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RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

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Attorneys for Appellant
 G4S Security Systems (Guam) Inc.

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of)	Docket No. OPA-PA-13-013
)	
G4S SECURITY SYSTEMS (GUAM) INC.)	APPELLANT'S REMEDIES
)	BRIEF
Appellant.)	
_____)	

Appellant G4S Security Systems (Guam) Inc. (“G4S”) thanks the Public Auditor and the Hearing Officer for the opportunity to submit a post-hearing brief on remedies. Should the Office of Public Accountability (“OPA”) rule in favor of G4S, and determine either that the G4S bid was responsive or that the Guam Department of Education (“GDOE”) is estopped from asserting the G4S bid was non-responsive, then the remedy is straightforward. GDOE should be instructed to consider the G4S bid for this procurement. *See, e.g., In the Appeal of JMI Edison*, OPA-PA 13-010 at 4 (Decision, Sept. 25, 2013) (OPA-PA 13-010 hereinafter cited as “JMI/J&B” to distinguish it from a different JMI appeal cited below). However, based on arguments already presented in these proceedings by GDOE and interested party Orion Construction Corporation (Guam) (“Orion”), G4S suspects that GDOE and Orion may submit remedies briefs contending that, even if the OPA rules

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in favor of G4S on the issues of responsiveness and/or estoppel, the OPA should nonetheless deny Orion any remedy and just reaffirm the contract that GDOE and Orion entered into in violation of the stay.

GDOE and Orion may seek to rely upon the OPA's recent decision in a different JMI appeal, In the Appeal of JMI Edison, OPA-PA-13-009 (Decision, Nov. 27, 2013) (hereinafter "JMI/GMHA"), where the OPA affirmed a contract despite a violation of the automatic stay. The current case is distinguishable from JMI/GMHA on several grounds.

In JMI/GMHA, the putative winning bidder, MedPharm, had already delivered four dialysis machines and fifteen water purification units to GMHA, in addition to providing training to GMHA. In the current case, although Orion has done some preliminary work, it has not yet ordered or installed any of the fire alarms or sprinklers.

In JMI/GMHA, the agency had already paid \$107,266.52 to the putative winning bidder, MedPharm. In the current case, GDOE has not yet made any payment to Orion.

In JMI/GMHA, the OPA found there was no evidence that MedPharm had acted fraudulently or in bad faith. In the current case, the bid opening for GDOE IFB 032-2013 took place on September 16, 2013. *E.g.*, Submission of Procurement Record, filed Oct. 11, 2013 ("SPR") at 198. On September 16, 2013, G4S served a protest in connection with IFB 032-2013 on GDOE. Submission of Agency Report, filed Oct. 21, 2013 ("SAR") at 247. On September 19, 2013, the Supply Management Administrator of GDOE denied the protest. SAR 296-297. The very same day, GDOE issued a "Notice to Lift Stay of Procurement" in which GDOE stated, "GDOE has

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responded to the protest and no appeal has been filed.” SAR 250. Thus, as previously argued by G4S, “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.” Motion to Declare Automatic Stay in Effect at 5 (filed herein Oct. 4, 2013).

In another recent OPA appeal, the OPA voided a contract entered into in violation of the automatic stay after denial of a protest but before the time for appeal had expired. JMI/J&B, Order Granting Motion Re: Automatic Stay (Sept. 20, 2013), and Decision at 4 (Sept. 25, 2013) (denying motion for reconsideration of order granting motion re: automatic stay). The OPA took this action to uphold the integrity of the procurement process even though in that particular instance (a) the putative winning bidder, J&B, had already installed over 100 air conditioners in schools; (b) the putative winning bidder, J&B, had already placed orders for more than 2,000 more air conditioners required by the contract, and was contractually obligated to its supplier for payment for all those units; and (c) 22 days had lapsed between the filing of JMI’s protest and GDOE’s representation to J&B that GDOE had responded to JMI’s protest “and no appeal has been timely filed.” It cannot be seriously argued that in the current case (a) Orion has done more work or incurred greater expense and liability than J&B in this prior case, (b) GDOE has incurred greater potential liability to Orion than it had to J&B, or (c) Orion has “cleaner hands” than J&B.

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Recent decisions from the OPA establish that in cases where a contract has been issued and performance has begun in violation of the automatic stay, there is a dividing line somewhere between the facts of JMI/J&B and JMI/GMHA that determines whether a contract will nonetheless be affirmed. The contract between GDOE and Orion falls short of that line. If G4S prevails on the substantive issues in dispute, the OPA should not affirm the contract between GDOE and Orion, but should instead return this matter to GDOE with instructions to consider the G4S bid.

Respectfully submitted,

DOOLEY ROBERTS & FOWLER LLP

Date: December 3, 2013

By: Seth Forman

SETH FORMAN
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