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E-Filed: GSA Opposition To Appellant's Motion For Injunctive Relief And Confirmation of Stay

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Fri, Aug 27, 2021 at 3:42 PM

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The Office of the Attorney General is attaching GSA Opposition To Appellant's Motion For Injunctive Relief And Confirmation Of Stay Of Procurement Pending Final Resolution of Appeal to be E-filed. Please confirm receipt of email and attachment. Thank you

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 **08-27-21 OPA OPA-PA-21-003.pdf**
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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

<p>IN THE APPEAL OF:</p> <p>Guahan Ventures, Inc. dba Turfco</p> <p style="padding-left: 100px;">Appellant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>DOCKET NO. OPA-PA-21-003</p> <p>GSA'S OPPOSITION TO APPELLANT'S MOTION FOR INJUNCTIVE RELIEF AND CONFIRMATION OF STAY OF PROCUREMENT PENDING FINAL RESOLUTION OF APPEAL</p>
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Appellee GENERAL SERVICES AGENCY (GSA) files this Opposition to Appellant's Motion for Injunctive Relief and Confirmation of Stay of Procurement Pending Final Pending Final Resolution of Appeal. This Opposition is limited to addressing the procedural issues raised in the Appellant's Motion, and not the merits of issues raised in the Appellant's Appeal. Appellant's arguments are unsupported

by the record in this matter and exhibit an attempt to confuse the issues with factual inaccuracies and contentions that have no legal grounds. Appellant's motion should be denied.

1. Turfco's protest did not trigger an automatic stay as their protest was made after award.

Turfco's primary argument in its motion is that its protest triggered an automatic stay pursuant to 5 GCA § 5425(g). According to this section, "In the event of a timely protest . . . the Territory shall not proceed further with the solicitation or with the award of the contract prior to the final resolution of such protest. . ." An automatic stay is triggered when a protest is "both factually timely *and filed before the award has been made*["] Guam Imaging Consultants Inc. v. Guam Mem. Hosp. Auth., 2004 Guam 15, ¶ 24 (August 12, 2004)(emphasis added); *see also* 2 GAR § 9101(e)("When a protest has been filed within 14 days and *before an award* has been made, the Chief Procurement Officer . . . shall make no award of the contract prior to final resolution of such protest["](emphasis added).

Turfco repeatedly and mistakenly claims that its Protest was filed pre-award despite the record and the facts showing otherwise. Turfco argues that the protest has not reached final resolution and that GSA "has proceeded further with the RFQ by preparing for delivery of the golf cars at issue." As the record plainly shows, GSA issued the Purchase Order to the winning offeror on June 19, 2021, and the

Government of Guam accepted delivery of the golf carts on June 23, 2021. (Agency Procurement Record, Tab 7). It wasn't until June 24, 2021 that Turfco filed a formal protest with GSA. (Notice of Appeal, Exhibit I) *after* the contract was awarded through the issuance of the purchase order and *after* the Government of Guam accepted delivery. In the face of these facts, Turfco's contention that its protest was filed prior to award and thus triggered the automatic stay is not only puzzling, it is simply wrong.

Turfco states that the "protest triggered the stay provision of 5 GCA § 5425(g) on June 25, 2021, when Turfco filed its protest."¹ GSA does not dispute that Turfco's June 24, 2021 Protest was timely filed within the period required by 5 GCA §5425(a). However, because it was filed *after* the award had been made, the automatic stay requirement under 5 GCA §5425(g) was not triggered and GSA was not required to stay any further action related to the contract.

2. GSA is not in violation of the automatic stay required by 5 GCA §5425(g)

Turfco relies on the language in 5 GCA §5425(g) to support their assertions that GSA has violated and continues to violate the automatic stay requirements are unavailing. The requirement that the automatic stay is triggered only when a protest is filed before an award has been made has been affirmed at the OPA, Superior Court, and Guam Supreme Court. "While our

¹ Turfco filed its protest on June 24, 2021 and not June 25, 2021.

cases have indicated that parties have sought to enforce the automatic stay by court order, our case law is equally clear that the automatic stay is a legal entitlement that vests upon a timely, *pre-award protest*. . . . We 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., Guam, 2020 Guam 20, ¶ 148 (Guam Dec. 7, 2020)(emphasis added).

