

1 BERMAN O'CONNOR & MANN
2 Suite 503, Bank of Guam Bldg.
3 111 Chalan Santo Papa
4 Hagåtña, Guam 96910
5 Telephone No.: (671) 477-2778
6 Facsimile No.: (671) 477-4366

7 Attorneys for Appellant:
8 *PACIFIC DATA SYSTEMS, INC.*

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 7/17/14

TIME: 4:50 AM PM BY: AA

FILE NO OPA-PA: 14-005

9 **OFFICE OF PUBLIC ACCOUNTABILITY**

Docket No. OPA-PA 14-005

10 In the Appeal of
11 *PACIFIC DATA SYSTEMS, INC.,*
12 Appellant.

**OPPOSITION OF PACIFIC DATA
SYSTEMS, INC. TO MOTION TO
DECLINE**

13 The Appellant Pacific Data Systems, Inc. ("PDS") opposes the Motion to
14 Decline filed by the General Services Agency ("GSA").

15 GSA claims that this appeal may not proceed because of a pending
16 judicial proceeding. 2 GAR Div. 4 § 12103(b) provides:

17 (b) Effect of Judicial Proceedings. If an action
18 concerning the procurement under Appeal has
19 commenced in court, the Public Auditor shall not act
20 on the Appeal except to notify the parties and decline
21 the matter due to Judicial involvement. This Section
22 shall not apply where a court requests the decision of
23 the Public Auditor ...

24 The issue is thus whether there is any court action concerning the procurement under
25 appeal. There clearly is not.

26 The Public Auditor may recall the Consolidated Decision in three appeals,
27 OPA-PA-12-016, 017, and 018 that was entered on March 6, 2013. All three appeals
28 arose from IFB GSA-064-11. In OPA-PA-12-016, the Public Auditor concluded that GTA
had offered a phone that was not compliant with the IFB in that it did not have a digital
display, and affirmed the award of this part of the procurement to PDS. GTA appealed
the Public Auditor's Decision. *See Teleguam Holdings LLC and its Wholly Owned*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Subsidiaries v. Territory of Guam, et al., CV0333-13. The Hon. Anita A. Sukola upheld the decision of the Public Auditor and ordered GTA's Complaint dismissed with prejudice. Final Judgment was entered on March 17, 2014, and GTA appealed to the Guam Supreme Court on April 21, 2014. However, GTA did not appeal the merits of Judge Sukola's Decision. Its appeal is limited only to the issue of whether Judge Sukola erred in requiring GTA to post a bond in order to obtain a Temporary Restraining Order. GTA had been ordered to post a bond in the amount of \$44,661.00. GTA argued that the automatic stay remained in effect and, as a result, it should not have been required to post a bond. Judge Sukola, however, ordered that the \$44,661.00 be paid to the Government of Guam and PDS.

PDS is attaching a copy of GTA's Opening Brief on Appeal. A review of that Brief reveals that the only relief requested by GTA is that the bond it posted be returned to it and not paid to the Government and PDS. That request is explicitly stated in the Conclusion. Whether or not the Government and PDS are ordered to return the \$44,661.00 to GTA is entirely irrelevant to the present PDS appeal. The disposition by the Supreme Court of GTA's appeal can have no effect whatsoever on the outcome of the present appeal. It is therefore not "... an action concerning the procurement under Appeal ..."

To the contrary, this appeal relates only to the attempt by PDS to comply with its obligations under certain Purchase Orders issued to it for installation of telecommunications equipment and service to the Governor's Office, the Lt. Governor's Office, and Government House (hereafter "Governor's Office"). PDS received a Notice of Default from GSA allowing 10 days to cure an alleged default. It is the position of PDS that it was not allowed access to the Governor's Office so that it could install the equipment necessary to provide the services ordered. At the Hearing, PDS will prove

1
2 that the denial of access by the Governor's Office for the purpose of installing the
3 equipment made it impossible for it to cure the alleged default within the allowed 10
4 days. This is an important issue for the administration of Guam's procurement law.
5 The issue is whether an agency may negate the award of a procurement to the lowest
6 and best bidder by the simple expedient of not allowing the vendor access to its
7 premises. The incumbent provider, GTA, lost this part of the procurement, and its
8 continued service to the Governor's Office thus violates the procurement law and is
9 illegal. Another issue is what exactly motivated the Governor's Office to deny access to
10 PDS in order to allow GTA to continue providing service.

