OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF, JMI-EDISON Appellant	**APPEAL NO: OPA-PA-11-001** **DECISION**

I. INTRODUCTION

This is the Decision of the Public Auditor for an appeal filed on January 4, 2011, by JMI-EDISON. (Hereafter referred to as "JMI") regarding the General Services Agency's, Government of Guam's (Hereafter referred to as "GSA") denial of JMI's protest concerning GSA's solicitation of Invitation for Bid No. GSA-105-10 (Radiology Imaging System Marked for the Department of Public Health and Social Services) (Hereafter referred to as "IFB"). The Public Auditor holds that MEDPHARM's Bid was responsive. Accordingly, JMI's appeal is DENIED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, pursuant to JMI's March 2, 2011 Waiver of Hearing. Anthony R. Camacho, Esq. served as the Office of Public Accountability's Hearing Officer for this appeal, and the Public Auditor makes the following findings of fact:

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1. On or about July 9, 2010, GSA issued the IFB.[1] The IFB was GSA's solicitation for the Department of Public Health and Social Services, Government of Guam (Hereafter Referred to as DPHSS) for a state of the art Radiology Imaging System.[2]

2. The IFB included extensive technical specifications that described the minimum equipment and performance requirements to be supplied by the equipment manufacturer.[3]

3. The IFB's specifications for the Radiology Imaging System's System Configuration required in relevant part, bids for or remarks on a standard or extended arm digital wall stand only, with single portable detector and optional stretcher.[4]

4. The IFB's specifications for the Radiology Imaging System's Acquisition Workstation required in relevant part, bids for or remarks on two (2) Nineteen (19) Inch LCD color monitors (1280 x 1024 Pixels).[5]

5. The IFB stated that all equipment and installation must meet compliance with the following regulatory agencies: Federal Regulations, Title 10, and title 49 and all changes and amendments thereto, NRC regulatory compliance tests, ALARA, NCRP, MQSA, and other guidelines and applicable Guam regulations, ordinances and codes, A.S.M.E., NEC, NFPA standards, Life Safety Code, Uniform Building Codes and applicable Guam regulations,

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[1] Invitation for Bid, IFB, Tab 5, Procurement Record filed on January 12, 2011.

[2] Radiology Imaging System, Paragraph 1.1. page 1, IFB, Id.

[3] Item No. 1.1., Radiology Imaging System As per the Following Specifications, IFB, Id.

[4] System Configuration, Specifications, Section I, Paragraph A, page 1, IFB, Id.

[5] Acquisition Workstation, Specifications, Paragraph F, page 2, IFB, Id.

ordinances, and codes.[6]

6. The IFB also required that bidders comply with all specifications and other requirements of the solicitation.[7]

7. The IFB stated that award shall be made to the lowest responsible and responsive bidders, whose bid is determined to be the most advantageous to the Government, taking into consideration the evaluation factors set forth in the solicitation.[8]

8. The IFB required the bidders to examine the specifications and all instructions.[9]

9. The IFB stated that any explanation desired by a bidder regarding the meaning or interpretation of the specifications must be submitted in writing to GSA and with sufficient time allowed for a written reply to reach all bidders before the submission of bids and that any information given to a prospective bidders will be furnished to all prospective bidders in writing as an amendment to the IFB is such information would be prejudicial to uninformed bidders.[10]

10. The deadline for bidders to submit their bids in response to the IFB was set for 10:00 a.m. on July 23, 2010.[11]

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[6] Item No. 1.1. Radiology Imaging System, As per the following Specifications, page 1, IFB, Id.

[7] Compliance with Specifications and Other Solicitation Requirements, Paragraph 6, General Terms and Conditions, IFB, Id.

[8] Award, Cancellation, & Rejection, Paragraph 22, General Terms and Conditions, IFB, Id.

[9] Preparation of Bids, Paragraph 2, Sealed Bid Solicitation Instructions, IFB, Id.

[10] Explanation to Bidders, Sealed Bid Solicitation Instructions, IFB, Id.

[11] Invitation for Bid, IFB, Id.

