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GDOE Rebuttal to Comments re OPA-PA-21-007

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Hafa Adai All,

Please see attached document for OPA-PA-21-007. Kindly confirm receipt, thank you.

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Guam Department of Education

**GDOE Rebuttal to Third Place Bidder (PDS) Comments OPA 21-007 (IFB 026) 102121.pdf**

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8 **OFFICE OF THE PUBLIC AUDITOR**
9 **PROCUREMENT APPEALS**

10 In the Appeal of

11 APPEAL CASE NO. OPA-PA-21-007

12 G4S Security Systems (Guam) Inc.,

13 **REBUTTAL TO COMMENTS ON AGENCY**
14 **REPORT BY THE THIRD PLACE BIDDER**
15 **(PDS)**

16 Appellant.

17 COMES NOW the Guam Department of Education (GDOE), by and through its Legal
18 Counsel, and files its Rebuttal to Comments on Agency Report by the Third Place Bidder, Pacific
19 Data Systems Inc. (also “PDS”) in response to the appeal of G4S Security Systems (Guam) Inc.,
20 of GDOE Multi-Step Invitation for Bid (IFB) 026-2021, for Indoor and Outdoor Wireless Local
21 Area Network (WLAN) Infrastructure Installation Project.

22 **I. RELEVANT BACKGROUND**

23 On April 13, 2021, GDOE issued its Multi-Step IFB 026-2021 for Indoor and Outdoor
24 Wireless Local Area Network (WLAN) Infrastructure Installation Project (hereinafter referred to
25 as the “IFB”). On May 28, 2021, GDOE received bids for the IFB from G4S Security Systems
26 (Guam) Inc. (hereafter referred to as “Appellant”) and Technologies for Tomorrow Inc. (hereafter
27 referred to as “TFT”). The final prices of the IFB from lowest to highest were TFT
28 (\$1,531,820.00), G4S Security Systems (Guam) Inc. or Appellant (\$1,944,000.00), PDS
(\$2,213,208.00), and California Pacific Technical Services LLC (\$3,750,285.30). *See*
Procurement Record at 545. On July 13, 2021, GDOE awarded to TFT as the lowest, most
responsible and responsive bid for the IFB. On August 10, 2021, Appellant protested the award

1 for TFT based on the grounds that TFT allegedly does not have a Guam Contractors License to
2 perform service. *See* Appellant’s Notice of Appeal at 8. On September 3, 2021, GDOE issued its
3 denial of Appellant’s protest. On September 20, 2021, GDOE received the notice of receipt of
4 appeal from the Office of the Public Auditor (OPA). On September 27, 2021, GDOE properly
5 performed its notice requirements as provided by the regulations. *See* 2 GAR Div. 4
6 §12104(c)(2). On October 14, 2021, PDS the third place bidder for the IFB, filed its Comments
7 on the Agency Report. The following is GDOE’s rebuttal to the third place bidder’s comments.

8 **II. PDS IS NOT AN INTERESTED PARTY, HAS NO STANDING IN THIS APPEAL,**
9 **AND IS DISRUPTING THE INTEGRITY OF THE APPEAL PROCESS.**

10 PDS is not an interested party in this Appeal. Guam Procurement law defines an
11 interested party as an actual or prospective bidder, offeror, or contractor **who appears to have a**
12 **substantial and reasonable prospect of receiving an award if the Appeal is denied.** *See* 2
13 GAR Div. 4 §12102(b); *compare with* 31 USC §3551(2) (Defines an Interested party with respect
14 to a contract or solicitation or other request for offers as an actual or prospective bidder or offeror
15 **whose direct economic interest would be affected by the award** of the contract or by failure to
16 award the contract).

17 By definition, PDS does not have a substantial and reasonable prospect of receiving an
18 award in any outcome of this Appeal, because the award is to TFT and the second place
19 Appellant is the party with standing regarding the prospect of receiving an award dependent on
20 the outcome of this Appeal. *See* 2 GAR Div. 4 §12102(b). PDS is not the Appellant and will be
21 unaffected by the result of this Appeal. For these reasons, PDS also has no direct economic
22 interest in this Appeal, regardless of the final decision. *Compare with* 31 USC §3551(2). Instead,
23 PDS is actively disrupting the integrity of this appeal process. PDS will gain nothing from the
24 result of this appeal. PDS appears to be improperly using this appeal process as a vehicle to
25 compel the OPA to entertain separate issues not included in the original protest for the purpose of
26 benefitting their personal interest. Guam Procurement law does not allow this and the intent of
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1 the appeal process is to promote the integrity of the procurement process. *See* 5 GCA §5703.
2 PDS is clearly not an interested party, and there is no integrity in what PDS is now doing.

