IN THE SUPREME COURT OF GUAM

GUAM IMAGING CONSULTANTS, INC., and RADS, a General Partnership,
Plaintiffs-Appellants,

v.

GUAM MEMORIAL HOSPITAL AUTHORITY and GUAM RADIOLOGY CONSULTANTS, INC.,
Defendants-Appellees.

Supreme Court Case No.: CVA03-020
Superior Court Case No.: CV0798-03

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 27, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] This interlocutory appeal arises from a civil action involving a procurement protest. Plaintiffs-Appellants RADS ("RADS") and Guam Imaging Consultants, Inc., ("GIC") appeal the trial court's denial of their motion to enforce the automatic stay provision of the Guam Procurement Law.[1] We hold that the trial court erred in its denial of the motion.

[2] However, we find that the trial court failed to address the jurisdictional issue of RADS and GIC's standing and therefore remand for the trial court's consideration of the standing issue. If the trial court determines that RADS and GIC have standing, proceedings shall continue consistent with this opinion. If the trial court determines that RADS and GIC do not have standing, the trial court shall dismiss the case for lack of jurisdiction.

I.

[3] On February 4, 2003, the Guam Memorial Hospital Authority ("GMHA") issued a Request for Proposals ("RFP") to procure professional radiology services. Guam Radiology Consultants, Inc., ("GRC"), RADS and a third entity submitted proposals. The introductory paragraph of RADS' proposal stated as follows: "This proposal to provide radiology services for Guam Memorial Hospital Authority (GMHA) is submitted from a group of Guam-based radiologists. The radiology services contract, if awarded, will be administered through a Guam corporation (RADS) to be formed by the radiologists." Appellee GMHA's Supplemental Excerpts of Record, p. 33 (RADS' Proposal for Radiology Services). The body of the proposal stated that RADS consisted of six radiologists identified by name as Drs. Hoffman, Mudd, Lizama, Itow, Briterman and Kwok. Three of the named individuals, Drs. Hoffman, Mudd and Lizama, were named on the signature page, although only Philip Manly signed the proposal, and did so as the Managing Director of RADS.

[1] RADS is purportedly a General Partnership made up of a group of Guam-based radiologists. GIC is a Guam corporation purported to be RADS' successor in interest.

[4] On or about March 21, 2003, based on review and assessment of their respective proposals, GMHA selected GRC as the most qualified offeror, ranked RADS as the second most qualified offeror, and ranked the third and final offeror as the third most qualified offeror. On April 26, 2003, Philip Manly submitted a protest to GMHA on behalf of RADS regarding the methods used by GMHA in its selection of GRC as the most qualified offeror. RADS later abandoned its April 26, 2003 protest.

[5] On May 6, 2003, RADS sent a letter to GMHA regarding call scheduling at the Hospital. The letter was signed by Drs. Hoffman, Mudd and Lizama. On May 12, 2003, another letter was sent to GMHA from RADS regarding the call schedule. The May 12 letter identified Drs. Hoffman, Mudd, Lizama and Itow as members of RADS but was only signed by Dr. Hoffman.

[6] On May 14, 2003, GMHA Administrator William I. McMillan ("McMillan") issued a memorandum on behalf of GMHA discussing a sole source interim agreement it had entered into with GRC, the most qualified offeror in the solicitation for professional radiology services, pending finalization of a two-year exclusive radiology services contract it was negotiating with GRC pursuant to the RFP.

[7] On May 16, 2003, counsel for Dr. Hoffman and RADS submitted a protest letter to GMHA regarding the contents of its May 14, 2003 memorandum. The letter protested both the sole source interim agreement and the purported "exclusive" nature of the contract being negotiated between GMHA and GRC.

[8] On May 22, 2003, McMillan wrote to RADS and indicated that GMHA was in receipt of its May 16 protest. McMillan further stated that he believed that GMHA had not violated any of its procedures and questioned RADS' standing to make a protest.

