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FILE NO OPA-PA: 13-009

1 **FISHER & ASSOCIATES**
2 Suite 101 De La Corte Building
3 167 East Marine Corp. Drive
4 Hagåtña, Guam 96910
5 Telephone: (671) 472-1131
6 Facsimile: (671) 472-2886

7
8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF :

11 JMI Edison,

12 Appellant.

CASE NO: OPA-PA 13-009

**OPENING BRIEF PURSUANT TO
OPA'S OCTOBER 29, 2013 ORDER**

13 **COMES NOW** the Guam Memorial Hospital Authority ("GMHA"), by and through counsel of
14 record Fisher & Associates, and submits its brief pursuant to the Office of Public Accountability's
15 ("OPA") Order dated October 29, 2013, that ordered the parties to brief the issues below.

16 **(1) WHAT WOULD BE THE IMPACT ON FUNDING IF THE CONTRACTS
17 AWARDED BY THE GMHA ARE DEEMED VOID?**

18 Procurement funding for GMHA IFB 020-2012 (Portable Kidney Machines with Reverse
19 Osomosis Water Purification Machines) was provided by the FY11 Hospital Preparedness Program
20 ("HHP") Grant and FY11 Compact Impact (DOI) funding. The total contract price of \$380,925.00
21 was funded as follows: \$107,266.53 from FY11 HHP Grant and \$273,658.47 from FY11 Compact
22 Impact funds.

23 The HPP Grant funds expired on June 30, 2013; however, an extension was granted for
24 ninety (90) days with a new expiration date of September 30, 2013. The GMHA issued a check for
25 \$107,266.52 to MedPharm on September 5, 2013 exhausting funds from the FY11 HHP Grant. *See*
26 *Exhibit A*. These funds were specifically used to purchase four (4) of the fifteen (15) total
27 hemodialysis machines, fifteen (15) water purifications units, and went towards training expenses.
28 *See Exhibit B*.

1 It would not be in the best interests of the Territory of Guam to deem the contract awarded to
2 MedPharm void. The expired, and now exhausted, FY11 HHP Grant funds in the amount of
3 \$107,266.52 would be lost. Further, the four (4) dialysis machines and fifteen (15) water purification
4 units that are currently on island and stored in GMHA's warehouse would be wasted because each bid
5 offeror proposed machines from a different manufacturer. Monetary loss would also result from the
6 travel expenses and leave already provided for two (2) of GMHA's biomedical personnel to attend a
7 five (5) day training at Gambro's (the manufacturer's) training facility in Denver, Colorado, in
8 September of this year. Additional patient safety and policy reasons against voiding this contract are set
9 forth under Section (2) B below.

10
11 **(2) IF AN AUTOMATIC STAY WAS IN EFFECT AND VIOLATED, WHY THE**
12 **CONTRACTS SHOULD NOT BE VOIDED.**

13 **A. There was no automatic stay in effect.**

14 Pursuant to 5 GCA § 5425(g), “[i]n the event of a *timely* protest...the Territory shall not
15 proceed further with the solicitation or with the award of the contract prior to final resolution of such
16 protest...” *Id.* (Emphasis added); *see also Guam Imaging, supra at ¶ 24.* The GMHA has argued at
17 length and provided evidence that JMI's June 21, 2013 protest was not timely. JMI had notice of
18 GMHA's intent to award the procurement to another bidder on June 6, 2013, and Guam law is clear that
19 protests must be submitted within 14 days after a party “knows or should know of the facts giving rise
20 thereto,” and the “right to protest lies with “[a]ny actual or prospective bidder, offeror, or contractor
21 who *may be aggrieved* in connection with the method of source selection, solicitation or award of a
22 contract.” 5 GCA § 5425(a) (Emphasis added); *see also* 26 GAR §§ 16901(c)(1); *Guam Imaging*
23 *Consultants, Inc. v. GMHA*, 2004 Guam 15.

