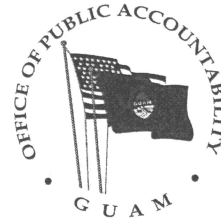


Suite 401 DNA Building  
 238 Archbishop Flores St.  
 Hagåtña, Guam 96910



# FAX

<b>To:</b>	Mr. Marcus Pido Supply Management Administrator Guam Department of Education	<b>From:</b>	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
<b>Phone:</b> <b>Fax:</b>	GDOE Phone: 475-0436 Fax: 472-5001	<b>Pages:</b>	7 (including cover page)
<b>CC:</b>	John Terlaje Attorney for J&B Modern Tech Phone: 477-8894 Fax: 472-8896  Julisis R. Nucum JRN Air Conditioning & Refrigeration, Inc. Phone: 649-8120 Fax: 649-5737	<b>Date:</b>	May 29, 2014
		<b>Phone:</b> <b>Fax:</b>	475-0390 x. 203 472-7951

**Re:** OPA-PA-14-001 Decision and Order [Re: J&B Modern Tech's Motion to Declare Stay in Effect]

Urgent     For Review     Please Comment     Please Reply     Please Recycle

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver. Thank you.

Jerrick Hernandez

[jhernandez@guamopa.org](mailto:jhernandez@guamopa.org)

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



OFFICE OF PUBLIC ACCOUNTABILITY  
Doris Flores Brooks, CPA, CGFM  
Public Auditor  
**BEFORE THE PUBLIC AUDITOR  
PROCUREMENT APPEALS  
TERRITORY OF GUAM**

**IN THE APPEAL OF  
J&B MODERN TECH,**

**Appellant.**

**Docket OPA PA-14-001**

**DECISION AND ORDER [RE: J&B  
MODERN TECH'S MOTION TO  
DECLARE STAY IN EFFECT]**

**INTRODUCTION**

On April 11, 2014, Appellant, J&B Modern Tech (“J&B”), filed a Motion to Declare Automatic Stay in Effect. On April 18, 2014, the Guam Department of Education (“GDOE”) filed an Opposition to Motion to Declare Automatic Stay in Effect. Also on April 18, 2014, Interested Party, JRN Air Conditioning & Refrigeration, Inc. (“JRN”), filed an Opposition to Appellant’s Motion to Declare Automatic Stay in Effect. On May 13, 2014, oral arguments were heard on J&B’s Motion before Public Auditor Doris Flores Brooks and Hearing Officer Peter C. Perez, Esq. John C. Terlaje, Esq. appeared on behalf of J&B along with J&B President Generoso M. Bangayan. Andrew T. Perez, Esq. appeared on behalf of GDOE along with GDOE Assistant Supply Management Administrator Carmen Taitano. Julienne Nucum, Esq. appeared telephonically on behalf of JRN along with JRN representative, Julisis R. Nucum.

The Public Auditor issues this Decision and Order based upon the procurement record, the documents and exhibits submitted by the parties, the oral arguments presented by the parties, and the parties’ respective briefs.

1  
2 **DECISION**

3 On November 25, 2013, GDOE issued Invitation for Bid 005-2014 (“IFB”) for the Air  
4 Conditioning Systems Exterior Duct Restoration Project. [GDOE 0249]. On December 17, 2013,  
5 JRN and J&B submitted bids. [GDOE 0014; 0109]. On February 5, 2014, GDOE issued a Bid  
6 Status to JRN. It stated, *inter alia*, “Bid is recommended for award to JRN Air Conditioning and  
7 Refrigeration, Inc. whose bid price was \$254,501.91.” [GDOE 0317]. On that same date, GDOE  
8 issued a Bid Status to J&B. It stated, *inter alia*, “Not selected due to Higher Price Bid Offered.”  
9 [GDOE 0318]. Also on February 5, 2014, GDOE Supervisor II, Albert G. Garcia, sent a  
10 Memorandum to Supply Management Administrator Marcus Y. Pido, stating that the  
11 recommendation for award is made to JRN Air Conditioning and Refrigeration and that the total  
12 amount recommended for award was \$254,501.91. Mr. Pido approved the recommendation.  
13 [GDOE 0319]. GDOE simultaneously awarded the bid and issued the purchase order to JRN on  
14 the same date, February 5, 2014.

