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In the Appeal of Guahan Ventures Inc. dba Turfco; OPA-PA-21-003

Claire Pollard <cpollard@rwtguam.com>
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Fri, Sep 3, 2021 at 4:10 PM

Dear Mr. Hernandez:

Please see the attached *Reply to Opposition to Motion for Injunctive Relief and Stay of Procurement Pending Final Resolution of Appeal* below in regards to the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

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 **9.3.21 Reply to Opposition to Motion.pdf**
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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of

Guahan Ventures Inc. dba Turfco,

Appellant.

DOCKET NO. OPA-PA-21-003

**REPLY TO OPPOSITION TO MOTION
FOR INJUNCTIVE RELIEF AND STAY
OF PROCUREMENT PENDING FINAL
RESOLUTION OF APPEAL**

I. INTRODUCTION

Appellant Guahan Ventures Inc. dba Turfco (“Turfco” or “Appellant”) is currently before the Office of Public Accountability (“OPA”) on appeal of the General Services Agency’s (“GSA” or “Procuring Agency” or “Agency”) denial of the protest filed by Turfco regarding the notice of award on GSA’s Request for Quotation (REQ) Q210280170 and RFQ 21002179 seeking golf carts (the “RFQ”). On August 27, 2021, Turfco moved the OPA for an order confirming that the automatic stay under 5 GCA § 5425(g) was triggered upon the filing of its Protest, and that the stay continues to be in force until final resolution of this protest and any appeals. On August 27, 2021, GSA opposed that motion on the assertion that “Turfco's protest did not trigger an automatic stay as their protest was made after award.” Opposition to a Motion, 2. This Reply is submitted to address GSA’s Opposition.

II. ARGUMENT IN REPLY

A. THE AUTHORITY RELIED UPON BY GSA IS DISTINGUISHABLE FROM THE PROCUREMENT THAT TURFCO HAS PROTESTED.

To support its assertion that the stay contemplated by Guam's procurement law does not apply here, GSA relies upon *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15. GSA tells us that since the particular contract award in *Guam Imaging Consultants, Inc.* occurred before a bid protest, the automatic stay was not triggered. *Guam Imaging Consultants, Inc.* is completely distinguishable from the procurement process that GSA has is utilizing here. In *Guam Imaging Consultants, Inc.* the protesting offeror was informed on March 21, 2003, that a selection of a most qualified offeror had been made by the procuring agency. **This notification to the eventual protester came on May 14, 2003 — nearly two months before an actual contract award was made.** See *Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15, ¶31 (referencing the record regarding “GMHA's announcement on May 14, 2003, that it had awarded a sole source interim contract....”) The protest in *Guam Imaging Consultants, Inc.* came on May 16, 2003.

Here, **GSA acknowledges that it awarded offeror Guam Autospot the golf carts at issue in this procurement before informing other offerors that a selection had even been made.** GSA admits that “As the record plainly shows, GSA issued the Purchase Order to the winning offeror on June 19, 2021, and the Government of Guam accepted delivery of the golf carts on June 23, 2021. (Agency Procurement Record, Tab 7). It wasn't until June 24, 2021, that Turfco filed a formal

protest with GSA. (Notice of Appeal, Exhibit I) after the contract was awarded through the issuance of the purchase order and after the Government of Guam accepted delivery.” Opposition, 2-3.

GSA neglects to inform the OPA that, prior to the purported delivery of the carts, Turfco requested information as to the award of RFQ21002179 on June 22, 2021. The record shows that the Bid Abstract for the requisition was sent to Turfco on June 24, 2021, and that the abstract showed that Turfco was the lowest responsive bidder. While the abstract was requested before cart delivery, the abstract was only sent **after** Autospot was able to deliver the carts. It was only on June 24, 2021 — **five days after issuing a purchase order to Autospot** — that GSA informed Turfco that they were not selected because Guam Auto Spot could deliver the golf carts “immediately.”¹ On June 24, 2021, Turfco protested GSA’s award to Guam Auto Spot based upon the improper late addition of the “immediate delivery” specification that was not contained in the original bid requirements, and that was only added after-hours in the waning moments of the bid submission window, after all offerors had already prepared their bids. Turfco’s protest was made at the first possible instance upon learning of the selection of Autospot. GSA denied the protest on June 25, 2021.

