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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI Edison,

Appellant.

Docket No. OPA-PA 13-010

**MOTION FOR EXPEDITED RELIEF
TO DECLARE AUTOMATIC STAY
IN EFFECT**

I. MOTION

JMI-Edison (JMI/Appellant) respectfully moves the Office of Public Accountability (OPA) for an immediate order determining that the statutory stay mandated by 5 GCA §5425(g) has remained in place since the initiation of JMI's protest of the Guam Department of Education's (GDOE) decision to award IFB008-2013. JMI further moves the OPA for an order compelling GDOE from taking any further action with regard to IFB008-2013 until final resolution of JMI's protest. JMI requests that, if deemed necessary by the OPA, a hearing officer be immediately appointed and a hearing held to address this motion. This Motion is supported by the record currently before the OPA, the appended supporting memorandum, the Declaration of Leslie Travis submitted contemporaneously herewith (hereinafter "Travis Declaration"), and any argument that the OPA may entertain on this matter.

II. MEMORANDUM IN SUPPORT OF MOTION

A. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

As stated in JMI-Edison's Notice of Appeal, JMI-Edison ("JMI") was an offeror which submitted a bid pursuant to an Invitation for Bid No. 008-2013 for Indefinite Quantity for

Purchase of AC Equipment ("IFB") issued by the Guam Department of Education ("GDOE"). The IFB sought proposals from vendors to submit bid for the supply of an indefinite quantity of air conditioning equipment.

The bids were opened publicly on March 28, 2013. On June 22, 2013, JMI received a "Bid Status and Intent to Award" letter informing it that that another offeror had been awarded the contract. *See*, Bid Status and Intent to Award, **Exhibit A** to the Notice of Appeal. On July 3, 2013, JMI submitted a Procurement Protest to GDOE citing several errors in GDOE's evaluation of JMI's offer. Because JMI's protest was timely filed, it triggered the automatic stay mandated by 5 GCA §5425(g). Section 5 GCA §5425(g) provides, in relevant part, that in the event of a timely protest... the Territory shall not proceed further with the solicitation of with the award of the contract prior to final resolution of such protest, and any such further action is void” 5 GCA §5425(g), unless there is a written determination by the Chief Procurement Officer with the written concurrent of the head of the purchasing agency and the Attorney General, that the award of the contract without delay is necessary to protect the substantial interests of the Territory. . . .” 5 GCA § 5425(g)(1).

On July 25, 2013 GDOE issued its decision denying JMI's protest. *See*, Decision, **Exhibit B** to the Notice of Appeal.

At 11:40 a.m. on July 25 2013, GDOE issued a letter to all bidders called “Notice to Lift Stay of Procurement.” This letter, without citation to Guam law, stated that “GDOE has responded to [JMI’s] protest and no appeal has been timely filed. Subsequently, GDOE will proceed with the procurement of IFB 008-2013....” (“Notice to Lift Stay”). *See*, Notice to Lift Stay of Procurement, **Exhibit A** to the Travis Declaration. The Notice to Lift Stay was issued on the same day as the denial of JMI’s protest. There was no basis or authority on GDOE’s part to find that JMI had not timely filed an appeal.

GDOE sent the Notice to Lift Stay was sent to JMI’s General Manager by before GDOE sent JMI the denial of its protest. The protest decision denied JMI’s protest on the same incorrect grounds used to exclude JMI from award of the IFB. The next day, June 26, 2013, JMI

its Notice of Intent to Appeal with the Office of the Public Auditor (“OPA”), and served the Notice of Intent to Appeal on the GDOE.

On August 2, 2013, JMI timely filed this appeal from the July 25, 2013 denial of its protest by GDOE. GDOE has not transferred the Procurement Record or submitted the Agency’s report to the OPA or JMI.

Upon information and belief, GDOE proceeded to execute a contract with the awardee of the IFB on July 26, 2013. This award and execution of the contract not only violated the statutory stay, it did not comply with 5 GCA §5425(g) requiring a written finding by the office of the Attorney General that the award of the contract without delay was necessary to protect the substantial interests of the territory. The contract is void.

B. ARGUMENT

1. The OPA has the jurisdiction and power to provide the order JMI seeks.

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 or award or award of a contract. *See* 5 GCA § 5425(e). Further, in the regime of procurement, the OPA holds the powers of 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).

