

David W. Dooley
 Seth Forman
 DOOLEY ROBERTS & FOWLER LLP
 Suite 201, Orlean Pacific Plaza
 865 South Marine Corps Drive
 Tamuning, Guam 96913
 Telephone No. (671) 646-1222
 Facsimile No. (671) 646-1223
 E-mail: Dooley@guamlawoffice.com
Forman@guamlawoffice.com

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 PROCUREMENT APPEALS

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Attorneys for Appellant
 G4S Security Systems (Guam) Inc.

**OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

In the Appeal of)
)
 G4S Security Systems (Guam) Inc.,)
)
 Appellant.)
 _____)

**MOTION TO DECLARE
 AUTOMATIC STAY IN EFFECT**
 Docket No. OPA-PA 13-013

I. MOTION

Appellant G4S Security Systems (Guam) Inc. (“G4S”) respectfully moves the Office of Public Accountability (“OPA”) for an order determining that the statutory stay mandated by 5 GCA §5425(g) has remained in place since the initiation of G4S’s protest of the Guam Department of Education’s (“GDOE”) decision to reject GS4’s bid on GDOE Invitation for Bid (“IFB”) 032-2013. G4S further moves the OPA for an order compelling GDOE to refrain from taking any further action with regard to IFB 032-2013 until final resolution of G4S’s protest. This motion is supported by the record before the OPA (primarily G4S’s Notice of Appeal and exhibits thereto), the following supporting memorandum, and any argument that the OPA may entertain on this matter.

II. MEMORANDUM IN SUPPORT OF MOTION

A. Relevant factual and procedural background.

ORIGINAL

As stated in G4S's Notice of Appeal, G4S submitted a bid pursuant to GDOE IFB 032-2013 for "Design Build Fire Alarm System Upgrade/Replacement and Fire Suppression/Sprinkler System Repair for Southern High School". The bids were opened publicly on September 16, 2013. G4S had the low bid, at \$477,693.65, while Orion Construction Corporation (Guam) ("Orion") was second lowest at \$499,998.00. *See Exhibits 1 and 2 to Notice of Appeal.*

On the same day, G4S received a "Bid Status" document from GDOE stating that the G4S bid was rejected due to failure to include copies of two items, "Clarification No. 2" and "Amendment No. 2", with its bid documents. *See Exhibit 3 to Notice of Appeal.*

Later that same day, G4S served a protest in connection with GDOE IFB 032-2013 on GDOE. *See Exhibit 6 to Notice of Appeal.* This was well within the 14 day deadline for filing of a protest. *See 5 GCA §5425(a).* Further clarifications were made by G4S in two letters dated September 30, 2013. *See Exhibits 7 and 8 to Notice of Appeal.* Both of these letters are dated within the 14-day period for G4S to protest the rejection of its bid on September 16, 2013 (*see 5 GCA §5425(a)*), although one of the letters might not have been delivered until October 1, 2013.

Because G4S's protest was timely filed, it triggered the automatic stay mandated by 5 GCA §5425(g). Section 5425(g) provides, in pertinent part, that "[i]n the event of a timely protest . . . ; the Territory shall not proceed further with the solicitation of the award of the contact prior to final resolution of such protest, and any such further action is void unless" there is a written determination by the Chief Procurement Officer and the Attorney General, with the written concurrence of the head of the purchasing agency, that the award of the contract without delay is necessary to protect substantial interests of the Territory.

On September 19, 2013, the Supply Management Administrator of GDOE denied the protest. *See Exhibit 9 to Notice of Appeal.* Also on September 19, 2013, GDOE issued a "Notice

to Lift Stay of Procurement” in which GDOE stated, “GDOE has responded to the protest and no appeal has been filed.” See Exhibit 10” to Notice of Appeal. Since the denial of the protest and the “Notice to Lift Stay of Procurement” were issued the same day, G4S had no opportunity to prepare and file an appeal. G4S obviously did not have the 15 days mandated by 5 GCA §5425(e).

On October 3, 2013, G4S filed this timely appeal from GDOE’s denial of G4S’s protest. As of the date of this motion, G4S has not received the Procurement Record or the agency report. On information and belief, GDOE proceeded to execute a contract with Orion. The award to Orion and execution of the contract not only violated the statutory stay, but on information and belief it also did not comply with the 5 GCA §5425(g) requirement of a written finding by the Attorney General that the award of the contact without delay was necessary to protect the substantial interests of the Territory. Thus the contact is void.

B. Legal argument.

1. The OPA has the jurisdiction and power to provide the relief G4S seeks.

“The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of Guam’s procurement laws.” 5 GCA §5703. The public auditor has to the power to review and determine “any matter properly submitted” to her. 5 GCA §5703. The Public Auditor reviews *de novo* denials of protests in connection with the solicitation or award of a contract. 5 GCA §5425(e). The OPA’s regulations provide that hearing officers appointed by the OPA have the power to rule on motions. 2 GAR §12109. Thus the OPA can issue orders to protect the integrity of the procurement process by enforcing the automatic stay.

