



OFFICE OF PUBLIC ACCOUNTABILITY
 Doris Flores Brooks, CPA, CGFM
 Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,) **APPEAL NO: OPA-PA-13-013**
 G4S SECURITY SYSTEMS (GUAM), INC.) **DECISION**
 Appellant)

I. INTRODUCTION

This is the Decision of the Public Auditor for procurement appeal number OPA-PA-13-013 which was filed by G4S SECURITY SYSTEMS (GUAM), INC., (Hereafter Referred to as "G4S") on October 3, 2013 regarding the Guam Department of Education's (Hereafter Referred to as "GDOE") September 19, 2013 denial of G4S's September 16, 2013 Protest concerning GDOE-IFB-032-2013 (Design Build Fire Alarm System Upgrade/Replacement and Fire Suppression/Sprinkler System Repair for Southern High School) (Hereafter referred to as "IFB"). The Public Auditor holds that: (1) GDOE violated Chapter III, Section 3.9.9.2, GDOE Procurement Regulations by failing to provide G4S with a copy of Amendment No. 2; (2) That GDOE violated 5 G.C.A. §5003 and Chapter I, Section 1.8, GDOE Procurement Regulations, and 5 G.C.A. §5001(b)(4) and Chapter I, Section 1.2.4, GDOE Procurement Regulations by arbitrarily using the Pre-Bid Conference sign in sheet to attempt to contact G4S and because GDOE only e-mailed Amendment No. 2 to one (1) out of the four (4) representatives who were listed on the Pre-Bid Conference sign in sheet; and (3) That GDOE violated 5 G.C.A. §5211(f) and Chapter III, Section 3.9.13.4.1(c)(ii), GDOE Procurement Regulations by failing to waive G4S's Bid's omission of the Amendment Acknowledgement Form for Amendment No. 2 as a minor informality. Accordingly, G4S's appeal is hereby SUSTAINED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the December 2, 2013 hearing for Appellant's Appeal. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. On or about September 6, 2013, GDOE issued the IFB.

2. The IFB stated, in relevant part, that:

a. Bidders must acknowledge in writing the receipt of any amendments to the IFB. Each amendment will contain an Amendment Acknowledgement Form. For each amendment, bidders must sign the Acknowledgement Form and return the signed copy via e-mail or fax to GDOE. Signed Acknowledgement Forms for every amendment must also be included with the bid submission. Bidders who fail to properly submit Amendment Acknowledgement Forms may be deemed nonresponsive and disqualified from participating in the IFB's solicitation.¹

b. A Mandatory Pre-Bid Conference and Site Visit was scheduled for September 9, 2013 at 1:30 p.m.²

c. The deadline for potential bidders to submit questions was September 11, 2013 at 4:00 p.m.³

d. The deadline for GDOE to publish responses to questions submitted by potential bidders was September 13, 2013 at 5:00 p.m.⁴

e. The deadline to submit bids in response to the IFB was September 16, 2013 at 10:00 a.m.

¹ Paragraph 2.8, Section 2, General Instructions, IFB, page GDOE 0092, IFB, Exhibit 6, Procurement Record filed on October 11, 2013 (Hereafter Referred to as "Procurement Record").

² IFB Timeline, page GDOE 0087, Id.

³ Id.

⁴ Id.

1 f. The IFB stated that there were no As-Built drawings for the existing conditions
2 of both Fire Alarm System and Fire Sprinkler System and that it was the responsibility of the
3 prospective bidder to verify the existing conditions of both systems.⁵

4 g. The IFB would be awarded to the lowest responsive and responsible bidder
5 and GDOE reserved the right to disqualify bids that it deemed to be nonresponsive, regardless of
6 whether the bid is determined to contain the lowest price.⁶

7 3. On September 6, 2013, GDOE issued Clarification No. 1, which amended the bid
8 submission date and time to read: "Monday, September 16, 2013 at 10:00 a.m." and which
9 stated that all else in the IFB remained the same.⁷ This clarification was included with the bid
10 package and taken by the potential bidders who picked up a bid package from GDOE.⁸

11 4. On September 6, 2013, G4S employee Janet Daikichy picked-up an IFB bid package
12 at GDOE on behalf of G4S and she filled out GDOE's bid register indicating that G4S's
13 telephone number was 646-2307, its facsimile number was 649-7245, and that its e-mail address
14 was sil.kadiusang@gu.g4s.com.⁹

15 5. On September 9, 2013, GDOE held the Pre-Bid Conference at Southern High School.
16 There were four (4) representatives from G4S who attended the conference and they were Quin
17 Santos, Jeremy Tereas, Randy Martin, and Silas Kadiusang. Each of these representatives
18 recorded their name, the company they represented, and their phone numbers and e-mail
19 addresses on GDOE's Pre-Bid Conference sign-in sheet.¹⁰

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23 ⁵ Note, Section 1, Project Description, page GDOE 0090, Id.

