

In the Appeal of J&B Modern Tech
Appellant's Trial Brief
OPA-PA-13-002 and OPA-PA-13-003

Putting aside "spin", it appears that many of the relevant facts are undisputed. While the parties disagree as to the law, perhaps the only factual dispute involves the precise condition of three air conditioning units as discussed below.

GDOE awarded J&B a contract for DOE IFB 050-2011 for the purchase of air conditioner units. Section 7119(c) of Title 17 of the Guam Code Annotated provides that any air conditioning system purchased by the Guam Public School System shall "[b]e the subject of a warranty and maintenance agreement that guarantees the system's working life for not less than five (5) years." J&B installed 500 units pursuant to this contract. GDOE awarded separate contracts, to different companies, for the purchase of the units and for the maintenance agreement. Thus J&B was asked to provide a warranty for units that another company would be maintaining.

J&B provided a warranty that stated as follows:

WARRANTY: The equipment shall be guaranteed to be free from defects in materials and workmanship. The warranty period is five (5) years for compressors only from initial start up date or when first DOE school used. Under no circumstances shall supplier and dealer, J&B Modern Tech be liable for incidental or consequential damages resulting without the Preventive Maintenance that should prevent further deterioration, breakdown and inefficient operation and cooling condition of the A/C units. Consumable related to the accessories are not covered. And further more, the warranty is NULL & VOID if damages is caused by Mother Nature or Force Majeure, Thunder & Lightning, Power Fluctuation, Disturbed, Tampered, Adjusted and/or Repaired by other Entities Technicians

GDOE made no objection to this warranty.

Subsequently GDOE contacted to J&B to request that repairs be done on a handful of the 500 units pursuant to the warranty. While the parties disagree about the interpretation of the

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applicable law, the only fact disputes appear to involve the nature of the problems with three of these units. J&B inspected the units in question and determined that the problems resulted from lack of required maintenance and/or work done on the units by persons other than J&B technicians. J&B noted the extremely dirty condition of the coils, and anticipates that evidence at the hearing will confirm this. While GDOE has taken the position that the units were less than a year old and thus had not yet required any preventive maintenance whatsoever, anyone who has owned even a window unit air conditioner knows that regular cleaning is necessary. Therefore, J&B took the position that the repairs in question were not covered by the warranty and that the warranty had been voided by the actions of GDOE and/or third parties.

GDOE responded by suspending J&B for alleged failure to honor the warranty and alleged breach of the terms of the contract. GDOE had threatened J&B with suspension in letters dated November 30, 2012 and February 6, 2013. However, GDOE did not actually prepare and execute a Determination and Notice of Suspension of J&B until March 21, 2013, and the Determination and Notice of Suspension was not served on J&B until late afternoon on Friday, March 22, 2013.

The Determination and Notice of Suspension provides, "Bids or proposals will not be solicited from J&B, and if they are received, they will not be considered during the period of suspension" A bid opening was scheduled for March 28, 2013, at 10:00 a.m. for Guam Department of Education Invitation for Bid No. 008-2013, Indefinite Quantity Bid for purchase of Air Conditioning Equipment. J&B planned to submit a bid for that matter. Thus it appears that

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GDOE timed the suspension so as to preclude any meaningful opportunity for review before the bid opening on IFB 008-2013.

J&B filed a Notice of Appeal of the suspension to the OPA on March 27, 2013. In addition to filing an appeal of the suspension with OPA, on March 27, 2013, J&B served a protest directed towards GDOE IFB 008-2014 on GDOE. J&B protested GDOE's determination that (a) J&B is not a responsible bidder and (b) that a bid for J&B on IFB 008-2013 would not be considered.

The bid opening for GDOE IFB 008-2013 took place on the morning of March 28, 2013. Having heard nothing in response to its protest, J&B submitted a bid. As can be seen by adding the line items in the Abstract of Bids, J&B's bid was the low bid, \$691,114 lower than that of the second lowest bidder.

On the afternoon of March 28, 2013, GDOE transmitted a "Notice of Non-Consideration, GDOE IFB 008-2013" to J&B, stating that "J&B's bid for the IFB will not be considered for award."

On April 1, 2013, J&B served a Second Protest in connection with GDOE IFB 008-2013 on GDOE. In this second protest, J&B protested (a) the conduct of the bid award in violation of the 5 GCA §5415(g) procurement stay; (b) the Notice of Non-Consideration, GDOE IFB 008-2013; and (c) any potential award to another bidder because such award would entail both a violation of the statutory stay and because J&B was the low bidder.

On April 3, 2013, the Supply Management Administrator of GDOE denied the two protests. On April 5, 2013, J&B filed an appeal of the denial of the two protests.

III. LEGAL ISSUES

A. **The suspension was improper.**

The central issue in both appeals is GDOE's suspension of J&B. The suspension is the sole issue in OPA-PA-002. At the same time, the suspension was the reason for GDOE's refusal to consider J&B's low bid on GDOE IFB 008-2013, and thus is the main issue in OPA-PA-003.