[9] On May 22, 2003, McMillan also appeared before the GMHA Board of Trustees and recommended that the two-year radiology contract be awarded to GRC. He explained that a protest was underway but that GMHA had evaluated the protest and determined that the protester did not have standing. The Board of Trustees awarded the contract to GRC by unanimously passing a motion to approve Official Resolution #03-055 entitled "Relative to the Awarding of an Exclusive Contract for Professional Radiology Services." Appellee GMHA's Supplemental Excerpts of Record, p. 55 (GMHA Board of Trustees minutes ¶ VI.D. (May 22, 2003)).

[10] On May 23, 2003, counsel for Dr. Hoffman and RADS wrote to McMillan and lodged an additional protest regarding the May 22, 2003 actions of the Board of Trustees. Further, the May 23 letter stated that if McMillan's letter of May 22 regarding the May 16 protest was meant to be a denial of the May 16 protest letter, such was insufficient as a denial pursuant to applicable law.

[11] On June 2, 2003, McMillan issued a memorandum concluding that award of the contract without delay was necessary to protect substantial interests of GMHA.

[12] On June 5, 2003, RADS and GIC filed their civil action in the court below regarding RADS' protest letter of May 16, 2003 followed by their filing of an amended complaint on June 6, 2003. The amended complaint stated that "Plaintiff RADS, at all times material hereto, was a General Partnership of licensed physician-radiologist[s] on the medical staff of Guam Memorial Hospital with clinical privileges in radiology," and that "Plaintiff [GIC] is a Guam corporation which became the corporate successor to the RADS Partnership." Appellants RADS and GIC's Excerpts of Record, p. 1 (Amended Complaint).

[13] On June 11, 2003, RADS and GIC filed a motion asking the trial court to enforce the automatic stay provision of the procurement law. The motion was denied by the trial court in its Decision and Order of August 27, 2003, resulting in the present interlocutory appeal.

II.

[14] We have previously held in this case that "the trial court's Decision and Order denying Appellants' request for an order enforcing the automatic stay provision of Guam's procurement law is the equivalent of an order refusing to grant an injunction as contemplated by 7 GCA § 25102(f), with such an injunction being preliminary in nature." Order, p. 2 (Nov. 19, 2003). Thus we have jurisdiction over this interlocutory appeal pursuant to Title 7 GCA § 25102 which states that "[a]n appeal in a civil action or proceeding may be taken from the Superior Court in the following cases: . . . (f) [f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction," Title 7 GCA § 25102(f) (1993), and Title 7 GCA § 3108(b) which states that "[o]rders other than final judgments shall be available to immediate appellate review as provided by law." Title 7 GCA § 3108(b) (1993).

[15] "This court undertakes *de novo* review of the trial court's legal conclusion[s] . . . ." *People v. Johnson*, 1997 Guam 9, ¶ 3. Similarly, "[w]e review issues of statutory interpretation and jurisdiction *de*

novo." *Pacific Rock v. Dept. of Educ.*, 2001 Guam 21, ¶ 13. However, "[w]e review a trial court's findings of fact for clear error." *Id.*; *see also Johnson*, 1997 Guam 9 at ¶ 3.

III.

[16] The issue raised by RADS and GIC in their appeal is whether the procurement law's automatic stay provision was triggered when RADS submitted its May 16, 2003 purported protest letter to McMillan. If so, also before us is whether McMillan thereafter sufficiently established necessity, thereby avoiding the automatic stay. However, GMHA raises the threshold jurisdictional issue of whether RADS and GIC had standing below. This issue was also raised before the trial court but not decided. When a trial court erroneously fails to address an issue raised before it, "an appellate court may either remand or, if the record is sufficiently developed, decide the issue itself." *Bank of Guam v. Reidy*, 2001 Guam 14, ¶ 31 (citation omitted); *see also Britton v. Co-op Banking Group*, 916 F.2d 1405, 1413-14 (9th Cir. 1990). We address the standing issue first.

