proposals of the offerors were received, and at least after G4S's protest was lodged, GDOE should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. See 5 G.C.A. 5201(g) ("Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids."). Rather, DOE explains that the law prohibits it from making such an examination, since 5 GCA §5211(e) mandates that "No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids." GDOE Agency Statement, 3, *citing* 5 GCA §5211(e). GDOE, in merely confining itself to the contents of the bid envelope, has ignored its obligation to determine if TFT, by submitting a bid for contracting work despite not having a contractor's license, is in fact a non-responsive and non-

responsible offeror. We know from the CLB determination that this was the case, and DOE could have made this determination itself had DOE not ignored the plain requirements of the IFB to assure that any awardee of the IFB was properly licensed to work on Guam.

Guam law makes it plain that GDOE's contracting officer is required to make a responsibility determination based on standards that are not specifically in the bid envelope. *See*, 5 GCA § 5230; 2 GAR § 3116. (setting factors to consider such as "appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them" as well as "a satisfactory record of integrity"). GDOE is also ignoring the mandate to make sure that "Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible." 2 GAR § 3116 (b)(4).

B. DOE'S NOTICE PROCEDURES AND RECORD SUBMISSION VIOLATES LAW.


Guam law mandates that "The Chief Procurement Officer ... shall give notice of the Appeal to the contractor if award has been made or, if no award has been made, **to all Interested Parties**; shall instruct said parties to communicate directly with the Public Auditor regarding the status of the Appeal, and directly with the procurement officer as allowed by law regarding the protested procurement action; and shall communicate to the Public Auditor the identities and addresses of said parties." 2 GAR § 12104(c)(2) (emphasis added). Here, GDOE intentionally omitted providing notice to any party other than TFT regarding the appeal. *See*, GDOE Notice of Interested Parties, September 27, 2021. This was in violation of law.

III. CONCLUSION

GDOE issued an IFB that was designated for award to a bidder offering to do contractor work without a valid contractor's license. The Procurement Record confirms that the intended awardee does not comply with these requirements, and the CLB itself has reconfirmed this fact. The award to TFT should be cancelled.

Respectfully submitted this 3rd day of December, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 
JOSHUA D. WALSH
Attorneys for Interested Party
Pacific Data Systems, Inc.