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PROCUREMENT APPEALS

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FILE NO OPA-PA: 13-010

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6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
7 **PROCUREMENT APPEAL**

8 IN THE APPEAL OF

9 JMI EDISON,

10 Appellant.

APPEAL NO. OPA-PA-13-010

MOTION FOR RECONSIDERATION

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14 Comes now Guam Department of Education (“GDOE”) and files this Motion for
15 Reconsideration of the Office of Public Accountability’s (“OPA”) Order Granting Motion Re
16 Automatic Stay in OPA-PA-13-010.

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18 **DISCUSSION**

19 In its September 20, 2013, Order Granting Motion Re Automatic Stay (“Order”), the OPA
20 determined that an automatic stay has been in effect since the timely filing of JMI Edison’s
21 (“JMI”) Procurement Protest on July 3, 2013 continuing through JMI’s timely Notice of Appeal
22 to the OPA filed on August 2, 2013, until final resolution. The order failed to acknowledge the
23 facts and circumstances in this case, and more importantly, the OPA’s ruling in *In the Appeal of*
24 *Guam Publications, Inc.*, Appeal No. OPA-PA-08-007.

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26 Again to reiterate, in *Guam Publications*, the OPA determined that an award occurring
27 between the denial of a protest and the filing of an appeal did not trigger the automatic stay
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1 provision contained in 5 G.C.A. § 5425(g) and 2 G.A.R. Div. 4 § 9101(e). *Id.* at 18. In *Guam*
2 *Publications*, the Pacific Daily News (“PDN”) filed a timely protest in April 7, 2008. *Id.* On
3 May 1, 2008, the General Supply Agency (“GSA”) denied PDN’s protest. After denying PDN’s
4 protest, GSA awarded the contract to Marianas Variety on May 9, 2008. *Id.* On May 14, 2008,
5 PDN filed an appeal with the OPA. *Id.* The OPA determined that because GSA awarded the
6 contract to Marianas Variety after the denial of PDN’s protest, but before PDN’s appeal, the
7 automatic stay provisions of 5 G.C.A. § 5425(g) and 2 G.A.R. Div. 4 § 9101(e) were not
8 triggered by PDN’s filing of its appeal. *Id.*

10 The situation contemplated in *Guam Publications* is almost exactly what occurred in the
11 award of the contract of the GDOE Invitation For Bid 008-2013 (“IFB”). On July 3, 2013, JMI
12 filed a protest of the IFB with the Superintendent of Education. GDOE Agency Report, Exhibit
13 13, Bates Stamp No. GDOE001854-001856. GDOE issued a denial of JMI’s protest of the IFB
14 on July 25, 2013. GDOE Agency Report, Exhibit 17, Bates Stamp No. GDOE0018882-001925.
15 On July 25, 2013, GDOE issued a Notice to Lift the Stay of the Procurement. Before this appeal
16 was filed, GDOE and J&B fully executed a contract for the IFB. GDOE Agency Report, Exhibit
17 16, Bates Stamp No. GDOE001859-001881. GDOE awarded the contract for the IFB to J&B
18 before this appeal was filed, and therefore, the automatic provisions of 5 G.C.A. § 5425(g) and 2
19 G.A.R. Div. 4 § 9101(e) are not applicable in this case.

21 In its Order, the OPA relied on *In the Appeal of IBSS*, OPA-PA-08-012. The facts are
22 vastly different in *IBSS* than in the present case. In *IBSS*, on May 15, 2008, the General Services
23 Agency (“GSA”) issued six Requests for Proposals involving the procurement of copier
24 machines. On May 20, 2008, Town House Department Store, Inc., dba Island Business Systems
25 & Supplies (“IBSS”) protested the all six Requests for Proposals before an award was made. On
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1 September 9, 2008, GSA denied IBSS' protest. On September 12, 2008, IBSS filed an appeal to
2 the OPA before an award had been made.