24 ⁶ Paragraph 2.11 Award, Section 2, General Instructions, page GDOE 0093, Id.

25 ⁷ Clarification NO. 1, page GDOE 00161, Id.

26 ⁸ Testimony of Marcus Pido, December 2, 2013. NOTE: Although the oral
27 Testimony referred to Amendment No. 1, GDOE Supply Management Administrator
28 Marcus Pido was referring to Clarification No. 1 as there was no Amendment
No. 1 issued for this procurement, see pages GDOE 00161 and GDOE 00162,
Exhibit 6, Procurement Record.

⁹ IFB Bid Register, page GDOE 00242, Exhibit 11, Id., and Testimony of Silas
Kadiusang on December 2, 2013.

¹⁰ Pre-Bid Conference Sign In Sheet, page GDOE 002, Exhibit 1, Procurement
Record.

1 6. On September 10, 2013, Silas Kadiasang signed GDOE's Amendment
2 Acknowledgement Form on behalf of G4S to confirm that G4S received GDOE's Clarification
3 No. 1 to the IFB.¹¹

4 7. On September 10, 2013, G4S submitted the following questions, in relevant part, to
5 GDOE:

6 a. Given the short time for this bid, as built drawings or floor plans on the entire
7 campus layout are essential in producing accurate estimates and designs, can we have these right
8 away?

9 b. Can we extend the Deadline for questions to Thursday to allow time for site
10 walk thru to be inclusive in questionnaire?

11 c. Some parts for the existing fire alarm system does not meet fire code. If some
12 of the existing system is to be used for the new systems, are we required to alter the structure to
13 adjust the existing Strobe and Pull stations locations so that it meets code?

14 d. The fire alarm wires that will be removed, are we to dispose of it or give to
15 GDOE?

16 e. Will GDOE and School principals approve outside classroom works between
17 8:00 a.m. and 2:45 p.m., and inside classroom work between 3:00 p.m. and 9:00 p.m.?

18 f. Will GDOE and School principals allow access to school for fire alarm work
19 on Saturdays, Sundays, and Holidays between 8:00 a.m. and 5:00 p.m?¹²

20 8. On September 11, 2013, G4S submitted the following question, in relevant part, to
21 GDOE: "Can existing Fire Alarm Conduit be used, thereby saving the Government a lot of
22 money?"¹³

23 9. On September 11, 2013, GDOE issued Amendment No. 2 to the IFB, which gave
24 answers to all the questions it had received from the bidders, which included GDOE's answers to
25 G4S's questions. In response to G4S's question asking for As-Built Drawings and Floor Plan,
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27 ¹¹ GDOE Amendment Acknowledgement Form dated September 10, 2013, page GDOE
0059, G4S's Bid, Exhibit 4, Id.

28 ¹² GDOE IFB Communications Log, Exhibit 2, page GDOE 005, Id.

¹³ Id., at page GDOE 004.

1 the amendment stated that GDOE was providing floor plans and some electrical drawings,
2 however, GDOE also stated that the accuracy of these plans and drawings was unknown. In
3 response to G4S's questions concerning whether GDOE would extend the deadline for potential
4 bidders to submit questions, GDOE extended that deadline to September 12, 2013 at 4:00 p.m.¹⁴

5 10. On September 11, 2013, GDOE Buyer Supervisor II, Albert G. Garcia, GDOE's
6 assigned buyer for the IFB, transmitted the IFB's Amendment No. 2 to the potential bidders via
7 e-mail. However, Garcia erroneously titled the e-mail subject and the attachment to the e-mail as
8 "GDOE IFB 032-2013 Amendment No. 1." Despite this, if the attachment was opened
9 electronically, the attachment was clearly titled: "Amendment No. 2."¹⁵

10 11. Garcia transmitted IFB Amendment No. 2 to G4S on September 11, 2013 by e-
11 mailing it to Randy Martin. Despite G4S having four (4) representatives at the Pre-Bid
12 Conference who each provided their e-mail addresses, Garcia sent the e-mail with Amendment
13 No. 2 to Martin only because Martin appeared on the Pre-Bid Conference sign in sheet as a
14 representative for G4S and because, due to prior dealings with Randy Martin in other
15 procurements, Martin was on Garcia's e-mail contact list whereas the other three (3) G4S
16 representatives who attended the Pre-Bid Conference were not.¹⁶

