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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, Aug 20, 2021 at 4:29 PM

Dear Mr. Hernandez:

Please see the attached *Motion for Injunctive Relief and Confirmation of Stay of Procurement Pending Final Resolution of Appeal* to be filed in 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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**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

PART I.

In the Appeal of

Guahan Ventures Inc. dba Turfco,

Appellant.

DOCKET NO. OPA-PA-21-003

**MOTION FOR INJUNCTIVE RELIEF
AND CONFIRMATION OF STAY OF
PROCUREMENT PENDING FINAL
RESOLUTION OF APPEAL**

MOTION

Appellant Guahan Ventures Inc. dba Turfco (“Turfco” or “Appellant”), by Appellant’s undersigned attorney, respectfully moves the Office of Public Accountability (“OPA”) for an immediate order determining that the statutory stay mandated by 5 GCA § 5425(g) was triggered and has remained in place since the initiation of Turfco’s protest of the General Services Agency (“GSA” or “Procuring Agency” or “Agency”) notice of award on GSA’s Request for Quotation (REQ) Q210280170 issued on June 14, 2021, and changed on June 16, 2021, with the identifier RFQ 21002179 seeking golf carts (the “RFQ”). Turfco further moves the OPA for an order compelling GSA, its agents, employees, successors, attorneys, and all persons in active concert and participation with them, from progressing forward

with contract performance or acceptance of performance of RFQ until final resolution of Turfco's protest, including any appeals.

Unless this motion is granted, Turfco will suffer immediate and irreparable injury, loss, and damage if the Procuring Agency is permitted to accept performance under the RFQ prior to final resolution of Turfco's protest, as more fully set forth in Turfco's Notice of Appeal and papers filed in this action.¹ This motion is supported by the record currently before the OPA, the appended Memorandum in Support of Motion , and any argument that the OPA may entertain on this matter.

MEMORANDUM IN SUPPORT OF MOTION

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The General Services Agency ("GSA") issued a Request for Quote for Requisition No. Q210280170 on June 14, 2021, seeking golf carts. Q210280170 stated that a quote was required no later than June 17, 2021, before close of business at 5pm. There was no delivery date originally indicated in the quotation. On June 14, 2021, GSA informed bidders that the "preferred ETA is 30 days from the date of purchase order award." Other offerors prepared their bids later that day, and the next day Turfco prepared its quote for golf carts with a delivery date of 30 days out from a firm order. On June 16, 2021, at 5:43 p.m. — after working hours and a day before the deadline for submission of quotes — GSA sent an email to offerors stating

¹ Though Turfco is here moving for injunctive relief, this motion should not be construed as altering Turfco's legal position that, because of its timely protest, the statutory stay mandated by 5 GCA § 5425(g) has been in place since the inception of the protest.

“See attached Request for Quote.... Please note that this is an ‘Emergency Procurement’ and Delivery Require is ‘IMMEDIATE’” Which was entered on the last page of the RFQ Request. Thank you for your attention please acknowledge receipt of this email.” (internal quotations and ellipses in original). The RFQ was also changed to RFQ21002179.

On June 24, 2021, Turfco learned that it was the lowest responsive bidder to the RFQ that was originally issued, but that the Abstract declared instead that Guam Auto Spot was selected for Award. GSA informed Turfco that Turfco was not selected because Guam Auto Spot could deliver the golf carts “immediately” — a specification change that was added the day before the quote was due and after all offerors had prepared their bids. 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. GSA denied the protest on June 25, 2021. This appeal to the OPA followed. Since receiving Turfco’s protest on June 24, 2021, the produced procurement record shows that GSA may have taken steps to proceed further with the award of the RFQ, despite the fact that this appeal has not yet been resolved before the OPA.

II. LEGAL ARGUMENT

The OPA should provide Turfco injunctive relief and confirming the stay of procurement. Enforcing a stay of procurement pursuant to 5 GCA § 5425(g) is within

the powers of the OPA. *See In the Appeal of Morrigo Equipment, LLC*, OPA-PA-15-014, OPA-PA-15-017, OPA-PA-16-001, p. 11 (finding that appellant had submitted timely protests under 5 GCA § 5425(a) and granting appellant's emergency motion to enforce stay of procurement required by 5 GCA § 5425(g)). GSA has violated and continues to violate the automatic stay required by 5 GCA § 5425(g). Unless this motion is granted, Turfco will suffer immediate and irreparable injury, loss, and damage if GSA is permitted to accept performance under the RFQ prior to final resolution of Turfco's protest.

Turfco filed a timely, pre-award protest pursuant to 5 GCA § 5425(a). This timely protest automatically triggered the stay provision of 5 GCA § 5425(g). This provision prohibits GSA, the purchasing agency of the Territory of Guam in this matter, from proceeding further with the award of the contract prior to final resolution of Turfco's protest and voids any such further action. *See* 5 GCA § 5425(g). The automatic stay provision remains in place from the date of the protest until the protest's final resolution. Turfco's protest has not reached final resolution and the stay remains in place. Yet, GSA has proceeded further with the RFQ by preparing for delivery of the golf carts at issue in this protest and appeal. Therefore, Turfco seeks an order of the OPA enforcing the stay by providing injunctive relief.