11 At the hearing, PDS will also present evidence that on December 13, 2013,
12 GTA filed a Motion for Contempt, seeking to hold GSA in contempt for issuing certain
13 Purchase Orders under this procurement, and PDS in contempt for working on those
14 Purchase Orders. There were hearings on GTA's Motion on December 24, 2013 and
15 January 9, 2014. GSA and PDS reached a mutual agreement not to proceed further with
16 the Purchase Orders regarding this part of the procurement pending the resolution by
17 the Court of GTA's Motion for Contempt. Judge Sukola denied the Motion for
18 Contempt 87 days later on March 10, 2014, at which time PDS was once again free to
19 commence work on the Purchase Orders. However, GSA has refused to take these 87
20 days in account as an excusable delay. In any event, but for the denial of access, the
21 evidence at the hearing will show that PDS could have completed work on the Purchase
22 Orders for the Governor's Office within the 10 days allowed in the Notice of Default.

23 It may thus be seen that there is no overlap between the limited issue
24 raised by GTA in its appeal to the Guam Supreme Court, and the limited issue in the
25 present appeal. In fact, it is most unfortunate that GSA has taken the position it has. It
26 may be predicted that it will take around a year or so from now for the resolution of
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

GTA's appeal to the Supreme Court. In the meanwhile, both GSA and PDS will be denied the benefit of the lowest and best bidder providing equipment and service to the Governor's Office. This situation seriously undermines the basic purpose of the procurement law.


The other pending court case that GSA refers to is a complete red herring. The Public Auditor may recall that in OPA-PA-12-018, the Public Auditor concluded that it was appropriate for GSA to provide that only one bidder would be awarded the contract for the GGWAN system. That is an entirely different part of IFB GSA-064-11, and has nothing whatsoever to do with the present PDS appeal. GTA did appeal the Public Auditor's Decision in the GGWAN matter in CV0334-13, and trial is set for August 18, 2014. However, the result of the trial in that case will relate only to the GGWAN issue, and can have no effect on the present appeal.

No further delay should be tolerated regarding the implementation of this procurement. GSA's Motion to Decline should be rejected, and this appeal processed as expeditiously as possible.

DATED this 17th day of July, 2014.

Respectfully submitted,

BERMAN O'CONNOR & MANN
Attorneys for Appellant
PACIFIC DATA SYSTEMS, INC.

By: 
BILL R. MANN

CVA2014-012

FILED

2014 JUN 30 PM 4:35

IN THE SUPREME COURT OF GUAM SUPREME COURT
OF GUAM

TELEGUAM HOLDINGS, LLC,

Plaintiff-Appellant(s),

vs.

OFFICE OF PUBLIC ACCOUNTABILITY, PACIFIC
DATA SYSTEMS, THE GOVERNMENT OF THE
TERRITORY OF GUAM, GENERAL SERVICES
AGENCY, DEPARTMENT OF ADMINISTRATION
GOV'T OF GUAM

Defendant-Appellee(s).

Appeal from the Superior Court of Guam

BRIEF OF APPELLANT TELEGUAM HOLDINGS, LLC

BERMAN O'CONNOR & MANN
RECEIVED

JUN 30 2014

Time: 5:05
By: wy

CARLSMITH BALL LLP
VINCENT C. CAMACHO
vcamacho@carlsmith.com
134 W Soledad Ave Ste 401
Hagåtña, Guam 96910
Tel No. 671.472.6813

Attorneys for Plaintiff-Appellant(s)
Teleguam Holdings, LLC

IN THE SUPREME COURT OF GUAM

TELEGUAM HOLDINGS, LLC,

Plaintiff-Appellant(s),

vs.

THE OFFICE OF PUBLIC
ACCOUNTABILITY, PACIFIC DATA
SYSTEMS, THE GOVERNMENT OF
THE TERRITORY OF GUAM,
GENERAL SERVICES AGENCY,
DEPARTMENT OF
ADMINISTRATION GOV'T OF
GUAM

Defendant-Appellee(s).

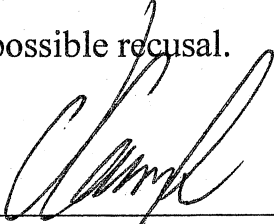
Supreme Court Case No. CVA2014-012
Superior Court Case No. CV0333-13

**TELEGUAM HOLDINGS, LLC'S
CERTIFICATE AS TO
INTERESTED PARTIES**

Undersigned counsel of record for Plaintiff-Appellant(s) Teleguam Holdings, LLC certifies that the following have an interest in the outcome of this case: (1) The Office of Public Accountability, (2) Pacific Data Systems, (3) The Government of the Territory of Guam, and (4) General Services Agency, Department of Administration Gov't of Guam. This representation is made to enable Justices of the court to evaluate possible recusal.