17 12. On or about September 11, 2013, Randy Martin received Garcia's e-mail
18 transmitting IFB Amendment No. 2, however, he did not read the e-mail until at least a day and a
19 half after he received it because he was sick, and he did not do anything about it because he is an
20 independent contractor and not an employee of G4S, and because he believed that Silas
21 Kadiusang was G4S's lead representative on this IFB.¹⁷

22 13. On September 12, 2013, GDOE issued Clarification No. 2, which responded to other
23 questions submitted by the potential bidders, to include G4S's question concerning whether
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26 ¹⁴ IFB Amendment 2 dated September 11, 2013, page GDOE 00164, Exhibit 6, Id.

27 ¹⁵ Testimony of Albert G. Garcia on December 2, 2013; e-mail dated September
28 11, 2013, Attachment B, and GDOE's September 19, 2013 Protest Decision,
Exhibit 18, GDOE's Agency Report filed on October 21, 2013.

¹⁶ Testimony of Albert Garcia on December 2, 2013.

¹⁷ Testimony of Randy Martin on December 2, 2013.

1 bidders could use existing Fire Alarm Conduits, to which GDOE replied yes, provided that the
2 conduits used meet all current code requirements.¹⁸

3 14. GDOE Buyer Supervisor Albert G. Garcia, transmitted Clarification No. 2 to all the
4 potential bidders via e-mail. Garcia sent this e-mail to G4S by sending it Randy Martin's e-mail
5 address only, on September 12, 2013.¹⁹

6 15. On or about September 12, 2013, Martin received Garcia's e-mail transmitting
7 Clarification No. 2, however, as stated above, he did not open this e-mail for at least a day
8 because he was sick, and he assumed that Silas Kadiasang was G4S's lead representative for the
9 IFB.²⁰

10 16. On September 16, 2013, G4S submitted its bid in response to the IFB. Although the
11 bid had the Amendment Acknowledgment Form for Clarification No. 1, it did not have an
12 Amendment Acknowledgment Form for Amendment No. 2 and Clarification No. 2.²¹

13 17. G4S bid the amount of \$345,414.61 for the Fire Alarm System
14 Upgrade/Replacement, and the amount of \$132,279.04 for the Fire Suppression/Sprinkler
15 System Repair, for a total bid of \$477, 693.65.²²

16 18. On September 16, 2013, Interested Party ORION CONSTRUCTION
17 CORPORATION (Hereafter Referred to as "ORION") submitted the only other bid in response
18 to the IFB. ORION bid the amount of \$451,700 for the Fire Alarm System
19 Upgrade/Replacement, and the amount of \$48,280 for the Fire Suppression/Sprinkler System
20 Repair, for a total bid of \$499,980, which was \$22,286.35 more than G4S's bid.²³

23 ¹⁸ IFB Clarification No. 2 dated September 12, 2013, page GDOE 00167, IFB,
24 Exhibit 6, Procurement Record.

25 ¹⁹ Email from Albert Garcia dated September 12, 2013, Attachment C, and GDOE's
26 September 19, 2013 Protest Decision, Exhibit 18, GDOE's Agency Report.

27 ²⁰ Testimony of Randy Martin on December 2, 2013.

28 ²¹ G4S Bid in response to the IFB, Exhibit 4, Procurement Record. NOTE: GDOE
Admits that the IFB Amendment No. 2 should have been labeled as Amendment No.
1 because other than Clarifications 1 & 2, and Amendment No. 2, there were no
other Clarifications or Amendments to the IFB, see GDOE Memorandum dated
September 18, 2013, IFB, page GDOE 00162, Exhibit 6, Procurement Record.

²² G4S Bid Form, page GDOE 0035, G4S Bid, Exhibit 4, Id.

²³ Abstract of Bidders dated September 16, 2013, Exhibit 7, Id.