The power of the OPA has been determined by the Guam Legislature to be as broad as is necessary. As mentioned above, Guam law provides that “[t]he Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.” 5 GCA §5703. Moreover, the OPA’s regulations provide that the hearing officers appointed by the OPA have the power “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. Title 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 cease further action regarding procurement. JMI is asking the OPA to declare that the stay is in effect.

2. GDOE’S “Notice to Lift Stay of Procurement” has no legal effect.

Guam law provides only one way an Agency can avoid the stay mandated by 5 GCA §5425(g). These provisions of Guam Procurement Law that address the automatic stay are codified at 5 GCA §5425(g) and override any inconsistent provisions that may exist in an Agency’s own regulations. *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, Guam Supreme Court, 2004 Guam 15 at ¶¶ 24, 41. Guam law is clear that any further action to proceed with a solicitation or award during the period of the automatic stay is void unless the contracting officer “after consultation with and written concurrence of the head of the

using or purchasing agency and the Attorney General or designated Deputy Attorney General, makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the Territory.” 5 GCA §5425(g). In addition, the law requires that the protester be afforded at least 2 days notice of such a determination. 5 GCA §5425(g). Guam courts have held that where an agency fails to obtain the Attorney General’s confirmation of a determination of necessity to lift the automatic stay, even where that confirmation is not required by its own regulations or procedures, the agency still must comply with 5 GCA §5425(g). *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority, Guam Supreme Court, 2004 Guam 15 at ¶ 41.*

Nothing in the record shows that the finding of necessity under 5 GCA §5425(g) has been made. To the contrary, the record is replete with facts that show GDOE’s ignoring of the stay was in contravention of law. First, JMI’s general manager received notice from GDOE of the purported lifting of the stay **before** the Agency sent its decision on JMI’s protest to him. *See* Email transmissions to JMI, **Exhibits B and C** to the Travis Declaration.¹ Second, JMI’s protest is pending, and there is not a final resolution. JMI has not yet exhausted its administrative review allowed under the Guam Procurement Code.

Finality of administrative review is addressed in sections 5425(e) and (f) of the procurement code, which provide that the agency's decision on the protest may be appealed to the Public Auditor within 15 days, and the Public Auditor's decision on the protest shall be final unless the aggrieved person files an action in the Superior Court in accordance with section 5480(a). *See* 5 GCA §§5425(e), (f). Similarly, the relevant regulations in place prior to the availability of appeals to the Public Auditor also reflect that a decision is not final where judicial review of the decision is sought. Title 2 GAR §9101.1 states that “[a] decision of the Chief

¹ It is true that the email transmission records show that GDOE sent JMI’s undersigned counsel the protest decision *sixty seconds* before GDOE sent JMI’s general manager the notice of the lifting of the stay. JMI’s legal counsel was not included on the email regarding the stay, and JMI’s general manager was not included on the email regarding the protest decision. Only a strained reading of Guam Procurement law would lead to a result where JMI, in order to maintain the automatic stay, would have had to file its appeal 59 seconds after receiving, through email, the agency’s protest decision. Such an absurd conclusion cannot be allowed to stand.

Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with §9103 and §9108." 2 GAR §9101.1.

Both the statutes and regulations define finality with reference to the filing of an appeal (or judicial review), and the requirement that the stay be in place prior to "final resolution" therefore logically includes the time for appeal as well through the appeal period. Any other interpretation would lead to the illogical ---and absurd---result wherein the stay could be lifted after the agency's decision on the protest but prior to appeal, but resurrect itself once an appeal is filed, a result which is inconsistent with the definition of finality under the procurement laws.

The OPA has articulated that "final resolution" of an appeal would include the time period of an appeal after protest. *In the Appeal of IBSS*, OPA-PA-08-012, at pp 9-10. GDOE has recognized the need for final resolution of protest before the ending of the statutory stay. GDOE's "Notice to Lift Stay" is based on GDOE's belief "no appeal has been timely filed." *See* Notice to Lift Stay of Procurement, attached as **Exhibit A** to the Travis Declaration. This is not the law. GDOE's agency level decision was rendered on July 25, 2013. JMI's statutory appeal timeline extended for 15 days beyond that. *See* 5 GCA § 5425(e). GDOE could not have determined that no appeal had been timely filed until at least August 9, 2013. The instant appeal was filed on August 2, 2013. The OPA has been clear that the award of a contract that violates the automatic stay is void. *In the Appeal of [IBSS]*, OPA-PA-08-012, at pp 9-10. The law requires that the OPA similarly rule here.

