

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Ms. Claudia S. Acfalle Chief Procurement Officer General Services Agency Department of Administration 148 Route 1 Marine Drive Piti, Guam 96915 Phone: (671) 475-1707 Fax: (671) 475-1727/472-4217	From:	Benjamin J.F. Cruz Public Auditor Office of Public Accountability
		Pages:	10 (including cover page)
CC:	Ms. Georgette Bello Concepcion, Esq. Brooks Concepcion Law, P.C. 247 Martyr Street, Ste. 101 Hagatna, Guam 96910 Phone: (671) 472-6848 Fax: (671) 477-5790	Date:	June 24, 2020
		Phone:	(671) 475-0390 x. 208
		Fax:	(671) 472-7951

Re: OPA-PA-20-005 Notice of Receipt of Appeal

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 Jerrick Hernandez, Auditor
jhernandez@guamopa.com



OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910

Phone: (671) 475-0390 / FAX: (671) 472-7951

June 24, 2020

Ms. Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

VIA FACSIMILE: (671) 475-1727

Re: Notice of Receipt of Appeal – OPA-PA-20-005

Dear Ms. Acfalle,

Please be advised that Beach Resort LLC dba The Hotel Sante Fe Guam (hereinafter referred to as “Hotel Santa Fe” filed an appeal with the Office of Public Accountability (OPA) on June 23, 2020, regarding the General Services Agency’s response to Hotel Santa Fe’s protest of the termination of its contract agreement related to quarantine hotels for the Government of Guam. (Purchase Order P206E00310). OPA has assigned this appeal case number OPA-PA-20-005.

Immediate action is required of GSA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at www.opaguam.org. The first six pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

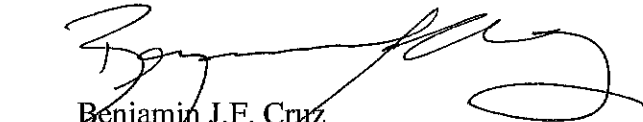
Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Wednesday, July 1, 2020**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Monday, July 13, 2020**, twenty (20) calendar days following receipt of this notice.

When filing all other required documents with our office, please provide one original and two copies to OPA (Electronic files of the two copies are acceptable for OPA), and serve a copy to

Hotel Santa Fe. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that GSA provide one original and two copies of the said record (Electronic files of the two copies are acceptable), which will be distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or jhernandez@guamopa.com should you have any questions regarding this notice.

Sincerely,



Benjamin J.F. Cruz
Public Auditor

Enclosure: First Seven Pages of the Notice of Appeal – OPA-PA-20-005

Cc: Georgette Bello Concepcion, Esq., Attorney for Hotel Santa Fe

1 **BROOKS CONCEPCION LAW, P.C.**
2 247 Martyr Street, Ste. 101
3 Hagatna, Guam 96910
4 (671) 472-6848
5 (671) 477-5790

RECEIVED
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6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

7 In the Appeal of) DOCKET NO. OPA-PA-_____
8)
9 **BEACH RESORT LLC dba THE**)
10 **HOTEL SANTE FE GUAM,**) **NOTICE OF APPEAL**
11 **Appellant**)

12 BEACH RESORT LLC dba The Hotel Santa Fe ("Santa Fe") hereby appeals the wrongful
13 termination of its agreement with Guam Homeland Security/Office of Civil Defense by General
14 Services Agency ("GSA") related to Purchase Order P206E00310 (the "Contract"). Santa Fe
15 brings this appeal pursuant to Title 5 of the Guam Code Annotated, §§ 5427 (a) and (e).
16

17 **I. APPELLANT INFORMATION**

18 Name: BEACH RESORT LLC dba The Hotel Santa Fe
19 Mailing Address: 132 Lagoon Drive, Tamuning, Guam 96913
20 Business Address: 132 Lagoon Drive, Tamuning, Guam 96913
21

22 For this Appeal, please direct all correspondence to Santa Fe's counsel of record, Georgette
23 Bello Concepcion, BROOKS CONCEPCION LAW, P.C, 247 Martyr St., Suite 101, Hagåtña, GU
24 96910, Tel. 472-6848; Fax: 4775790; gbc@guamlaw.net.