1 19. On September 16, 2013, GDOE Buyer Supervisor Albert G. Garcia, disqualified G4S
2 and recommended that the bid contract be awarded to ORION because G4S did not submit their
3 Amendment Acknowledgement Forms for Clarification No. 2 and Amendment No. 2 with their
4 bid, in violation of Section 2.8, Acknowledgement of Amendments, of the IFB, and because
5 ORION had complied with this requirement by submitting the Amendment Acknowledgement
6 Forms for Clarifications 1 and 2, and Amendment No. 2 with its bid.²⁴ Garcia's disqualification
7 of G4S and his recommendation for award to ORION was subsequently approved by GDOE
8 Supply Management Administrator Marcus Pido.²⁵

9 20. On September 16, 2013, GDOE issued a bid status informing G4S that their bid had
10 been rejected due to their failure to comply with Section 2.8 of the IFB, because of their failure
11 to submit Amendment Acknowledgement Forms for Amendment No. 2 and Clarification No. 2
12 with their bid and also notifying G4S that the bid was recommended for award to ORION. G4S
13 received this bid status at approximately 3:16 p.m. that day via facsimile.²⁶

14 21. That same day, G4S submitted its written protest to GDOE of GDOE's rejection of
15 G4S's Bid and GDOE's award recommendation to ORION. In its protest, G4S argued that
16 G4S's bid should not have been rejected because G4S did not receive Amendment No. 2 and
17 Clarification No. 2.²⁷

18 22. On September 19, 2013, GDOE issued its decision regarding G4S's September 16,
19 2013 protest. GDOE denied the protest by stating that Section 2.8 of the IFB required that
20 signed Amendment Acknowledgement Forms for every amendment must be included with the
21 bid and that failure to comply with that requirement may result in bids being deemed non-
22 responsive and disqualified. GDOE also confirmed that Amendment No. 2 and Clarification No.

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26 ²⁴ GDOE Memorandum dated September 16, 2013, page GDOE 00211, Exhibit 9, Id.

27 ²⁵ Id., at page GDOE 00212.

28 ²⁶ Transmission Report with copy of Bid Status dated September 16, 2013, page GDOE 00204, Exhibit 8, Id.

²⁷ G4S Protest dated September 16, 2013, Exhibit 12, Agency Report filed on October 21, 2013.

1 2 were e-mailed to G4S representative Randy Martin and GDOE stated that it could not be held
2 responsible for the lack of action of non-GDOE employees.²⁸

3 23. On October 3, 2013, fourteen (14) days after GDOE issued its Protest Decision
4 denying G4S's September 16, 2013 protest, G4S filed this appeal.

6 III. ANALYSIS

7
8 Pursuant to 5 G.C.A. §5703, the Public Auditor shall review GDOE's September 19,
9 2013, Decision denying G4S's September 16, 2013 protest *de novo*. As a preliminary matter, the
10 Public Auditor must consider ORION's Notice of Judicial Proceeding which alleges that the
11 Public Auditor should not proceed with deciding this appeal because of the case of *Xerox*
12 *Corporation v. The Office of Public Accountability*, CVA13-018 (Supreme Court of Guam).

14 A. There is no Action concerning the Procurement under Appeal in Courts of Guam.

15 ORION's argument that the Public Auditor should not take any more actions on this
16 appeal because of CVA13-018 has no merit. Generally, if an action **concerning the**
17 **procurement under Appeal** has commenced in Court, the Public Auditor shall not act on the
18 Appeal except to notify the parties and decline the matter due to judicial involvement (Bold
19 Emphasis Added). 2 G.A.R., Div. 4, Chap. 12, §12103(b). Here, ORION argues that the
20 aforementioned procurement regulations applies here because an issue in CVA13-018 concerns
21 whether the Public Auditor has the jurisdiction to terminate a contract which is one of the issues
22 in this matter. However, by its plain language, 2 G.A.R., Div. 4, Chap. 12, §12103(b) would
23 only apply if the procurement under appeal in CVA13-018 concerns the procurement under
24 appeal in this matter. Pursuant to 2 G.A.R., Div. 4, Chap. 12, §12108(h), the Public Auditor
25 hereby takes judicial notice of the record in CVA13-018. That matter is the appeal of the Public
26 Auditor's Decision in *In the Appeal of Town House Department Stores, Inc., dba Island Business*

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28 ²⁸ GDOE Protest Decision dated September 19, 2013, Exhibit 18, Agency Report
filed on October 21, 2013.

1 *Systems & Supplies*, OPA-PA-11-002 (Office of Public Accountability), which concerned
2 GDOE-IFB-022-2010 (Document Management Services). Here, this appeal concerns GDOE-
3 IFB-032-2013 (Design Build Fire Alarm System Upgrade/Replacement and Fire
4 Suppression/Sprinkler System Repair for Southern High School), which is not the same
5 procurement at issue in CVA13-018. Therefore, the Public Auditor finds that 2 G.A.R., Div. 4,
6 Chap. 12, §12108(h) is inapplicable to this matter. The Public Auditor will now review GDOE's
7 decision denying G4S's September 16, 2013 protest.

