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OFFICE OF THE PUBLIC AUDITOR
GOVERNMENT OF GUAM
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By: Anne Camacho

BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of the Debarment of
Rex International, Inc.

Appellant

NOTICE OF APPEAL

Docket No. OPA-PA 06-001

ORIGINAL

Appellant Information:

Rex International, Inc. ("Rex")

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Appeal Information:

- A) Purchasing Agency: Guam Waterworks Authority ("GWA")
- B) Construction Contract for the Design and Construction of Chaot-Agana Relief Sewer Modifications GWA Project No. S100-004-LOC (the "Contract").
- C) The Final Notice of Debarment was issued August 30, 2006 by Sam Taylor, GWA

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Legal Counsel, and received by Rex August 31, 2006.

D) This Appeal is made from a Decision on Debarment.

E) There are no competing bidders involved in this appeal.

Form and Filing:

1. Statement of Grounds for Appeal

A. GWA's Final Notice of Debarment was issued by its legal counsel, Sam Taylor, in violation of 5 GCA § 5426(a): only "the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency . . . shall have authority to debar a person for cause from consideration for award of contracts." This authority shall not be delegated. 2 GAR § 2107. As such, GWA's Final Notice of Debarment is void and of no effect.

B. GWA General Manager David Craddick granted Rex an extension to complete the project by April 16, 2006. See March 24, 2006 letter from David Craddick, GWA General Manager, to Dan Ramos, Rex Project Engineer. Said extension is contradictory to Rex's alleged failure to complete the project within 180 days, as stated in GWA's legal counsel's Notice of Suspension Pending Debarment and the Grounds Therefore ("Notice of Suspension").

C. The April 12, 2006 Notice of Suspension was issued during the time Rex had been granted an extension to complete the project, that is, before Rex had even had a chance to complete the project on time.

D. There was no "recent record of failure" as required under 5 GCA § 5426, sufficient to justify Rex's 2 year debarment.

E. See attachment re: additional factual responses to debarment grounds raised by GWA Legal Counsel Sam Taylor.

2. Rex seeks to have the Final Notice of Debarment voided.

3. See attached documents. Rex continues to assemble additional supporting documents.

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Declaration regarding court action:

To the best of Rex's knowledge, no action in court has been commenced concerning the subject of this appeal.

Dated October 30, 2006.

DOOLEY ROBERTS & FOWLER LLP

By:



TIM ROBERTS
Attorneys for Appellant
Rex International, Inc.

The following is an excerpt from Rex's response to the issues raised in GWA Legal Counsel Sam Taylor's Notice of Suspension and Final Notice of Debarment. The outline below corresponds to the outline in Mr. Taylor's Notices, generally.

1. VIOLATION OF CONTRACT PROVISIONS SO SERIOUS AS TO JUSTIFY DEBARMENT

a. Trench Collapse

When the problem regarding the shoring of the Route 4 trench was raised, Siwoo, who was primarily responsible for the problem, was informed and required to rectify the situation. Unfortunately, and contrary to Rex's instructions, Mr. Seong, the Siwoo President and General Manager violated Rex's Safety and Activity Hazard Analysis and personally went down into the trench to do a visual inspection in order to install a proper shoring system. As you know, the trench collapsed on Mr. Seong.

The decision of Mr. Seong to enter the trench was his personal decision and was a clear violation of Rex's Safety Protection agreement with Siwoo. As further evidence of Rex's good faith in attempting to appropriately address the trench collapse, Rex set up soil movement monitoring equipment. Records were submitted to both GWA and DPW. As such, Rex asks that GWA reconsider the shoring/trench issue as a basis for the debarment.

b. Sand Bedding

As to the use of substandard sand bedding, Rex incurred the costs of removing about 50 feet of the substandard bedding, out of a total 1300 feet of bedding. The resulting delay to the project was only 3 or 4 days.

