



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of Pacific Data Systems; Consolidated Appeal No.'s OPA-PA-21-004 and OPA-PA-21-005

Claire Pollard <cpollard@rwtguam.com>

Fri, Sep 17, 2021 at 4:29 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Edwin J. Torres" <etorres@rwtguam.com>

Dear Mr. Hernandez:

Please see attached *Reply to GDOE's Opposition to Appellant's Motion for Injunctive Relief and Stay of Procurement Pending Final Resolution of Appeal* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

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 **9.17.21 Reply to GDOE's Opposition to Appellants Motion.pdf**
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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Pacific Data Systems, Inc. (PDS),

Appellant.

**CONSOLIDATED APPEAL NOS:
OPA-PA-21-004
OPA-PA-21-005**

**REPLY TO GDOE’S OPPOSITION TO
APPELLANT’S MOTION FOR
INJUNCTIVE RELIEF AND STAY OF
PROCUREMENT PENDING FINAL
RESOLUTION OF APPEAL**

I. INTRODUCTION

Appellant Pacific Daily Systems, Inc. (“PDS” or “Appellant”) is currently before the Office of Public Accountability (“OPA”) on consolidated appeal of the Guam Department of Education’s (“GDOE” or “Procuring Agency” or “Agency”) denial of the protests filed by PDS regarding the intended awards of IFB 027-2021 and IFB 028-2021 (the “IFBS”). On August 31, 2021, PDS moved the OPA for an order confirming that the automatic stay under 5 GCA § 5425(g) was triggered upon the filing of its Protest, and that the stay continues to be in force until final resolution of this protest and any appeals. On September 8, 2021, GDOE opposed that motion on the unconventional assertions that PDS should have brought an independent protest of DOE’s violation of law *vis a vis* the automatic stay and that this is a post-award protest since the Notice

of Awards issued on June 4, 2021, for the IFBs constituted the “awards” in this consolidated matter. This Reply is submitted to address GDOE’s Opposition.

II. ARGUMENT IN REPLY

A. THIS IS A PRE-AWARD PROTEST. THE AUTHORITY RELIED UPON BY GDOE DOES NOTHING TO ALTER THAT FACT.

To support its assertion that the stay contemplated by Guam’s procurement law does not apply here, GDOE relies upon the OPA’s decision in *In the Appeal of JJ Global Services*, OPA-PA-19-001 (“*JJ Global Services*”), where the OPA explained the uncontested fact that in Guam, an automatic stay of procurement does not issue when a protest is filed after an award. GDOE’s fundamental error in relying upon *JJ Global Services* — an error that is either a misapprehension of law or a purposeful attempt to thwart meaningful review of its IFBs — is that in that case “it is undisputed that the IFB Contract was awarded to [the winning offeror] on October 31, 2018” and that the protest was filed “on November 19, 2018.” *JJ Global Services*, Decision, May 8, 2019, p. 10. Here, the inverse is true; it is undisputed that PDS’s protests came **before** GDOE made attempts to enter into a contract with the intended awardee. On June 9 and 10, 2021, PDS timely submitted, and GDOE received, written, agency-level protests to GDOE of the intended awards to GTA. *See*, Procurement Record OPA-PA-004 (“PR1”), 57; Procurement Record OPA-PA-00-005 (“PR2”) 607. The Procurement Record shows that, shortly after receiving PDS’s protests, GDOE proceeded further with the attempted award of the contract for these telecommunication procurements through contract negotiations and attempted contract execution. *See*, PR1 OPA-PA-004, 15; 183-184; PR2 15.

While GDOE is claiming that PDS's protest has come after the award to the first ranked offeror, **what GDOE is actually urging is for the OPA to adopt the absurd position that naming a first ranked offeror is synonymous with making an award.** Since, in the creative view of GDOE, providing notice of a coming award would be the same as the award itself, all protests filed after that moment would be deprived of the automatic stay set forth in section 5 GCA § 5425(g). GDOE provides absolutely no authority for its position that informing the parties of an offeror selected for award is synonymous with the award itself. Such an absurd interpretation has no support in the law and must be rejected.

While Guam's procurement laws and regulations do not contain an explicit definition of what actually constitutes an "award" in the procurement sphere, court precedent and practice show that GDOE's position here is far afield from reality. *In Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15, the Supreme Court of Guam recognized a clear distinction between naming an offeror for the Government to contract with, and actually entering into a contractual award with that offeror. 2004 Guam 15, ¶ 30 (Guam Aug. 12, 2004) ("There is ample support in the record that on March 21, 2003, GMHA merely announced that GRC was the most qualified offeror among those that submitted proposals in response to the RFP."). Similarly, the Court in *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, noted how a protest was to be construed pre-award even though the bid protest came after the procuring agency — the General Services Agency in that case— issued notice recommending award to another offeror before the protest filed. The Supreme Court of

Guam, reviewing that determination, concluded that “In this case, the Superior Court found the procurement to be in the ‘pre-award’ stage. We find no reason to disturb this finding....” *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 22 (internal citation omitted).

