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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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5 Interested Party

6 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

8 In the Appeal of J & B Modern Tech,  
9  
10 Appellant.

OPA-PA-14-001

**OPPOSITION TO  
APPELLANT'S MOTION TO  
DECLARE AUTOMATIC STAY  
IN EFFECT**

13  
14 **COMES NOW** JRN Air Conditioning & Refrigeration, Inc. ("JRN" herein), an  
15 Interested Party in this Appeal as the current contractor in the relevant bid, and files its  
16 Opposition to Appellant's Motion to Declare Automatic Stay in Effect in the matter referenced  
17 above.

18  
19 **STATEMENT OF FACTS**

20 On Monday, November 25, 2013, an invitation for bid identified as GDOE IFB 005-2014  
21 was issued by the Purchasing Agency in this matter, the Guam Department of Education  
22 ("GDOE" herein), for the Air Conditioning Systems Exterior Duct Restoration Project ("Project"  
23 herein). Government certification for this project was set at \$300,000. A pre-bid conference and  
24 site inspections organized by GDOE occurred on December 6, 2013 and December 10, 2013.  
25 JRN conducted prior site inspections on September 20, 2013, September 23, 2013, September  
26 24, 2013 and attended the December 6, 2013 pre-bid conference and site inspections organized  
27 by GDOE. By the amended deadline for submission on December 17, 2013, only Appellant and  
28 JRN submitted bids for GDOE's consideration. Appellant's bid presented a total cost of

1 \$350,000. JRN's bid presented a total cost of \$254,501.90.

2 On February 5, 2014, GDOE issued a Bid Status notification to both bidders relating its  
3 award to JRN. On that same day, Purchase Order No. 20140367-00 was issued by GDOE to  
4 JRN reflecting the award. On February 6, 2014, Appellant submitted its Protest against the  
5 award to GDOE. Appellant protested the award on the ground that JRN did not attend the  
6 December 10, 2013 site inspection organized by GDOE at Southern High School, one of the four  
7 schools to benefit from the Project. As its immediate response to Appellant's Protest, GDOE  
8 issued a Notice of Stay of Procurement on February 7, 2014 pursuant to 5 GCA § 5425(g).<sup>1</sup> In  
9 that same notice, GDOE advised participating bidders that the stay "shall remain in effect until  
10 the protest is resolved."

11 On March 7, 2014, GDOE issued a Notice to Lift the Stay of Procurement following its  
12 determination that the stay was improperly imposed. In its Notice to Lift the Stay of  
13 Procurement, GDOE cited 2 GAR § 9101(e) and stated that "[t]he Protest, in this instance, came  
14 after the award and a Stay should not have been issued . . . [t]herefore, the issued Stay is hereby  
15 lifted."<sup>2</sup> GDOE also denied Appellant's Protest in its entirety on March 7, 2014. Immediately  
16 following the lift of the stay, JRN commenced work to meet the 120-day turnaround called for in  
17 the Project.

18 On March 13, 2014, Appellant commenced this Appeal with the OPA by filing its Notice  
19 of Appeal. In hearing the matter, the OPA is to determine these issues of fact: (1) whether  
20 attending both the GDOE-organized site inspections on December 6, 2013 and December 10,  
21 2013 was the only way to comply with Section 2.1.2 of the invitation for bid and (2), if so,  
22 whether JRN's attendance on December 6, 2013 only, after having conducted its own site

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23  
24 <sup>1</sup> Section 5425(g) of Title 5 of the Guam Code Annotated states: "In the event of a timely protest under  
25 Subsection (a) of this Section or under Subsection (a) of § 5480 of this Chapter, the Territory shall not proceed  
26 further with the solicitation or with the award of the contract prior to the final resolution of such protest, and any  
such further action is void . . . ."

27 <sup>2</sup> Section 9101(e) of Title 2 of the Guam Administrative Rules and Regulations states: "When a protest has  
28 been filed within 14 days [pursuant to 2 GAR § 91019(c)(1)] and before an award has been made, the Chief  
Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall make no award of the  
contract prior to final resolution of such protest, and any such further action is void . . . ."