A. Standing of RADS and GIC

[17] Standing is a threshold jurisdictional matter. *Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993) (stating that "[s]tanding determines the power of the court to entertain a suit," and that "standing is a jurisdictional question that must be addressed at the threshold of any case."). In the context of a request to invoke an automatic stay, the *Brewer* Court stated that, "[u]ntil [petitioner] demonstrates that she has standing . . . she may not obtain an automatic stay." *Brewer*, 989 F.2d at 1024. In so holding, the court relied on "the fundamental principle of jurisdiction that a party must have standing to litigate . . . . A grant of a stay is an exercise of judicial power, and we are not authorized to exercise such power on behalf of a party who has not first established standing." *Id*. at 1025 (citing *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2204-05 (1975), wherein the United States Supreme Court said that, "[i]n essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."). Thus, the issue of standing may completely affect the ability of RADS and GIC to bring this action and the trial court should have considered and decided this issue.

[18] In *Bank of Guam v. Reidy*, also a case involving the government procurement process and a protest pursued therein, this court was faced with a situation where issues were raised by the parties below

but were not addressed by the trial court. *Reidy*, 2001 Guam 14. We held there that "[w]here the trial court has erroneously failed to exercise its discretion, an appellate court may either remand or, if the record is sufficiently developed, decide the issue itself." *Id.* ¶ 31 (citing *Wharf v. Burlington Northern R. Co.*, 60 F.3d 631, 637 (9th Cir. 1995). We went on to say that "we express no opinion whatsoever on any of the protest issues raised in the lower court or on appeal and remand to the lower court for a determination of these issues." *Id.* Similarly, in the Ninth Circuit Court of Appeals case of *Britton v. Co-op Banking Group*, the trial court failed to address the issue of standing, although the issue was raised before it and was again raised on appeal. *Britton*, 916 F.2d at 1413. The *Britton* appellate court considered the issue of standing but ultimately held that because of unresolved issues that could impact a decision on standing that "were neither analyzed by the district court nor briefed on appeal," the issue should be remanded to the trial court for further fact-finding and determination. *Id.* at 1414-15. The *Britton* court acknowledged that standing is a threshold issue, stating that "[i]n their response to [appellant's] motion to compel arbitration before the district court as well as on appeal, appellees challenge [appellant's] standing to compel arbitration. Despite the fact that this is a threshold issue, the district court did not resolve it, ruling instead that [appellant] had waived arbitration." *Britton*, 916 F.2d at 1413 (footnote omitted). The tenor of the *Britton* court's analysis indicates that if it had found the record to be sufficient regarding the issue of standing the court would have decided the standing issue itself and remand would not have been necessary. *Cf. Spenlinhauer v. O'Donnell*, 261 F.3d 113, 118 (1st Cir. 2001) (wherein the court held that where the trial court had failed to make the required standing determination in a bankruptcy proceeding the appellate court would make the determination on its own without remanding the issue if the appellate record contained sufficient facts to do so). Thus, we must first determine if the record before us is sufficient to support a decision by this court regarding RADS and GIC's standing. If not, remand is required.

[19] The United States Supreme Court has held that a party has standing when he is "entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Sedlin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205. In sum, GMHA and GRC argue that RADS and GIC lack standing because RADS "has never had a legal existence on Guam," and because GIC is no more than RADS' successor in interest

and therefore may not exercise any rights greater than RADS could have exercised on its own. Appellee GMHA's Opening Brief, p. 20.

[20] In response to GMHA's February 4, 2003 RFP for professional radiology services, a proposal was submitted by RADS. The protest that is the subject of the civil action herein was filed by RADS on May 16, 2003 and later pursued through the filing of a complaint by both RADS and GIC with the court below. However, Guam law requires that in order for an individual or group of individuals identified by a fictitious name to maintain an action in a court of Guam "on account of any contracts made, or transactions had, under such fictitious name," Title 18 GCA § 26103 (1992) a certificate must first be filed with the Director of Revenue and Taxation, "stating the name in full and place of residence of such person and stating the names in full of all the members of such partnership and their places of residence." Title 18 GCA §§ 26101, 26103 (1992). Nothing in the record before us indicates that RADS has satisfied this requirement. Further, it is conceded by GIC that it is merely the corporate successor in interest to RADS and has no rights herein other than those it is pursuing as RADS' successor. Additionally, nothing in the record before us articulates the process undertaken by RADS and GIC to render GIC RADS' corporate successor in interest, nor is there anything in the record before us indicating whether RADS may continue as a plaintiff to this action itself considering that GIC has become its successor in interest. These factual issues were "neither analyzed by the [trial court] nor briefed on appeal." *Britton*, 916 F.2d at 1413-14. Thus the record before us is insufficient to determine these issues which appear fundamental to RADS and GIC's standing. Consequently the standing issue must be remanded to the trial court. In remanding this issue, "we express no opinion whatsoever on any of the [standing] issues raised in the lower court or on appeal and remand to the lower court for a determination of these issues." *Reidy*, 2001 Guam 14 at ¶ 31.