25 **II. APPEAL INFORMATION**

26 A. Purchasing Agency: Office of the Governor
27 B. Contract No.: Purchase Order P206E00310 (See **Exhibit A** attached hereto.)
28

ORIGINAL

1 C. Date of Contract: May 16, 2020

2 D. This appeal arises from the procuring agency's failure to adhere to the terms of the
3 Contract which resulted in the unlawful cancellation of Purchase Order No. P206E00310. The
4 procuring agency terminated the purchase order without cause and without first allowing Santa Fe
5 ten days to cure the alleged list of concerns as required under the terms of the Agreement. Santa Fe
6 appealed the cancellation of its Contract. The GSA denied said appeal. See letter dated June 10,
7 2020 attached hereto as **Exhibit B**.

9 E. The Contract was awarded to Core Tech International on May 21, 2020. See
10 Purchase Order P206E00326 attached hereto as **Exhibit C**.

11 III. Relevant Procedural History

12 In May 2020, GSA sent out a Request for Quotation for quarantine facilities the government
13 of Guam will utilize for 14 day mandatory quarantine for arriving passengers from COVID-19
14 affected areas. See **Exhibit D** attached hereto. Attached to the Request for Quotation were
15 "Attachments 1. Specifications 2. Terms and Conditions" and referenced on page 1 of the RFQ. *Id.*

17 On or about May 15, 2020 Santa Fe provided a Quotation in response to a Request for
18 Quotation ("RFQ") to serve as a quarantine facility. See Hotel Non-Congregate Shelters attached
19 hereto as **Exhibit E**.

21 Santa Fe "was selected based upon meeting the standards required to house" passengers
22 from COVID-19 affected areas. See Exhibit B attached hereto (June 10, 2020 letter from GSA).

23 In a letter dated May 27, 2020, GSA informed Santa Fe that Purchase Order Number
24 P206E00310 was cancelled retroactively to May 23, 2020. See **Exhibit F** attached hereto (May 27,
25 2020 letter from GSA to Santa Fe) (hereinafter "Termination Letter). GSA cancelled the purchase
26 order due to Santa Fe's alleged failure to meet the "terms of the agreement." *Id.* Emphasis added.
27 Quarantined passengers did not leave Santa Fe until May 24, 2020.
28

1 On May 29, 2020, Santa Fe protested the cancellation of Purchase Order Number
2 P206E00310. See May 29, 2020 letter from Santa Fe to GSA attached hereto as **Exhibit G**. The
3 grounds for Santa Fe's protest were 1) the alleged deficiencies listed in GSA's Termination Letter
4 were non-existent; and 2) GSA failed to comply with Section IX (A)(iii) of the "agreement" or
5 "terms and conditions" attached to the RFQ and purchase order.
6

7 On June 1, 2020, Santa Fe invoked its contractual right to a 10 day cure period, as provided
8 in Section IX (iii) of the "agreement." See June 1, 2020 letter from Santa Fe to GSA attached hereto
9 as **Exhibit H**.

10 On June 9, 2020 Santa Fe sent GSA a follow up letter to its May 29, 2020 protest letter.
11 See **Exhibit I** (letter dated June 9, 2020 from Santa Fe to GSA.)
12

13 On June 10, 2020, GSA denied Santa Fe's protest. See Exhibit E. GSA denied Santa Fe's
14 protest as its "review of the purchase order did not indicate that a cure language was provided for,
15 and as such, there is no right to have one." *Id.*

16 IV. STATEMENT OF GROUNDS FOR APPEAL

17 A. The alleged deficiencies listed in GSA's Termination Letter were non-existent.

18 In its Termination Letter GSA lists basic terms of the agreement Santa Fe allegedly failed to
19 meet. The first time Santa Fe learned of the specific alleged failures were in the Termination Letter.
20 Until it received the Termination Letter Santa Fe was not aware that there were concerns as to its
21 compliance with the terms of the purchase order and agreement. Prior to that, all Santa Fe knew
22 from the media was that passengers quarantined at its hotel were being evacuated to another hotel
23 and that said passengers were informed of the evacuation via letter.
24

25 Santa Fe's position is that it was not in breach of any of the terms of the agreement. The list
26 of concerns in the Termination Letter were non-existent. In fact, GSA representatives (Anita Cruz
27 and Claudia Acfalle) along with Guam Homeland Security Administrator Charles Esteves walked
28

1 the premises prior to informing Santa Fe that its quotation was accepted. GSA's basis for cancelling
2 the purchase order was due to findings by the Guam National Guard and Homeland Security.