The OPA itself has stated in previous procurement appeals, that an automatic stay is not triggered when the protest is made after award. In the Appeal of, JJ Global Services, the Public Auditor found that although the Appellant’s protest was timely, it was made after the award of the contract, and the protest did not trigger the automatic stay. (OPA-PA-19-001, Decision, Page 10, May 8, 2019, Page 10). In In the Appeal of TLK Marketing Co., Ltd., OPA-PA-16-003, (Decision and Order, June 15, 2016, Page 3), the Public Auditor denied the Appellant’s motion and found that the automatic stay was not triggered and could not be confirmed because the protest “was filed after award.” On appeal, the Superior Court found the Public Auditor’s “decision that an automatic stay was not in effect *was correct*.” TLK Marketing Co., LTD., v. Guam Visitors Bureau, Office of Public Accountability, and HIC, Inc., Decision and Order, CV0914-16, page 10, (Super. Ct. Guam, November 13, 2018) (emphasis added). The Superior Court reiterated that “The Supreme Court has already weighed in on what the plain language of 5 GCA 5425(g) means. An

automatic stay is only triggered when the protest is “factually timely *and filed before the award was made.*” *Id.* at 10 quoting Guam Imaging, 2004 Guam 15 ¶ 24 (emphasis added).

TurfcO claims that GSA “has taken steps to violate the automatic stay or procurement mandated by Guam Law” and cites to the Procurement Record, Tab 7. TurfcO states “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” . . . and Bills of Sale for the “Governor’s Office” were also prepared. (Motion, Section D, Page 7). This statement is simply inaccurate. The Procurement Record Tab 7 clearly shows that the Purchase Orders were issued on June 19, 2021. The Bills of Sale were issued on June 22, 2021. TurfcO hadn’t yet filed its protest when these procurement actions were taken. TurfcO’s protest was filed on June 24, 2021 after the Purchase Orders and Bills of Sale were issued. GSA did not deny TurfcO’s Protest until June 25, 2021. (Notice of Appeal, Exhibit J). GSA is not in violation of 5 GCA 5425(g) as there was no automatic stay triggered or in place when it issued the purchase order and the government took delivery before TurfcO even filed its protest.

3. TurfcO’s Motion for Injunctive Relief should be denied.

TurfcO has requested that the OPA exercise authority it does not have and grant injunctive relief and stay the performance of this procurement. The OPA does not have the jurisdiction to grant injunctive relief. In In the

Appeal Of, JJ Global Services, in denying the appellants request for injunctive relief, the OPA itself stated that it “does not have the jurisdiction to impose injunctive relief on the Purchasing Agency. (OPA, PA-19-001, Decision and Order RE Appellant’s Motion for Injunctive Relief and Stay of Procurement for Final Decision on Second Protest, Page 2, March 25, 2019). The OPA instead deferred to the express authority of the Superior Court of Guam to grant injunctive relief. “The Superior Court of Guam has the authority to grant injunctive relief. The Superior Court of Guam’s power to issue injunctive relief in a procurement dispute is granted by 5 GCA §5480(c) (Id. at 3) Thus, Turfco’s request for the OPA to grant injunctive relief may not be granted as the OPA does not have jurisdiction to do so.

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CONCLUSION

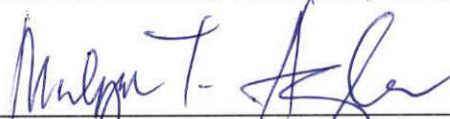
The Guam Procurement Code, Guam Procurement Regulations and case law clearly establishes that GSA is not in violation of the automatic stay requirement. Turfco's protest was filed after the procurement was completed and the Government of Guam accepted delivery. Therefore, the automatic stay provision of 5 GCA 5425(g) was not and is not triggered. Furthermore, Turfco has not successfully shown that it will be irreparably harmed by the awarding of this contract and is not entitled to Injunctive Relief, which the OPA does not have the jurisdiction to grant, as a matter of law.

Turfco's motion should be denied.

Respectfully submitted this 27th day of August, 2021.

OFFICE OF THE ATTORNEY GENERAL
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By:



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