

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

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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

7 In the Appeal of ) DOCKET NO. OPA-PA-20-005  
8 )  
9 **BEACH RESORT LLC dba THE** )  
10 **HOTEL SANTE FE GUAM,** )  
11 ) **APPELLANT'S OPPOSITION TO**  
12 ) **GSA'S MOTION FOR SUMMARY**  
13 ) **JUDGMENT**  
14 )  
15 ) **Appellant** )

16 BEACH RESORT LLC dba The Hotel Santa Fe ("Santa Fe"), by and through its counsel of  
17 record, submits this Opposition to GSA's Motion for Summary Judgment.

18 **BACKGROUND**

19 In May 2020, General Services Agency ("GSA") sent out a Request for Quotation for  
20 quarantine facilities the for the government of Guam to utilize for 14 day mandatory quarantine for  
21 arriving passengers from COVID-19 affected areas. See Appellant's Notice of Appeal ("NTA"),  
22 **Exhibit D.** Attached to the Request for Quotation were "Attachments 1. Specifications 2. Terms  
23 and Conditions" and referenced on page 1 of the RFQ. Id.

24 On or about May 15, 2020 Santa Fe provided a Quotation in response to the Request for  
25 Quotation ("RFQ") to serve as a quarantine facility. See NTA , **Exhibit E.**

26 Santa Fe "was selected based upon meeting the standards required to house" passengers  
27 from COVID-19 affected areas. See NTA, **Exhibit B.**

28 In a letter dated May 27, 2020, GSA informed Santa Fe that Purchase Order Number  
P206E00310 was cancelled retroactively to May 23, 2020. See NTA, **Exhibit F** (May 27, 2020

1  
2 The only reason given by GSA in wrongfully terminating Santa Fe's Purchase Order  
3 ("Contract") was "findings by the National Guard and Homeland Security on their walk through on  
4 Saturday, May 23 2020 of [Santa Fe's] failure to meet the terms of the agreement." Termination  
5 Letter. Exhibit F, Santa Fe's Notice of Appeal, OPA-PA-20-005. "Based upon these violations,  
6 [GSA] [cancelled] the purchase order effective May 23, 2020." *Id.* GSA cites no other reason.  
7 Furthermore, GSA does not invoke any of the termination provisions it now claims is the basis on  
8 which it wrongfully terminated Santa Fe's Contract.  
9

10 **GSA cannot make up its mind as to whether Section IX of the Contract which**  
11 **includes the termination provisions it now claims applies.**

12 In moving for summary judgment GSA contends it is an undisputed fact that "the PO [or  
13 Contract] includes and incorporates by reference twenty-seven pages of additional terms and  
14 conditions, each page of which was initialed and acknowledged by the Santa Fe's president, Mr.  
15 Bart Jackson." By making this assertion, GSA contradicts itself. One basis for denying Santa Fe's  
16 protest at the agency level was that Section IX of the Contract was NOT part of the terms and  
17 conditions referenced in the Contract. Emphasis added. In its moving papers, GSA conveniently  
18 ignores the fact that when it initially denied Santa Fe's protest, citing In the Appeal of Basil  
19 Industrial Food Services, OPA Appeal No. OPA-PA 16-006 and OPA-PA-16-008, GSA took the  
20 position that "a review of the purchase order did not indicate that a cure language was provided for,  
21 and as such, there is no right to have one." Agency Report, Tab 3. The FIRST time it took the  
22 position that the terms and conditions applied, which include *inter alia* the three termination  
23 provisions GSA now argues apply and the fourth termination provision (10 day-cure) invoked by  
24 Santa Fe, was in the Agency Report. In the Agency Report, GSA cites Section IX of the Contract  
25 in support of its contention that "as part of their submittal, [Santa Fe] agreed to the following terms  
26 and conditions..." *Id.* Tab 1. GSA argues that only the three termination provisions of Section IX  
27  
28

1 that benefit it apply and the one that Santa Fe relied on is not applicable.