Most troubling about GDOE’s position that the June 4, 2021, notices to offerors constituted an award is that GDOE’s arguments to the OPA directly contradict the plain language of GDOE’s June 4, 2021, notices. In language that GDOE has either neglected or refused to highlight to the OPA, the June 4, 2021, notices make it plain that any award “is conditioned upon the successful execution and final approval of the contract and/or purchase order by all parties required by Guam law.” PR1 515; PR2 605. The entire relevant passage prepared by GDOE, including its affirmation that “the successful bidder shall not acquire any legal or equitable rights relative to the contract services until a contract containing terms and conditions acceptable to the Government of Guam is executed,” is excerpted below from the procurement record:

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 501 Mariner Avenue
 B-Building, Suite 116
 Barrigada, Guam 96313
 Telephone: (671) 475-0438/Fax: (671) 472-5001
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JON J. P. FERNANDEZ
 Superintendent of Education

CARMEN T. CHARFAUROS
 Supply Management Administrator

NOTICE OF AWARD

June 4, 2021

This award is conditioned upon the successful execution and final approval of the contract and/or purchase order by all parties required by Guam law. This notice does not constitute the formation of a contract between the Guam Department of Education and the successful Bidder. The successful Bidder shall not acquire any legal or equitable rights relative to the contract services until a contract containing terms and conditions acceptable to the Government of Guam is executed. The Guam Department of Education further reserves the right to cancel this Notice of Award at any time prior to the execution of a written contract in accordance with the provisions of the Guam Procurement Law and any other applicable laws or regulations.

Sincerely,


 CARMEN T. CHARFAUROS
 Supply Management Administrator

Acknowledgment Receipt

Print Name _____
 Signature _____
 Date _____ Time _____


GDOE605

To be sure, the GDOE’s attempts to finalize and execute a contract with the noticed awardee comes on June 15, 2021, several days **after** PDS filed its protests and triggered the automatic stay. *See, e.g.*, PR2, 247. All of this activity constitutes a violation of law, and would render any resulting contract void. *See, In the Appeal of G4S Security Systems (GUAM), Inc.*, OPA-PA-13-013, Decision and Order re Appellant’s Motion to Declare Automatic Stay in Effect, November 12, 2013, p.2 (explaining that “ Generally, in the event of a timely protest, the purchasing agency shall not proceed further with the solicitation or award of the contract prior to final resolution of such protest, and any such further action is void unless the head of the purchasing agency


and the Attorney General of Guam, make written determinations that award of the contract without delay is necessary to protect substantial interests of the Government of Guam, and the protestant is given at least two (2) days prior notice.”) More, the drafted contracts contained in the procurement records show signatures that all come after PDS’s June 10, 2021, protests, and remain unsigned by either the Attorney General or the Governor Guam. The page from IFB028-2021 is excerpted here, and its counterpart appears in the Procurement Record (2) at pg. 15:

IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year appearing below their respective signatures.

GUAM DEPARTMENT OF EDUCATION:


 JON J.P. FERNANDEZ
 Superintendent of Education
 Date: 08/30/2021


**TELEGUAM HOLDINGS, LLC DBA
 GTA:**


 By: Joseph R. Shinghara
 Its: Chief Financial Officer
 Date: 08/11/2021

GUAM DEPARTMENT OF EDUCATION:


 JAMES L.G. STAKE
 Legal Counsel
 Date: 08/30/21

CERTIFIED FUNDS AVAILABLE:


 CERTIFIED OFFICER
 Department of Education
 Date: JUNE 15, 2021

AMOUNT: \$70,782.84

REVIEWED BY:


 CARMEN CHARFAUROS
 Supply Management Administrator
 Date: 6/15/2021

APPROVED AS TO FORM AND LEGALITY: APPROVED:

LEEYIN T. CAMACHO
 Attorney General of Guam
 Date:

LOURDES LEON GUERRERO
 Governor of Guam
 Date:

B. THE ISSUE OF GDOE'S VIOLATION OF THE AUTOMATIC STAY IS PROPERLY BEFORE THE OPA.

In an effort to avoid review altogether, GDOE urges the OPA to put its head into the sand, and ignore confronting whether or not GDOE has proceeded with this procurement in violation of law. The crux of this argument is as novel as GDOE's insistence that this matter is "post-award." GDOE argues circularly that since its June 4, 2021, notice of award was, in fact, the award, PDS should have protested the lack of an automatic stay within 14 days of the notice. Opposition, 2. This argument fails for two key reasons.