B. THE OPA CAN ISSUE THE ORDER THAT TURFCO SEEKS

The GSA is correct that the previous public auditor had declined to enforce the automatic stay when a contract between the agency and the winning bidder had been executed prior to a timely protest. Despite that ruling, the OPA can indeed provide

¹ The immediate delivery requirement was a specification change that was added the day before the quote was due and after all offerors had prepared their bids.

the relief sought by Turfco. *In the Appeal of TLK Marketing Co., Ltd.* OPA-PA-16-003, (Decision and Order, June 15, 2016, Page 3), the previous public auditor, while finding that the automatic stay could not be confirmed in that case because the protest in that case was filed after award, explained that she found that the offeror there “was deprived of any meaningful opportunity to protest the procurement prior to award or to receive the benefits of the automatic stay. This appears to be a trend with procuring agencies awarding contracts concurrently without notifying non-selected bidders, in an attempt to limit the protesting period and avoid the automatic stay.” *Id.* The public auditor also explained that the situation created “resulting fundamental unfairness.” *Id.*

While the previous public auditor declined to take action, this office should embrace the full breadth of the jurisdiction that the legislature has provided it. The Public Auditor has the power to promote the integrity of the procurement process and the purposes of Guam’s procurement laws. *See* 5 GCA § 5703 (“The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.”). The Public Auditor has the power to review and determine “any matter properly submitted” to her, 5 GCA § 5703, and reviews *de novo* denials of protests in connection with the solicitation of a contract. *See* 5 GCA § 5425(e). Further, in the regime of procurement, the OPA holds powers akin to a court, since Guam law allows procurement matters brought before a court to be, without limitation, remanded to the OPA. *See* 2 GAR § 12103(b). Moreover, the OPA’s regulations provide that the hearing officers appointed by the OPA have the “power,

among others, to (d) Rule on motions, and other procedural items on matters pending before such officer.” 2 GAR § 12109. The OPA is also specifically tasked with reviewing Agency determinations to lift the statutory stay imposed by Guam law. 2 GAR § 12501(b) mandates that the “Public Auditor shall review and confirm or reject any determination by the Chief Procurement Officer or the Director of Public Works that award of a contract without delay pending Appeal is necessary to protect the interests of the government.” 2 GAR § 12501(b).

The OPA also has the power to order an agency to take certain action *vis a vis* a procurement. The OPA routinely orders agencies to take certain action or cancel certain action with regard to specific procurements. *See In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA-08-012, Decision at pp 9-10 (Feb. 10, 2009). (Ordering GSA to cancel a multi-step bid). In a prior appeal, *In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA -08-003, Decision (July 11, 2008), the Public Auditor determined that while she lacked jurisdiction over the appeal to consider the merits of the protest because there was not yet an agency decision, she did have the power and the jurisdiction under Guam law to compel an agency to render a decision on a protest. In other words, the OPA can order Government of Guam agencies to take action and — as Turfco is requesting here — recognize the existence of the stay, and the violation of that stay.

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C. THE OPA SHOULD PRESERVE THE INTEGRITY OF THE PROCUREMENT PROCESS BY REIGNING IN AGENCY CONDUCT THAT IS DESIGNED TO WEAKEN THE PROCUREMENT PROTEST REVIEW PROCESS.

Turfcó's instant appeal provides the OPA with an opportunity to bring further clarity to the nature of the automatic stay under Guam's procurement law. Without a stay in place, and with the procuring agency actively moving forward with contract performance, the prejudice to Turfcó and other similarly situated offerors who are told of an award only after a purchase order is issued mounts, and any meaningful resolution for Turfcó becomes more difficult to obtain. More, every moment of additional use of the carts by GSA further entangles GSA and Autospot with each other, creates further financial commitments, creates additional litigation difficulty, and damages claims that will be held by Turfcó against GSA — should the OPA determine that the contract executed for the RFQ was void.