3 In Guam, standing may be conferred either constitutionally or statutorily. *Teleguam*
4 *Holdings LLC v. Guam*, 2018 Guam 5 at 8. Based on the above, PDS has no statutory standing
5 because it is not an interested party under this appeal. To establish constitutional standing a party
6 must show: (1) it has suffered an injury in fact; (2) that the injury can be fairly traced to the
7 challenged action taken by the defendant; and (3) that it is likely beyond mere speculation that a
8 favorable decision will remedy the injury sustained. *See In re A.B. Won Pat Int'l Airport Auth.*,
9 2019 Guam 6 at 9 (also citing *Guam Mem'l Hosp. Auth.*, 2012 Guam 17 ¶ 10). The requirement
10 of an injury in fact is a hard floor of jurisdiction that cannot be removed by statute, and that party
11 seeking to establish injury has the burden of proving standing. *In re A.B. Won Pat Int'l Airport*
12 *Auth.*, 2019 Guam 6 at 11. Here, PDS has failed to show all three (3) factors above.

13 Therefore, PDS has no standing before the OPA and it is not an interested party. For these
14 reasons, GDOE respectfully requests that the OPA exclude their rebuttal filings which are clearly
15 intended to disrupt and corrupt the integrity of the appeal process. *See* 5 GCA §5703.

16 **III. GUAM PROCUREMENT LAW CLEARLY AND DIRECTLY ADDRESSES THE**
17 **APPEAL.**

18 Guam Procurement law is clear on this matter. Guam Procurement law states that bids
19 **shall** be evaluated based on the requirements set forth in the invitation for bids and that **no**
20 **criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.** *See* 5
21 GCA §5211(e). The contract shall be awarded with reasonable promptness by written notice to
22 the lowest responsible bidder whose bid **meets the requirements and criteria set forth in the**
23 **Invitation for Bids.** *See* 5 GCA §5211(g). The IFB did not require the submission of a Guam
24 Contractor's license. *See* Procurement Record at 1-252. Also acknowledged by the Appellant.
25 *See* Appellant's Notice of Appeal at 8. Therefore, in accordance with Guam law and the terms
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1 and conditions of the IFB, GDOE properly evaluated and awarded the IFB. *See* 5 GCA
2 §§5211(e) & (g).

3 Appellant here does not contest that the Procurement law addresses the entirety of their
4 appeal. *See* Appellant's Notice of Appeal at 8. Both Appellant and the third place bidder, make
5 their claims without providing actual legal authority on evaluating and awarding an IFB based on
6 terms not set forth in the IFB. Appellant and third place bidder also fail to provide any legal
7 authority that requires GDOE and its procurement officers to evaluate and award an IFB based on
8 additional terms not set forth in the IFB. This is not required. Instead, Guam Procurement law
9 directly addresses this issue, and as a result this matter should be dismissed.

10 Numerous courts have addressed this exact same issue repeatedly and case law on this
11 matter is well established. In *Kyorkin Construction, Inc.*, B-226238 (1987), the Government
12 Accountability Office (GAO) held that, where a solicitation contains a general licensing
13 requirement, but does not require that a successful bidder possess any specific license, the
14 contracting officer is free to make an award without considering whether the bidder is licensed
15 under state law. In *Kyorkin Construction, Inc.*, the Protester contested the award because the
16 winning bidder did not possess a valid California contractor's license and argued that they were
17 not in compliance with the IFB's licensing requirement. The GAO held that where, as here, no
18 specific license requirement is imposed, the contracting officer is free to make an award without
19 regard to whether the bidder is actually licensed under state law. *Id.* **This is so because**
20 **contracting officers generally are not competent to pass upon the question of whether a**
21 **particular license is legally required for the performance of work.** *Id.* Compliance with a
22 general licensing requirement is a matter to be resolved by the contractor and the state authorities.
23 *Id.* Since the provision here does not require a specific license, the awardee's lack of a license at
24 the time of contract award does not provide a legal basis to object to the award. *Id.* (also citing
25 *Metropolitan Ambulance Service, Inc.*, B-213943 (1984)).
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1 In addition, in *Hap Construction, Inc.*, B-278515 (1998), the GAO held that a general
2 licensing requirement is a performance requirement, not a definitive responsibility criterion, and
3 it need not be satisfied prior to award. In *Hap Construction, Inc.*, the protester argued that the
4 possession of valid Virgin Island licenses was a definitive responsibility criterion which was
5 required to be satisfied prior to award. *Id.* The IFB did not require that the bidders provide
6 evidence of licensing with their bids, rather the IFB simply used standard Federal Acquisition
7 Regulations (FAR) language calling for compliance with any applicable licensing requirements
8 during the performance of the contract. *Id.* **A general requirement such as this to comply with
9 federal, state or local laws and to obtain necessary local licenses does not itself render the
10 requirement a definitive responsibility criterion even if local statutes require licenses as
11 precondition to submitting a bid. *Id.* Rather, the requirement is a performance
12 requirement which may be satisfied during the contract performance and does not affect
13 the decision to award except as a general responsibility matter. *Id.***

14 Furthermore, in *Interstate Industrial Incorporated*, B-241974 (1990), a protester argued
15 that bidders did not possess required state licenses at the time of the bid opening for the IFB. The
16 GAO held that where a solicitation does not impose a requirement that a bidder have a particular
17 license, but instead contains only a general requirement that the bidder comply with any
18 applicable licensing requirements, the contracting officer may properly make the award without
19 regard to whether the bidder possesses the licenses at the time of the award. *Id.* (also citing *Rowe*
20 *Contracting Serv., Inc.*, B- 228647 (1987)).