B. Automatic Stay

[21] Also before us is RADS and GIC's appeal of the trial court's decision denying its request for an automatic stay. Whether the stay is warranted requires review of the relevant provisions of the procurement law.

[22] The Guam Procurement Law is found at Title 5 GCA Chapter 5 and controls procurement by GMHA. Title 5 GCA § 5125 (1996). Although the Chief Procurement Officer as the head of the Guam

Services Agency is the central procurement officer responsible for all executive branch procurement, he is authorized to delegate such procurement responsibilities. Title 5 GCA §§ 5110, 5114 (1996). Pursuant to the Guam Health Act of 1977, GMHA's enabling legislation, GMHA was authorized to "[a]dopt such rules and regulations . . . as may be necessary for the . . . performance of its duties and administration of its operations." Title 10 GCA § 80104(i) (1996). On July 12, 1989 the GMHA Board of Trustees issued a resolution regarding adoption of GMHA's own Procurement Rules and Regulations. Appellee GMHA's Brief, Addendum p. 11 (GMHA Board of Trustee's Resolution No. 90-59, May 9, 1990, reaffirming Resolution 89-10-73); *see* Title 26 Guam Admin. R. & Regs. §§ 16101 *et seq*. (1997). On July 31, 1990, then-Governor Ada issued Executive Order 90-16 entitled, in part, "Transferring Procurement and Related Activities of the GMHA From the Dept of Admin General Services Agency to the GMHA . . . ." Exec. Order 90-16 (July 31, 1990). GMHA's Procurement Regulations explain that they were created "to provide standard policies and procedures governing the procurement . . . of . . . services . . . for the Guam Memorial Hospital in conformity [with] 5 GCA Chapter 5." 26 GAR § 16101. Thus, a GMHA procurement of services through an RFP is governed by both the Guam Procurement Law and GMHA's own Procurement Regulations.

[23] Both the Guam Procurement Law and GMHA's Procurement Regulations contain automatic stay provisions that are triggered by timely protests. The provision found in GMHA's Procurement Regulations closely mirrors the statutory provision. Both provisions also include an allowance for a showing of necessity whereby the automatic stay may be avoided. The statutory language is as follows:

> (g) In the event of a timely protest under Subsection (a) of this Section or 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 further action is void, unless:
>
> > (1) The Chief Procurement Officer or the Director of Public Works after consultation with and written concurrence of the head of the using or 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 substantial interests 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 Board or the Court, the Board or Court has confirmed such determination, or if no such protest is pending, no protest to the Board of such determination is filed prior to expiration of the two (2) day period specified in Item (2) of Subsection (g) of this Section.

Title 5 GCA § 5425(g)(1)-(3) (1996). The automatic stay provision of GMHA's Procurement Regulations is found at Section 16901(e) and states as follows:

> **(e) Stay of Procurement During Protest.** When a protest has been filed within fourteen (14) days and before an award has been made, the Hospital Administrator shall make no award of the contract until the protest has been settled, unless:
>
> > (1) The Hospital Administrator makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Hospital; 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 Hospital Administrator or the Court, the Hospital Administrator or Court has confirmed such determination, or if no such protest is pending, no protest to the Hospital Administrator of such determination is filed prior to expiration of the two (2) day period specified in Item (2) above.