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9 **B. Section 2.8 of the IFB does not apply to Clarification 2.**

10 GDOE did not properly apply the provisions of Section 2.8 of the IFB to G4S's bid. As
11 stated above, Section 2.8 of the IFB states, in relevant part, that: (1) bidders must acknowledge in
12 writing the receipt of any amendments to the IFB by signing the Amendment Acknowledgement
13 Form contained in each amendment and returning the signed copy via e-mail or fax to GDOE,
14 (2) signed Acknowledgement Forms for every amendment must also be included with the bid
15 submission, and (3) bidders who fail to properly submit Amendment Acknowledgement Forms
16 may be deemed nonresponsive and disqualified from participating in the IFB's solicitation. By
17 its plain language, the provisions of Section 2.8 of the IFB apply only to amendments. GDOE
18 Procurement Regulations require amendments to invitations for bids to be identified as such and
19 they require amendments to reference the portions of the invitation of bid they amend. Chapter
20 III, Section 3.9.9.1, GDOE Procurement Regulations. Here, GDOE properly identified
21 Amendment No. 2 as the only amendment to the IFB. GDOE's Clarifications 1 & 2 fail to meet
22 the standard set forth in Chapter III, Section 3.9.9.1, DOE Procurement Regulations, because
23 they are not properly identified as amendments. Thus, the Public Auditor finds that Section 2.8
24 of the IFB only applies to Amendment No. 2 and not Clarification No. 2. The Public Auditor
25 must now consider whether GDOE properly disqualified G4S's bid because it failed to submit
26 the Amendment Acknowledgement Form as required by Section 2.8 of the IFB.

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2 **C. GDOE failed to transmit Amendment No. 2 to G4S.**

3 GDOE failed to provide Amendment No. 2 to G4S. Generally, an amendment to an
4 invitation for bids shall be sent to all prospective bidders known to have received an invitation
5 for bids. Chapter III, Section 3.9.9.2, GDOE Procurement Regulations. Here, G4S clearly
6 identified its telephone and facsimile numbers, and its e-mail address on GDOE's Bid Register.
7 Despite this, GDOE arbitrarily chose to use the Pre-Bid Conference sign in sheet instead of the
8 Bid Register. The Public Auditor finds this use of the Pre-Bid Conference sign in sheet to be
9 improper. GDOE should have used the bid register, which records all prospective bidders who
10 picked up the IFB package, to obtain the proper e-mail addresses of the prospective bidders in
11 order to ensure compliance with Chapter III, Section 3.9.9.2, GDOE Procurement Regulations,
12 which requires that IFB Amendment No. 2 be sent to all prospective bidders who picked up an
13 IFB package. GDOE's use of the Pre-Bid Conference sign in sheet alone does not ensure
14 compliance with Chapter III, Section 3.9.9.2, GDOE Procurement Regulations, because the sign
15 in sheet only records those persons who attended the conference instead of those persons who
16 picked up an IFB package. Further, GDOE aggravated the improper use of the Pre-Bid
17 Conference sign-in sheet by arbitrarily picking just one (1) out of the four (4) G4S
18 representatives who attended the Pre-Bid Conference. The Public Auditor notes that GDOE e-
19 mailed Amendment No. 2 to both of the two (2) ORION representatives who attended the Pre-
20 Bid Conference.²⁹ GDOE must act in good faith and it must ensure the fair and equitable
21 treatment of all persons who deal with GDOE's procurement operations. 5 G.C.A. §5003 and
22 Chapter I, Section 1.8, GDOE Procurement Regulations, and 5 G.C.A. §5001(b)(4) and Chapter
23 I, Section 1.2.4, GDOE Procurement Regulations. The Public Auditor finds that GDOE failed to
24 meet these standards by its arbitrary use of the Pre-Bid Conference Sign-In Sheet and by e-
25 mailing Amendment No. 2 to only one (1) out of four (4) G4S representative who attended the
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28 ²⁹ See Pre-Bid Conference Sign in Sheet, page GDOE 00300, Attachment A, and E-mail dated September 11, 2013, Attachment B. GDOE Protest Decision dated September 19, 2013, Exhibit 18, Agency Report filed on October 21, 2013.