1. **GDOE improperly separated the warranty and the maintenance agreement.**

As noted above, 17 GCA §7119(c) provides that any air conditioning system purchased by the Guam Public School System shall "[b]e the subject of a warranty and maintenance agreement that guarantees the system's working life for not less than five (5) years." GDOE violated the statute by awarding separate contracts, to different companies, for the purchase of the units and for the maintenance agreement. Separation of the warranty from the maintenance not only violates the statute, but makes no sense. A vendor cannot be expected to warrant maintenance done by his competitor. Anyone who has ever bought a motor vehicle or an appliance knows that the warranty will not remain in effect if one takes the item to the original vendor's competitor for maintenance and repairs.

Thus J&B should not have been suspended for not "repairing" problems that were not covered under the terms of the accepted warranty, but that instead resulted solely from lack of maintenance or tampering by someone else.

2. **GDOE failed to comply with procedural requirements of Guam law.**

GDOE's suspension of J&B was also erroneous on procedural grounds. With respect to the warranty issue, J&B was involved in trying to resolve a contract or breach of contract controversy with GDOE pursuant to 5 GCA §5427 and its implementing regulations. 2 GAR § 9103(e) expressly provides that "All controversies involving claims asserted by the territory against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Chief Procurement Officer ... or the head of a Purchasing Agency" The warranty related disagreement between J&B and GDOE is certainly a contract controversy and, based on the foregoing statute, *must* be resolved pursuant to the dispute resolution provisions of Section 9103. This was made manifest by GDOE's own Purchase Order which recited the dispute resolution clause of 2 GAR § 9103(g). *See* GDOE April 4, 2013 Submission of Procurement Record, Bate Stamp GDOE 004-005 in OPA-PA-13-002. In *Pacific Rock Corp. v. Department of Education*, 2001 Guam 21, ¶ 32 n. 5, the Court similarly noted that "[t]he requirement of resolving the dispute at the administrative level provided for in the Procurement Act comport with the contracts signed by the parties in this case. Each of the four contracts contained a 'Disputes Clause'"

GDOE did not attempt to resolve the parties' contract controversy through issuance of a written decision which could then be subject to administrative or judicial review. Instead, GDOE jumped straight to a suspension and proposed debarment. DOE ignored the relevant provisions of the procurement law and regulations governing the resolution of contract controversies. GDOE also ignored the provisions of the parties' contract which expressly incorporated the regulatory provisions mandating that *all* contract controversies would be resolved through the issuance by

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GDOE of a written decision on the controversy that would be the subject of administrative or judicial review.

Furthermore, the warranty was certainly a legitimate contract controversy. Out of the 500 A/C units J&B installed, GDOE has implemented a suspension over a contractual warranty dispute involving only three of those units. J&B investigated GDOE's complaints regarding those units and provided DOE with numerous photographs of the units which illustrated quite clearly that those particular units had not been maintained at all. The units were filthy and covered with dirt/mold. The filters had not been cleaned nor had the units been rinsed, the most basic of maintenance procedures that all homeowners on Guam must attend to. GDOE admitted in its Agency Report in OPA-PA-13-002 that it did not touch the units.

Now realizing the error of its ways, GDOE's latest air conditioner procurement, the subject of the second appeal, contains specifications requiring the winning bidder to guarantee that a warranty will not be voided if a maintenance and repair contractor follows its own maintenance schedule. The relevant provision from IFB No. 008-2013 provides that "[t]he Contractor in submitting their bid acknowledges and agrees that in the event that preventative maintenance is performed on the installed HVAC units by a person(s) other than the Contractor, the Contractor will continue to honor the five (5) year warranty, so long as, Preventative Maintenance is performed according to the Preventative Maintenance Schedule." See Procurement Record, filed April 12, 2013, at GDOE 00177-00178, While this will not solve the problem, it does show that GDOE is

slowly coming around to an acknowledgement of the grave error it made in ignoring the requirements of 17 GCA § 7119(c).

While GDOE did award a maintenance and minor repair contract to another contractor as of November, 2012, there is no evidence that GDOE sent its maintenance contractor out to perform simple preventative maintenance on the three units at issue for the suspension that gave rise to non-consideration of J&B's bid in the current procurement. Those simple maintenance procedures may well have brought those units back to their full operating capacity and remedied their failure to operate efficiently. The warranty provided by J&B guaranteed sound workmanship, materials and the compressor for five (5) years. GDOE never provided any notice under the J&B warranty of any defect in workmanship, materials or a defect with respect to the compressor. GDOE has simply been requiring that J&B, on threat of debarment, perform routine maintenance on those units. But GDOE did not contract with J&B for routine maintenance.

Therefore, this was a contract controversy subject to the statutes and regulations concerning such controversies. It was improper for GDOE to suspend J&B over a breach of contract controversy when GDOE failed to first comply with the statute governing such controversies.