24 If, assuming arguendo, JMI's protest was timely, any automatic stay in effect was lifted when
25 the GMHA rejected JMI's protest. *In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007, the
26 OPA found that automatic stay provisions were not triggered as a result of the appeal to the OPA
27 because General Service Agency completed its award between its denial of PDN's April 7, 2008 protest
28

1 and PDN's appeal to the OPA. *Id.*, Findings and Recommendations of Hearing Officer, Sept. 5, 2008.
2 Similarly, in this case, there was no automatic stay triggered because the GMHA completed its award
3 between its rejection of JMI's protest on July 17, 2013 and JMI's appeal to the OPA on August 7, 2013.

4 At the October 29, 2013 hearing, the OPA referred the parties to its more recent decisions
5 regarding automatic stay provisions in the following appeals: *In the Appeal of JMI Edison*, OPA-PA-
6 13-010, and *In the Appeal of K Cleaning*, OPA-PA 13-004. Both cases are distinguishable from the
7 present appeal.

8 *In the Appeal of JMI Edison*, OPA-PA-13-010, the OPA granted JMI's motion for automatic
9 stay based on JMI's *timely* procurement protest in that case. The OPA found that "[f]inal resolution of
10 a protest includes the time period of an appeal after protest." *Id.*, Order Granting Motion re Automatic
11 Stay dated September 20, 2013, p. 1, ll. 21 and 22, citing *In the Appeal of Town House Department*
12 *Stores, Inc. dba Island Business Systems & Supplies*, OPA-PA-08-012. However, the important
13 distinction is that *In the Appeal of Town House Department Stores* (the case upon which the OPA relied
14 and cited to), "IBSS filed its protest on May 20, 2008, and the appeal in this matter on September 12,
15 2008 *prior* to an award being made in any of the RFQs." *Id.*, Decision, p. 9, ll. 21 – 23 (Emphasis
16 added). Thus, the OPA found that final resolution included the time period of an appeal after protest
17 **because** IBSS filed its procurement appeal **before** an award was made. Similarly, *In the Appeal of K*
18 *Cleaning*, OPA-PA 13-004, the OPA found that automatic stay was violated because the Guam
19 International Airport Authority awarded an IFB while the appeal before the OPA was pending. *Id.*,
20 Decision October 28, 2013.

21
22 The factual circumstances in this case are completely different. JMI's protest was not timely;
23 JMI did not file its appeal before an award was made; and the GMHA did not award the contract during
24 the course of this procurement appeal. The contract was awarded to MedPharm after the GMHA's
25 rejection of JMI's protest on July 17, 2013, and before JMI's appeal to the OPA on August 7, 2013.
26 Therefore, the OPA's analysis *In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007, is
27 applicable: there was no automatic stay triggered because the award was completed between the
28

1 rejection of the protest and the appeal to the OPA.

2 **B. Even if there was an automatic stay in effect, the contract should not be voided.**

3 As explained above, it would not be in the best interests of the Territory of Guam to deem the
4 contract awarded to MedPharm void. FY11 HHP Grant funds in the amount of \$107,266.52 would be
5 lost; the four (4) dialysis machines and fifteen (15) water purification units currently on island would be
6 wasted; and additional monetary losses would result from the travel expenses and leave already
7 provided for two (2) of GMHA's biomedical personnel to attend training at the manufacturer's facility
8 in Colorado.

9 Moreover, it is of vital importance for the GMHA to commission the fifteen (15) portable
10 kidney (hemodialysis) machines with reverse osmosis water purification machines without delay. The
11 GMHA currently has three (3) portable and nine (9) stand-alone hemodialysis machines manufactured
12 by Fresenius. These machines are at least fifteen (15) years old and three (3) models behind. Each
13 machine has a recommended total hour usage, but these machines have been utilized far beyond their
14 life expectancy. Repairs are not possible because Fresenius no longer manufactures parts for these
15 machines, so the machines can break down at any time and negatively impact patient care and safety.
16 Voiding the contract would result in lost funding and cause delays, increasing the risks to patient care
17 and safety in Guam.