1 inspections prior, disqualify it as a nonresponsive bidder and, inter alia, JRN was awarded the bid  
2 unjustly.

3 No further stays have been issued and JRN continues its work during the pendency of this  
4 Appeal. To date, JRN has completed approximately 45% of the work called for in the Project  
5 and the first and second applications for payment was submitted to GDOE on April 7, 2014 and  
6 on April 16, 2014, respectively.

7 On April 11, 2014, Appellant submitted its Motion to Declare Automatic Stay in Effect.  
8 In its Motion, Appellant asks the OPA to (1) declare that a statutory stay pursuant to 5 GCA §  
9 5425(g) was improperly lifted by GDOE and has been in effect since Appellant's Protest on  
10 February 6, 2014 and (2) order GDOE to refrain from taking any further action on the Project  
11 until the final resolution of this Appeal.

### 12 13 ARGUMENT

#### 14 **I. THE OPA SHOULD DENY APPELLANT'S MOTION BECAUSE APPELLANT'S** 15 **PROTEST WAS UNTIMELY AND, THUS, COULD NOT TRIGGER AN** 16 **AUTOMATIC STAY PURSUANT TO EITHER 5 GCA § 5425, 2 GAR § 9101, OR** **§§ 9.2.3.1 and 9.2.5 OF GDOE'S PROCUREMENT REGULATIONS.**

17 Timeliness of a protest is a threshold issue that must be settled prior to determining  
18 whether the protesting party is entitled to an automatic stay. Appellant, as the protesting party in  
19 this instance, may be entitled to an automatic stay in procurement under three separate codes: 5  
20 GCA § 5425, 2 GAR § 9101, and §§ 9.2.3.1 and 9.2.5 of GDOE's Procurement Regulations.  
21 While Appellant's Motion relies solely on 5 GCA § 5425, GDOE referenced 2 GAR § 9101 in its  
22 Notice to Lift the Stay of Procurement, and the OPA had discussed § 9.2.5 of GDOE's  
23 Procurement Regulations in its order in *In the Appeal of G4S Security Systems (Guam), Inc.*,  
24 Appeal No. OPA-PA-13-013, in which the OPA granted a motion similar to Appellant's here.  
25 Each is discussed in turn.

26 Section 5425(a) of Title 5 of the Guam Code Annotated provides the standard by which a  
27 protest will be deemed timely and, thus, trigger an automatic stay pursuant to 5 GCA § 5425(g):  
28 "[t]he protest shall be submitted in writing within fourteen (14) days after such aggrieved person

1 knows or should know of the facts giving rise thereto.”

2 Section 9101(c)(1) of Title 2 of the Guam Administrative Rules and Regulations provides  
3 the standard by which a protest will be deemed timely and, thus, trigger an automatic stay  
4 pursuant to 2 GAR § 9101(e): “[p]rotests shall be made in writing to the Chief Procurement  
5 Officer, the Director of Public Works, of the head of a Purchasing Agency, and shall be filed in  
6 duplicate within 14 days after the protestor knows or should have known of the facts giving rise  
7 thereto. . . [p]rotests filed after the 14 day period shall not be considered.”

8 Section 9.2.3.1 of GDOE’s Procurement Regulations provides the standard by which a  
9 protest will be deemed timely and, thus, trigger an automatic stay pursuant to § 9.2.5 of GDOE’s  
10 Procurement Regulations: [p]rotest (sic) shall be made in writing to the Director of Education  
11 and shall be filed in duplicate within fourteen (14) working days after the protestor knows or  
12 should have known of the facts giving rise thereto . . . [p]rotests filed after the fourteen (14)  
13 working day period shall not be considered.”