11. On July 19, 2010, Interested Party MEDPHARM requested for an amendment to the IFB on the grounds that the specifications listed a wrong or non-existent model of the General Electric Brand and that MEDPHARM believed that the correct model was the Optima XR640 instead of Optima XR460, and MEDPHARM requested that the bid submission and opening date be extended to July 30, 2010.[12]

12. On July 20, 2010, GSA responded to MEDPHARM by stating that the correct model number for the Radiology Imaging System is Model No. GE Optima XR640 and by denying MEDPHARM's request to extend the bid submission and opening date due to funding requirements.[13]

13. On July 20, 2010, GSA issued IFB Amendment No. 1 correcting a model number description for the Radiology Imaging System and requiring prospective bidders to provide an electrical source to power the new machine that will be installed.[14]

14. On July 23, 2010, JMI and MEDPHARM submitted bids in response to the IFB.[15] JMI's Radiology Imaging System was based on a General Electric Optima 640 and JMI's total bid price was $460,000, while MEDPHARM's Radiology Imaging System was based on a Shimadzu, RadSpeed DR-Auto and MEDPHARM's total bid price was $323,747.[16]

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[12] Letter dated July 19, 2010 from Arthur C. Adriano, MEDPHARM Equipment Sales Specialist to Claudia S. Acfalle, GSA's Chief Procurement Officer, IFB, Tab 15, Procurement Record filed on January 12, 2011.

[13] GSA Memorandum to All Prospective Bidders dated July 20, 2010, IFB, Tab 15, Id.

[14] Amendment No. 1 dated July 20, 2010, IFB, Tab 14, Id.

[15] Abstract of Bids, IFB, Tab 6, Procurement Record filed on January 12, 2011.

[16] Id.

15. MEDPHARM's bid stated that it complied with the IFB's specification requirement for a standard or extended arm digital wall stand only, with single portable detector and optional stretcher for the Radiology Imaging System's Configuration.[17]

16. MEDPHARM's bid stated that it complied with the IFB's specification requirement for the Radiology Imaging System's Acquisition Workstation's two (2) Nineteen (19) Inch LCD color monitors (1280 x 1024 Pixels).[18]

17. MEDPHARM's bid stated that Shimadzu Corporation, the manufacturer of the RadSpeed DR-Auto Radiology Imaging System MEDPHARM was offering, held Certificate No. EC97J1031 from the Japan Audit and Certification Organization for Environment and Quality (Hereafter Referred to as "JACO") certifying that Shimadzu Corporation complied with the management systems outlined in ISO 14001:2004 and JIS Q 14001:2004 concerning the Development, design, manufacture, sales, services, and logistics of Analytical and Measuring Instruments, Medical Systems, Aircraft Equipment, Hydraulic Equipment, Industrial Machinery and Laboratory Instruments., and that said JACO Certificate was issued on June 10, 2009 and would expire on June 23, 2010.[19] Additionally, MEDPHARM's bid stated that Shimadzu Corporation was Certified to the standard of EN ISO 9001:2008, JIS Q 9001:2008 by TÜV Rheinland Cert GmbH, concerning the design, development, manufacturing, importing, and sales of medical diagnostic imaging devices and systems and related devices, and that said certificate

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[17] System Configuration, Paragraph A., Section I, Specifications, Page 1, MEDPHARM's Bid, Tab 4, Procurement Record filed on January 12, 2011.

[18] Acquisition Workstation, Paragraph F., Section I, Specifications, Page 2, MEDPHARM's Bid, Tab 4, Id.

[19] JACO Certificate No. EC97J1031, Shimadzu RADspeed DR Series Pamphlet, MEDPHARM Bid, Tab 4, Id.

is valid from May 13, 2010 to May 12, 2013.[20] There were no other documents concerning compliance with laws, regulations, or manufacturing standards in MEDPHARM's bid.

