



Jerrick Hernandez <jhernandez@guamopa.com>

RE: In the Appeal of G4S Security Systems (Guam), Inc.; Appeal No. OPA-PA-21-007

R. Marsil Johnson <rmarsjohnson@bsjmlaw.com>

Wed, Dec 15, 2021 at 5:14 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

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Dear Mr. Hernandez:

Please see attached **Interested Party Technologies for Tomorrow, Inc.'s Opposition to G4S Security Systems (Guam), Inc.'s Motion in Limine** for e-filing in the above-referenced matter.

Should you have any questions or concerns, please let us know. Kindly confirm receipt via return e-mail.

Thank you.

Regards,

R. MARSIL JOHNSON**BLAIR STERLING JOHNSON & MARTINEZ**

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E-mail: rmarsjohnson@bsjmlaw.comwww.bsjmlaw.com**NOTICE:** Please update your address book to reflect my new e-mail address – rmarsjohnson@bsjmlaw.com. Thank you.

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110K**2021.12.15 - TFT OPPOSITION TO G4S MOTION IN LIMINE RE TFT APPEAL OF G4S, OPA-PA-21-007.pdf**
237K

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11
12 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
13 **PROCUREMENT APPEAL**
14

15 In the Appeal of)	Docket No. OPA-PA-21-007
)	
16 G4S Security Systems (Guam), Inc.,)	TECHNOLOGIES FOR
)	TOMORROW, INC.’S
17 Appellant.)	OPPOSITION TO
)	G4S SECURITY SYSTEMS (GUAM),
)	INC.’S MOTION IN LIMINE
)	

18 Interested Party **TECHNOLOGIES FOR TOMORROW, INC.** (“TFT”), hereby submits its
19 opposition to the G4S Security Systems (Guam), Inc. (“G4S”) Motion in Limine filed in the above-
20 captioned Office of Public Accountability Procurement Appeal concerning Guam Department of
21 Education (“GDOE”) Invitation for Bid No. IFB 026-2021 (the “IFB”).

22 Procurement appeal hearings before the OPA are required to be informal. Participation by
23 interested parties aids the Public Auditor fulfill his duty to conduct a de novo review of agency
24 procurement decisions. Interpretation of the procurement law to allow interested parties to
25 meaningfully participate in the appeal process promotes the underlying purposes and policies of
26 the law, which includes ensuring the fair and equitable treatment of all persons who deal with
27 Guam’s procurement system, fostering effective broad-based competition, and safeguarding the
28 quality and integrity of the procurement system. 5 G.C.A. § 5001(b)(4), (5), and (6).

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1 **ARGUMENT**

2 **A. TFT ENTERED ITS APPEARANCE BECAUSE THE PUBLIC AUDITOR SUGGESTED THAT**
3 **TFT’S WAS MISSING FROM THE APPEAL AND TFT HAS INFORMATION THAT MAY HELP**
4 **RESOLVE THIS APPEAL**

5 The Hearing Officer may “[r]equire parties to state their positions with respect to the
6 various issues in the proceeding,” “[r]equire parties to produce for examination those relevant
7 witnesses and documents under their control”, and “[c]onsider testimony and evidence submitted
8 by any competing bidder, offeror or contractor of the protestant or appellant.” 2 G.A.R. Section
9 12109(b), (c), and (j).

10 At the November 17, 2019 motion hearing, the Public Auditor (acting as the Hearing
11 Officer in this matter) suggested that TFT was missing from the appeal. TFT believes the Public
12 Auditor was correct—TFT was missing from the appeal and has information that may help resolve
13 it. As a consequence, TFT retained counsel and made its appearance.

14 Since the Public Auditor has the authority to include TFT in this appeal and because TFT’s
15 participation may assist the appeal process, the Public Auditor should exercise his authority, as
16 provided in 2 G.A.R. Div. 4 § 12109, and allow TFT to participate in this appeal.

17 **B. EXCLUDING ARGUMENTS RAISED BY INTERESTED PARTIES UNLAWFULLY**
18 **CONSTRAINS THE PUBLIC AUDITOR’S ABILITY TO CONDUCT A DE NOVO REVIEW AND**
19 **HURTS THE INTEGRITY OF THE PROCUREMENT PROCESS**

20 G4S’s interpretation of Guam procurement law subjugates interested parties to mere
21 window dressing status and would deprive the Public Auditor of the benefit of considering
22 arguments raised by a party who is inherently interested in the resolution of the procurement
23 appeal. This cannot be the rule.

24 Guam procurement law specifically allows interested parties to comment on the agency
25 report, submit testimony, introduce evidence, and participate in hearings before the Public Auditor.
26 2 G.A.R., Div. 4 § 12104(c)(4). Nothing in Guam procurement law in any way requires exclusion
27 of interested parties from the appeal process. Even the comment regulation cited by G4S only
28

1 states that interested parties may result in the resolution of the appeal without consideration of the
2 comments. 2 G.A.R. § 12104(c)(5). Thus, resolution of an appeal without consideration of
3 comments is fully within the discretion of the Public Auditor.