2. GDOE’s notice to lift stay had no legal effect.

The automatic stay under 5 GCA §5415(g) remains in effect from the timely filing of a procurement protest through the timely filing of a notice of appeal to the OPA until a final

resolution. In re Appeal of JMI Edison, OPA-PA-13-010, Order Granting Motion re Automatic Stay at p. 1 (Sept. 20, 2013). “Final resolution” of a protest includes the time period of an appeal after a protest. *Id.* Action on a procurement is stayed until resolution of the appeal. *Id.* Thus in this case, as in JMI Edison, the stay could not be lifted on the same day the protest was denied. G4S had 15 days to file an appeal of the denial of its protest, and it has done so. The stay took effect when G4S served its protest on September 16, 2013, and it has remained in effect continuously since then.

Since the JMI Edison Order strongly supports G4S’s position, there is no need to G4S to distinguish that decision. G4S would nonetheless note that the equities supporting enforcement of the stay here are even stronger than they were in that case. The facts which follow are based upon Interested Party J&B’s Opposition to Motion for Expedited Relief filed August 16, 2013 in the JMI Edison case. While the facts come from one party’s brief, none of the facts were disputed.

In JMI Edison, bidder J&B received a “Bid Status and Intent to Award” letter. This letter informed all bidders that J&B would be awarded the contract for school air conditioners. On July 3, 2013, JMI submitted a timely protest to GDOE. GDOE issued a Notice of Stay of Procurement.

On July 25, 2013, J&B received a “Notice to Lift Stay of Procurement” from GDOE. The notice stated that GDOE had responded to JMI’s protest “and no appeal has been timely filed.” Since competing bidders are not directly involved in the resolution of protests at the initial internal stage with the contracting agency, J&B did not know the date when GDOE had issued a denial of JMI’s protest. Thus J&B had no reason to suspect that JMI’s protest had not been decided and denied quickly, and no reason to suspect that the statement concerning expiration of the 15-day time limit for an appeal was not correct.

On July 25, 2013 J&B also received the fully executed contract. Also on the same day, J&B also received a Notice to Proceed from GDOE. Because of the rapidly approaching school year and

the effect of the lack of air conditioning on many school children, J&B immediately began work on the project. J&B installed over 100 units from a GDOE priority list, and ordered over 2,000 more units required by the contract. Then, after J&B had performed substantial work and was contractually obligated to pay for all the units ordered, J&B first learned that JMI's time for appeal had not expired when J&B's counsel read about JMI's appeal in the newspaper on August 6, 2013.

In the JMI case, a contractor had substantially performed a contract and incurred substantial liabilities in good faith reliance upon GDOE's representation that the stay had expired because the deadline for a procurement appeal had passed. Nonetheless, the OPA had no hesitation about declaring the stay in effect, nunc pro tunc to the date of the initial protest, even if this meant possibly forcing a contractor who had relied upon the GDOE's representations in unquestioned good faith into bankruptcy. See In re Appeal of JMI Edison, OPA-PA-13-010, Order Granting Motion re Automatic Stay at p. 2 (Sept. 20, 2013). In the current case, the bid opening was on September 16, 2013, and GDOE issued the purported lift of stay a mere three days later, on September 19, 2013. Thus the competing bidder here, Orion, had to know that the 15-day deadline for a procurement appeal had not passed at the time of the purported lift of stay, and that GDOE's purported notice of lift of stay had no legal effect. In short, the OPA's reasoning on this issue in the JMI Edison case is even more compelling on the facts here.

3. G4S will be irreparably injured if the stay is not enforced.

If the stay is not honored and Orion goes forward with the contract during the pendency of this appeal, even if G4S ultimately prevails in this dispute it may be unable to recover anything more than bid costs. See 5 GCA §§ 5425(a)(1), (2); 5GCA §5425(h). When an aggrieved bidder or offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated profits, such a bid protestor is irreparably harmed. Essex Electro Engineers, Inc. v. United States, 3 Cl. Ct.

277, 287 (1983). This is the same situation faced by G4S, and necessitates the action sought by this motion.

C. CONCLUSION

GDOE's disregard of the statutory stay poses immediate and irreparable harm to G4S and threatens the integrity of Guam's procurement system. G4S asks that the OPA issue an order finding that the statutory stay mandated by 5 GCA §54215(g) has remained in place since the initiation of G4S's protest concerning GDOE IFB 032-2013. G4S further requests that the OPA compel GDOE to cease further action in connection with this procurement until final resolution of G4S's protest. For the foregoing reasons, G4S's motion should be granted.

Respectfully submitted,

DOOLEY ROBERTS & FOWLER LLP

Date: October 7, 2013

By: Seth Forman
DAVID W. DOOLEY
SETH FORMAN
Attorneys for Appellant G4S Security
Systems (Guam) Inc.