2 GSA terminated Santa Fe's Contract due to its claim that GSA failed to comply with the  
3 terms of its Contract and provided a list of alleged deficiencies. GSA should not be allowed to argue  
4 that in hindsight they could terminate for cause or convenience as that is not why it terminated Santa  
5 Fe's contract. GSA is limited to its argument that Santa Fe's contract was terminated due to the  
6 alleged deficiencies in its June 10, 2020 Termination Letter and nothing else. Because GSA  
7 terminated Santa Fe's contract for one reason only, Santa Fe was correct in invoking Section IX(d)  
8 of the Contract in protesting GSA's termination of Santa Fe's Contract.  
9

10 The mere fact that GSA flip-flops as to the reason it terminated Santa Fe's Contract should  
11 cause pause by the OPA. Guam's Procurement Code requires "all parties involved in the  
12 negotiation, performance, or administration of territorial contracts to act in good faith." 5 GCA §  
13 5003. Based on the requirement that GSA act in good faith in administering its contract with Santa  
14 Fe, it was only fair that Santa Fe be given notice of the alleged deficiencies and 10 days to cure said  
15 deficiencies especially when the alleged deficiencies were based on a third-party's findings and did  
16 not jeopardize any of the passenger's health or isolation of passengers in the hotel. Santa Fe's  
17 contract is with GSA and not the National Guard. With regard to whether GSA acted in good faith,  
18 it is notable that two days before the termination of Santa Fe's contract became effective, GSA  
19 already entered into the exact same contract as Santa Fe's with another hotel on May 21, 2020 as if  
20 it anticipated terminating Santa Fe's Contract, which had only begun on May 19, 2020. The other  
21 hotel's rates were higher than Santa Fe's. GSA did not inform Santa Fe that its contract was  
22 cancelled until 4 days AFTER it was effective and after it removed all passengers from the hotel on  
23 May 24, 2020.  
24  
25

26 Pursuant to Section IX. A(iii), Termination for Cause Default ("10 day cure" provision):

27 If the Hotel refuses or fails to perform any of the provisions of this contract with such  
28 diligence as will ensure its completion within the time specified in this contract, or any

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

11 GSA terminated Santa Fe's contract for cause, *arguendo*, therefore, only this provision  
12 applies. GSA argues the 10-day cure provision does not apply and instead it had unfettered  
13 discretion to decide whether or not to allow Santa Fe 10 days to cure the alleged deficiencies. While  
14 GSA may have the discretion to determine whether or not to it should give Santa Fe 10 days to cure,  
15 said discretion must be exercised in good faith as required under 5 GCA § 5003.

16 In denying Santa Fe's protest at the agency level, GSA cites a portion of the OPA's Decision  
17 In the Appeal of Basil Industrial Services, Appeal Nos. OPA-PA 16-006 and OPA-PA-16-008 and  
18 argues that the ten day cure provision was not part of the terms and conditions of Santa Fe's  
19 contract. The regulation Basil argued applied to its contract included the language "the  
20 procurement officer may notify the contractor...and if not cured in 10 days...such officer may  
21 terminate the contractor's right to proceed with the contract..." In Basil, the OPA ruled "[i]f this  
22 regulation were applicable, GSA would have had to give Basil 10 days to cure its May 31, 2016  
23 default and GSA would have then wrongfully terminated Basile' Contract..." Emphasis added.  
24 Here, based on the OPA's ruling that if the ten-day cure provision was part of Basil's contract, GSA  
25 would have had to give Basil 10 days to cure, GSA was required to give Santa Fe notice of the  
26 alleged deficiencies and 10 days to cure. It did not.