14 While there are small textual differences between the three, those differences are  
15 significant in application. Furthermore, that the three codes are found within three separate  
16 authorities, all three govern the operation of GDOE, and all three must be considered. *Guam*  
17 *Imaging Consultants, Inc. v. GMHA et al.*, 2004 Guam 15 ¶¶ 23, 27, and 41 (The Supreme Court  
18 of Guam, in hearing an interlocutory appeal in a case regarding the procurement of radiology  
19 services by the Guam Memorial Hospital Authority, held that both the Guam Procurement Law  
20 and GMHA’s own procurement regulations apply to GMHA and that the requirements of both  
21 must be satisfied. GMHA, being equally subject to both the Guam Procurement Law and its own  
22 procurement regulations, is not relieved from complying with one by meeting the requirements of  
23 the other.) Similarly and along the same line of reasoning, a protesting party, i.e. Appellant,  
24 stands to benefit from the applicability of all three codes provided he or she also meets the  
25 requirements imposed on him or her.

26  
27 **A. Appellant’s Protest Was Untimely Because It Was Filed With GDOE More**  
28 **Than Three Weeks After The December 17, 2013 Bid Submission Deadline,**  
**When Appellant Suspected JRN’s Bid To Be Nonresponsive.**

1 All that is required from Appellant to benefit from an automatic stay in procurement,  
2 under any of the three authorities, is that Appellant's Protest be timely filed with GDOE. The  
3 record indicates that even with the most lenient timeliness standard of the three ( the 14-working-  
4 days standard in § 9.2.5 of GDOE's Procurement Regulations), Appellant's Protest came too late  
5 to trigger any automatic stay.

6 Appellant's Protest is based on the fact that the winning bidder, JRN, did not attend the  
7 December 10, 2013 site inspection organized by GDOE at Southern High School. Notice of  
8 Appeal, pp. 3, 9-10, and 13. From Appellant's perspective, JRN's absence on that day meant  
9 that JRN could not possibly meet the requirements laid out in Section 2.1.2 of the invitation for  
10 bid. Appellant then, relying on its understanding of Section 2.1.2, could reasonably expect JRN  
11 to not pursue submitting a bid because, to Appellant, JRN had been nonresponsive as of  
12 December 10, 2013.

13 On submission day, December 17, 2013, Appellant became aware that only two bids were  
14 submitted to GDOE for consideration. Appellant further learned that aside from its own bid, the  
15 other bid was submitted by JRN, not ACC Business Enterprises, the other attendee at the  
16 Southern High School site inspection on December 10, 2013. Procurement Record, Exhibit 7.  
17 Upon viewing the Abstract of Bids, Appellant was on notice that a bidder it considered  
18 nonresponsive nevertheless submitted a competing bid. Thus, Appellant actually knew of the  
19 facts upon which Appellant's Protest is based as early as December 17, 2013. Therefore,  
20 marking December 17, 2013 as the date Appellant knew of the facts giving rise to its Protest,  
21 Appellant should have submitted its Protest to GDOE no later than December 31, 2013 per 5  
22 GCA § 5425(a) and 2 GAR § 9101(c)(1) or no later than January 13, 2014 (accounting for  
23 weekends and holidays) per § 9.2.3.1 of GDOE's Procurement Regulations in order to be  
24 considered timely.

25 Appellant did not submit its Protest to GDOE until February 6, 2014, more than three  
26 weeks after the bid submission deadline, when Appellant factually knew JRN had submitted a  
27 bid despite not attending the December 10, 2013 site inspection organized by GDOE at Southern  
28 High School. Submission of Agency Report, Exhibit 12. Because Appellant waited so long to

1 file its Protest despite already having the fact for it, Appellant's Protest cannot be considered  
2 timely under either 5 GCA § 5425(a), 2 GAR § 9101(c)(1), or § 9.2.3.1 of GDOE's Procurement  
3 Regulations.