18. On July 23, 2010, GSA provided the bids to DPHSS and requested that DPHSS' review and evaluate the specifications of respective Radiology Imaging Systems offered by JMI and MEDPHARM to ensure they met the IFB specifications.[21]

19. On July 26, 2010, Peter Roberto, Director, DPHSS, concurred that the specifications of the respective Radiology Imaging Systems offered by JMI and MEDPHARM both met the IFB's specifications.[22]

20. On July 28, 2010, Pedro San Nicolas, GSA Buyer II, recommended that the bid be awarded to MEDPHARM as it submitted the lowest responsive and responsible bid in response to the IFB and Claudia Acfalle, GSA Chief Procurement Officer approved the recommendation that same day.[23]

21. On July 28, 2010, GSA awarded the IFB to MEDPHARM by issuing Purchase Order No. P106A06027.[24] Said purchase order states that all equipment and installation must meet compliance with the following regulatory agencies: Federal Regulations, Title 10, Title 49, and

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[20] TÜV Rheinland Certificate Registration No. 01 100 096363,Shimadzu RADspeed DR Series Pamphlet, MEDPHARM Bid, Tab 4, Id.

[21] GSA Memorandum dated July 23, 2010 from Pedro F. San Nicolas to DPHSS, TAB 13, Procurement Record filed on January 12, 2011.

[22] Id.

[23] GSA Memorandum Re Analysis of IFB dated July 28, 2010 from Pedro San Nicolas, GSA Buyer II, to Claudia Acfalle, GSA Chief Procurement Officer, TAB 12, Procurement Record Filed on January 12, 2011.

[24] GSA Purchase Order No. P106A06027 dated July 28, 2010, Tab 10, Id.

all changes and amendments thereto, NRC Regulatory Compliance Tests, ALARA, NCRP, MOSA, and other guidelines and applicable Guam Regulations Ordinances and Codes A.S.M.E., NEC, HFPA Standards, Life Safety Code, and Uniform Buildings Codes.[25]

22. On July 28, 2011 GSA issued a bid status to JMI which stated that JMI's bid was rejected due to high price and that the bid is recommended for award to MEDPHARM in the total amount of $323,747.[26]

23. On August 6, 2010, nine (9) days after GSA notified JMI that JMI's bid was rejected, JMI filed a protest with GSA alleging that MEDPHARM's bid was non-responsive because, in relevant part: (1) MEDPHARM's bid did not have the optional stretcher required by Section A, System Configuration, of the IFB's Specifications; (2) MEDPHARM's bid did not have the two (2) LCD Monitor's as required by Section F, Acquisitions Workstation, of the IFB's specifications; and (3) MEDPHARM's bid did not contain documents outlining compliance with the regulatory agencies as required in the bid instructions.[27]

24. On December 16, 2010, more than four months after JMI filed their protest, GSA denied JMI's protest on the following relevant grounds: (1) The brochure provided by MEDPHARM with its bid indicates that their bid meets the optional stretcher requirement set forth in Section A, System Configuration of the IFB Specifications; (2) The brochure provided by MEDPHARM with its bid indicates that their bid meets the requirement for two (2) LCD Monitors as set forth in Section F, Acquisitions Workstation, of the IFB's specifications; and (3) Concerning the regulatory compliance documents, the IFB indicates that bidders must submit

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[25] Id.

[26] GSA Bid Status dated July 28, 2010, TAB 11, Id.

[27] JMI's Bid Protest dated August 6, 2010, TAB 1, Id.

documents outlining compliance with the regulatory agencies but did not specify any particular regulatory agency documents required.[28] Although the law is silent on the exact time allowed to respond to protests, it is noted that four months is an inordinate amount of time and would generally not be considered a reasonable and expeditious amount of time from the date the protest was filed until GSA rendered its decision on the protest filed.

25. On December 21, 2010, JMI received GSA's denial of JMI's August 6, 2010 Protest.[29]

26. On January 4, 2011, fourteen (14) days after receiving GSA's denial of their August 6, 2010 protest, JMI filed this appeal.