Dated: 30 June 2014.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
vcamacho@carlsmith.com
134 W Soledad Ave, Ste 401
Hagåtña, Guam 96910
Tel No. 671.472.6813
Attorneys for Plaintiff-Appellant(s)
Teleguam Holdings, LLC

CORPORATE DISCLOSURE STATEMENT

Respondent Teleguam Holdings, LLC submits this Corporate Disclosure Statement pursuant to Guam Rule of Appellate Procedure 13.1. Teleguam is a wholly owned subsidiary of AP Teleguam, a Delaware Limited Liability Company.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	
Table of Authorities	
I. INTRODUCTION.....	1
II. JURISDICTIONAL STATEMENT	1
III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	2
IV. STATEMENT OF THE CASE.....	2
(A.) Nature of the Case	2
(B.) Course of Proceedings	3
(C.) Disposition by the Superior Court	5
V. STATEMENT OF THE FACTS.....	6
VI. SUMMARY OF THE ARGUMENT	7
VII. STANDARD OF REVIEW	7
VIII. ARGUMENT	8
(A.) The automatic stay remains in effect when a procurement protest is appealed to the Superior court and until a final resolution	8
(B.) A bond should not be required to preserve an automatic stay	14
(C.) The lower court erred in releasing the bond to GSA and PDs.....	17
IX. CONCLUSION.....	19
Statement of Related Cases.....	20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 910 F.2d 1049 (2d Cir. 1990).....	17, 18
<i>Guam Imaging Consultants, Inc. v. GMHA</i> , 2004 Guam 15.....	9, 10, 11, 12, 14, 19
<i>Holmes v. Territorial Land Use Comm'n</i> , 1998 Guam 8.....	7
<i>Pangelinan v. Gutierrez</i> , 2000 Guam 11	8
<i>Sumitomo Constr. Co., Ltd. v. Gov't of Guam</i> , 2001 Guam 23	8
<i>Town House Dep't Stores, Inc. v. Dep't of Educ.</i> , 2012 Guam 25	7

Statutes

5 GCA § 5425	8, 9, 10, 11, 12, 13, 14, 15, 18, 19
5 GCA § 5480	6, 8, 9, 10, 11, 13
7 GCA § 25101	2
7 GCA § 25102	2
7 GCA § 3107	2
7 GCA § 3108	2

Rules

Guam R. Civ. P. 65(c).....	17
----------------------------	----

I. INTRODUCTION

This appeal provides the Court with an opportunity to clarify the narrow issue of the procedures and requirements that should be followed in a procurement civil action when the Government of Guam violates the automatic stay provision of the Guam Procurement Law. Appellant Teleguam Holdings LLC and its wholly owned subsidiaries ("Teleguam") bring this appeal because the Superior Court erred when it required Teleguam, a timely protestor to a pre-award procurement, to post a bond in order to maintain the automatic stay.

This brief demonstrates that a bond should not be required to preserve the automatic stay of the Guam Procurement Law, and that because the Government of Guam, General Services Agency ("GSA"), and competing bidder Pacific Data Systems ("PDS") could not have suffered or incurred any damages for actions that they never had the right to do, the bond imposed in this case should be returned to Teleguam.

II. JURISDICTIONAL STATEMENT

This appeal arises from a civil action involving a pre-award procurement protest and addresses three orders of the Superior Court: (1) the May 3, 2013, Order to post a bond in the amount of \$44,661.00, (2) the March 10, 2014, Decision and Order awarding the bond to the GSA and PDS, and (3) the March 19, 2014, Order releasing the bond to GSA and PDS. A final judgment was rendered

on March 19, 2014. The Clerk of the Superior Court entered the judgment on the docket on March 20, 2014. Within thirty days thereafter, on April 21, 2014, Teleguam filed its Notice of Appeal. Appellant's Excerpts of Record ("ER") at 24-25 (Not. Appeal, Apr. 21, 2014).

Teleguam's appeal stems from a final order issued by the Superior Court of Guam. Therefore, the Supreme Court may properly exercise jurisdiction over this appeal. 7 GCA §§ 3107 and 3108; *see also* 7 GCA §§ 25101 and 25102.

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does the automatic stay pursuant to the Guam Procurement Law continue when a procurement matter is appealed to the Superior Court?
2. Must a protestant post a bond in order to preserve the automatic stay pursuant to the Guam Procurement Law?
3. Did the lower court err in releasing the bond to parties who violated the automatic stay?

IV. STATEMENT OF THE CASE

(A.) NATURE OF THE CASE

This is a civil action contesting and appealing decisions by GSA and the Office of Public Accountability ("OPA") regarding Bid Forms 2 & 3 of IFB GSA 064-11 soliciting telecommunications products and services. GSA initially issued a

Bid Status recommending an award to Teleguam for Bid Forms 2 & 3, but GSA revised its Bid Status recommending an award to PDS for Bid Forms 2 & 3. ER at 10 (Finds. Fact & Concl. L., Oct. 31, 2013). Prior to making an award for Bid Forms 2 & 3, Teleguam timely filed the underlying protest contesting GSA's determination that PDS was the lowest bidder. ER at 10 (Finds. Fact & Concl. L.).

(B.) COURSE OF PROCEEDINGS

On May 18, 2012, prior to GSA issuing an award for Bid Forms 2 & 3, Teleguam protested GSA's May 3, 2012 Revised Bid Status. ER at 10 (Finds. Fact & Concl. L.). On October 5, 2012, GSA denied the Protest. ER at 10 (Finds. Fact & Concl. L.). On October 8, 2012, Teleguam appealed GSA's denial of its protest to the OPA, and on March 6, 2013, the OPA issued its Decision upholding GSA's recommendation to award Bid Forms 2 & 3 to PDS. ER at 11 (Finds. Fact & Concl. L.). On March 20, 2013, Teleguam filed a Verified Complaint in the Superior Court of Guam appealing the OPA's March 6, 2013 Decision on the basis that GSA and OPA erred by not finding Teleguam was the lowest bidder. ER at 6 (Finds. Fact & Concl. L.).

On April 25, 2013, Teleguam filed an *Ex Parte* Motion for Temporary Restraining Order after discovering GSA was issuing purchase orders to PDS for Bid Forms 2 & 3 prior to a final resolution of its protest. ER at 1-2 (Order Granting

Mot. for TRO, May 3, 2013). Prior to filing the Motion, Teleguam asked GSA to void and rescind all improperly issued Purchase Orders, but GSA erroneously refused. On May 3, 2013, during the pendency of the lawsuit, the lower court issued an Order Granting Teleguam's Motion for Temporary Restraining Order, but required Teleguam to post a bond for \$44,661.00. ER at 1-2 (Order Granting Mot. for TRO). Teleguam complied. ER at 3-4 (Not. of Posting of Bond, May 3, 2013). The Superior Court specifically found that "unless restrained from doing so, Defendant [GSA], will continue to award purchase orders to Defendant [PDS] under IFB GSA 064-11 Bid Forms 2 & 3; and that GTA [Teleguam] will suffer immediate and irreparable harm if Defendants are not prohibited from said awarding of purchase orders." ER at 1 (Order Granting Mot. for TRO).

After a trial was held, on October 31, 2013, the Court issued its Findings of Fact and Conclusions of Law and found in Defendants' favor. The Court, however, never issued an order allowing GSA to issue purchase orders under the IFB to PDS. The Court had also not yet entered a final judgment in this case (in fact, one was not issued for many more months), and the time for Teleguam to appeal this Court's decision had not begun to run.

Notwithstanding the automatic stay under Guam Procurement Law and the absence of a final judgment or a Court order allowing the Government to issue

purchase orders, in November 2013, GSA issued 29 purchase orders for Bid Forms 2 & 3 to PDS. ER at 17-18 (Dec. & Order Plaintiff's Mot. for Contempt, Mar. 10, 2014). Teleguam requested that GSA and PDS be held in contempt for violating the Temporary Restraining Order and the automatic stay pursuant to the Guam Procurement Law. ER at 16-21 (Dec. & Order Plaintiff's Mot. for Contempt). The Court, however, denied Teleguam's Motion for Contempt without addressing the automatic stay provision of the Guam Procurement Law. ER at 16-21 (Dec. & Order Plaintiff's Mot. for Contempt).

(C.) DISPOSITION BY THE SUPERIOR COURT

As stated, on October 31, 2013, the Superior Court affirmed the OPA's ruling and ruled that Teleguam failed to sustain its burden of proof that the OPA's decision was arbitrary, capricious, fraudulent, clearly erroneous or contrary to law. ER at 12-13 (Finds. Fact & Concl. L.).

Months later, on March 10, 2014, the lower court granted the Defendants' request for the entire bond of \$44,661.00. ER at 16-21 (Dec. & Order Plaintiff's Mot. for Contempt). The lower court then ordered the Clerk of court to issue a check jointly payable to the Treasurer of Guam and PDS. ER at 22-23 (Order Disposition of Bond, Mar. 19, 2014).

V. STATEMENT OF THE FACTS

The facts as pertinent to this appeal surround GSA's issuance of purchase orders in violation of the automatic stay provision. As already discussed, Teleguam filed a protest prior to an award of Bid Forms 2 & 3.

After the OPA's decision, and before Teleguam's rights to file a civil action under 5 GCA § 5480 expired, GSA issued over 40 purchase orders for Bid Forms 2 & 3. ER at 1-2 (Order Granting Mot. for TRO). Teleguam in fact timely commenced an action in the Superior Court of Guam challenging the OPA's decision and GSA's underlying decision. ER at 6 (Finds. Fact & Concl. L.).

In spite of finding that "Teleguam will suffer immediate and irreparable harm if Defendants are not prohibited from said awarding of purchase orders," ER at 1 (Order Granting Mot. for TRO), the lower court also ordered Teleguam to post a surety bond in the amount of \$44,661.00. ER at 2 (Order Granting Mot. for TRO).

After the Superior Court dismissed Teleguam's complaint, ER at 13 (Finds. Fact & Concl. L.), GSA again illegally issued 29 purchase orders for Bid Forms 2 & 3 to PDS. ER at 14-15 (Decl. of Elyze M. Iriarte, Dec. 13, 2013). As no final judgment had yet been rendered, Teleguam's rights to appeal the Superior Court's findings of fact and conclusions of law had not yet expired.

Upon the issuance of the judgment, the lower court then released the entire bond to GSA and PDS.

VI. SUMMARY OF THE ARGUMENT

According to Guam Procurement Law, the Territory shall not proceed with the award of a contract prior to final resolution of any protest. Any such action is void. In this case, GSA illegally issued purchase orders to PDS prior to final resolution of the instant procurement case and refused to cease such action, thereby violating the automatic stay. Moreover, Teleguam should not have been required to post a bond to preserve the automatic stay provision of the Guam Procurement Law. Finally, the lower court erred when it released the bond to GSA and PDS because (1) the purchase orders were issued illegally and (2) GSA and PDS were never wrongfully enjoined.

VII. STANDARD OF REVIEW

As this appeal concerns statutory interpretation and legal issues, the appropriate standard of review is *de novo*. *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ¶ 11. When there are no issues of fact in dispute, a lower court's decision is reviewed *de novo*. *Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 6.

VIII. ARGUMENT

(A.) THE AUTOMATIC STAY REMAINS IN EFFECT WHEN A PROCUREMENT PROTEST IS APPEALED TO THE SUPERIOR COURT AND UNTIL A FINAL RESOLUTION

Guam's Procurement Law, in relevant part, states, "[i]n the event of a timely protest . . . under Subsection (a) of §5480 of this Chapter, 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) (emphases added). Furthermore, a decision of the Public Auditor is final *unless* a person adversely affected by the decision commences an action in the Superior Court in accordance with Subsection (a) of §5480. 5 GCA § 5425(f) (emphases added).

It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself. *See Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23. Absent clear legislative intent to the contrary, the plain meaning prevails. *Sumitomo Constr. Co., Ltd. v. Gov't of Guam*, 2001 Guam 23 ¶ 17 (citing *Aaron v. SEC*, 446 U.S. 680, 697 (1980)). The plain meaning of Section 5425(g) indicates that the Government of Guam cannot proceed with the award of a contract prior to a procurement protest being finally resolved. Section 5425(f) clearly indicates that

the OPA's decision on a procurement protest is not final if an action is filed in the Superior Court challenging the OPA's decision.

Here, the OPA's decision was not a final resolution of this matter because Teleguam filed a timely civil action in the Superior Court. Based on section 5425(g), GSA was not allowed to issue purchase orders from the date of the OPA's decision because the instant protest filed by Teleguam under 5 GCA § 5480(a) is timely and a final resolution of this protest had not been reached. On this basis, the Court correctly enforced the automatic stay, although it should have voided the purchase orders altogether.

Additionally, this Court previously held that the automatic stay provision of the Guam Procurement Law is triggered when a protest is filed pre-award. *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15 ¶ 40. In that case, Plaintiffs-Appellants RADS filed a pre-award protest for an exclusive contract between Guam Memorial Hospital Authority and Guam Radiology Consultants, Inc. ("GRC") on May 16, 2003. *Id.* at ¶ 6. The GMHA Board of Trustees awarded the exclusive contract to GRC on May 22, 2003, several days after RADS filed its protest. *Id.* at ¶ 9. Because RADS protest was filed before GMHA awarded the contract this Court held that the automatic stay provision was triggered by RADS protest on May 16, 2003. *Id.* at ¶ 40.

In this case, the chronology confirms that Teleguam timely filed its protest before GSA ever awarded the contract and issued purchase orders to PDS. On May 18, 2012, Teleguam timely filed a Protest to GSA's May 3, 2012 Revised Bid Status before GSA issued any award. ER at 10 (Finds. Fact & Concl. L.). In fact, it was not until March 19, 2013, that GSA issued any purchase orders. Teleguam's protest was filed approximately ten (10) months before GSA issued purchase orders to PDS. Based on this Court's holding in *Guam Imaging*, the automatic stay provision was triggered on May 18, 2012, when Teleguam filed its Protest with GSA because it was timely and filed before an award was made.

The Appellees argued, in the trial court, that GSA had the right to issue purchase orders after the OPA's Decision of March 6, 2013 and prior to Teleguam filing this civil action on March 20, 2013. In other words GSA and PDS assert that the automatic stay is not applicable. However, section 5425(f) does not grant GSA the authority to proceed with an award, and clearly holds the finality of the OPA's decision in abeyance until the time to file a civil action under section 5480 expires. GSA's issuance of purchase orders directly contravened sections 5425(f) and (g).

Based on the statutory requirements, the Court must consider two issues regarding the timing of the filing of the protest. *Guam Imaging*, 2004 Guam 15 ¶ 24. The first being timeliness in relation to the underlying facts and the second

being whether it was filed before an award was made. *Id.* If the protest was both factually timely and filed before the award was made, the automatic stay provision was triggered. *Id.* The Court will then turn to whether the agency has adequately shown "necessity" thereby triggering an exception to the automatic stay. *Id.*

As to the timeliness in relation to the underlying facts, Guam law provides that a protest must be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto. 5 GCA § 5425(a). In this case, there is no dispute that Teleguam's protest of GSA's Revised Bid Status, was made within the requisite fourteen (14) days. Teleguam received GSA's Revised Bid Status on May 4, 2012 and filed its written protest with GSA on May 18, 2014, exactly fourteen (14) days from the day it received the Revised Bid Status. Thus, Teleguam's protest in relation to the underlying facts was timely.

Guam law provides that in the event of a timely protest under Subsection (a) of Section 5425 or under Subsection (a) of Section 5480, the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest and as such any further action is void. 5 GCA § 5425 (g). The law also provides instances where the automatic stay can be avoided. Section 5425(g) provides that "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 further action is avoid, *unless*:

1. The Chief Procurement Officer after consultation with and the written concurrence of the head of the purchasing agency and the Attorney General or designated Deputy Attorney General, makes a written determination that the award of the contract without delay is necessary to protect the substantial interest of the Territory; and
2. Absent a declaration of emergency by the Governor, the protestant has been given at least two (2) days notice (exclusive of territorial holidays); and
3. If the protest is pending before the Public Auditor or the Court, the Public Auditor or Court has confirmed such determination, or if not such protest is pending, not protest to the Public Auditor of such determination is filed prior to the expiration of the two (2) day period specified in Item 2 of Subsection (g) of this Section.

5 GCA § 5425(g)(1)-(3)(2005). In this case, there was no evidence presented in the record or in any papers indicating any attempt by GSA to invoke the "necessity" provision so as to avoid the implication of the automatic stay.¹ Rather, the Appellee and the lower court completely disregarded the requirement of the law. ER at 1-2 (Order Granting Mot. for TRO); ER at 16-21 (Dec. & Order Plaintiff's Mot. for Contempt).

¹ This Court coined the term "necessity" in *Guam Imaging* as an exception to the automatic stay provision of the Guam Procurement Law.

With regard to the second inquiry, the Court must determine if the protest was filed before an award was made. In this case, GSA admitted it awarded the first purchase order only after the OPA's decision was issued on March 6, 2013, some ten (10) months after Teleguam filed its protest. ER at 1-2 (Order Granting Mot. for TRO). The Court must find that the protest was filed pre-award.

Because Teleguam's protest was timely and filed pre-award, the Court must find that the automatic stay provision was triggered. Thus any purchase order issued after the OPA's decision shall be void pursuant to Section 5425(g).

Moreover, the automatic stay remains in effect until "final resolution." 5 GCA § 5480. The Superior Court's findings of fact and conclusions of law did not constitute a final resolution of the procurement protest, as Teleguam had the right to appeal to the Supreme Court.

GSA's issuance of purchase orders in November 2013 prior to a final resolution by the court again violated section 5425(g). Teleguam once more sought relief from the lower Court's by finding GSA and PDS in contempt for violating the automatic stay, ER at 17-18 (Dec. & Order Plaintiff's Mot. for Contempt), when GSA issued purchase orders to PDS prior to the final resolution of Teleguam's protest. In its Decision, the Court completely disregarded the automatic stay provisions and held that Teleguam failed to meet its burden that

GSA and PDS committed contempt. ER at 16-21 (Dec. & Order Plaintiff's Mot. for Contempt). The lower Court's finding contravenes the statutory requirements and the holding of this Court in *Guam Imaging*.

In conclusion, the plain language of section 5425(f) and (g) must be upheld. Until a final resolution is reached by the highest tribunal, or the time to appeal to the highest tribunal expires, the automatic stay provision of Guam's Procurement Law remains in effect.

(B.) A BOND SHOULD NOT BE REQUIRED TO PRESERVE AN AUTOMATIC STAY

Nothing in the Guam Procurement Law requires a bond to be posted in order for the automatic stay to take or remain in effect. Based on 5 GCA §5425(g) and this Court's holding in *Guam Imaging*, the automatic stay is triggered when a protest is timely filed pre-award, not when a protestor files a bond.

The automatic stay provision is intended to preserve the *status quo* during the pendency of the pre-award protest. Numerous policy reasons justify an automatic stay: (1) prevention of a wrongful contract award; (2) preservation of the rights of a bid protester; (3) resolution before performance by a potentially wrong bidder; (4) preservation of the public treasury by insuring that a contract is awarded to the lowest responsible bidder; and (5) orderly resolution of bid and contract protests. If a bond is required to prevent someone from violating the

automatic stay, then the *status quo* and each of the above policy reasons will be disrupted.

It would be an injustice to set a precedent which construes section 5425(g) so as to allow the Government to violate a procurement stay and then require the protesting party to post a bond stop the Government's violations of the automatic stay. Not only will the Government not be deterred from violating the procurement law, it will profit in knowing that the protestant must post a bond. The requirement of a bond deters a protestant who timely challenge a violation of procurement law from protecting their rights, calls to question the integrity of the procurement process, and is not in the best interest of the Territory.

The purpose of the bond to secure an injunction is for the payment of any costs and damages as may be incurred or suffered by any party found to be *wrongfully* enjoined or restrained. The Superior Court's imposition of a bond turns this reasoning on its head. In this case, the bond protected those who acted wrongfully (here, GSA and PDS), and penalized those (here, Teleguam) properly exercising their rights to file a civil action and appeal rights.

Because the Defendants failed to comply with the automatic stay, the most expeditious remedy Teleguam pursued was to file a temporary restraining order to enjoin GSA and PDS from continuing to violate the automatic stay provision. In

the instant case, GSA admitted to issuing purchase orders and PDS admitted to receiving the purchase orders. It cannot be possible to conclude that when a party admits to violating the automatic stay that the party is wrongfully enjoined or restrained from such conduct. The lower Court found that Teleguam "will suffer immediate and irreparable harm if Defendants are not prohibited from awarding purchase orders." ER at 1 (Order Granting Mot. for TRO). After a hearing, the Court found that GSA and PDS did in fact violate the stay and ordered that no other purchase order be issued and that no further action be taken on previously issued purchase orders. ER at 1-2 (Order Granting Mot. for TRO). More significantly, the Court ordered that PDS shall disconnect service to all government of Guam agencies receiving service under the instant procurement in effect voiding the purchase orders.

Can it be possible that a party violating the law could be wrongfully enjoined or restrained in light of the party's own admission and the Court finding that the parties have in fact violated the law? If yes, then the lower Court was justified in requiring a bond; however, if no, then the lower court erred in requiring a bond. In this case, GSA and PDS violated the automatic stay thus they could not be wrongfully enjoined even if the lower Court found in their favor on the merits. The lower court erred in requiring Teleguam to post a bond.

Absent from the Court's Order granting the TRO, are the Court's reasons as to how the Court could find that GSA and PDS violated the automatic stay and order Teleguam to post a bond to protect the interest of the Defendants, in effect penalizing Teleguam for asking the Court to enforce the automatic stay.

Bidders who have rights to protest and enforce the automatic stay provision should not be required to post a bond for timely exercising their lawful rights. The practical effect here was to have Teleguam pay the Government and a competing bidder to do what the Government was already required to do. Accordingly, the Court should find that a bond is not required to preserve the automatic stay of the Guam Procurement Law.

(C.) THE LOWER COURT ERRED IN RELEASING THE BOND TO GSA AND PDS

While a Court may require a bond as security for a restraining order, the bond constitutes payment for costs and damages by a party "who is found to have been wrongfully enjoined or restrained." Guam R. Civ. P. 65(c). A party has been wrongfully enjoined "if it is ultimately found that the enjoined party had at all times the right to do the enjoined act." *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990). The focus of the "wrongfulness" inquiry is whether, in hindsight in light of the ultimate decision on

the merits after a full hearing, the injunction should not have issued in the first instance. *Id.*

Under these standards, GSA and PDS were not wrongfully enjoined. As stated above, they violated the automatic stay provision of the Guam Procurement Law. In light of section 5425(g), GSA was never authorized to issue Purchase Orders to PDS because Teleguam still had a right to appeal to the Superior Court of Guam, which it did, and a final resolution of the protest had not been reached.

The lower court, however, found that GSA and PDS were wrongfully enjoined because they prevailed in the matter, but it failed to address the analysis of the automatic stay provision and Teleguam's arguments that GSA's and PDS' actions were in violation of Guam's Procurement Law.

Even more puzzling is the lower Court's conclusion that Teleguam failed to meet its burden to show by a preponderance of the evidence that the Defendants committed contempt when it issued purchase orders in November 2013. ER at 18-19 (Dec. & Order Plaintiff's Mot. for Contempt). It cannot be possible that the Court found that the Defendants violated the automatic stay when GSA issued purchase orders and granted the TRO but later conclude that Teleguam failed to meet its burden for the Defendants' contempt. The only logical explanation is that

the lower court once again completely disregarded the requirements of Section 5425(g) and this Court's holding in *Guam Imaging*.

In fact, the Government of Guam, GSA, and PDS could not have suffered or incurred any damages for actions that they never had the right to do. Sections 5425(g) and (f) are clear that any award during the pendency of a protest is void. The lower court did not have the discretion to overrule this statutory requirement even if the Court ultimately denies the protestant's appeal on the merits. To do so is contrary to the automatic stay provision.

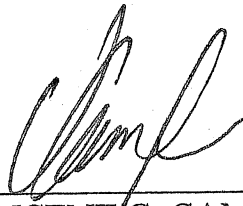
Releasing the bond to GSA and PDS even after finding that they violated the automatic stay provision is like a crime victim paying a perpetrator for committing the crime. It is wrong to reward GSA and PDS for violating the automatic stay and penalize Teleguam for the violations of law that GSA and PDS committed. For these reasons, the bond should have been released back to Teleguam.

IX. CONCLUSION

Teleguam asks the Court to find that the automatic stay remains in effect until a final resolution is made if a protester files a timely pre-award protest and that a bond is not required to preserve the automatic stay of the Guam Procurement Law. Teleguam also asks that the decision of the Superior Court to award the bond to GSA and PDS be reversed and that the bond be returned to Teleguam.

Dated: 30 June 2014.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
Attorneys for Plaintiff-Appellant(s)
Teleguam Holdings, LLC

STATEMENT OF RELATED CASES

Teleguam is unaware of any related cases currently before this Court.

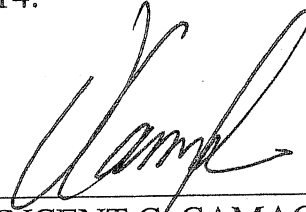
4837-0816-9499.5

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Rule 16(a)(7)(B) because this brief contains 4,423 number of words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

DATED: Hagåtña, Guam, June 30, 2014.

CARLSMITH BALL LLP



VINCENT C. CAMACHO
Attorneys for Appellant
TELEGUAM HOLDINGS, LLC