4 This is important, because Guam procurement law requires that the Public Auditor conduct
5 a thorough, de novo review of agency decisions and nothing in Guam’s procurement law should
6 be used to constrain the Public Auditor’s duty to engage in a de novo review of procurement
7 appeals. See *Data Mgmt. Res., LLC v. Off. of Pub. Accountability*, 2013 Guam 27 (Guam Nov.
8 22, 2013) (“Nothing in Guam’s Procurement Law restricted OPA’s power, as provided by statute
9 and in the GAR, to review the propriety of terms and conditions of the bid solicitation at issue.”).
10 “Under this de novo review, neither factual nor legal conclusions made by the procuring agency
11 in denying a protest are entitled to deference.” *DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*,
12 Guam, 2020 Guam 20, ¶ 42 (Guam Dec. 7, 2020).

13
14
15 If G4S’s motion in limine is granted, the Public Auditor would not be allowed to consider
16 arguments raised by TFT in its hearing brief, resulting in an unlawful restriction on the Public
17 Auditor’s review of the issue before it.

18 G4S’s interpretation is also contrary to the principles and purposes of Guam procurement
19 law. 5 G.C.A. § 5001(a) and (b). These principles and purposes must be considered when
20 construing and applying the procurement law. G4S’s argument is also contrary to the statute which
21 requires the Public Auditor utilize its jurisdiction to promote the integrity of the procurement
22 process and the purposes of 5 G.C.A. Chapter 5. 5 G.C.A. § 5703(f).

23
24 The integrity of the procurement process is best served by allowing the Public Auditor to
25 consider all relevant evidence and arguments for an adequately considered decision. It could only
26 injure the integrity of the procurement process to require the Public Auditor to consciously turn a
27 blind eye to valid arguments that could be raised by interested parties in procurement appeals.
28

1 Lastly, Ninth Circuit case law cited by G4S to support its position does not relate at all to
2 the Guam procurement appeals and contradicts the practice of the Supreme Court of Guam, which
3 has requested and considered new arguments presented by interested parties even after oral
4 argument.

5 The Ninth Circuit opinion in *Howard v. F.A.A.*, 17 F.3d 1213 (9th Cir. 1994) cited by G4S
6 does not involve procurement, nor does it concern or interpret Guam procurement law. It involves
7 the suspension of a commercial pilot’s license by the Federal Aviation Administration. It
8 addresses a petitioner’s failure to raise an issue at the agency level (not that of an interested party)
9 and the failure of the petitioner to exhaust administrative remedies. There was no interested party
10 in *Howard*. The *Howard* court’s refusal to permit the petitioner to raise new points on appeal was
11 also partly based on a statute that explicitly barred petitioners from raising new arguments on
12 appeal:
13

14 We cannot reach Petitioner's first argument because he did not raise the claim
15 below. Under the code, “No objection to an order of the Board or Secretary of
16 Transportation shall be considered by the court unless such objection shall have
17 been urged before the Board or Secretary of Transportation or, if it was not so
18 urged, unless there were reasonable grounds for failure to do so.” 49 U.S.C.App. §
1486(e).

19 *Howard v. F.A.A.*, 17 F.3d 1213, 1216 (9th Cir. 1994). No such statute or rule exists barring
20 interested parties from raising new arguments before the Public Auditor in Guam procurement
21 appeals. As such, the opinion in *Howard* is as far as can possibly be removed from the subject of
22 interested parties’ participation in Guam procurement appeals.

23 In contrast, the Supreme Court of Guam in *Fleet Servs., Inc. v. Dep’t of Admin., Gov’t of*
24 *Guam*, 2006 Guam 6 (2006), at oral argument, requested further briefing from the parties (which
25 included an interested party), about whether the procurement in *Fleet Services* was within the
26 scope of procurement of “other professionals” as set forth in 5 G.C.A. § 5121. *Id.* at ¶ 8. This
27 issue had not been raised at all prior to the Supreme Court of Guam requesting the parties to brief
28

1 the issue. Thus, if it is not too late or improper for the Supreme Court of Guam to ask an interested
2 party to brief a new issue of law at oral argument then it should be well within the authority of the
3 Public Auditor to consider new arguments raised by interested parties while he conducts a de novo
4 review of an agency procurement decision.

5 **CONCLUSION**

6 Based on the foregoing, TFT respectfully requests that G4S's motion in limine be denied
7 in its entirety and that TFT be permitted to participate in the hearing in this appeal so that the
8 Public Auditor may gain as full an understanding of the facts and circumstances of this appeal
9 before issuing his decision.
10

11 **DATED** this 15th day of December, 2021.

12 **BLAIR STERLING JOHNSON & MARTINEZ**
13 **A PROFESSIONAL CORPORATION**

14 
15 BY: _____

16 **R. MARSIL JOHNSON**
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