4  
5 **B. Appellant's Untimely Protest Could Not Trigger Any Automatic Stay.**

6 While GDOE, regardless of the date of its submission, entertained Appellant's untimely  
7 Protest by accepting it and imposing a stay pursuant to 5 GCA § 5425(g), Appellant's Protest  
8 categorically could not trigger the automatic stay that 5 GCA § 5425(a) and 5 GCA § 5425(g)  
9 together provide.<sup>3</sup> Submission of Agency Report, Exhibit 16. Section 5425(g) of Title 5 of the  
10 Guam Code Annotated prefaces the automatic stay with a timely protest, using the language "[i]n  
11 the event of a timely protest."

12 Similarly, Appellant's Protest could not trigger an automatic stay pursuant to either 2  
13 GAR § 9101(e) and § 9.2.5 of GDOE's Procurement Regulations. Both 2 GAR § 9101(e) and §  
14 9.2.5 of GDOE's Procurement Regulations also preface any automatic stays with timely protests.  
15 Section 9101(e) of Title 2 of the Guam Administrative Rules and Regulations uses the language  
16 "[w]hen a protest has been filed within 14 days and before an award has been made . . . ."  
17 Section 9.2.5 of GDOE's Procurement Regulations uses the same language, but provides for 14  
18 working days, rather than 14 calendar days, presumably affording the protesting party a better  
19 chance at triggering an automatic stay. As stated above, Appellant's Protest fails to prove timely  
20 under even the most lenient timeliness standard in GDOE's Procurement Regulations.

21 Furthermore, for an automatic stay to be triggered pursuant to either 2 GAR § 9101(e) or  
22 § 9.2.5 of GDOE's Procurement Regulations, the triggering protest must be timely *and* come  
23 before an award has been made. Here, Appellant's Protest is clearly not timely, but beyond that,  
24

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25 <sup>3</sup> Also note that both 2 GAR § 910199(c)(1) and § 9.2.3.1 of GDOE's Procurement Regulations prohibit  
26 the acceptance of any untimely protest. As such, GDOE's acceptance of Appellant's Protest is only valid under 5  
27 GCA § 5425(a), which does not have any language prohibiting a purchasing agency from still accepting an untimely  
28 protest. However, while Appellant's Protest survives under 5 GCA § 5425(a), its untimeliness definitively bars it  
from triggering the automatic stay provided by 5 GCA § 5425(g). GDOE had absolutely no authority whatsoever to  
impose a stay and issue its Notice of Stay of Procurement on February 7, 2014. Recognizing its error, GDOE lifted  
the improperly imposed stay on March 7, 2014. Submission of Agency Report, Exhibit 17.

1 it was not filed before the award to JRN was made on February 5, 2014. Notice of Appeal, p. 11;  
2 Submission of Agency Report, Exhibit 15. Thus, Appellant's Protest also fails to trigger any  
3 automatic stay on that point, and Appellant's untimely Protest conclusively cannot trigger any  
4 automatic stay, whether pursuant to either 5 GCA § 5425(g), 2 GAR § 9101(e), or § 9.2.5 of  
5 GDOE's Procurement Regulations.

6  
7 **C. Because Any Stay Imposed Was Unwarranted And GDOE's Notice To Lift**  
8 **Stay Of Procurement Was Necessary To Remove The Improperly Imposed**  
9 **Stay, Any Action By GDOE And By JRN Following The Lifting Of The Stay**  
10 **Is Not Void.**

11 All three of the codes under which a protest could trigger an automatic stay provide that  
12 any further action by the purchasing agency on the solicitation or award is void.<sup>4</sup> Such further  
13 action is void unless the purchasing agency makes a written determination that shows avoidance  
14 of a stay is necessary to protect substantial government interests and, absent a government  
15 emergency, gives the protesting party at least two-days' notice of such. 5 GCA § 5425(g)(1)-(2);  
16 2 GAR § 9101(e); § 9.2.5 of GDOE's Procurement Regulations. (Section 5425(g)(1) of Title 5  
17 of the Guam Code Annotated goes further to also require the concurrence of the Attorney  
18 General.)