15 The next day, on February 6, 2014, J&B filed a Protest to the Superintendent of Education  
16 and Supply Management Administrator asserting that JRN’s bid was non-responsive and that  
17 JRN should be disqualified from consideration.

18 On February 7, 2014, GDOE issued a Notice of Stay. On March 7, 2014, GDOE denied  
19 J&B’s Protest and issued a Notice to Lift Stay of Procurement. On March 13, 2014, J&B filed a  
20 Notice of Appeal, appealing GDOE’s March 7, 2014 Decision. In its appeal, J&B concedes that  
21 the appeal “is brought in the context of a post award protest.”

22 Relying on the Public Auditor’s Decision in *In re Appeal of JMI Edison*, OPA-PA-13-010,  
23 Order Granting Motion for Automatic Stay [September 20, 2013], J&B argues that the automatic  
24 stay pursuant to 5 G.C.A. § 5425(g) was triggered upon J&B’s timely filing of its February 6,  
25 2014 Protest and continues to remain in effect. J&B also argues that it will be irreparably injured  
26 if the automatic stay is not enforced.

1 GDOE argues that *In re Appeal of JMI Edison*, OPA-PA-13-010, Order Granting Motion for  
2 Automatic Stay [September 20, 2013] is distinguishable from the facts of this case. It further  
3 argues that pursuant to the Supreme Court of Guam case *Guam Imaging Consultants, Inc. v.*  
4 *Guam Memorial Hospital Authority (GMHA)*, 2004 Guam 15, the automatic stay is not triggered  
5 when a timely protest is filed after an award is made. GDOE asserts that J&B is limited to  
6 remedies other than an automatic stay.

7 JRN argues that no automatic stay was triggered because J&B's Protest was untimely. As  
8 such, JRN stated in its April 18, 2014 Opposition to Appellant's Motion to Declare Automatic  
9 Stay that it had completed 45% of the contract. It further argues that J&B's Motion fails to  
10 satisfy the criteria for granting preliminary injunctive relief.

11 The Guam Procurement Law is found at Title 5 G.C.A. Chapter 5. Pursuant to 5 G.C.A. §  
12 5425(g), subject to certain exceptions not applicable here, "In the event of a timely protest...the  
13 Territory shall not proceed further with the solicitation or with the award of the contract prior to  
14 final resolution of such protest, and any further action is void..." The Supreme Court of Guam  
15 has ruled that the automatic stay provisions found in the Guam Procurement Law require that a  
16 protest be both factually timely and be pursued before the award has been made to trigger the  
17 automatic stay. *Guam Imaging Consultants, Inc.*, ¶ 23. Two issues must be considered regarding  
18 the timing of the protest, the first being timeliness in relation to the underlying facts, the second  
19 being whether it was filed before the award was made. If the protest was both factually timely and  
20 filed before the award was made, the automatic stay provision is triggered. *Id.* at ¶ 24. Thus, in  
21 order to determine whether or not the automatic stay has been triggered it must be determined if  
22 the protest was filed in a timely manner and before an award was made. *Id.* at ¶ 32.

23 J&B's Protest was timely filed. 5 G.C.A. § 5425(a) provides, "Any actual or prospective  
24 bidder, offeror, or contractor who may be aggrieved in connection with the method of source  
25 selection, solicitation or award of a contract, may protest to the...head of a purchasing agency.  
26 The protest shall be submitted in writing within fourteen (14) days after such aggrieved person  
27 knows or should know of the facts giving rise thereto."

1 J&B was a bidder that asserts it was aggrieved when on February 5, 2014 GDOE did not  
2 select it for award and instead recommended the award to JRN.

3 The next day, on February 6, 2014, J&B filed a Protest to the Superintendent of Education  
4 and Supply Management Administrator asserting that JRN's bid was non-responsive and that  
5 JRN was disqualified from consideration. J&B's February 6, 2014 Protest was filed within  
6 fourteen (14) days of GDOE's February 5, 2014 Bid Status issuances to JRN and J&B.  
7 Accordingly, J&B's Protest was timely filed.