2. DELIBERATE FAILURE WITHOUT GOOD CAUSE TO PERFORM IN ACCORDANCE WITH THE SPECIFICATION OR TIME FRAME SET FORTH IN THE CONTRACT

a. Failure To Complete Project Within 180 Days

GWA has construed Rex's failure to complete construction of the Chaot Wastewater lines within 180 days from the commencement of the Contract, as a "deliberate" failure to perform. While the project was not completed on time, this failure cannot reasonably be construed as "deliberate" as is required under 5 GCA § 5426. A number of other factors beyond Rex's control contributed significantly to the delay in completing the project.

For example, at the time Rex bid for the project, it was not disclosed to Rex that DPW proposed to widen Route 4. Rex had bid the project based on the reasonable assumption that it was dealing with Route 4 as it existed. Accordingly, Rex planned to install 1,000 linear feet of 24" diameter pipe adjacent to the then existing pipe along the Route 4. However, after Rex was awarded the project, and after a preliminary review of the plans, DPW disclosed the proposed widening,

forcing Rex to relocate its pipe 10 feet farther away than planned.

As a result of the forced relocation of the 24" pipe, a massive excavation and disposal of hillside material was required. Also as a result of the relocation, additional changes to the trench due to the new elevation were required, and additional bedding sand had to be laid. Despite the considerable alterations wrought by the planned DPW road widening, Rex's request for change orders were never granted. Thus these delays and additional construction and material expenses were borne exclusively by Rex.

Enclosed with this letter is a copy of a letter/notice from Donald C. Antrobus of GWA to Marc Gagarin, DPW Chief Engineer. The main topic of this correspondence was the relocation of the pipe centerline, which superseded the original plans issued by GWA and DPW, and as bid by Rex.

As a result of the relocation, major change order work in the form of slope cutting and excavation had to be done. Rex submitted its price for that additional work (copy enclosed), however, no change order was issued by GWA, and no time extension was granted by GWA.

b. Traffic Control Plan

Turning to the traffic control plan issues cited in your notice, Rex did not ignore much less fail to comply with the traffic management requirement. Right after the collapse of the trench, Rex deployed personnel with temporary traffic signs from 5:00 a.m. until 9:30 a.m. every morning for almost two (2) months.

Unfortunately, there was an instance of miscommunication regarding temporary traffic monitoring and control. When Rex received a lift order on the work stoppage, it presumed that the traffic control requirement was included in the lift order. When Rex discovered otherwise, traffic control was immediately re-implemented.

c. Vertical Trench

When GWA's Chief Engineer inspected the site on March 31, 2006, Rex had halfway completed lowering the 36" diameter pipe into the trench near the pump house. No shoring system was in place because no excavation or banking could be done; banking the trench at that point would have impacted the stability of the adjacent old pump house and perimeter cyclone wire fence and footings (see enclosed sketch). The potential damage to the pumping system was considerable. Rex therefore risked being faulted for the vertical trench walls, instead of risking damage to the pump house.

Also during that time, GWA's Chief Engineer suggested that Rex adopt a balloon system to clog the 36" pipe for bypass pumping. Regrettably, a 36" system was not available on Guam at that time; only a 12" balloon type clogging system from Smithbridge was available. Rex wrote to GWA and verbally informed GWA about the situation. Since Rex received no reply or comments thereto from GWA, it assumed that the method as planned was acceptable.

d. Slope Stabilization Plan

It is unfortunate that GWA found it difficult to coordinate with Rex's staff regarding a slope stabilization plan. Rex's engineers and subcontractors were in contact with GWA's engineers on a daily basis since the October 25, 2005 trench collapse. As part of the contract, an I-Connect radio transmitter was issued to GWA-Treatment Department Engineers for general communication and coordination purposes, which Rex relied on to keep the lines of communication open with GWA.

3. RECENT RECORD OF FAILURE TO PERFORM SATISFACTORILY UNDER A CONTRACT

GWA cites the problems under this single Contract as evidence of a "recent record of failure." Given the mitigating circumstance described above, Rex suggests that this single problematic contract should not be the basis for the most drastic penalty available: a two (2) year debarment.