19 Here, analysis of these particular provisions in the codes is wholly unnecessary. As stated  
20 above, Appellant's untimely Protest did not trigger any automatic stay that would void any action  
21 on the parts of both GDOE and JRN as consequence to JRN winning the bid and GDOE  
22 awarding it to JRN. In fact, while the improperly imposed stay was in effect from February 7,  
23 2014 through March 7, 2014, GDOE did nothing and JRN performed no work.

24 Yet, Appellant's Motion states "the competing bidder here, JNR (sic), had to know . . .

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25 <sup>4</sup> Section 9.2.5 of GDOE's Procurement Regulations uses language textually different from 5 GCA §  
26 5425(g) and 2 GAR § 9101(e) that states, in pertinent part, "the Director of Education shall make no award of the  
27 contract until the protest has been settled." This language, without context, cannot apply to the facts here in this  
28 Appeal because an award had already been made to JRN on February 5, 2014. Notice of Appeal, p. 11; Submission  
of Agency Report, Exhibit 15. With some context, however, such language can be understood to mean the same as  
its counterpart language in both 5 GCA § 5425(g) and 2 GAR § 9101(e) to void all further action and not just  
awarding a contract.

1 that GDOE's purported notice of lift of stay had no legal effect" to presumably argue that actions  
2 taken even after the March 7, 2014 lift of stay are void. Appellant's Motion to Declare  
3 Automatic Stay in Effect, p. 4. In making this argument, Appellant relies on another appeal that  
4 went before the OPA, *In the Appeal of JMI Edison*, Appeal No. OPA-PA-13-010, but does little  
5 to meaningfully discuss its significance, stating "there is no need for [Appellant] to distinguish  
6 that decision." Appellant's Motion to Declare Automatic Stay in Effect, p. 3. However, there  
7 are significant distinctions between the facts in *JMI Edison* and the present facts, distinctions that  
8 make the reasoning behind the OPA's decision to grant JMI Edison's Motion for Expedited  
9 Relief to Declare Automatic Stay in Effect inapplicable to this Appeal.

10 *JMI Edison* concerned an invitation for bid issued by GDOE for the purchase of air  
11 conditioning equipment. On June 22, 2013, JMI Edison received a Bid Status and Intent to  
12 Award notification from GDOE alerting GDOE's award to another bidder.<sup>5</sup> *JMI Edison*, Notice  
13 of Appeal, Exhibit A. On July 3, 2013, JMI Edison submitted a timely Protest to GDOE based  
14 on errors JMI Edison believed GDOE made in evaluating JMI Edison's bid. JMI Edison's  
15 Protest was timely because the facts that gave rise to it could not have been known to JMI Edison  
16 until it received the Bid Status and Intent to Award on June 22, 2013 and its Protest came only 11  
17 calendar days later. JMI Edison's Protest properly triggered an automatic stay pursuant to 5  
18 GCA § 5425(g), which was then lifted on July 25, 2013 simultaneously with GDOE's denial of  
19 JMI Edison's Protest. In the Notice to Lift Stay of Procurement issued on July 25, 2013, GDOE  
20 stated "GDOE has responded to [JMI's] protest and no appeal has been timely filed." *Id.*, Travis  
21 Declaration, Exhibit A. In granting JMI Edison's motion, the OPA was convinced by JMI  
22 Edison's argument that GDOE prematurely declared that JMI Edison had not timely filed an  
23 appeal despite JMI Edison, at that time of the lifting of the stay, still had the full 15-day period  
24 for appeal to the OPA per 5 GCA § 5425(e), making the Notice to Lift Stay of Procurement  
25 legally ineffective. *Id.*, Appellant's Motion for Expedited Relief to Declare Automatic Stay in

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26  
27 <sup>5</sup> The winning bidder in *JMI Edison* was Appellant, and Appellant, presumably, would have had opposed  
28 JMI Edison's Motion for Expedited Relief to Declare Automatic Stay in Effect. Considering the OPA eventually  
granted that motion, Appellant has an interest in distinguishing the present facts from those in *JMI Edison*.