8 However, J&B's Protest was filed after GDOE awarded the contract to JRN. Because GDOE  
9 simultaneously awarded the bid and issued the purchase order to JRN on the same date, February  
10 5, 2014, J&B's Protest filed on February 6, 2014 was post-award. The Supreme Court of Guam  
11 has ruled that the automatic stay provisions found in the Guam Procurement Law require that a  
12 protest be both factually timely and be pursued before the award has been made to trigger the  
13 automatic stay. *Guam Imaging Consultants, Inc.*, ¶ 23. Consequently, the automatic stay was not  
14 triggered in this case. Furthermore, the Public Auditor's Decision in *In re Appeal of JMI Edison*,  
15 OPA-PA-13-010, is distinguishable because in that case JMI's timely protest was filed before the  
16 award was made.

17 The manner in which GDOE simultaneously issued the Bid Status recommending the award  
18 to JRN and issuing the purchase order was inconsistent with the Guam Procurement Law  
19 purposes and policies. Pursuant to these policies, GDOE was required to ensure public confidence  
20 in the procedures followed for public procurement; to ensure the fair and equitable treatment of  
21 all persons who deal with the procurement system; to foster effective broad-based competition  
22 within the free enterprise system; and, to provide safeguards for the maintenance of a  
23 procurement system of quality and integrity. 5 G.C.A. § 5001(b). All parties involved in the  
24 negotiation, performance, or administration of territorial contracts are required to act in good  
25 faith. 5 G.C.A. § 5003. The Guam Procurement Law provides that contracts shall be awarded  
26 *with reasonable promptness* by written notice. [emphasis added] 5 G.C.A. § 5211(g).

1 In the instant case, GDOE acted in violation of the spirit of the Guam Procurement Law.  
2 GDOE's actions deprived J&B of the opportunity to obtain an automatic stay when it filed its  
3 Protest and to maintain the status quo during its timely appeal to the Public Auditor. In its defense  
4 at the May 13 Motions Hearing, DOE Legal Counsel Andrew Perez stated "Nothing in the  
5 procurement law, nothing in the procurement regulations prevent a waiting period to  
6 award...Theres nothing there that prevents an agency from issuing their notices, issuing their  
7 intent to award and then subsequently issuing on the same day, a purchase order. We have not  
8 found anything in the procurement law that prevents us from doing that." J&B Attorney John  
9 Terlaje argued that when the notice to award and purchase order are issued at "... the same time,  
10 when do we protest? When do we appeal? We find it disingenuous for any party, whether it's the  
11 interested third party, whether it's the government, to come and say well it doesn't state it." Mr.  
12 Perez acknowledged that changes to the procurement law and regulations to include more  
13 guidance on the automatic stay process "may be something that the Legislature needs to address."  
14 Since the automatic stay has not been triggered, J&B has been denied a meaningful remedy,  
15 should J&B's appeal succeed.<sup>1</sup>

16  
17  
18  
19  
20  
21  
22  

---

<sup>1</sup> Pursuant to 5 G.C.A. § 5451, if prior to award it is determined that a proposed award of a  
23 contract is in violation of law, the proposed award shall be cancelled or revised to comply with  
24 the law. If that determination is made after an award, if the person awarded the contract has not  
25 acted fraudulently or in bad faith the contract may be ratified and affirmed; or terminated. If the  
26 person awarded the contract has acted fraudulently or in bad faith, the contract may be declared  
27 null and void; or may be ratified and affirmed if such action is in the best interests of the  
28 Territory. 5 G.C.A. § 5452. In the instant case no evidence has been presented or any arguments  
advanced that JRN has acted fraudulently or in bad faith.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CONCLUSION**

J&B's Motion to declare the automatic stay in effect is DENIED.

The Guam Legislature is invited to address the issue of concurrently issuing an intent to award and award of a contract thus eliminating the automatic stay.

**IT IS SO ORDERED this 29<sup>th</sup> day of May, 2014.**



**DORIS FLORES BROOKS, CPA, CGFM  
PUBLIC AUDITOR**