JMI recognizes that the OPA has previously taken an appeal where the Agency did award a contract in the time period between rendering its decision and before the offeror's OPA appeal was filed. In *Appeal of Guam Publications, Inc.*, OPA-PA 08-007, the Agency denied the offeror's protest on May 1, 2008. The Agency then moved forward with a contract award a week later on May 9, 2008. The offeror submitted its appeal to the OPA on May 14, 2008. To the extent that the OPA, in *dicta*, did not disturb that contract award, the OPA should recognize the

flaw of such a conclusion, recognize the distinguishing characteristics and absurdity of the instant procurement, and rule that GDOE's contract award in this case is void.

The prior dicta of the OPA did not address the confounding sequence of events that faced JMI in the instant matter. Here, JMI first received notice that the stay was being lifted, then received notice that its protest was denied, then faced an immediate contract execution by the agency. JMI responded within a single day to place the agency on notice of its imminent appeal. Simply put, JMI acted with unprecedented speed to bring this matter to the OPA. If GDOE is allowed to cast aside the statutory stay, issue a protest decision, and negotiate and execute a contract in the span of a only a few hours, the entire procurement system would be undermined. The statutory stay and the protections it affords aggrieved offerors would be eviscerated, and potentially aggrieved offerors would be forced to clog the courts and the OPA in order to take preemptive steps through litigation to make certain that the statutory stay has effect.

Furthermore, the denial of a protest followed immediately by an award of a contract prior to the expiration of the time to appeal to the OPA, in this case within hours of the denial, would mean, if the stay did not continue in place, that every appeal reaching the OPA would resolve itself into a post-award protest completely excluding from the OPA's consideration of and depriving the protesting party of the remedies available under 5 GCA § 5451 regarding pre-award protests when the protest itself was made before an award.

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). If GDOE could,

as it did here, ignore the statutory stay and move forward with contract execution prior to final resolution of an offeror's protest, the goal of our procurement laws would be frustrated, and competition cannot be preserved.

3. JMI will be irreparably injured.

Guam law provides that if Appellant JMI is successful in its protest, JMI "shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees...." 5 GCA §5425(h). GDOE's pushing forward with the procurement award to J&B Modern Tech hampers any remedy JMI may have to become an awardee of the solicitation, since the Territory may be able to merely ratify and affirm J&B's contract regardless of the outcome of the instant appeal. 5 GCA § 5425(a)(1); (2). As more air conditioners are ordered and installed by J&B, JMI becomes less and less likely of having a meaningful outcome to its appeal.

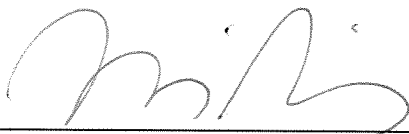
Since JMI will only be able to recover the costs of its bid if the stay is not honored and its protest appeal is sustained by the OPA, JMI will be irreparably injured. Irreparable injury is defined as injury for which there is no adequate remedy at law. *Shin v. Fujita Kanko Guam, Inc.*, CVA 07-002, 2007 WL 4348300 (Guam Dec. 6, 2007); *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 716-17 (Fed. Cl. 2006). The Federal Claims court has held that where an aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated profits, such a bid protester is irreparably harmed. *See Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) citing *Essex Electro Eng'rs, Inc. v. United States*, 3 Cl.Ct. 277, 287 (1983), *aff'd*, 757 F.2d 247 (Fed.Cir.1985). This is the exact situation faced by JMI, and necessitates the action requested by JMI.

C. CONCLUSION

GDOE's disregard of the statutory stay poses immediate and irreparable harm to JMI and threatens the integrity of Guam's procurement system. JMI-Edison asks that the OPA issue an immediate order finding that the statutory stay mandated by 5 GCA §5425(g) has remained in place since the initiation of JMI's protest of GDOE's decision to award IFB008-2013. JMI further requests that the OPA compel GDOE to cease further action in connection with this procurement until final resolution of JMI's protest.

Submitted this 9th day of August, 2013.

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