18 Further, the Center for Medicare and Medicare Services ("CMS") has determined that the
19 reverse osmosis systems attached to the nine (9) stand-alone hemodialysis machines are obsolete, i.e.
20 the reverse osmosis systems are not in conformance with acceptable standards of medical care. The
21 GMHA has been instructed by CMS to correct this situation without delay and is currently at risk for
22 citation. The delays that would result if the contract was voided would increase the GMHA's risk for
23 citation by CMS and the Joint Commission (an organization that evaluates health care organizations in
24 the area of safe and effective quality care), and open GMHA to the risk of litigation because GMHA is
25 currently unable to meet the standard of medical care in this area. It goes without saying that the
26 GMHA, as Guam's only hospital, must strive to maintain the standard of medical care for the people of
27
28

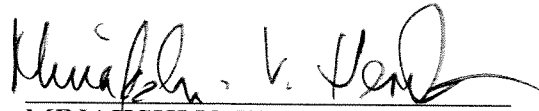
1 this island.

2 Based on the foregoing and briefing previously provided, the GMHA maintains:

- 3 1. That JMI's protest was not timely and no automatic stay was triggered;
- 4 2. Even if JMI's protest was timely, there was no automatic stay triggered because GMHA's
- 5 completed the award between the rejection of JMI's protest and JMI's appeal to the OPA;
- 6 and
- 7 3. Even if there was an automatic stay in effect, the contract should not be voided because it
- 8 would result in a loss of Federal grant funding and increase risks to patient care and safety in
- 9 Guam.

10 Respectfully submitted this 4th day of November 2013.

11
12 FISHER & ASSOCIATES

13 

14 MINAKSHI V. HEMLANI, ESQ.

EXHIBIT A

GUAM MEMORIAL HOSPITAL AUTHORITY AGANA, GUAM
 Vendor: 0001400 MEDPHARM
 Invoice # P.O. # Date Description Gross Discount Net
 13062353 002013282 7/30/13 107266.52 107266.52

B 123608

Received by: *Michelle Pangolin*
 Michelle Pangolin
 10/8/13

CHECK DATE: 9/05/2013 * TOTALS * 107266.52 107266.52

GUAM MEMORIAL HOSPITAL AUTHORITY
 OPERATING ACCOUNT
 850 CARLOS CAMACHO ROAD TAMUNING GUAM 96911

AGANA BRANCH
 BANK OF GUAM
 AGANA, GUAM

101-511
 1214

B 123608
 CHECK NO.
 123608

ONE HUNDRED SEVEN THOUSAND TWO HUNDRED SIXTY SIX DOLLARS
 AND 52/100

DATE

AMOUNT

9-05-2013

**107,266.52

MEDPHARM
 ** FOR EFF **
 PO BOX 11864
 TAMUNING, GU 96931

[Signature]
 NON-NEGOTIABLE

⑈123608⑈ ⑆121405115⑆ 0101⑈014714⑈

EXHIBIT B



136 Kayen Chando, Dededo, Guam 96929
 Fax No: 1 671-632 9000 ::: Tel No: 1 671-632 6000 : 1 671-632 6005
 Email: medpharm@medpharmusa.com
 GUAM . SAIPAN . POHNPEI . PHILIPPINES

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INVOICE DATE 07/30/2013

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 850 Governor Carlos G., TAMUNING, GUAM

SHIP TO GUAM MEMORIAL HOSPITAL
 850 Governor Carlos G., GUAM

ACCOUNT# GMH-798
TERMS 30 days
SALESMAN MICHELLE R. PANGELINAN

SHIP METHOD
SHIP DATE 07/30/2013

CUSTOMER PO.#
DUE DATE 08/29/2013

LINE NO.	ITEM ID	DESCRIPTIONS	BATCH ID	EXP. DATE	QTY	UOM	UNIT COST	EXTENSION
1	31080011	HEMODIALYSIS SYSTEM, PHOENIX® X36 115V 60HZ, #103453			4.00	UT	23,795.000	95,180.000
2	31230002	WATER PURIFICATION UNIT, WRO 300H*, UNIT #107365			15.00	UT	0.000	0.000
3	TE	TRAINING AND EXPENSES			1.00	DEF	12,086.530	12,086.530

SUB TOTAL 107,266.530
FREIGHT & HANDLING 0.000
DISCOUNT 0.000
TOTAL AMOUNT 107,266.530

REMARKS PO# 20132831-000

DEA LIC. NO: AG6159683
EXPIRATION: 09/30/2013

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DATE _____

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