1 Effect, pp. 4-7; *Id.*, Order Granting Motion Re Automatic Stay.

2 In the present case, Appellant knew of the facts giving rise to its Protest eight whole  
3 weeks prior to GDOE issuing the Bid Status notification, and Appellant's Protest came more  
4 than three weeks after the absolutely latest date by which it could trigger an automatic stay.  
5 Thus, Appellant's timing with regard to events herein is not comparable to JMI Edison's. Unlike  
6 in *JMI Edison*, Appellant was not entitled to any automatic stay.

7 Even more of a significant distinction is that the Notice to Lift Stay of Procurement  
8 issued in *JMI Edison* misrepresented JMI Edison's ability to appeal GDOE's denial of its Protest.  
9 Here, nothing in the Notice to Lift Stay of Procurement issued by GDOE on March 7, 2014  
10 spoke to Appellant's appeal rights or whether Appellant will not or did not timely file an appeal.  
11 Although, Appellant seems to blur the present facts with those in *JMI Edison* when stating that  
12 JRN "had to know that the 15-day deadline for a procurement appeal had not passed at the time  
13 of the purported lift to (sic) stay." Appellant's Motion to Declare Automatic Stay in Effect, p. 4.  
14 Contrastingly, because GDOE's March 7, 2014 notice did not contain any language pertaining to  
15 anything about an appeal, JRN was entirely reasonable in relying on that notice as valid and  
16 legally effective. Thus, any action on the part of JRN after March 7, 2014, including  
17 commencing work and applying for payment, and any action on the part of GDOE, such as  
18 accepting JRN's work and issuing payment for such work, is not void.

19  
20 **II. THE OPA SHOULD DENY APPELLANT'S MOTION BECAUSE IT ALSO**  
21 **FAILS TO ESTABLISH THAT PRELIMINARY INJUNCTIVE RELIEF, IN THIS**  
22 **CASE AN ORDER TO DECLARE A STAY UNTIL THE FINAL RESOLUTION**  
23 **OF THIS APPEAL, IS APPROPRIATE.**

24 Courts use a four-part test to determine whether granting preliminary injunctive relief  
25 pending an appeal is appropriate. That test factors (1) the moving party's likelihood of success  
26 on the merits, (2) whether the moving party will be irreparably injured without such relief, (3)  
27 substantial injury to the opposing party if such relief was granted, and (4) the public interest.  
28 *Benavente et al. v. Taitano et al.*, 2006 Guam 20 ¶ 15 (citing to *Hilton v. Braunskill*, 481 U.S.  
770, 776 (1987)). While the burden of overcoming this test rests with the moving party,

1 Appellant's Motion discusses irreparable injury only. Nevertheless, a complete analysis leads to  
2 the conclusion that granting the preliminary injunctive relief Appellant seeks, i.e. a stay on  
3 procurement until the final resolution of this Appeal, would be unwarranted.

4  
5 **A. Appellant's Motion Does Not Discuss Appellant's Likelihood Of Prevailing**  
6 **On The Issues Presented In This Appeal.**

7 As stated above, the two issues brought before the OPA are (1) what was required by  
8 Section 2.1.2 of the invitation for bid and (2) whether attending site inspections scheduled and  
9 organized by GDOE was the only means by which a bidder could have complied with Section  
10 2.1.2. Appellant claims that (1) attendance at the pre-bid conference and site inspections  
11 scheduled by GDOE was mandatory despite no indication from GDOE as such and despite  
12 further confirmation from GDOE of the same and (2) attendance at the pre-bid conference and  
13 site inspections scheduled by GDOE was the only manner in which a potential bidder could  
14 sufficiently comply with Section 2.1.2 and, therefore, qualify as a responsive bidder. The  
15 likelihood of Appellant prevailing on these two issues is relatively minimal.

