

DATE: 4/11/14

TIME: 3:20 AM PM BY: JB

OFFICE OF PUBLIC ACCOUNTABILITY
FILING NO. OPA-PA: 14-001

PROCUREMENT APPEAL

In the Appeal of)
) MOTION TO DECLARE
) AUTOMATIC STAY IN EFFECT
J&B Modern Tech,)
) Docket No. OPA-PA 14-001
Appellant.)
)
)

I. MOTION

Appellant J&B Modern Tech ("J&B") respectfully moves the Office of Public Accountability ("OPA") for an order determining that the statutory stay mandate by 5 GCA §5425(g) has remained in place since the initiation of J&B's protest of the Guam Department of Education's ("GDOE") decision to reject J&B's Invitation for Bid ("IFB") 005-2014.

J&B further moves the OPA for an order compelling GDOE to refrain from taking any further action with regard to IFB 005-2014 until final resolution of J&B's protest. This is motion is supported by the record before the OPA (primarily J&B's Notice of Appeal and exhibits thereto), the following supporting memorandum, and argument that the OPA may entertain on this matter.

II. MEMORANDUM IN SUPPORT OF MOTION

A. Relevant factual and procedural background.

As stated in J&B's Notice of Appeal, J&B submitted a bid pursuant GDOE IFB 005-2014 for "Air Conditioning Systems Exterior Duct Restoration Project". The bids were opened publicly on December 6, 2013.

ORIGINAL

1 On February 5, 2014, GDOE submitted a bid status stating that J&B modern Tech's
2 bid exceeds the government's certification. Although Section 2.1.2 of the bid states in part,
3 "Site Inspection and field verification of existing layout and conditions is mandatory". On
4 February 6, 2014, J&B submitted its protest to GDOE based on JNR's failure to attend and pre
5 site inspection. On February 7, 2014, GDOE issued a Notice of Stay of Procurement in light of
6 J&B's Letter of Protest.
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8 On March 7, 2014, GDOE denies J&B's protest and issues the Notice to Lift Stay of
9 Procurement. J&B filed its timely appeal with the OPA on March 13, 2014. Many days prior
10 to the 15 day expiration date.
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12 **B. Legal argument.**

13 1. The OPA has the jurisdiction and power to provide the relief J&B seeks.
14 "The Public Auditor's jurisdiction shall be utilized to promote the integrity of the
15 procurement process and the purposes of Guam's procurement laws." 5 GCA §5703. The
16 Public Auditor has the power to review and determine "any matter properly submitted" her. 5
17 GCA §5703. The Public auditor reviews *de novo* denials of protests in connection with the
18 solicitation or award of a contract. 5 GCA §5425(e). The OPA's regulations provide that
19 hearing officer appointed by the OPA have the power to rule on motions. 2 GAR §12109.
20 Thus the OPA can issue orders to protect the integrity of the procurement process by
21 enforcing the automatic stay.
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23 **2. GDOE's notice to lift stay had no legal effect**

24 The automatic stay under 5 GCA §5415(g) remains in effect from the timely filing of a
25 procurement protest through the timely filing of a notice of appeal to the OPA until a final
26 resolution. In re Appeal of JMI Edison, OPA-PA-13-010, Order Granting Motion re
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1 Automatic Stay at p.1 (Sept. 20, 2013) “Final resolution” of a protest included the time period
2 of an appeal after a protest. *Id.* Action on procurement is stayed until resolution of the appeal.
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4 *Id.* Thus in this case, as in JMI Edison, the stay could not be lifted on the same day the protest
5 was denied. J&B had 15 days to file an appeal of the denial of its protest, and it has done so.
6 The stay took effect when J&B served its protest on February 6, 2014, and it has remained in
7 effect continuously since then.

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

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

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

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

1 school year and the effect of the lack of air conditioning on many school children, J&B
2 immediately began work on the project. J&B installed over 100 units from a GDOE priority
3 list, and ordered over 2,000 more units required by the contract. Then, after J&B had
4 performed substantial work and was contractually obligated to pay for all the units ordered,
5 J&B first learned that JMI's time for appeal had not expired when J&B counsel read about
6 JMI's appeal in the newspaper on August 6, 2013.
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8 In the JMI case, a contractor had substantially performed a contract and incurred
9 substantial liabilities in good faith reliance upon GDOE's representation that the stay had
10 expired because the deadline for a procurement appeal had passed. Nonetheless, the OPA had
11 no hesitation about declaring the stay in effect, nunc pro tunc to the date of the initial protest,
12 even of this meant possibly forcing a contractor who had relied upon GDOE's representations
13 in unquestioned good faith into bankruptcy. *See In re Appeal of JMI Edison*, OPA-PA-13-
14 010, Order Granting Motion re Automatic Stay at p. 2 (Sept. 20, 2013), In the current case,
15 the bid opening was on December 6, 2013, and GDOE issued the purported lift to stay, on
16 March 7, 2014. Thus the competing bidder here, JNR, had to know that the 15-day deadline
17 for a procurement appeal had not passed at the time of the purported lift to stay, and that
18 GDOE's purported notice of lift of stay had no legal effect. In short, the OPA's reasoning on
19 this issue in the *JMI Edison* case is even more compelling on the fact here.
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22 **3. J&B will be irreparably injured of the stay in not enforced.**

23 If the stay in not honored and JNR goes forward with the contract during the pendency
24 of this appeal, even if J&B ultimately prevails in this dispute it may be unable to recover
25 anything more than bid costs. *See* 5 GCA §§5425(a)(1), (2); 5 GCA §5425 (h). When an
26 aggrieved bidder or offeror can only gain the costs of bid preparation in a suit for damages,
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1 and not anticipated profits, such a bid protestor is irreparably harmed. Essex Electro
2 Engineers, Inc. v. United States, 3 Cl. Ct.277, 287 (1983). This is the same situation faced by
3 J&B, and necessitates the action sought by this motion.
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5 **C. CONCLUSION**

6 GDOE's disregard of the statutory stay poses immediate and irreparable harm to J&B
7 and threatens the integrity of Guam's procurement system. J&B asks that the OPA issue an
8 order finding that the statutory stay mandated by 5 GCA §5425(g) has remained in place since
9 the initiation of J&B's protest concerning GDOE IFB 005-2013. J&B further request that the
10 OPA compel GDOE to cease further action in connection with this procurement until final
11 resolution of J&B's protest. For the foregoing reason, J&B's motion should be granted.
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13 Respectfully submitted: April 11, 2014.
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15 Attorney for Appellant
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