III. ANALYSIS

The Public Auditor must decide an appeal regarding a procurement method, solicitation, or award, or entitlement to costs by determining whether the purchasing agency's decision on the protest of the method of selection, solicitation, or award of the contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. 2 G.A.R., Div. 4, Chap. 12, §12201(a). Here, the Public Auditor must decide whether GSA's December 16, 2010 denial of JMI's August 6, 2010 protest was in accordance with the statutes, regulations, and the IFB's terms and conditions. The main issue presented by JMI is whether GSA improperly denied JMI's protest allegations that: (1) MEDPHARM's bid did not have the optional stretcher required by Section A, System Configuration, of the IFB's Specifications; (2) MEDPHARM's bid did not have the two (2) LCD Monitors as required by Section F,

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[28] GSA's December 16, 2010 denial of JMI's August 6, 2010 Protest, TAB 2, Id.

[29] GSA's FAX Cover Letter dated December 21, 2010, TAB 2, Id.

Acquisitions Workstation, of the IFB's specifications; and (3) MEDPHARM's bid did not contain documents outlining compliance with the regulatory agencies as required in the bid instructions.[30] The Public Auditor's will review these issues *De Novo*. 5 G.C.A. §5703 and 2 G.A.R. Div. 4, Chap. 12, §12103(a).

A. GSA's Brief on Remedies Complies with the March 3, 2011 Order After Pre-Conference Hearing.

As a preliminary matter, the Public Auditor must decide JMI's March 10, 2011 Motion to Strike. JMI argues that Section I of GSA's March 8, 2011 Brief on Remedies must be stricken from the record because it did not comply with the March 3, 2011 Order After Pre-Conference Hearing because it is outside the scope of remedies provided by the Procurement Code and is a further attempt to argue the merits of JMI's Appeal.[31] The OPA ordered that the parties may, but are not required to, file and serve on the other parties additional briefs on the issue of remedies no later than March 8, 2011 at 5:00 p.m.[32] All the parties, to include GSA filed briefs concerning remedies on March 8, 2011. In its brief regarding remedies, GSA argues that no remedy is necessary because the procurement was valid and JMI's appeal should be dismissed.[33] Alternatively, GSA argues that if the Public Auditor finds that the JMI appeal has merit, the remedy should be made pursuant to 5 G.C.A. §5452 because JMI's protest and appeal was made post-award, and that the Public Auditor grant the remedy of affirming the award which is

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[30] Attachment 1, JMI's Notice of Appeal filed on January 4, 2011.

[31] Line 3, Page 2, JMI's Objection to Portions of the Government's Statement on Remedies and Motion to Strike filed on March 10, 2011.

[32] Paragraph 3, Order After Pre-Hearing Conference file on March 3, 2011.

[33] Page 1, GSA's Memorandum on Remedies filed on March 8, 2011.

provided by the aforementioned statute.[34] The Public Auditor finds that GSA's Brief on Remedies complies with the requirements of the OPA's March 3, 2011 Order After Pre-Conference Hearing and JMI's Motion to Strike is hereby DENIED.

B. MEDPHARM's Bid complies with Section A, System Configuration, of the IFB's Specifications

JMI's argument that MEDPHARM's bid did not comply with Section A, System Configuration of the IFB's Specifications because MEDPHARM did not offer a stretcher has no merit. Generally, in Competitive Sealed Bidding, the contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements set forth in the invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1). The term "responsive bidder" as used in the aforementioned statute and regulation means a person who submitted a bid which conforms in all material respects to the invitation for bids. 5 G.C.A. §5201(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(2). Here, as stated above, the IFB's specifications for the Radiology Imaging System's System Configuration required in relevant part, bids for or remarks on a standard or extended arm digital wall stand only, with single portable detector and optional stretcher.[35] This specification requirement was a material requirement for the IFB because, as stated above, the IFB required the bidders to

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[34] Page 4, Id.