1 Pre-Bid Conference when GDOE e-mailed the Amendment to both of ORION's representatives
2 who attended the conference.

3
4 **D. G4S's Omission of the Amendment Acknowledgement Form for Amendment No. 2
is a Minor Informality that must be waived.**

5 G4S's bid's omission of the Amendment Acknowledgement Form for Amendment No. 2
6 must be waived. Generally, correction of inadvertently erroneous bids before award shall be
7 permitted in accordance with Procurement Regulations. 5 G.C.A. §5211(f). Thus, the Public
8 Auditor must review GDOE's Procurement Regulations to determine whether G4S's bid's
9 omission of the Amendment Acknowledgement Form could be waived. According to those
10 regulations minor informalities are mistakes found in bids after opening but prior to award and
11 are matters of form rather than substance evident from the bid document that can be waived or
12 corrected without prejudice to other bidders; that is, the effect on price, quantity, quality,
13 delivery, or contractual conditions is negligible, and GDOE's Superintendent shall waive such
14 minor informalities or allow a bidder to correct them depending on which is in the best interest
15 of GDOE. Chapter III, Section 3.9.13.4, GDOE Procurement Regulations. GDOE's
16 Procurement Regulations identify the failure of a bidder to acknowledge receipt of an
17 amendment to an invitation for bids as a minor informality if it is clear from the bid that the
18 bidder received the amendment and intended to be bound by its terms; or the amendment
19 involved had a negligible effect on price, quantity, quality, or delivery. Chapter III, Section
20 3.9.13.4.1(c), GDOE Procurement Regulations. As stated above, G4S never received
21 Amendment No. 2 because GDOE only sent it to Randy Martin, an independent contractor and
22 not G4S. Hence, GDOE Procurement Regulations allow G4S's bid's omission of the
23 Amendment Acknowledgement Form if Amendment No. 2 had only a negligible effect on price,
24 quantity, quality, or delivery. As stated above, Amendment No. 2 contained GDOE's responses
25 to the questions submitted by the potential bidders. It also informed the bidders that floor plans
26 and some electrical drawings would be provided. GDOE and ORION argue that the floor plans,
27 drawings and GDOE's responses to the questions were material and could affect a bidder's price,
28 quantity, quality, or delivery. However, the Public Auditor finds these arguments lack merit.

1 Amendment No. 2 stated that the accuracy of GDOE's floor plans and drawings was unknown
2 and that the bidders should verify existing conditions to prepare its bids. Although G4S did not
3 receive Amendment No. 2, Silas Kadiusang, G4S's lead representative for the IFB, and his team
4 inspected and measured actual conditions at Southern High School to prepare G4S's bid as
5 recommended by the IFB and Amendment No. 2.³⁰ In fact, G4S relied heavily on its site
6 inspection and the bid specifications to prepare its bid.³¹ The IFB placed a high value on this
7 type of inspection by stating that the bidders are responsible for inspecting the project site and
8 verifying all existing equipment, conditions, testing, and repairs.³² G4S should not be penalized
9 for preparing its bid in accordance with these instructions which were not altered by Amendment
10 No. 2. Therefore, the Public Auditor finds that Amendment No. 2 only had, at best, a negligible
11 effect on price, quantity, quality, or delivery because the Amendment did not alter the IFB's
12 strong preference for the bidders to verify existing conditions at the project site and portions of
13 Amendment No. 2 recommend that the bidders prepare their bids pursuant to such verifications.

14 Finally, the Public Auditor finds that GDOE's internal checks and balances should have
15 prevented it from erroneously disqualifying G4S's bid. As stated above GDOE's assigned buyer
16 for the IFB reviewed G4S's bid and recommended it be automatically disqualified without
17 considering whether G4S's bid's omission of an Amendment Acknowledgment Form for
18 Amendment No. 2 was a minor informality that could have been waived. As part of the process
19 and GDOE's internal checks and balances, the buyer's recommendation was reviewed by
20 GDOE's Supply Management Administrator, who had the last opportunity to consider whether
21 G4S's Bid should have been disqualified. Had a proper review of the buyer's recommendation
22 been carried out, GDOE may have appropriately considered whether G4S's bid should have been
23 disqualified or not. However, it appears, based on the record in this matter, that GDOE's Supply
24 Management Administrator merely signed off on the recommendation without considering this

26 ³⁰ Paragraph 1.1.1, Project Scope & Intent and Note found in pages GDOE 0088
27 and GDOE 0090, IFB, Exhibit 6, Procurement Record and Testimony of Silas
Kadiusang on December 2, 2013.

28 ³¹ Id., and Testimony of Ed Bitanga on December 2, 2013.