27 The "other termination provisions" which include termination without cause, termination in  
28 the best interests of the Government of Guam, and termination for convenience do NOT apply in

1 this case. Tab 1. Each provision serves different purposes. Basil v GSA, 2019 Guam 29 ¶ 17  
2 quoting Dart Advantage Warehousing, Inc. v. United States, 52 Fed. Cl. 694, 707 (2002). (“[W]here a  
3 contract provides ‘different and independent ways to terminate a contract, the two clauses have different  
4 purposes and provide different rights and obligations.’”). To allow GSA to now in hindsight through  
5 everything on the wall and see what sticks renders these provisions meaningless and illusory.  
6

7 GSA argues termination was in the best interest of the Government and cites Section IX(A)(ii) of  
8 the Contract which provides: “GHS OCD may terminate this Agreement based upon the determination  
9 that such termination is the best interests of the Government...Circumstances for termination under this  
10 clause include but are not limited to Hotel’s successful completion of services under this Agreement to  
11 the satisfaction of GHS OCD.” Contract, Section IX(A)(i). GSA puts emphasis on “to the satisfaction  
12 of GHS OCD.” However, the court cannot read that language in isolation of the rest of the provision.  
13 Ramiro v. White, 2016 Guam 6, ¶ 21 (Guam Feb. 12, 2016) (“Moreover, Decedent's agreement with  
14 Coast360 (i.e., the Instrument) should be viewed as a whole “so as to give effect to every part, if  
15 reasonably practicable, each clause helping to interpret the other.” 18 GCA § 87107 (2005); *see also*  
16 Gov't of Guam v. Pacificare Health Ins. Co. of Micronesia, 2004 Guam 17 ¶ 73 (an agreement “must  
17 be viewed as a whole, with each provision interpreted in light of each other, so as to give effect to  
18 every part, if reasonably practicable. When the intent is clear, the court must give effect to that  
19 intent.” (citations and footnote omitted)).”).  
20

21 Reading the sentence in its entirety in conjunction with the rest of Section IX (A)(ii) leads to the  
22 conclusion that GSA’s argument fails for at least two reasons. First, GSA did not include “its  
23 determination that such termination is in the best interests of the Government” in its Termination Letter.  
24 Second, this provision contemplates the purpose for the contract had been completed and it is no longer  
25 in the best interest to continue a contract when said purpose had been completed. The government could  
26 terminate a contract under this provision in the event funding runs out. GSA must show why it is in  
27 the GOVERNMENT’s best interest to cancel Santa Fe’s Contract and move the passengers to a new  
28

1 hotel. The test is not how it is in the best interests in the passengers. GSA does not and cannot show  
2 that the list of alleged deficiencies warranted the cancellation of Santa Fe's Contract.

3 GSA argues that "even without cause, GSA was entitled to terminate the contract because it was  
4 in the best interest to move quickly due to the COVID-19 public health emergency..." The termination  
5 without clause provision provides:

6 GHS OCD may terminate this Agreement without cause, upon the delivery of written  
7 notice to the Hotel at least thirty (30) days prior to the intended date of termination.

8  
9 Contract, Section IX(A)(i). If the termination without cause provision applied, GSA is in breach as it  
10 failed to give Santa Fe 30 days' notice of its intent to cancel its Contract. The 30 day notice is required  
11 under Section IX(A)(iii). In its moving papers GSA glosses over the language of the termination  
12 without cause provision because it knows that it is in breach of this provision if it did apply.

13 The fact that the procurement was done under an emergency declaration by the Governor  
14 does not exempt GSA from abiding by the terms of the Contract and Guam Procurement Law. More  
15 importantly, even if the "other termination provisions" applied, neither justifies GSA's cancellation  
16 of Santa Fe's Contract as the alleged list of deficiencies were non-existent. The OPA should deny  
17 GSA's motion and move this matter to hearing at which time Santa Fe will present evidence  
18 supporting its contention that GSA wrongfully terminated its Contract.


19  
20 **CONCLUSION**

21 The OPA should deny GSA's motion for summary judgment as there is a dispute as to  
22 whether the termination for cause, no cause or convenience apply.

23 Respectfully submitted this 10<sup>th</sup> day of August, 2020.

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25 **BROOKS CONCEPCION LAW, P.C.**

26  
27 By:

  
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Georgette Bello Concepcion, Esq.  
Counsel for Appellant Santa Fe