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FILE NO. OPA-PA 16-003

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of

TLK Marketing Co. Ltd.,

Appellant.

**DOCKET NO. OPA-PA-16-003**

**REPLY TO OPPOSITION TO A MOTION  
IN RE A STAY**

**I. INTRODUCTION**

Appellant TLK Marketing Co., Ltd. (“TLK”) is currently before the Office of Public Accountability (“OPA”) on appeal of the Guam Visitors Bureau’s (“GVB”) denial of two protests filed by TLK regarding the *Request for Proposal – Tourism Destination Marketing Representation Services in the Republic of Korea* (GVB RFP No. 2016-006) (the “RFP”). On May 6, 2016, TLK filed its *Motion for Orders Confirming the Automatic Stay* asking the OPA to issue an order confirming that the automatic stay under 5 GCA §5425(g) was triggered upon the filing of Protest 1, and that the stay continues to be in force until final resolution of these protests and any appeals. *See*, Motion at 2. On June 1, 2016, GVB filed its opposition memorandum, opposing the motion on the basis that “the solicitation is concluded and a contract was signed

prior to a protest.” See, *Opposition to a Motion in Re a Stay* (“TLK Opp.”) at 3. For the reasons discussed below, the OPA should confirm the automatic stay because the Contract is void, and GVB has not rebutted TLK’s factual and legal assertions supporting the confirmation of the automatic stay.

## II. ARGUMENT

### A. The Authority Relied Upon by GVB is Inapposite.

To support its assertion that the automatic stay required by Guam’s procurement law was not triggered upon the filing of TLK’s protest, GVB relies upon *Guam Imaging Consultants, Inc. v. Guam Mem’l Hosp. Auth.*, 2004 Guam 15. *Guam Imaging* is inapposite and does not apply. GVB argues that since the contract award in *Guam Imaging* occurred before a bid protest, the automatic stay was not triggered. See, TLK Opp. at 2. The facts of *Guam Imaging* can be distinguished from the facts in this appeal. In *Guam Imaging*, the protesting offeror was informed on March 21, 2003 that a selection of a most qualified offeror had been made by the procuring agency. **The contract award was not announced until May 14, 2003—nearly two months after the protesting offeror had been informed that it was not selected.** See, *Guam Imaging Consultants, Inc. v. Guam Mem’l Hosp. Auth.*, 2004 Guam 15, ¶31 (referencing the record regarding “GMHA's announcement on May 14, 2003 that it had awarded a sole source interim contract....”). The protest in *Guam Imaging* was filed on May 16, 2003, nearly two months after the protestor had been informed that it was not selected.

Here, TLK discovered through the Sunshine Act responses provided by GVB on April 7, 2016, that GVB notified HIC, Inc. (“HIC”) of its ranking and that it was the most qualified offeror on or about March 4, 2016. See, **Exhibit K** (3/4/2016 Email Exchange) to the Declaration of Joyce Tang submitted on May 6, 2016 (“Tang Decl.”). TLK and the other two

offerors did not receive any information regarding the ranking of best qualified offerors until March 10, 2016. GVB sought to keep the ranking a secret until it was able to finalize and sign the contract with HIC. *See*, Notices of Non-Selection, attached as **Exhibit Q** to the Tang Decl, and the Notice of Award and Contract, attached as **Exhibit M** to the Tang Decl. By keeping the ranking, the negotiation, the putative award and the signing of the contract a secret, GVB circumvented procurement laws and wrongfully tried to prevent the filing of “...any protest from other offerors,” to avoid the automatic stay, and to limit a protestor’s remedies to post award remedies. *See*, Tang Decl. **Exhibit L**, (3/9/2016 Email Exchange).

**B. GVB Argument That TLK’s Protest Was Filed After Award Is Not Supported by the Facts or the Law.**

GVB argues that the Contract entered into with HIC is valid and not subject to the automatic stay despite the clear evidence that the GVB board did not approve the contract, and that GVB failed to comply with Procurement Law in maintaining documents, logs, and records of this procurement. GVB has described these failures as mere “procedural failures and irregularities....” Opposition at 2. All of the foregoing deficiencies and violations of the RFP and the Guam procurement law support TLK’s contention that this procurement was improperly handled, that the contract is void, and that GVB tried to wrongfully cut off offeror’s protest rights and remedies.

GVB has offered no facts or authority to rebut TLK’s position that the wrongful acts, the lack of board authority, and the failure to comply with Guam Procurement law and the RFP, resulted in a void contract. *First*, GVB did not contest that GVB Board approval was required after negotiations and prior to a contract award, and that such approval did not occur here. *See*, Tang Decl. **Exhibit E** at 32. *Second*, GVB did not contest that GVB finished negotiating the terms of its purported contract with HIC before it informed other offerors that a selection had

been made. *Third*, GVB did not contest that GVB failed to prepare a Memorandum of Negotiation after negotiations with HIC concluded, despite the fact such a Memorandum was required. *See* 2 GAR §3114(m). By not rebutting these materials allegations, GVB has conceded TLK's allegations – concessions which TLK submits is sufficient for the OPA to confirm that the automatic stay is in effect.