26 GAR § 16901(e)(1)-(3). The Procurement Law requires the Attorney General's written concurrence while GMHA's Procurement Regulations do not. This significant distinction is discussed below. Further, the automatic stay provisions found in GMHA's own Procurement Regulations and the Guam Procurement Law require that a protest in the context of a GMHA procurement of services be both factually timely and be pursued before the award has been made in order to trigger the automatic stay.

[24] Therefore, under the aforementioned legal and regulatory requirements, we must consider two issues regarding the timing of the filing of the protest, the first being its timeliness in relation to the underlying facts, the second being whether it was filed before the award was made. If the protest was both factually timely and filed before the award was made, the automatic stay provision was triggered and we must then determine whether necessity was adequately shown by GMHA, thereby providing an exception to operation of the automatic stay.

1. Timeliness of the May 16, 2003 Protest Letter

[25] Both the Guam Procurement Law and GMHA's Procurement Regulations contain provisions

allowing for protests and explaining when they must be filed. The statutory language is as follows:

> **§ 5425. Authority to Resolve Protested Solicitations and Awards. (a) Right to Protest.** Any actual . . . offeror . . . 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. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.

Title 5 GCA § 5425(a) (1996). The parallel provision of the GMHA Procurement Regulations state as follows:

> **§ 16901. Protest Resolution by the Hospital Administrator or the Associate Administrator. (a) Authority to Resolve Protested Solicitations and Awards.**
>
> **(1) Definitions.**
>
> (A) *Interested Party* means any actual or prospective . . . offeror . . . that may be aggrieved by the solicitation or award of a contract and who files a protest.
>
> . . .
>
> **(c) Filing of Protest.**
>
> **(1) When Filed.** Protest shall be made in writing to the Hospital Administrator . . . within fourteen (14) days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Hospital Administrator. Protests filed after the fourteen (14) day period shall not be considered.
>
> **(2) Subject of Protest.** Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

26 GAR §§ 16901(a), (c). Thus, a protest filed by an actual offeror in the context of a GMHA procurement of services through an RFP that may be aggrieved by the solicitation is timely if the protest is received by the Hospital Administrator within fourteen days of when the protestor knew or should have known of the facts giving rise to the protest. 5 GCA § 5425(a); 26 GAR §§ 16901(a), (c).

[26] The process of awarding a contract in the context of an RFP for professional services is addressed by both the Guam Procurement Law and GMHA's Procurement Regulations. The statutory provision is as follows:

> **(e) Award.** Award shall be made to the offeror determined in writing . . . to be best qualified based on the evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable.

Title 5 GCA § 5216(e) (1996). The language of GMHA's Procurement Regulations regarding the award of a contract in the RFP context is as follows:

> **(l) Negotiation and Award of Contract.**
>
> . . .
>
> > **(3) Successful Negotiation of Contract with Best Qualified Offeror.** If compensation, contract requirements, and contract documents can be agreed upon with the best qualified offeror, the contract shall be awarded to that offeror.

26 GAR § 16314(l)(3). Thus, since both the Guam Procurement Law and GMHA's Procurement Regulations apply to a procurement of professional services by GMHA through an RFP, a contract is to be awarded by GMHA to the best qualified offeror if fair and reasonable compensation, contract requirements, and contract documents can be agreed upon. 5 GCA § 5216(e); 26 GAR § 16314(l)(3).

[27] In the present case the trial court held that "[t]he relevant statute in determining whether or not Plaintiffs are entitled to the stay which they seek is contained in 5 GCA § 5425." Record on Appeal, tab 54 (Decision and Order at 5). The trial court's Decision and Order is devoid of any reference to GMHA's own Procurement Regulations which also apply to GMHA. Upon considering only Title 5 GCA § 5425, the trial court stated that "[p]laintiffs fail to recognize that the procurement statute allows a stay of award or its solicitation only if a protest is made timely in connection with 'the method of source selection, solicitation, or award of a contract.' There can be only one event, and not a series of events, which triggers the right to protest." Record on Appeal, tab 54 (Decision and Order at 8, quoting 5 GCA § 5425(a)).