A. Turfco has the right to protest under 5 GCA § 5425(a), and filed a timely protest.

Turfco has the right to protest the Award under 5 GCA § 5425(a). Any actual bidder who may be aggrieved in connection with the award of a contract may protest to the head of a purchasing agency. *See* 5 GCA § 5425(a). Turfco is an actual bidder

for the RFQ. A party becomes “aggrieved” when they become aware of a violation of one of the procurement law’s substantive provisions or the terms of the IFB. *See DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 84. On June 24, 2021, Turfco learned that it was the lowest responsive bidder to the RFQ and was not selected for award. As a result, Turfco became aggrieved in connection with the award of the RFQ. Pursuant to 5 GCA § 5425(a), Turfco made its protest to GSA, the purchasing agency, within fourteen (14) days after Turfco learned of the facts giving rise to the protest. 5 GCA § 5425(a); *DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 77 citing *Guam Imaging*, 2004 Guam 14 ¶ 25. Therefore, Turfco has brought a proper and timely protest.

B. Turfco’s timely protest automatically triggered a stay under 5425(g).

Turfco’s protest triggered a stay. The stay provision states, “...the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void....” 5 GCA § 5425(g). To trigger this provision, the protest must first be a timely protest under either 5 GCA § 5425(a) or § 5480(a). 5 GCA § 5425(g). As demonstrated in the previous section of this brief, Turfco’s protest meets the statutory requirements of a timely protest under 5 GCA § 5425(a). Thus, Turfco’s protest triggered the stay provision of 5 GCA § 5425(g) on June 25, 2021, when Turfco filed its protest.

Turfco’s protest triggered the stay *automatically*. Guam courts have “consistently held that the stay following a timely, pre-award procurement protest applies ‘automatically.’” *DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020

Guam 20, Amended Opinion ¶ 148. Once a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. No court order is necessary for the automatic stay to become effective. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. The automatic stay is a legal entitlement that vests upon a timely, pre-award protest. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. Thus, Turfco's timely protest automatically triggered a stay, which has been in place upon protest on June 25, 2021, and continues until this protest and appeal are finally resolved.

C. The automatic stay remains in place throughout the appeal process.

The automatic stay in this matter is still in place. The OPA has held 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. The automatic stay set forth in 5 GCA § 5425(g) remains in effect from the date of the protest and continues until final resolution of the action by the Superior Court. *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 148. Because the automatic stay is in place from the date of the protest at least through a decision by the Superior Court, the automatic stay must necessarily remain in place from the date of the protest to the final decision regarding the protest by the OPA. The automatic stay in this matter came into effect upon Turfco's protest of June 25, 2021. Turfco then timely filed a notice of appeal to the OPA. The OPA has not yet decided Turfco's appeal.

Thus, as this protest has not yet reached final resolution, the automatic stay, triggered on June 25, 2021, has and will remain in place throughout the appeal process.

D. Turfco is in violation of the stay required by 5 GCA § 5425(g).

GSA appears to be in violation of the automatic stay required by 5 GCA § 5425(g). The statute provides, in the event of a timely protest such as this, the government agency “shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void...” 5 GCA § 5425(g). Despite this, it appears that GSA has taken steps to violate the automatic stay or procurement mandated by Guam Law. The Procurement Record shows that, shortly after deciding to deny Turfco’s Protests, GSA issued purchase orders to AutoSpot for the golf carts to be delivered to the “Governor’s Office.” Procurement Record, Tab 7. Bills of Sale for the “Governor’s Office” were also prepared. Procurement Record, Tab 7. The procurement record does not show any attempted compliance with the requirements of 5 GCA 5425 (g) that would allow pushing forward with a procurement despite the existence of the automatic stay.

E. Turfco will suffer immediate and irreparable injury, loss, and damage if GSA is allowed to continue to violate the automatic stay prior to final resolution of GSA’s protest.

Guam law provides that if Appellant Turfco is successful in its protest, Turfco “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). GSA’s pushing forward with the procurement award to another entity

hampers any eventual remedy Turfco may have to become an awardee of the solicitation, since the Territory may be able to merely ratify and affirm Turfco's contract regardless of the outcome of the instant appeal. 5 GCA § 5425(a)(1); (2).

Since Turfco might 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, Turfco 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 Turfco, and necessitates the action requested by Turfco.

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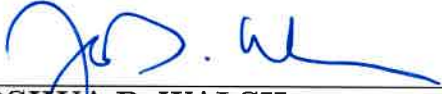
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CONCLUSION

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, 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, and declare that all actions taken by GSA since June 25, 2021, in furtherance of the RFQ are void.

Respectfully submitted this 20th day of August 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

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