3 The Order did not distinguish between the award made in this present case, which
4 occurred before a timely appeal was filed, and the award made in *IBSS*, which was made after a
5 timely appeal was filed. The OPA did not explain why the OPA's reasoning in *Guam*
6 *Publications* was inapplicable in the present case. The OPA has not expressly stated in the Order
7 if an award had in fact been made in the present case, or if this award came after a denial of JMI's
8 protest, but before JMI filed its timely appeal. This issue has not been fully addressed by the
9 OPA's Order. If the OPA had addressed the above discussed issues, the OPA would need to use
10 the rule set forth in *Guam Publications* – that an award occurring between the denial of a protest
11 and the filing of an appeal did not trigger the automatic stay provision contained in 5 G.C.A. §
12 5425(g) and 2 G.A.R. Div. 4 § 9101(e). Therefore, the OPA must reconsider the Order, and find
13 that no automatic stay was in place at the time the award of the contract.
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16 The OPA's Order also did not determine whether a contract was fully executed. Under
17 Guam law, if a party is unlawfully awarded a contract, the Public Auditor must sustain the award
18 of the contract if (1) the party awarded the unlawful contract neither acted fraudulently nor in bad
19 faith, and (2) it is in the best interest of to ratify and affirm the award. 5 G.C.A. § 5452(a)(1)(i).
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21 As stated in our Hearing Brief, J&B Modern Tech ("J&B") did not act fraudulently or in
22 bad faith. There is neither evidence nor information that has been presented to substantiate that
23 J&B acted fraudulently or in bad faith in responding to the IFB. There is no evidence to suggest
24 J&B either defrauded GDOE or mislead GDOE in order to be awarded the contract. The Public
25 Auditor must find that J&B neither acted fraudulently nor acted in bad faith.
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27 GDOE emphasizes that it is in the best interest of Guam to ratify and affirm the award to
28 J&B. The funding source identified for IFB is from the Adequate Education Act Trust Account

1 (“Trust”). GDOE Exhibit 7, Bates Stamp No. GDOE001134. The Trust was established by
2 Public Law 31-40 and amended by Public Law 31-234. Pursuant to Public Law 31-234, the funds
3 contained in the Trust are set to expire if these funds are not obligated by September 30, 2013.
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5 GDOE stresses that it is in the best interest of Guam to ratify and affirm the award to J&B.
6 The funding source that has been identified for IFB is from the Adequate Education Act Trust
7 Account (“Trust”). GDOE Exhibit 7, Bates Stamp No. GDOE001134. The Trust was established
8 by Public Law 31-40 and amended by Public Law 31-234. Pursuant to Public Law 31-234, the
9 funds contained in the Trust are set to expire if these funds are not obligated by September 30,
10 2013.

11 Public Law 28-45 is known as the Every Child is Entitled to an Adequate Education Act
12 (“the Act”). See 20 G.C.A. § 15136. Under Guam law, GDOE is required to keep all GDOE
13 classrooms at an air temperature no greater than 78°F (“the Mandate”). See 1 G.C.A. §
14 715(12)(f). If GDOE fails to comply with the Mandate, GDOE is open to suits for injunctive
15 relief under the Act, and may be subject paying for the costs associated with the suit. See 7
16 G.C.A. § 12108.1(a); 19 G.C.A. § 1116(b); 7 G.C.A. § 20302(8); 7 G.C.A. § 26603.1; P.L. 28-45.
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18 Thus, a cancellation or other modifications of the Agreement between GDOE and J&B
19 pursuant to the IFB (“the Agreement”) would result in the possible loss of these funds and the
20 inability of GDOE to purchase much needed air conditioner units. In addition, the cancellation or
21 other modification of the Agreement would place GDOE in position to violate the Mandate and
22 the Act, which would result in students and teachers subjected to classrooms at an air temperature
23 greater than 78°F. GDOE respectfully asks the OPA to determine that the contract is valid in the
24 best interest of the territory of Guam, and that the OPA reconsider the Order and find that that an
25 automatic stay in this matter is unwarranted in this matter.
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CONCLUSION

For the foregoing reasons, GDOE respectfully requests that the Office of Public Accountability reconsider the September 20, 2013, Order Granting Motion Re Automatic Stay in OPA-PA-13-010, and find that an automatic stay in this matter was not in place at the time of the award of this contract pursuant to *Guam Publications*.

Dated this 24th day of September, 2013.

Respectfully submitted,

GUAM DEPARTMENT OF EDUCATION

By: 
ANDREW T. PEREZ, ESQ.
Legal Counsel