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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: May 16, 2019
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FILE NO OPA-PA: 19-004

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of) DOCKET NO. OPA-PA-¹⁹⁻⁰⁰⁴~~004~~ FDJ
REX INTERNATIONAL,)
Appellant)
NOTICE OF APPEAL

REX INTERNATIONAL (“Rex”) hereby appeals the constructive denial of its demand for payment by Guahan Academy Charter School (“GACS”) related to Rex’s contract with GACS, GACS-3-2017-03 (the “Contract”). Rex brings this appeal pursuant to Title 5 of the Guam Code Annotated, §§ 5427 (a), (e) and (f) and § 5406.

I. APPELLANT INFORMATION

Name: Rex International
Mailing Address: P.O. Box 10000, Tamuning, GU 96931
Business Address: 139 E. Chalan Santo Papa, Suite 201, Hagåtña, GU 96910

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

II. APPEAL INFORMATION

A. Purchasing Agency: Guahan Academy Charter School
B. Contract No.: GACS-3-2017-03 (See Exhibit A attached hereto.)
C. Date of Contract: April 11, 2017

1 D. This appeal arises from GACS failure to respond within 60 days after Rex's demand for final
2 payment. Said inaction is deemed an adverse decision pursuant to 5 GCA § 5427(f). See letter dated
3 Mach 5, 2019 attached hereto as Exhibit B.

4 E. There is no competing bidder at issue in this Appeal.

6 III. Relevant Procedural History

7 Rex and Guahan Academy Charter School ("GACS") entered into a Formal Contract dated
8 April 11, 2017 to construct the GACS Tiyan Campus ("Contract") procured in accordance with 5
9 GCA, Chapter 5¹:

10 To install and assemble modular classrooms in the warehouse space, upgrade the fire
11 protection and fire alarm systems to comply with the changed use; and to renovate the
12 administration building for the various functions required and associated with
13 operating the school. It also includes the transportation and placement of eight modular
14 classrooms from the existing Tiyan Campus a travel distance of approximately 4,500
15 linear feet. (Project Description).

16 Exhibit C attached hereto, true and correct copy of Notice of Intent to Award dated April 25, 2016.

17 Rex performed work and expended funds in compliance with its obligations under the
18 Contract. GACS, however, has failed to pay Rex's applications for payments in full.

19 Rex attempted to amicably settle this matter with GACS to no avail. Rex has lost all faith in
20 GACS' ability to settle its claim. In a letter dated March 5, 2019, pursuant to Section 7² of the

21
22 ¹ 17 GCA § 12107. Duties and Powers, and other Requirements, of Charter
23 Schools.

24 (c) ...An Academy Charter school shall have the following
25 powers:...

26 (4) to secure appropriate insurance and to make contracts and leases, including agreements to procure or
27 purchase services, equipment, and supplies subject to Chapter 5, Title 5, Guam Code Annotated...

28 ² Pursuant to the Contract, disputes are appealable to the OPA:

SECTION 7. DISPUTES

Except as otherwise specifically provided in this Contract, all disputes concerning questions of fact arising under this Contract shall be decided by the GACS Board of Trustees whose decision shall be final and conclusive upon the parties thereto. In the meantime, the Contractor shall diligently proceed with the work as directed. However, the final decision of the GACS Board of Trustees is appealable to the Guam Public Auditor as provided under 5 G.C.A. § 5427(e).

1 Contract, Rex demanded GACS pay the outstanding balance owed to Rex in the amount of
2 **\$566,762.50** plus interest, attorney's fees and costs. The 60th day on which GACS was required to
3 respond to said demand was May 6, 2019.

4 Rex timely appeals GACS' failure to timely respond or to pay the amount due in full as
5 demanded.³

7 IV. STATEMENT OF GROUNDS FOR APPEAL

8 A. GACS breached the Rex International Contract.

9 Rex performed work and expended funds in compliance with its obligations under the
10 Contract. GACS, however, has failed to pay Rex's applications for payments in full.

11 In a letter dated March 5, 2019, pursuant to Section 7 of the Contract, Rex demanded GACS
12 pay the outstanding balance owed to Rex in the amount of **\$566,762.50** plus interest, attorney's fees
13 and costs. GACS failed to timely respond as required under 5 GCA § 5427(f).

14 GACS failure to respond to Rex's demand for final payment is deemed an adverse decision
15 pursuant to 5 GCA § 5427(f), which Rex now appeals.

16 Rex seeks an order from the Public Auditor finding GACS in breach of the Contract due to
17 its failure to pay in full for services and materials it received.

18 B. GACS breached the Implied Covenant of Good Faith and Fair Dealing.

19 "Every contract imposes upon each party a duty of good faith and fair dealing in its
20 performance and its enforcement." Rest.2d Contracts, §205. Good faith is defined by the Guam
21 Uniform Commercial Code as "honesty in fact in the conduct of transaction concerned," 13 GCA §
22 1201(19), and in the context of merchants as "honesty in fact and the observance of reasonable
23 commercial standards of fair dealing in the trade." 13 GCA § 1203 (1)(b). The implied covenant of
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27 ³ Rex intends to seek monetary damages against GACS under the Government Claims Act and in the Superior Court of
28 Guam. However, in an abundance of caution, Rex seeks a decision/declaration by the OPA that GACS is in breach of the
terms of the Contract and must pay the amount owed to Rex.

1 good faith and fair dealing “requires each contracting party to refrain from doing anything to injure
2 the right of the other to receive the benefits of the agreement.” Baza v. Guam Memorial Hospital
3 Plan, Inc., Superior Court of Guam Civil Case No. 1146-87 (Decision and Order, May 2, 1988)
4 (citing Egan v. Mutual of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979). “The implied covenant
5 seeks to protect the contracting parties’ reasonable expectations.” Hubbard Chevrolet Co. v.
6 General Motors Corp., 873 F.2d 873, 876-877 (5th Cir. 1989) (citing Restatement (Second) of
7 Contracts § 205(a) (“Good faith...emphasizes consistency with the justified expectations of the
8 other party; it excludes [conduct that violates]...community standards of decency, fairness or
9 reasonableness.”)).

11 GACS’ failure to respond to Rex’s inquiries and final demand for payment goes against the
12 honesty in fact in the conduct of the transaction concerned. GACS received the benefit of the
13 services and materials provided by Rex, thus Rex is entitled to payment in full pursuant to the terms
14 of the Contract.

16 **V. RELIEF REQUESTED BY REX INTERNATIONAL**

17 Rex International respectfully request a ruling from the OPA as follows:

- 18 1. GACS is in breach of the terms of the Contract by failing to pay Rex in full;
- 19 2. GACS breached the implied covenant of good faith and fair dealing;
- 20 3. GACS owes Rex International **\$566,762.50**;
- 21 4. For an award of reasonable attorney’s fees and costs of this appeal;
- 22 5. For such other relief that the OPA may determine is just and proper; and
- 23 6. GACS requests a hearing on this matter.

25 Respectfully submitted this 16th day of May, 2019.

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

27 By: _____

28 Georgette Bello Concepcion, Esq.
Counsel for Appellant Rex International