[35] System Configuration, Specifications, Section I, Paragraph A, page 1, IFB, Id.

comply with all specifications.[36] However, the term "optional" as used in the aforementioned IFB specification simply means involving an option or not compulsory.[37] Thus, whether the MEDPHARM's bid included a stretcher bears no relevance on the issue of whether MEDPHARM's bid was responsive because, at best, the stretcher was an optional item. Additionally, the Public Auditor finds that what this specification really means is that the Radiology Imaging System could have the optional capability of being used on a patient in a stretcher. Further, MEDPHARM's Bid complies with this requirement because MEDHARM's Shimadzu, RadSpeed DR-Auto Radiology Imaging System includes a ceiling mounted x-ray tube support which, with a single button press, automatically moves the ceiling mounted x-ray tube support to the imaging position, relative to the wall stand, x-ray table, or if used, a stretcher.[38] Thus, the Public Auditor finds that MEDPHARM's bid complied with the requirements of Section A, System Configuration of the IFB's Specifications. The Public Auditor will now review JMI's second allegation.

C. MEDPHARM's Bid Complies with Section F, Acquisitions Workstation, of the IFB's Specifications.

There is no merit to JMI's allegation that MEDPHARM's Bid failed to comply with Section F, Acquisitions Workstation, of the IFB's Specifications. As stated above, the contract

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[36] Compliance with Specifications and Other Solicitation Requirements, Paragraph 6, General Terms and Conditions, IFB, Id.

[37] Merriam-Webster Online Dictionary.

[38] See extract from Shimadzu RadSpeed DR Auto Radiology Imaging System Pamphlet, Exhibit 1, MEDPHARM's Comments on Agency Report filed on January 31, 2011.

shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements set forth in the invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1). Further, requirement for the two (2) Nineteen (19) Inch LCD color monitors required by Section F of the IFB's specifications is a material requirement because, as stated above, the IFB required the bidders to comply with all specifications.[39] As stated above, the IFB's specifications for the Radiology Imaging System's Acquisition Workstation required in relevant part, bids for or remarks on two (2) Nineteen (19) Inch LCD color monitors (1280 x 1024 Pixels).[40] Here, MEDPHARM's bid included two (2) Nineteen (19) Inch LCD color monitors (1280 x 1024 Pixels).[41] Further, MEDPHARM's Shimadzu, RadSpeed DR-Auto Radiology Imaging System can use more than one (1) LCD monitor at a time.[42] Thus, the Public Auditor finds that MEDPHARM complied with Section F, Acquisitions Workstation, of the IFB's Specifications. The Public Auditor will now review JMI's Third allegation.

D. MEDPHARM was not required to provide certificates of compliance with its Bid.

There is no merit to JMI's allegation that MEDPHARM's was required to submit

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[39] Compliance with Specifications and Other Solicitation Requirements, Paragraph 6, General Terms and Conditions, IFB, Id.

[40] Acquisition Workstation, Specifications, Paragraph F, page 2, IFB, Id.

[41] Acquisition Workstation, Paragraph F., Section I, Specifications, Page 2, MEDPHARM's Bid, Tab 4, Id.

[42] See extract from Shimadzu RadSpeed DR Auto Radiology Imaging System Pamphlet, Exhibit 3, MEDPHARM's Comments on Agency Report filed on January 31, 2011.

documents outlining compliance with the regulatory agencies with its bid. The IFB did require the bidders to submit descriptive literature **as specified in the IFB** with their bids (Bold Emphasis Added).[43] Thus, this requirement is limited to descriptive literature specifically required by the IFB. As stated above, the IFB stated that all equipment and installation must meet compliance with the following regulatory agencies: Federal Regulations, Title 10, and title 49 and all changes and amendments thereto, NRC regulatory compliance tests, ALARA, NCRP, MQSA, and other guidelines and applicable Guam regulations, ordinances and codes, A.S.M.E., NEC, NFPA standards, Life Safety Code, Uniform Building Codes and applicable Guam regulations, ordinances, and codes.[44] The Public Auditor acknowledges that there is a broad spectrum of laws GSA and DPHSS required the bidders to review. Both GSA and DPHSS were responsible to conduct this research and determine which specific laws, codes, and regulations applied to the Radiology Imaging System and embody these requirements in an IFB Specification. While there are no specific regulatory compliance document submission requirements stated in the IFB, the Public Auditor finds that GSA and DPHSS should conduct its own due diligence and ensure the equipment purchased, as a result of the IFB, meets federal regulatory medical diagnostic equipment requirements for radiology imaging systems. Further, the Public Auditor finds that the IFB's language requires that the successful bidder's proposed equipment and installation must meet the large body of federal and Guam laws, regulations, and standards described, however, the IFB's language does not require that prospective bidders

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[43] Paragraph 19, Descriptive Literature, General Terms and Conditions, IFB, Tab 5, Procurement Record filed on January 12, 2011.