³² Paragraph 1.1.1, Project Scope & Intent, page GDOE 0088, IFB, Exhibit 6,
Procurement Record.

1 issue. GDOE can greatly improve its procurement process by simply conducting thorough
2 reviews of recommendations to disqualify bidders to prevent the disqualification of bids that
3 contain mistakes or omissions that can be validly waived as minor informalities. As a result of
4 this review not taking place, the Public Auditor finds that GDOE was required to waive G4S's
5 bid's omission of an Amendment Acknowledgement Form for Amendment No. 2 pursuant to 5
6 G.C.A. §5211(f) and Chapter III, Section 3.9.13.4.1(c)(ii), and that GDOE violated that
7 Procurement Law and Regulation by failing to do so.

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9 **E. The IFB Contract must be awarded to G4S because it is the lowest responsive bidder.**

10 G4S argues that GDOE should be instructed to consider G4S's bid.³³ Here, GDOE is at
11 the pre-award stage of the solicitation and, as stated above, GDOE recommends the award of the
12 IFB to ORION.³⁴ Generally, if a proposed award of a contract is in violation of the law, then, the
13 proposed award shall be cancelled or revised to comply with the law. 5 G.C.A. §5451 and
14 Chapter IX, Section 9.6, GDOE Procurement Regulations. Here, GDOE's proposed award to
15 ORION is in violation of law. As stated above, the Public Auditor has found that GDOE
16 violated Chapter III, Section 3.9.9.2, GDOE Procurement Regulations by failing to provide G4S
17 with a copy of Amendment No. 2, that GDOE violated 5 G.C.A. §5003 and Chapter I, Section
18 1.8, GDOE Procurement Regulations, and 5 G.C.A. §5001(b)(4) and Chapter I, Section 1.2.4,
19 GDOE Procurement Regulations by arbitrarily using the Pre-Bid Conference sign in sheet to
20 attempt to contact G4S and because GDOE only e-mailed Amendment No. 2 to one (1) out of the
21 four (4) representatives who were listed on the Pre-Bid Conference sign in sheet, and the Public
22 Auditor has found that GDOE violated 5 G.C.A. §5211(f) and Chapter III, Section
23 3.9.13.4.1(c)(ii), GDOE Procurement Regulations by failing to waive G4S's bid's omission of
24

25 _____
³³ Page 1, G4S's Remedies Brief filed on December 4, 2013.

26 ³⁴ NOTE: GDOE actually awarded the IFB's contract to ORION on September 19,
27 2013 after it denied G4S's Protest. However, pursuant to the November 12,
28 2013 Decision & Order Re Appellant's Motion to Declare Automatic Stay in
Effect, the OPA found this award to be in violation of 5 G.C.A. §5425(g) and
Chapter IX, Section 9.2.5, GDOE Procurement Regulations, and ruled that
GDOE's September 19, 2013 award of the contract to ORION was void.

1 the Amendment Acknowledgement Form for Amendment No. 2 as a minor informality. Thus,
2 the Public Auditor finds that GDOE must cancel the proposed award to ORION, GDOE must
3 retract its disqualification of G4S, and GDOE must waive G4S's bid's omission of an
4 Amendment Acknowledgement Form for Amendment No. 2 as a minor informality, and GDOE
5 shall consider G4S for award of the IFB's contract as G4S's bid was \$22,286.35 lower than
6 ORION's Bid.³⁵

7 ORION argues that instead of terminating GDOE's existing contract with ORION, the
8 Public Auditor should affirm it.³⁶ This is possible post-award if ratifying or affirming a contract
9 awarded in violation of law is in the best interests of the Government of Guam. 5 G.C.A.
10 §5452(a)(1) and Chapter IX, Section 9.7.1.1, GDOE Procurement Regulations. However, the
11 Public Auditor finds these provisions inapplicable. As stated in Footnote 34 herein, ORION's
12 contract with GDOE was found to be void because it violated the automatic stay. Hence, the
13 parties are where they were without it, specifically, G4S's bid was disqualified and GDOE had
14 recommended award of the IFB contract to ORION. This makes the provisions regarding
15 cancelling proposed awards pursuant to 5 G.C.A. §5451 and Chapter IX, Section 9.6, GDOE
16 Procurement Regulations more applicable than the post-award provisions cited by ORION.
17 Additionally, the Public Auditor is not convinced that ratifying and affirming ORION's void
18 contract is in the best interests of the Government of Guam. The Public Auditor must utilize her
19 jurisdiction to promote the integrity of the procurement process and the purposes of Guam's
20 Procurement Laws. 5 G.C.A. §5703. The Public Auditor finds that affirming a contract that
21 violated the automatic stay and whose award was the result of a purchasing agency's failure to
22 act in good faith, treat all bidders fairly, and follow its procurement regulations, would only
23 threaten the integrity of the procurement process because such affirmation will only embolden
24 other procurement officials to act in like manner.