[28] Upon review, and in consideration of the applicability of GMHA's own Procurement Regulations to solicitations undertaken by GMHA as stated above, we disagree with the trial court's conclusion that "[t]here can only be one event, and not a series of events, which triggers the right to protest." Record on Appeal, tab 54 (Decision and Order at 8). The plain meaning of 26 GAR 16901(c)(2), which states that "[p]rotestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer," supports an interpretation that there may be multiple events in any given solicitation that could legitimately trigger protests. 26 GAR § 16901(c)(2).

[29] The trial court also drew the legal conclusion that RADS protested GMHA's "announcement to sole source an interim radiology contract with GRC" but that the protest was "not a protest which comes within the parameters of § 5425(a), which would trigger the application of the automatic stay provision of § 5425(g)." Record on Appeal, tab 54 (Decision and Order at 8). The court went on to say that "[s]uch a protest does not trigger the application of 5 GCA § 5425(a). Only a timely protest to the decision announced on March 21, 2003 to award GMHA's radiology contract to GRC would have triggered the automatic stay provision." Record on Appeal, tab 54 (Decision and Order at 8).

[30] This determination by the trial court was influenced by its factual finding that "[o]n March 21, 2003, GMHA issued a written notice advising Plaintiff RAD and others that GRC was awarded the contract under the RFP." Record on Appeal, tab 54 (Decision and Order at 6). We review the trial court's factual findings for clear error. *Johnson*, 1997 Guam 9 at ¶ 3. In undertaking such review, the facts are to be construed in a light most favorable to the party prevailing below, *id.*, and clear error exists if "the entire record produces [a] definite and firm conviction that the court below committed a mistake." *Yang v. Hong*, 1998 Guam 9, ¶ 7 (quoting *Guam v. Chargualaf*, Crim. No. 88-00068A, 1989 WL 265040 at *2 (D. Guam App. Div. Sept. 26, 1989)). Construing the facts in a light most favorable to GMHA and GRC, we find that the trial court committed clear error. 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. GMHA did not announce on March 21, 2003 that it had awarded the contract to GRC. Based on our review of the record, negotiations between GMHA and GRC regarding the terms and conditions of the radiology services contract were not completed as of March 21, 2003. Therefore, the radiology services procurement award was not made to GRC as of March 21, 2003.

[31] Upon our *de novo* review of the trial court's legal conclusion that RADS' protest regarding the sole source interim contract was not something that could be protested, and in consideration of the broad language found at 26 GAR § 16901(c) and the trial court's factual error stated above, we hold that GMHA's announcement on May 14, 2003 that it had awarded a sole source interim contract to GRC was an event that RADS was entitled to protest. *See* 26 GAR § 16901(c).

[32] In the case before us, RADS and GIC argue that on May 16, 2003 RADS timely protested two separate and distinct components of the May 14, 2003 memorandum written by McMillan. They argue that one protest was of the award of an "interim sole source" contract to GRC. They further argue that the other protest was of GMHA's reference to an "exclusive" contract being negotiated by GMHA with GRC. However, the trial court only considered the "interim sole source" contract protest, failing to address the "exclusive" contract protest. Upon our review of the record before us, we conclude that there is substantial support for RADS and GIC's argument and we therefore agree that the protest letter consisted of two distinct protests and that the trial court failed to consider the "exclusive" contract protest lodged on May 16, 2003. "Where the trial court has erroneously failed to exercise its discretion, an appellate court may either remand or, if the record is sufficiently developed, decide the issue itself." *Reidy*, 2001 Guam 14 at ¶ 31. We find that there is a sufficient factual record upon which to base legal conclusions regarding RADS' exclusivity protest. Thus, in order to determine if the automatic stay was triggered, we must consider the two protests separately and determine if either of them was filed in a timely manner and before an award was made.

a. Protest of Sole Source Contract

[33] On May 16, 2003, RADS protested the interim sole source contract mentioned in GMHA's memorandum of May 14, 2003. GMHA does not dispute RADS and GIC's contention that RADS first learned about this sole source contract when it received a copy of the May 14, 2003 letter. There is substantial support in the record before us that RADS did not know, nor should it have known, of the facts giving rise to this protest until it received GMHA's May 14, 2003 memorandum. Thus, we hold that the May 16, 2003 protest of such sole source contract was timely. *See* 5 GCA § 5425(a); 26 GAR § 16901(c).