16 Section 2.1.2 of GDOE IFB 005-2014 states, in pertinent part, "[t]he Contractor must  
17 conduct pre site inspections to determine existing conditions and any special needs/requirements  
18 for execution of project. **Site Inspection and field verification of existing layout and**  
19 **conditions is mandatory.**" The remainder of this section does not discuss whether GDOE shall  
20 schedule site inspections, and if so, whether attendance of such is mandatory.

21 Section 2.3.1 provides that a pre-bid conference may be held at GDOE's discretion when  
22 a potential bidder submits a written request for one. Section 2.3.1 further requires GDOE to  
23 inform all potential bidders of the date, time, and location of the pre-bid conference should  
24 GDOE oblige. Yet, there is no further language within this section that discusses whether  
25 attendance at a pre-bid conference is mandatory. No other part of GDOE IFB 005-2014 speaks  
26 on the matter of attendance at either a site inspection or a pre-bid conference scheduled by  
27 GDOE.

28 JRN submits that a bidder fails to comply with the provisions of Section 2.1.2 by not at

1 all conducting the mandatory site inspections and field verifications. Noncompliance thereto  
2 would then disqualify that bidder as nonresponsive. However, the issues in this Appeal concern  
3 how a potential bidder sufficiently complies with Section 2.1.2. JRN, relying on the plain  
4 language of Section 2.1.2 and GDOE's written responses to the pre-bid questions, contends that  
5 what is mandatory are the site inspections and field verifications themselves and that such are  
6 conducted prior to the submission of a bid. In fact, GDOE previously stated that though a pre-  
7 bid conference and site inspections was scheduled at the request of potential bidders, attendance  
8 was not made mandatory and potential bidders were welcomed to satisfy Section 2.1.2 on their  
9 own initiative through separate site visits. Notice of Appeal, p. 11; Submission of Agency  
10 Report, Exhibit 18.

11 JRN more than sufficiently complied with the requirements of Section 2.1.2 when it  
12 conducted the requisite site inspections and field verifications at Upi Elementary School on  
13 September 20, 2013, at Simon Sanchez High School on September 23, 2013, at Southern High  
14 School on September 24, 2013, and at C.L. Taitano Elementary School on December 6, 2013.  
15 Interested Party JRN Air Conditioning & Refrigeration, Inc.'s Comments to Submitted Agency  
16 Report, Exhibits A, B, C, and D. That JRN was proactively conducting site inspections well  
17 ahead of time because of GDOE's initial request for a cost proposal is basis to disqualify JRN as  
18 nonresponsive is insupportable. *Id.*, p. 1. That GDOE, whose interests are aligned with JRN,  
19 will prevail on the merits is more likely.

20  
21 **B. Appellant's Claim That It Will Be Irreparably Injured If No Stay Is**  
22 **Enforced Is Too Speculative In Light Of Appellant's Own Nonresponsive**  
**Bid.**

23 In its Motion, Appellant claims that without a stay, even if Appellant prevails on the  
24 merits, Appellant may not be able to recover anything more than bid costs. Appellant's Motion  
25 to Declare Automatic Stay in Effect, p. 4. In making that assertion, Appellant cites to *Essex*  
26 *Electro Engineers, Inc. v. U.S.*, 3 Cl. Ct. 277, 287 (1983), which held that when an aggrieved  
27 bidder can only gain the costs of bid preparation in a suit for damages, and not anticipated  
28 profits, such bidder is irreparably harmed. *Id.*, pp. 4-5. However, Appellant does not stand in the

1 same position as the aggrieved bidder in that case. In *Essex Electro Engineers*, Essex was the  
2 lowest responsive bidder that should have won the bid and would have but for the purchasing  
3 agency's error in awarding the contract to bidder who offered a lower price but could not meet  
4 the technical specifications called for in the invitation for bid. *Essex Electro Engineers, Inc. v.*  
5 *U.S.*, 757 F.2d 247 (1985).