The instant appeal also provides the OPA with an opportunity to bring to a halt a concerning trend: collusion between Government agencies and Offerors to award contracts and issue purchase orders in such a manner as to avoid just procurement protests altogether and avoid the automatic stay should such a protest be brought. It has become clear from a review of the Procurement Record that GSA worked directly with Autospot, without the knowledge of other bidders, to declare Autospot the awardee of the RFQ, withhold information regarding the ranking and award of the order so as to deprive offerors like Turfcó of their protest rights under Guam procurement law.

Federal procurement law, while not controlling, is instructive on the important

role the statutory stay plays in procurement regimes. The United States Court of Federal Claims, examining the similar statutory stay of procurement that is triggered in federal bid protests and continues through the appeal process before the Government Accountability Office (GAO), has written that “The automatic stay is intended to preserve the status quo during the pendency of the protest so that an agency would not cavalierly disregard the GAO's recommendation to cancel the challenged award. The overarching goal of the stay is to preserve competition in contracting and ensure a fair and effective process at the GAO.” *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 30-31 (Fed. Cl. 2006) (internal quotations and citations omitted). The GAO — the Federal Government’s procurement oversight equivalent of this office — has specifically found fault with contracting agencies for attempting to circumvent the statutory stay by informing losing offerors so late after the award that protesters could not reasonably avail themselves of the suspension remedy.² See, e.g., *Gtt Indus., Inc.*, B-220824, United States Government Accountability Office (Nov. 5, 1985) (Explaining that unsuccessful offerors should be informed of that status and be provided debriefings so that they obtain the benefit of the stay provision.); see also *Strategica, Inc.*, B-227921 United States Government Accountability Office (Oct. 27, 1987) (noting the failure of a contracting officer to give unsuccessful offerors in small business set-aside procurements pre-award notice of

² 31 U.S.C.A. § 3553(d)(4) enables a protester to have the benefit of this automatic performance stay if the protest was filed with GAO (1) within 10 days after the date of the contract award or (2) within five days after a debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

the name and location of the apparent successful offeror). If GSA could, as it has done here, ignore the statutory stay and move forward with clandestine contract execution and purchase orders prior to even informing unsuccessful offerors that a selection has been made, the goal of our procurement laws would be frustrated, and competition cannot be preserved.³

III. CONCLUSION

GSA should not be allowed to provide clandestine notices to some offerors and withhold information from others in order to neuter the protest rights of offerors it does not favor. Turfco respectfully requests that the OPA enforce the stay of procurement by issuing an order confirming that the automatic stay under 5 GCA § 5425(g) was triggered upon the filing of the protest, that GSA's failure to inform all parties that a particular offeror was selected for award was in violation of law, and that the stay continues to be in force until final resolution of these protests including any appeals. The OPA should grant injunctive relief on these issues in accordance with its powers expressed in *In the Appeal of Morrigo Equipment, LLC*, OPA-PA-15-

³ The Guam Supreme Court has recognized the importance of the automatic stay in preserving the status quo pending review of a procurement protest. The Court has held that Government Agencies should delay on moving forward with contract performance during the time periods that an aggrieved offeror may seek review of a solicitation. In *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, the court explained that "The Government should refrain from taking action (e.g., issuing purchase orders to its chosen bidder) on a procurement award until the fourteen-day period has expired and a civil action has not been filed in the Superior Court to review the OPA's decision. There is no clearly stated legislative intent contrary to this interpretation."

014, OPA-PA-15-017, OPA-PA-16-001, and declare that all actions taken by GSA since June 25, 2021, in furtherance of the RFQ are void.

Submitted this 3rd day of September, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

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