[34] The May 16, 2003 protest of the interim sole source contract mentioned in GMHA's May 14, 2003 memorandum must also have been filed prior to the contract being awarded in order for the automatic stay to be triggered. 26 GAR § 16901(e). However, RADS and GIC do not dispute that the interim sole source contract was awarded prior to May 16, 2003. In fact, their first cause of action before the trial court alleges in part that their May 16, 2003 protest letter was "protesting the award of the 'sole source'

contract with GRC" as they were informed on May 14, 2003 that GMHA had already entered into the sole source agreement with GRC. Record on Appeal, tab 6, p. 3 (Amended Complaint). By arguing that the sole source agreement had already been entered into between GMHA and GRC, for the purposes of determining whether the automatic stay was triggered by their protest of the sole source agreement RADS and GIC acknowledge that an award of the sole source contract had already been made. Further, the record before us provides ample support that the interim sole source contract had already been awarded to GRC as of May 14, 2003, the date of GMHA's memorandum. The memorandum itself stated that, "the Hospital has entered into sole source procurement with [GRC] until the Radiology Services Agreement is executed in its entirety." Appellee GMHA's Suppl. Excerpts of Record, p. 0038 (McMillan Memo., May 14, 2003). Additionally, McMillan stated in writing on at least two separate occasions that the interim sole source contract with GRC was to run from March 24, 2003 until June 23, 2003. *See* Appellee GMHA's Suppl. Excerpts of Record, pp. 00128, 00130 (McMillan's Memos., May 16, 2003 and May 27, 2003). We therefore hold that the interim sole source contract was awarded to GRC prior to May 16, 2003. Accordingly, RADS' protest of the interim sole source contract did not trigger the automatic stay.[2]

[35] We must now consider the second protest RADS filed on May 16, 2003. The second protest was of the "exclusive" nature of the contract being negotiated by GMHA with the most qualified offeror, GRC. In order to trigger the automatic stay, this protest must have been timely and before the award was made.

b. Protest of Exclusive Contract Between GMHA and GRC

[36] GRC argues that RADS knew of the facts that gave rise to this protest long before fourteen days prior to May 16, 2003, and thus the protest was not timely. *See* 5 GCA 5425(a); 26 GAR 16901(c). RADS and GIC argue that while RADS may have been aware all along that an exclusive contract may be negotiated, RADS had no knowledge whatsoever, nor should it have had such knowledge, that such exclusivity might be of a "closed" nature rather than of an "open" nature until RADS was in receipt of GMHA's May 14, 2003 memorandum. Upon our review of the record, we agree with RADS and GIC.

[2] It is important to note that the only issue before us in this case is whether the automatic stay was triggered by either of the two May 16, 2003 protests lodged by RADS and GIC. Thus, although we hold that an award of the interim sole source contract was made by GMHA to GRC prior to May 16, 2003, we do so only for purposes of considering whether the automatic stay was triggered. In making this determination we do not consider the merits of the sole source award as that issue is not before us.

To the extent that the May 16, 2003 protest was of the possibly "closed" nature of the exclusive contract being negotiated by GMHA with GRC, we hold that the protest was timely. We must now consider if this timely protest was pre-award in order to determine if the protest triggered the automatic stay.

[37] As stated above, a contract is to be awarded by GMHA to the best qualified offeror if fair and reasonable compensation, contract requirements, and contract documents can be agreed upon. 5 GCA § 5216(e); 26 GAR § 16314(l)(3). However, even if the three factors have arguably been agreed upon, until the actual award is granted, the solicitation, by definition, is still in the pre-award stage. Our review of the record provides guidance regarding whether the award of contract had yet been made to GRC by GMHA as of RADS' May 16, 2003 protest.