First, it is fundamental that the public auditor has the power to review and determine *de novo* any matter properly submitted to him. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap 12, §12103(a). Here, PDS brought a timely protest within 14 days of its aggrievement, i.e, within 14 days of learning that GDOE had selected a nonresponsive and non-responsible offeror for award. When its protest was denied and this matter progressed to the OPA, the procurement record was provided and revealed that GDOE had taken steps, post-protest, to move forward with contract execution. Those points were properly raised to the OPA in the Comments on the procurement record allowed under 2 GAR § 12104(1)(4) and raised in PDS's subsequent motion. The issue of this procurement is properly before the OPA, and the OPA has *de novo* authority to review matters regarding the automatic stay linked to that procurement appeal.

Second, even if the issue of GDOE's violations of the automatic stay should have been the subject of a third and fourth protest to GDOE, GDOE's insistence that PDS exhaust some administrative remedy with GDOE before presenting the issue to the

OPA is an invitation to futility and the waste of resources. We know from GDOE's filings in this appeal the agency's view on whether or not the automatic stay has been violated. GDOE has advanced the argument that its June notice to bidders was sufficient to take this matter into the realm of post-award protests. It would be futile for PDS to ask GDOE whether or not GDOE believes the automatic stay has been violated. That answer, given GDOE's novel interpretation of procurement law is not a mystery. In Guam, "a party need not exhaust administrative remedies if the record reflects that it would be futile to do so." *Barrett-Anderson v. Camacho*, 2015 Guam 20, ¶ 32 citing *Blaz v. Cruz*, No. Civ.App. 84-0014A, 1985 WL 56592 at *4 (D. Guam App. Div. Apr. 29, 1985). There was no other administrative review to exhaust, and the issue of GDOE's conduct in this procurement is already before the OPA.

C. THE OPA CAN ISSUE THE ORDER THAT PDS SEEKS.

GDOE, in asking the OPA to decline to act on the PDS motion, ignores the fact that the OPA has consistently rendered decisions regarding the existence of the automatic stay in appeals before it when asked to. *See, e.g., In the Appeal of G4S Security Systems (GUAM), Inc.*, OPA-PA-13-013, Decision and Order re Appellant's Motion to Declare Automatic Stay in Effect, November 12, 2013; *See also, In the Appeal of J&B Modern Tech, Decision and Order*, May 29, 2014.

The Public Auditor can also act as PDS asks. The OPA has the power to promote the integrity of the procurement process and the purposes of Guam's procurement laws. *See* 5 GCA § 5703 ("The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5."). The

Public Auditor has the power to review and determine “any matter properly submitted” to him, 5 GCA § 5703, and reviews *de novo* denials of protests in connection with the solicitation of a contract. See 5 GCA § 5425(e). Further, in the regime of procurement, the OPA holds powers akin to a court, since Guam law allows procurement matters brought before a court to be, without limitation, remanded to the OPA. See 2 GAR § 12103(b). Moreover, the OPA’s regulations provide that the hearing officers appointed by the OPA have the “power, among others, to (d) Rule on motions, and other procedural items on matters pending before such officer.” 2 GAR § 12109. The OPA is also specifically tasked with reviewing Agency determinations to lift the statutory stay imposed by Guam law. 2 GAR § 12501(b) mandates that the “Public Auditor shall review and confirm or reject any determination by the Chief Procurement Officer or the Director of Public Works that award of a contract without delay pending Appeal is necessary to protect the interests of the government.” 2 GAR § 12501(b).

The OPA also has the power to order an agency to take certain action *vis a vis* a procurement. The OPA routinely orders agencies to take certain action or cancel certain action with regard to specific procurements. See *In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA-08-012, Decision at pp 9-10 (Feb. 10, 2009). (Ordering GSA to cancel a multi-step bid). In a prior appeal, *In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA -08-003, Decision (July 11, 2008), the Public Auditor determined that while she lacked jurisdiction over the appeal to consider the merits of the protest because there was not yet an agency decision, she did have the power and


the jurisdiction under Guam law to compel an agency to render a decision on a protest. In other words, the OPA can order Government of Guam agencies to take action and — as PDS is requesting here — recognize the existence of the stay, and the violation of that stay.

III. CONCLUSION

GDOE should not be allowed to adopt an absurd interpretation of the issuance of an “award” in procurement law that would effectively turn every protest into a post award protest. PDS respectfully requests that the OPA enforce the stay of procurement by issuing an order confirming that the automatic stay under 5 GCA § 5425(g) was triggered upon the filing of the protest, that GDOE’s efforts to finalize a contract was in violation of law, and that the stay continues to be in force until final resolution of these protests including any appeals. The OPA should grant injunctive relief on these issues in accordance with its powers expressed in *In the Appeal of Morrico Equipment, LLC*, OPA-PA-15-014, OPA-PA-15-017, OPA-PA-16-001, and declare that all actions taken by GDOE since June 10, 2021, in furtherance of the IFBs are void.

Respectfully submitted this 17th day of September, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
EDWIN J. TORRES
Attorneys for Appellant
Pacific Data Systems, Inc.