[44] Item No. 1.1. Radiology Imaging System, As per the following Specifications, page 1, IFB, Id.

submit documents showing compliance with each and every law, regulation, or standard cited by the IFB. Instead, the IFB requires only the successful bidder to furnish all necessary and desirable information and instructions for the proper operation of the equipment.[45] The plain language of this requirement clearly states that it only applies to the successful bidder and not all the bidders, and the IFB does not require the submission of compliance documents by prospective bidders at the time they submit their bids.

The IFB states in the General Terms and Conditions Item 19. Descriptive Literature, that all prospective bidders are required to submit product literature that clearly identifies items in the IFB. The IFB states that the descriptive literature is required to establish, for the purpose of evaluation and award, details of the product(s) the bidder proposes to furnish, including design, materials, components, performance characteristics, methods of manufacture, construction, assembly or other characteristics which are considered appropriate.[46] There were no descriptive regulatory compliance literature or certification documents specified in the IFB that all bidders were required to submit with their bids. The IFB only required regulatory compliance for the successful bidder's offered equipment's operation, testing, and installation.[47] Therefore, the Public Auditor finds that whether MEDPHARM's submission of its certificates of compliance with various standards and codes was responsive is moot because the IFB did not require the bidders to submit such documents with their bids.

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[45] Item No. 1.1. Radiology Imaging System as per the following Specifications, Page 1, IFB, TAB 5, Procurement Record filed on January 12, 2011.

[46] General Terms and Conditions. Item 19. Descriptive Literature, IFB, TAB 5, Procurement Record filed on January 12, 2011.

[47] Item No. 1.1 Radiology Imaging System, As per the following Specifications, page 1, IFB. Id.

IV. CONCLUSION

Based on the foregoing, the Public Auditor hereby determines the following:

1. GSA's Brief on Remedies complies with the requirements of the OPA's March 3, 2011 Order After Pre-Conference Hearing and JMI's Motion to Strike is hereby DENIED

2. MEDPHARM's bid complied with the requirements of Section A, System Configuration of the IFB's Specifications.

3. MEDPHARM complied with Section F, Acquisitions Workstation, of the IFB's Specifications.

4. MEDPHARM's submission of its certificates of compliance with various standards and codes with its bid and after its bid are not relevant to the issue of whether MEDPHARM's bid was responsive because the IFB did not require the bidders to submit such documents with their bids.

5. GSA and DPHSS should conduct an independent analysis of what specific laws, codes, and regulations apply to the Radiology Imaging System equipment and its installation to determine whether the equipment and its installation GSA and DPHSS received pursuant to Purchase Order No. P106A06027 complied with Federal Regulations, Title 10, Title 49, and all changes and amendments thereto, NRC Regulatory Compliance Tests, ALARA, NCRP, MOSA, and other guidelines and applicable Guam Regulations Ordinances and Codes A.S.M.E., NEC, HFPA Standards, Life Safety Code, and Uniform Buildings Codes, as required by said purchase order. Such independent analysis is necessary because the IFB's and the Purchase Order's mere citation of a broad spectrum of laws, regulations, and codes, are not sufficient to protect the health and safety of the DPHSS staff and patients who will use the Radiology Imaging System.

6. JMI's Appeal is DENIED.

This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative Decision. 5 G.C.A. §5481(a).

A copy of this Decision shall be provided to the parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website www.guamopa.org.

DATED this 21st day of April, 2011.

DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR

FAX

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