6 Here, Appellant's bid was nonresponsive to GDOE IFB 005-2014. Section 2.4.1 of  
7 GDOE IFB 005-2014 states that, in determining the lowest responsive bidder, GDOE will be  
8 guided by the price of overall performance and delivery and a bid's responsiveness to the  
9 requirements of the invitation for bid. With regard to price alone, Appellant's total cost of  
10 \$350,000 was \$50,000 over government certification for this Project set at \$300,000, a fact  
11 known to Appellant prior to the submission deadline. Notice of Appeal, pp. 26 and 51-53. That  
12 Appellant knew it was submitting a bid over government certification cannot support an  
13 expectation that but for GDOE's selection of JRN's bid, it would have been the next lowest  
14 responsive bidder and, thus, selected for award. At best, Appellant's detriment had JRN's bid  
15 not won, i.e. having spent for bid preparations, would still not capture Appellant's anticipated  
16 profits, however much.

17 Furthermore, even if Appellant's bid was the only option GDOE had to consider, whether  
18 GDOE would have issued an award to Appellant at its asking price is uncertain. A lone bid in an  
19 amount so above government certification would have encouraged GDOE to hold off on an  
20 award and reassess its finances and/or need for the work.

21  
22 **C. Appellant's Motion Fails To Assess The Substantial Injury to the Opposing**  
23 **Parties, GDOE and JRN, If A Stay Were Granted.**

24 Injury to GDOE as result of a stay is relatively more certain, however. A common risk in  
25 government procurement is that the bid price presented by a bidder cannot be guaranteed  
26 indefinitely. Delays in the commencement or progression of work, for almost any reason, leads  
27 to an increase in overall costs to both contractor and purchasing agency. Cost increases  
28 substantial enough typically result in undesired change orders and further strains on government

1 resources. With the current contract between GDOE and JRN, GDOE presumably has a cushion  
2 of \$45,498.10, the difference between JRN's bid price and the maximum amount allowed for  
3 expenditure on this Project. Procurement Record, Exhibit 5. If a stay were granted, however,  
4 given the protracted nature a procurement appeal may take on, GDOE stands to potentially  
5 consume that cushion simply because JRN cannot perform the work it is ready, willing, and able  
6 to provide GDOE with as little cost as possible.

7 Injury to JRN as a result of a stay would be even worse. To date, JRN has completed  
8 45% of the Project and has already submitted two applications for payment totaling to  
9 \$105,955.98. However, GDOE has yet to remit any payment. If a stay were granted, JRN stands  
10 to go unpaid for all of the materials and labor it had already expended in its good faith reliance  
11 on the March 7, 2014 Notice to Lift Stay of Procurement and in its diligent and commendable  
12 efforts to deliver on time for the benefit of the four public schools. Moreover, a stay, while  
13 preventing JRN from being rightly compensated for its work thus far, will not relieve JRN of its  
14 peripheral obligations to vendors and suppliers for any materials and equipment purchased by  
15 JRN in reliance of the current contract. A stay would, therefore, produce more substantial and  
16 more certain injury for both GDOE and JRN compared to Appellant.

17  
18 **D. A Stay In Procurement In Accordance with Appellant' Motion**  
19 **Disadvantages the Public Interest.**

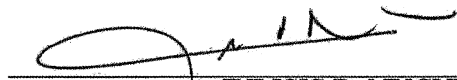
20 Any adverse effects a stay would have on GDOE ultimately passes on to the public at  
21 large because all immediate adverse effects go to resources in general. The stay would lead to  
22 the unnecessary expenditure of public funds, such as if GDOE were to take remedial measures to  
23 reinforce air conditioning ducts deteriorating more and more as their replacement is stalled for  
24 more time. GDOE would, conceivably, also spend more in executing another assessment of the  
25 public schools' disrepair after a stay would have already frustrated the urgency of and need for  
26 the work.

1 **CONCLUSION**

2 For the foregoing reasons, JRN respectfully requests that the OPA deny Appellant's  
3 Motion to Declare Automatic Stay in Effect.

4  
5 Submitted on April 18, 2014

6  
7 By

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11 JULISIS R. NUCUM  
12 JRN Air Conditioning & Refrigeration, Inc.  
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