3 What were these findings based on? As to linen and towels, the terms and conditions
4 specified in the agreement provide, *inter alia*, Santa Fe "provide regular linen and towel service for
5 all persons quarantined at the facility..." It is not possible to have an issue with the linen and
6 towel service when that service is performed weekly and the guests were on the promises for 6 days.
7 See **Exhibit H** attached hereto (Letter dated June 1, 2020 from Santa Fe to GSA).

9 Another alleged deficiency was rooms not being fully furnished as required in the purchase
10 order. Nowhere in the purchase order or attached agreement is "fully furnished" defined such that
11 Santa Fe is on notice as to what its rooms lacked rendering them not fully furnished.

12 Santa Fe was already compliant with each of the items listed, with the exception of those
13 whose compliance was contingent upon standards that were not provided. Neither the purchase
14 order nor the "agreement" provides any specific requirements as to the items listed in the
15 Termination Letter that put Santa Fe on notice as to the basic terms it allegedly failed to meet. At a
16 walkthrough of the facility before any guests arrived, the rooms were deemed fully acceptable as
17 furnished.

18 GSA cannot read terms or conditions into the "agreement" or the purchase order that are not
19 specifically included therein. To allow GSA to add terms or conditions would be in violation of the
20 terms of the Contract as the Contract specifies that "[t]his Agreement...(ii) contains all of the
21 covenants and Agreements between the parties with respect to each subject matter in any manner
22 whatsoever. Exhibit A, page 11 of 27, Section XXI.

23
24
25 **B. GSA wrongfully cancelled Santa Fe's Purchase Order.**

26 In denying Santa Fe's protest, citing In the Appeal of Basil Industrial Food Services, OPA
27 Appeal No. OPA-PA 16-006 and OPA-PA-16-008, GSA takes the position that "a review of the
28

1 purchase order did not indicate that a cure language was provided for, and as such, there is no right
2 to have one.” Exhibit B. GSA assumed Santa Fe was referring to Procurement Regulation 2
3 GARR § 6101(8)(a).

4
5 In Basil, Basil relied on 2 GARR § 6101(8)(a) which provides, in relevant part, that if a
6 contractor commits a substantial breach of the contract, the procurement officer may notify the
7 contractor in writing of the delay or non-performance and if not cured in 10 days or any longer time
8 specified in writing by the Procurement Officer, such officer may terminate the contractor’s right to
9 proceed with the contract or such part of the contract as which there has been delay or failure to
10 properly perform. Per the OPA if this regulation was applicable, GSA would have to give Basil 10
11 days to cure any default and GSA would have wrongfully terminated Basil’s contract. The OPA
12 held that because the language of the regulation was not included as a provision within Basil’s
13 contract it did not apply and Basil did not have the right to invoke a 10 day cure period.
14 Furthermore, Basil’s contract provided that in the event Basil received a C or lower rating from the
15 Department of Public Health and Social Services, the procuring agency could immediately terminate
16 its contract.¹

17
18 The facts of this case are distinguishable from that of Basil. Unlike Basil’s contract, Santa
19 Fe’s Contract does not have a provision authorizing GSA to terminate it without further notice.
20 In addition, Santa Fe’s Contract includes the ten day cure period provided by 2 GARR §
21 6101(8)(a). Attached to the Request for Quotation were “Attachments 1. Specifications 2. Terms
22 and Conditions” and referenced on page 1 of the RFQ. See Exhibit E attached hereto. Pursuant
23
24

25 ¹ Section 12.9 of the Basil’s contract states:

26 In the event the Bidder who is awarded this [Invitation for Bid] for the provision of ENP Nutrition Services is issued a
27 “C” rating from the Division of Environmental Health, DPHSS or is issued a “Stop Order” by the Guam Fire Department,
the awarded Vendor may be terminated as the Vendor of the ENP Nutrition Services.

28 Basil Food Indus. Servs. Corp. v. Guam, 2019 Guam 29 ¶ 3.

1 to Section IX. A(iii), Termination for Cause Default:

2 If the Hotel refuses or fails to perform any of the provisions of this contract with such
3 diligence as will ensure its completion within the time specified in this contract, or any
4 extension therefore, otherwise fails to timely satisfy the contract provisions, or
5 commits any other substantial breach of this contract, the Procurement Officer may
6 notify the Hotel in writing of the delay or non-performance and if not cured in ten days
7 or any longer time specified in writing by the Procurement Officer, such officer may
8 terminate the Hotel's right to proceed with the contract or such part of the contract to
9 which there has been delay or failure to properly perform. In the event of termination
10 in whole or in part the Procurement Officer may procure similar supplies or services
11 in a manner and upon terms deemed appropriate by the Procurement Officer. The Hotel
12 shall continue performance of the contract to the extent it is not terminated and shall
13 be liable for excess costs incurred in procuring similar goods or services.