3. J&B was not provided with due process.

In addition, after failing to comply with any of the procedures required by 5 GCA §5427, GDOE then also failed to observe due process requirements by providing J&B with a hearing before the suspension. See ATL, Inc. v. United States, 3 Cl. Ct. 259, 274 (1983) (even

where government has discretion to debar or suspend, this discretion must be exercised after fair investigation, with such notice, hearing and opportunity to answer as would constitute due process).

The Guam Procurement Code and its implementing regulations governing suspension and debarment fail to comport with basic notions of due process. While the procurement regulations provide that a contractor notified of a suspension or proposed debarment action may request a hearing, neither the statute nor the regulations provide any time period within which any such hearing must be held. An open ended period of time for the provision of a hearing can visit severe harm on a contractor's property and liberty interests. As noted by the court in Related Industries, Inc. v. United States, 2 Cl. Ct. 517, 526 (1983), "[e]ven apart from the procurement regulations on debarment, the due process clauses of the fifth and fourteenth amendments require that a determination by governmental authority stigmatizing a person as so lacking in integrity that he is to be deprived of property or the liberty to enjoy rights which he would otherwise enjoy must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response."

Here, GDOE never provided any specific notice of any defect in workmanship, materials or with respect to the compressor, which is what the warranty issued by J&B covered. A simple claim that a unit does not operate or cool efficiently suggests a simple maintenance problem, not a warranty issue. If you ignore an air conditioner as GDOE has done here, it will rather quickly stop working efficiently. Basic routine maintenance must be provided to keep an air conditioner in sound operating condition. GDOE has provided notice of nothing other than its own failure to

provided routine maintenance. It has never provided any specific notice of a product defect actionable under a warranty. If you never change the oil in your car, the manufacturer will not honor any warranty when the engine inevitably seizes up.

B. Miscellaneous procedural issues.

1. GDOE was properly served with J&B's first protest.

GDOE complained in OPA-PA-13-003 that J&B's first protest was served on GDOE's Office of the Superintendent, rather than GDOE's Office of Supply Management. This issue would appear to have been largely mooted by service of J&B's second protest upon both the Office of the Superintendent and the Office of Supply Management. Nonetheless, J&B notes that section 5425(a) of Title 5 of the Guam Code Annotated provides in pertinent part, "Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or *the head of a purchasing agency.*" (Emphasis added.) The relevant general procurement regulation similarly provides, "Protests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or *the head of a Purchasing Agency* A protest is considered filed when received by the Chief Procurement Officer, the Director of Public Works, or *the head of a Purchasing Agency.*" (Emphasis added.) 2 GAR §9101(c)(1) (emphasis added). Section 9.2.3.1 of GDOE's own procurement regulations on its website provides, "Protest shall be made in writing to *the Director of Education* A protest is considered filed when received by *the Director of Education.*" (Emphasis added.) A provision buried in the IFB itself

concerning "correspondence" by e-mail, fax or hand delivery cannot repeal a statute and two regulations specifically addressing service of procurement protests. Service of the first protest upon the Superintendent complied with all applicable statutes and regulations.

2. J&B has not waived any arguments.

J&B has not waived any arguments or positions by bidding upon IFB 050-2011, the subsequent maintenance contract or IFB 008-2013. A private business must protect its interests and its options by submitting bids—failure to bid could have been a much greater "waiver". GDOE cannot avoid express statutory requirements such as those in 17 GCA § 7119(c) by asserting some inferred "waiver" from a bidder or contractor who might not spot such noncompliance in an IFB.

When GDOE did not respond to J&B's initial protest concerning IFB 008-2013, but instead proceeded with the bid opening, J&B did not know whether this meant that the protest was upheld or that it was ignored. J&B had little choice but to preserve its rights by attempting to submit a bid, which at the time of the opening itself appeared to be accepted. As a practical matter, regardless of legal technicalities, if another responsive bid by another responsible bidder had been lower than J&B's bid, it would have mooted J&B's protest, as well as any need for the second appeal and an expedited schedule for appeal of the suspension. Once GDOE went forward with the bid opening, presentation of J&B's bid could have thus promoted administrative "judicial economy". On the other hand, as long as GDOE was going forward with the opening, it was important for J&B to be present with a bid already prepared, so that any subsequent claim by J&B to be the low bidder could be substantiated rather than be dismissed as an after-the-fact fabrication.

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IV. CONCLUSION

J&B was improperly suspended, and thus improperly disqualified from bidding upon GDOE IFB 008-2013. GDOE's errors have not only complicated the purchase and maintenance of school air conditioning units, but will cost the taxpayers of Guam an extra \$691,114.00 for the new units to be purchased under IFB 008-2013. The suspension of J&B should be vacated, and J&B's bid for IFB 008-2013 should be considered.

Respectfully submitted,

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