**C. The OPA Should Preserve the Integrity of the Procurement Process by Holding Agencies Accountable and Reigning in Agencies Which Do Not Comply with Procurement Law and Seek to Undermine A Protestor's Rights and Remedies.**

TLK's appeal provides the OPA with an opportunity to bring further clarity to the nature of the automatic stay under Guam's procurement law. Without a stay in place, and with the procuring agency actively moving forward with contract performance, the prejudice to TLK mounts and any meaningful resolution for TLK becomes more difficult to obtain. Moreover, by allowing HIC to perform, predictably, GVB will attempt to use the existing relationship as a reason why it would be in the best interest of the territory to proceed with a void and collusively procured contract. If the OPA agrees with TLK that the HIC is void, allowing HIC to perform creates additional obligations between GVB and HIC, including financial commitments, and exposure of the Government to potential claims for damages against the a government agency.

This appeal also provides the OPA with an opportunity to bring to a halt a disturbing trend: collusion between Government agencies and Offerors to award contracts in such a manner as to avoid just procurement protests altogether and avoid the automatic stay should such a protest be brought. It has become clear from a review of GVB's Sunshine Act response and the Procurement Record that GVB colluded with HIC to violate Guam Procurement Law by withholding information regarding the ranking and award of the contract so as to deprive offerors like TLK of their protest rights under Guam procurement law. If agencies are permitted to evade

the automatic stay by waiting until after a contract has been awarded before informing unsuccessful offerors, there will be two unfavorable consequences: *First*, protestors with legitimate grievances will be deprived of their right to a meaningful protest review process; and *Second*, offerors who hope for a stay of proceedings will be forced to file pre-emptive protests and unnecessarily tie up the Public Auditor's time and resources before the appropriateness of a protest can be determined.

Federal procurement law is instructive on the important role the statutory stay plays in procurement regimes. The United States Court of Federal Claims, examining the similar statutory stay of procurement that is triggered in federal bid protests and continues through the appeal process before the Government Accountability Office (GAO), has held that “[t]he automatic stay is intended to preserve the status quo during the pendency of the protest so that an agency would not cavalierly disregard the GAO's recommendation to cancel the challenged award. The overarching goal of the stay is to preserve competition in contracting and ensure a fair and effective process at the GAO.” *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 30-31 (Fed. Cl. 2006) (internal quotations and citations omitted). The GAO—the Federal Government's procurement oversight equivalent of this office—specifically found fault with contracting agencies for attempting to circumvent the statutory stay by informing losing offerors so late after the award that protestors could not reasonably avail themselves of the suspension remedy.<sup>1</sup> *See, e.g., Gtt Indus., Inc.*, B-220824, United States Government Accountability Office (Nov. 5, 1985) (Explaining that unsuccessful offerors should be informed of that status and be provided debriefings so that they obtain the benefit of the stay provision.); *See also Strategica*,

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<sup>1</sup> 31 U.S.C.A. § 3553(d)(4) enables a protester to have the benefit of this automatic performance stay if the protest was filed with GAO (1) within 10 days after the date of the contract award or (2) within five days after a debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

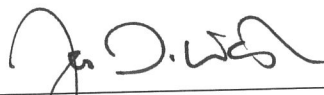
*Inc.*, B-227921 United States Government Accountability Office (Oct. 27, 1987) (noting the failure of a contracting officer to give unsuccessful offerors in small business set-aside procurements pre-award notice of the name and location of the apparent successful offeror). If GVB could, as it has done here, ignore the statutory stay and move forward with secret contract execution prior to even informing unsuccessful offerors that a selection has been made, the goal of our procurement laws would be frustrated, and competition, fair play, and transparency and in Guam's procurement regime would be called into doubt.<sup>2</sup>

### III. CONCLUSION

Based on the foregoing, TLK requests an order confirming that the automatic stay under 5 GCA §5425(g) is in effect.

Respectfully submitted this 3<sup>rd</sup> of June, 2016.

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<sup>2</sup> The Guam Supreme Court has recognized the importance of the automatic stay in preserving the status quo pending review of a procurement protest. The Court has held that Government Agencies should delay on moving forward with contract performance during the time periods that an aggrieved offeror may seek review of a solicitation. In *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, the court explained that "The Government should refrain from taking action (e.g., issuing purchase orders to its chosen bidder) on a procurement award until the fourteen-day period has expired and a civil action has not been filed in the Superior Court to review the OPA's decision. There is no clearly stated legislative intent contrary to this interpretation."