10 In its Termination Letter GSA informs Santa Fe that it was cancelling the purchase order
11 because Santa Fe failed to meet the terms of the "agreement." But yet, in denying Santa Fe's protest
12 GSA takes the position that the "purchase order did not indicate that a cure language was provided
13 for..."

15 The purchase order which was drafted by GSA includes the following language on page 1 of
16 the purchase order: "Attachments 1. Specifications 2. Terms and Conditions.", Exhibit A. The only
17 document attached to the purchase order is a document that begins with "Statement of Leased
18 Premises and Services to be Performed" which must be the "agreement" GSA references in the
19 Termination Letter. This document or "agreement" includes the 10 day cure period which GSA asserts
20 is not part of the purchase agreement. GSA cannot simply ignore the provisions within the
21 "agreement" which are adverse to its interest when convenient or read terms that are not included in
22 the purchase order. *See Basil Food Indus. Servs. Corp. v. Guam*, 2019 Guam 29 ¶ 17 ("In effect, Basil
23 asks the court to read the application of 2 GAR Div. 4 § 6101 into the terms of Section 12.9 of the
24 contracts. But that we cannot do.").

25
26
27 GSA failed to comply with Section IX.A(iii) of the Contract on two levels. First, it failed to
28 put Santa Fe on notice that it failed and refused to remedy any alleged deficiencies. The first time

1 Santa Fe was provided details as to what the issues were was in the Termination Letter. Second,
2 GSA failed to provide Santa Fe time to cure any of the alleged deficiencies once it became aware of
3 said deficiencies. As a result of said failures, GSA wrongfully cancelled the purchase order.
4

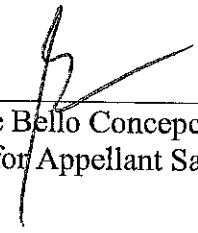
5
6 **V. RELIEF REQUESTED BY SANTA FE**

7 Santa Fe respectfully request a ruling from the OPA as follows:

- 8 1. That GSA is in breach of the terms of the Purchase Order and Agreement;
- 9 2. That the cancellation of Purchase Order Number P206E00310 be rescinded as of
10 May 23, 2020 and reinstated as of that date;
- 11 3. That Santa Fe be awarded the value of its purchase order;
- 12 4. For an award of reasonable attorney's fees and costs of this appeal;
- 13 5. For such other relief that the OPA may determine is just and proper; and
- 14 6. Santa Fe requests a hearing on this matter.

15
16 Respectfully submitted this 23rd day of June, 2020.

17
18
19 **BROOKS CONCEPCION LAW, P.C.**

20
21 By: 
22 Georgette Bello Concepcion, Esq.
23 Counsel for Appellant Santa Fe
24
25
26
27
28

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**FAX**

To:	Ms. Claudia S. Acfalle Chief Procurement Officer General Services Agency Department of Administration 148 Route 1 Marine Drive Piti, Guam 96915 Phone: (671) 475-1707 Fax: (671) 475-1727/472-4217	From:	Benjamin J.F. Cruz Public Auditor Office of Public Accountability
		Pages:	10 (including cover page)
CC:	Ms. Georgette Bello Concepcion, Esq. Brooks Concepcion Law, P.C. 247 Martyr Street, Ste. 101 Hagatna, Guam 96910 Phone: (671) 472-6848 Fax: (671) 471-5790	Date:	June 24, 2020
		Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

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Jerrick Hernandez, Auditor

jhernandez@guamopa.com



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-20-005 Notice of Receipt of Appeal

2 messages

Jerrick Hernandez <jhernandez@guamopa.com>

Wed, Jun 24, 2020 at 10:41 AM

To: jon.calvo@guam.gov, tim.aguon@ghs.guam.gov, charles.esteves@ghs.guam.gov, Robert Kono <robert.kono@gsa.guam.gov>, Claudia Acfalle <claudia.acfalle@gsa.guam.gov>

Hafa Adai,

Please see attached Notice of Receipt of Appeal for OPA-PA-20-005. The Notice was also faxed to GSA.

--

Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA
Auditor
Office of Public Accountability – Guam
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