[38] Following GMHA's receipt of RADS' May 16, 2003, protest letter, McMillan responded in writing on May 22, 2003 and referenced the May 16, 2003 letter from RADS' counsel. McMillan stated that GHMA "is in receipt of your letter of protest regarding RFP-006-2003 on behalf of Dr. Ben Hoffman and RADS." Appellee GMHA's Suppl. Excerpts of Record, p. 0050 (McMillan's Ltr., May 22, 2003). The evening of May 22, 2003, McMillan attended a GMHA Board of Trustees meeting and informed the Board that "there is a protest to this contract underway, however, the Hospital has evaluated the protest and determined that the protester does not have standing." Appellee GMHA's Suppl. Excerpts of Record, p. 0055 (GMHA Board of Trustees Meeting Minutes, p. 3, May 22, 2003). The Board then reviewed and unanimously approved on motion proposed Official Board Resolution #03-055 entitled "Relative to the Awarding of an Exclusive Contract for Professional Radiology Services," thereby awarding the contract to GRC. *Id.*

[39] Further, on June 2, 2003, McMillan prepared a memorandum to file that stated the following:

> [t]he Hospital and [GRC] have negotiated the terms and conditions of an agreement for professional radiology services and are prepared to submit the agreement to the Attorney General for review and approval and then to the Governor for execution.
>
> There is a protest of the RFP by one of the Offerors who have asked that procurement be stayed. Given the critical nature of the service I have determined that the award of this contract without delay is necessary to protect substantial interests of the Hospital.

Appellee GMHA's Suppl. Excerpts of Record, p. 0058 (McMillan Memo., June 2, 2003).

[40] Based on the record before us, the two year contract for professional radiology services was awarded to GRC by GMHA on May 22, 2003 and thus it had not yet been awarded as of May 16, 2003, when RADS filed its protest regarding the possible exclusive and closed nature of such contract. Therefore, we hold that such protest was filed pre-award. Because we hold that this protest was timely and pre-award, we hold that the automatic stay provision was triggered by such protest. We must now consider GMHA's argument that it made an adequate showing of necessity and thus avoided the automatic stay.

2. Necessity

[41] McMillan sent a letter to counsel for RADS on June 2, 2003 to which he attached his memorandum to file of the same date, *see id.*, and stated in his letter that "the GMHA Procurement Rules and Regulations permits a procurement award notwithstanding a protest." Appellee GMHA's Suppl. Excerpts of Record, p. 0057 (McMillan Ltr., June 2, 2003). The record in this case is devoid of any reference to GMHA having obtained a written concurrence from the Attorney General or a Deputy Attorney General as required by the Guam Procurement Law. 5 GCA 5425(g)(1). Although GMHA's own Procurement Regulations appear to allow the GMHA Administrator to unilaterally make a determination of necessity, we hold today that because the Guam Procurement Law also applies to a procurement of professional services undertaken by the GMHA, the GMHA Administrator must also satisfy the requirements of the Guam Procurement Law. Therefore, because GMHA's attempt to establish necessity failed to satisfy the requirements of the Guam Procurement Law provision regarding necessity, we hold that GMHA has not made an adequate showing of necessity.

IV.

[42] For the reasons stated above we hold that the trial court erred in denying RADS and GIC's motion to enforce the automatic stay and that the automatic stay was triggered by RADS' May 16, 2003 protest of the exclusive nature of the contract being negotiated between GMHA and GRC and that GMHA failed to make a proper showing of necessity to avoid the automatic stay. The trial court's Decision and Order denying RADS and GIC's motion to enforce the automatic stay is therefore **REVERSED**.

[43] Moreover, we hold that RADS and GIC's standing cannot be determined in this case based on review of the record before us. Therefore, we hereby **REMAND** this matter to the trial court for a determination of RADS' and GIC's standing to pursue their claims. If the trial court finds that standing exists, proceedings shall continue consistent with this opinion. However, if the trial court determines that standing does not exist, the trial court shall dismiss the case for lack of jurisdiction.