21 Moreover, in *American Mutual Protective Bureau*, B-208067 (1982), a protester argued
22 that the winning bid for the IFB did not have the required state license for performance. The
23 GAO recognized a distinction between a solicitation requirement that the bidder have a particular
24 license or permit and a general requirement that a bidder comply with any applicable licensing
25 and permit requirements. *Id.* In the former case, the requirement is one specifically established
26 for the procurement and compliance therewith is a matter of bid responsibility while, in the latter
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1 case, a bidder's failure to possess a particular license or permit is not necessarily a prerequisite to
2 award, **since the need of a license or permit to perform a contract is a matter between the**
3 **bidder and the licensing authority.** *Id.* (also citing *Career Consultants, Inc.*, B- 195913
4 (1980)). The GAO held that, there is no indication that under either IFB any particular license or
5 permit was required; consequently, the lack of a license would not be a bar to an affirmative
6 determination of responsibility. *Id.*

7 Based on the above, this issue before the OPA has been decided repeatedly by other courts
8 and is directly consistent with Guam Procurement law stating that the IFB shall be evaluated and
9 awarded in accordance with its published terms. *See* 5 GCA §§5211(e) & (g). Therefore, GDOE
10 properly evaluated and awarded the IFB and this Appeal should be dismissed.

11 **IV. THIS APPEAL IS NOT PROPERLY BEFORE THE OPA AND FAILS TO STATE**
12 **A VALID CLAIM ON WHICH THE OPA IS ABLE TO DECIDE.**

13 The Public Auditor has the power to promote the integrity of the procurement process and
14 the purposes of Guam's Procurement laws, and the Public Auditor's jurisdiction shall be utilized
15 to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5, Guam
16 Procurement Law. *See* 5 GCA §5703. The Public Auditor shall determine whether a decision on
17 a protest of method of selection, solicitation or award of a contract, or entitlement to costs is in
18 accordance with the statutes, regulations, and the terms and conditions of the solicitation. *See* 2
19 GAR Div. 4 §12112. Here, the foundation of this protest is **not** a procurement issue. Appellant's
20 allegations against TFT do not include a method of selection, solicitation or award of a contract,
21 or entitlement to costs in accordance with the statutes, regulations, and the terms and conditions
22 of the IFB, and therefore this appeal is not properly before the OPA and should be dismissed. *Id.*
23 The OPA does not have jurisdiction over matters that are within the legal authority of the Guam
24 Contractors License Board (also the "Board"). Appellant and PDS have failed to provide any
25 legal authority for the OPA to stand in the shoes of the Guam Contractors License Board and
26 enforce the rules and regulations of the Board.
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1 Guam law directly addresses the question of who has jurisdiction over the issue raised by
2 this appeal. The Contractors License Board shall enforce the rules and regulations adopted
3 pursuant thereto; and the enforcement of Chapter 70, which includes the requirement of a Guam
4 Contractors License, shall be the Board, not the OPA. *See Generally* 21 GCA Chapter 70. For
5 these reasons, this appeal is not properly before the OPA, this is not a procurement matter, and
6 thus this appeal should be dismissed.

7 In addition, Appellant G4S concedes that Guam Procurement Law mandates that an IFB
8 shall be evaluated based on the requirements set forth in the IFB and that GDOE IFB 026-2021 in
9 its published terms and conditions did not require the submission of a Guam Contractor's license.
10 *See* Appellant's Notice of Appeal at 8. Therefore, the parties are all in agreement that the
11 procurement law prohibits the subsequent inclusion of a Guam Contractors License requirement
12 in the evaluation and award of the IFB. Consequently, this appeal fails to provide a valid claim
13 for the OPA to decide on, and over which the OPA has jurisdiction. Other courts have held that
14 in the event a protester has failed to state a valid basis for protest, such protest may be dismissed.
15 *See Ensign-Bickford Company*, B-274904 (1996); *see also Sun Environmental, Inc.-*
16 *Reconsideration*, B- 228491 (1987) (The GAO held that when a protest, on its face, does not state
17 a valid basis for protest, the GAO will summarily dismiss the protest without requiring the
18 submission of an agency report). The Appeal before the OPA is clearly not a valid basis for
19 protest, and GDOE respectfully request that the OPA dismiss this appeal in its entirety.
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21 In conclusion and based on the aforementioned reasons, GDOE respectfully requests that
22 the OPA dismiss this appeal in its entirety.

23 Respectfully submitted this 21st day of October 2021,

24 **GUAM DEPARTMENT OF EDUCATION**

25 By: 
26 **JAMES L.G. STAKE**
27 *Legal Counsel*