25 ORION also challenges the Public Auditor's jurisdiction to terminate a GDOE contract.³⁷

27 ³⁵ Abstract of Bidders dated September 16, 2013, Exhibit 7, Id.

28 ³⁶ Page 1, Paragraph I, ORION's Remedies Brief filed on December 4, 2013.

³⁷ Page 4, Paragraph II, Id.

1 ORION's allegations that the OPA must consult with Guam's Attorney General prior to
2 terminating a GDOE contract are not supported by Guam Procurement Law or Regulations. The
3 language in Chapter IX, Section 9.7.1.1, cited by ORION, requiring GDOE's Superintendent to
4 consult with the Attorney General to terminate an unlawful contract, does not apply to the OPA.
5 Additionally, ORION's reliance on 1 G.C.A. §1909(h), which requires the OPA to report to the
6 Attorney General any violations of law concerning the expenditure of public funds and property
7 of the Government of Guam, is equally misplaced because that statute does not prevent the
8 Public Auditor from exercising her jurisdiction by enforcing 5 G.C.A. §5451 and Chapter IX,
9 Section 9.6, GDOE Procurement Regulations which allow her to terminate proposed awards that
10 violate law.

11 12 **IV. CONCLUSION**

13
14 Based on the foregoing, the Public Auditor hereby determines the following:

15 1. GDOE violated Chapter III, Section 3.9.9.2, GDOE Procurement Regulations by
16 failing to provide G4S with a copy of Amendment No. 2.

17 2. GDOE violated 5 G.C.A. §5003 and Chapter I, Section 1.8, GDOE Procurement
18 Regulations, and 5 G.C.A. §5001(b)(4) and Chapter I, Section 1.2.4, GDOE Procurement
19 Regulations by arbitrarily using the Pre-Bid Conference sign in sheet to attempt to contact G4S
20 and because GDOE only e-mailed Amendment No. 2 to one (1) out of the four (4)
21 representatives who were listed on the Pre-Bid Conference sign in sheet.

22 3. GDOE violated 5 G.C.A. §5211(f) and Chapter III, Section 3.9.13.4.1(c)(ii), GDOE
23 Procurement Regulations by failing to waive G4S's bid's omission of the Amendment
24 Acknowledgement Form for Amendment No. 2 as a minor informality.

25 4. G4S's Appeal is hereby SUSTAINED.

26 5. GDOE's September 16, 2013 Bid Status informing G4S that their bid had been
27 rejected due to their failure to comply with Section 2.8 of the IFB, because of their failure to
28 submit Amendment Acknowledgement Forms for Amendment No. 2 and Clarification No. 2

1 with their bid and also notifying G4S that the bid was recommended for award to ORION is
2 hereby deemed null and void *ab initio* and shall no longer have any force or effect.

3 6. No later than two (2) weeks after this Decision is issued, GDOE shall waive G4S's
4 bid's omission of the Amendment Acknowledgement Form for Amendment No. 2, as a minor
5 informality pursuant to 5 G.C.A. §5211(f) and Chapter III, Section 3.9.13.4.1(c)(ii), GDOE
6 Procurement Regulations.

7 7. GDOE shall consider G4S's bid for award and complete the IFB solicitation no later
8 than thirty (30) days after this Decision is issued.

9 8. The Public Auditor finds that G4S is entitled to its reasonable costs incurred in
10 connection with the IFB's solicitation and G4S's protest, excluding attorney's fees, pursuant to 5
11 G.C.A. §5425(h), because there was a reasonable likelihood that G4S may have been awarded
12 the contract because it had the lowest bid but for GDOE's violations of Guam Procurement Law
13 and GDOE Procurement Regulations as set forth herein. GDOE may object to G4S's cost
14 demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days
15 after G4S submits such cost demand to GDOE.

16 This is a Final Administrative Decision. The Parties are hereby informed of their right to
17 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
18 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
19 Decision. 5 G.C.A. §5481(a).

20 A copy of this Decision shall be provided to the parties and their respective attorneys, in
21 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
22 www.guamopa.org.

23
24 DATED this 5th day of January, 2014.

25
26
27 
28 DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR