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

IN THE APPEAL OF

APPEAL NO. OPA-PA-14-001

J&B MODERN TECH,

**OPPOSITION TO MOTION TO DECLARE  
AUTOMATIC STAY IN EFFECT**

Appellant.

Comes now Guam Department of Education (“GDOE”) and files this Opposition to J&B Modern Tech’s (“J&B”) Motion to Declare Automatic Stay in Effect in OPA-PA-14-001.

**BACKGROUND**

GDOE issued GDOE Invitation for Bid 005-2014 (“IFB”) on November 25, 2013, for the Air Conditioning Systems Exterior Duct Restoration Project. GDOE Exhibit 7, Bates Stamp No. GDOE 00249-00350.

Bid submissions for the IFB were due on December 17, 2013 at 10:00 a.m., and a bid opening was conducted at that time. J&B Modern Tech (“J&B”) and JRN Air Conditioning & Refrigeration (“JRN”) were the only bidders to submit bids. GDOE Exhibit 4, Bates Stamp No. GDOE0014-0108; GDOE Exhibit 5, Bates Stamp No. GDOE0109-0227. The two bids submitted were opened and logged onto an Abstract of Bids. GDOE Exhibit 7, Bates Stamp No. GDOE0316.

On February 5, 2014, GDOE awarded JRN the contract by issuing a purchase order in the amount of \$254,501.91. GDOE Exhibit 15, Bates Stamp No. GDOE0381-0382. On February 6, 2014, J&B filed a protest to the Superintendent of Education and Supply Management Administrator. GDOE Exhibit 12, Bates Stamp No. GDOE0376-0377. A Notice of Stay of the

ORIGINAL

1 Procurement was issued after the receipt of the Protest on February 7, 2014. GDOE Exhibit 16,  
2 Bates Stamp No. GDOE0382.

3 On March 7, 2014, GDOE denied the protest in its entirety. On the same day, GDOE  
4 issued a Notice to Lift the Stay of Procurement. GDOE Exhibit 17, Bates Stamp No.  
5 GDOE0384. GDOE determined that the stay provision contained in 5 G.C.A. § 5425(g) and 2  
6 G.A.R. Div. 4 § 9101(e) did not apply because J&B filed its protest after JRN was issued a  
7 purchase order.

### 8 DISCUSSION

9 A protest is considered timely when it is made in writing to the Director of Education and  
10 shall be filed within fourteen working days after the protestor knows or should have known of the  
11 facts giving rise thereto. *See* 5 G.C.A. § 5425(a); Chapter IX, Section 9.2.3.1, DOE Procurement  
12 Regulations; *See* 2 G.A.R. Div. 4 § 9101(c)(1). Under Guam law, in the event a timely protest is  
13 made, the Territory shall not proceed further with the solicitation or with the award of the contract  
14 prior to final resolution of such protest. 5 G.C.A. § 5425(g).

15 However, Chapter IX, Section 9.2.5, DOE Procurement Regulations and 2 G.A.R. Div. 4  
16 § 9101(e) further elaborate that the automatic stay provision is triggered only when a timely  
17 protest is made and that the protest was filed before an award was made. *See Guam Imaging*  
18 *Consultants, Inc. GMHA*, 2004 Guam 15 ¶24 (The Guam Supreme Court interpreted 5 G.C.A. §  
19 5425(g) along with 26 G.A.R. § 16901(e), which is the Guam Memorial Hospital Authority's  
20 automatic stay provision contained in its procurement regulation, and 26 G.A.R. § 16901(e) is  
21 substantially similar to both Chapter IX, Section 9.2.5, DOE Procurement Regulations and 2  
22 G.A.R. Div. 4 § 9101(e)).

23 In *Guam Imaging Consultants*, the Guam Supreme Court read both the Guam  
24 Procurement law and the procurement regulations together, and clearly stated that there must be a  
25 two-step analysis in order to determine whether the automatic stay provision is triggered. *Id.* at  
26 ¶¶23 – 24. The first step is to determine whether there is a timely filing of a protest, and the  
27

1 second step is to determine whether the protest was filed before an award was made. *Id.* at ¶24.  
2 The Guam Supreme Court concluded that the automatic stay provision is triggered only when a  
3 protest is timely filed and filed prior to an award being made. *Id.* Therefore, the Guam Supreme  
4 Court's interpretation is binding upon the OPA.

5 J&B heavily relies on the OPA's decision in *In re Appeal of JMI Edison*, OPA-PA-13-  
6 010, Order Granting Motion re Automatic Stay. In *JMI Edison*, on July 3, 2013, JMI Edison  
7 ("JMP") filed a protest with GDOE before an award had been made. *JMI Edison*, OPA-PA-13-  
8 010, Submission of Procurement Record, Exhibit 13, Bates Stamp No. GDOE001854-001856.  
9 As a result of the protest, GDOE issued a Notice of Stay of Procurement on July 3, 2013. *Id.* at  
10 Exhibit 14, Bates Stamp No. GDOE001857. On July 25, 2013, GDOE issued a written response  
11 denying JMI's protest. *Id.* at Exhibit 17, Bates Stamp No. GDOE001882-001925. On the same  
12 day, GDOE lifted the stay and fully executed the contract with J&B. *Id.* at Exhibit 15, Bates  
13 Stamp No. GDOE001858 and Exhibit 16, Bates Stamp No. GDOE001859-001881. In *JMI*  
14 *Edison*, JMI's protest was timely filed *before an award was made*. Therefore, the OPA ruled that  
15 the automatic stay was triggered when JMI filed its protest.

16 However, the facts and circumstances in *JMI Edison* are vastly different than in the  
17 present case. On February 5, 2014, GDOE issued an Analysis and Recommendation that  
18 determined that JRN was the lowest responsible bidder, and recommended JRN be awarded the  
19 contract for the IFB On February 5, 2014. GDOE Exhibit 9, Bates Stamp No. GDOE00319.  
20 GDOE awarded JRN the contract by issuing Purchase Order No. 20140367-00 in the amount of  
21 \$254,501.91 on February 5, 2014. GDOE Exhibit 15, Bates Stamp No. GDOE0381-0382. On  
22 February 6, 2014, a day after the award was made to JRN, J&B filed a protest in writing with  
23 GDOE.

24 J&B filed its protest within the 14 days as required by 5 G.C.A. § 5425(a), Chapter IX,  
25 Section 9.2.3.1, DOE Procurement Regulations, and 2 G.A.R. Div. 4 § 9101(c)(1). However, it is  
26 clear that J&B filed its protest after the issuance of a purchase order to the JRN. Under the  
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1 analysis of in *Guam Imaging Consultants*, the automatic stay provisions contained in 5 G.C.A §  
2 5425(g), Chapter IX, Section 9.2.5, DOE Procurement Regulations and 2 G.A.R. Div. 4 § 9101(e)  
3 is triggered only when there is a timely protest filed and only if, the protest is filed before an  
4 award is made. In the instant case, J&B filed its timely protest *after an award had been made*,  
5 and therefore, the automatic stay provision was never triggered.

6 Based on the Guam Supreme Court's interpretation of the automatic stay provisions of the  
7 Guam Procurement Law and Regulations in *Guam Imaging Consultants*, the automatic stay  
8 provisions contained in 5 G.C.A. § 5425(g), Chapter IX, Section 9.2.5 of the DOE Procurement  
9 Regulations and 2 G.A.R. Div. 4 § 9101(e) were not triggered, and thus, GDOE was not  
10 mandated to institute a stay. Therefore, GDOE was permitted to lift the stay on March 7, 2014.

11 J&B argues that it will suffer irreparable harm if the stay is not instituted. Guam law  
12 limits what an aggrieved bidder may recover if its appeal is sustained. *See* 5 GCA § 5425(h). In  
13 addition, Guam law limits the remedies that the OPA may impose either before or after an award  
14 has been made. *See* 5 G.C.A. § 5451 and 5 G.C.A. § 5452. Therefore, J&B is limited to the  
15 remedies provided under the law, and is not entitled to an automatic stay.

16  
17 **CONCLUSION**

18 For the foregoing reasons, GDOE respectfully requests that the Office of Public  
19 Accountability deny J&B's Motion to Declare Automatic Stay in Effect.

20 Dated this 18<sup>h</sup> day of April, 2014.

21 Respectfully submitted,

22 **GUAM DEPARTMENT OF EDUCATION**

23  
24 By:   
25 **ANDREW T. PEREZ, ESQ.**  
26 *Legal Counsel*