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FILE NO OPA-PA: 13-009

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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

**OPPOSITION TO MOTION FOR  
INJUNCTIVE RELIEF AND STAY OF  
PROCUREMENT**

13 **COMES NOW** the Guam Memorial Hospital Authority (“GMHA”), by and through counsel of  
14 record Fisher & Associates, and submits its opposition to appellant JMI’s motion for injunctive relief  
15 and stay of procurement pending final resolution of appeal.

16 At status hearing held October 29, 2013, the Office of Public Accountability (“OPA”) ordered  
17 the parties to expeditiously brief the issue of whether the Public Auditor has the authority to grant JMI’s  
18 oral motion to stay. It is the GMHA’s position that the OPA does not have such authority and even if it  
19 did, the motion for stay is premature.

20 **I. JMI’s MOTION IS PREMATURE BECAUSE IT ASKS THE OPA TO CONSIDER**  
21 **THE MERITS OF ITS APPEAL WHEN IT HAS NOT YET BEEN DETERMINED**  
22 **THAT ITS PROTEST WAS TIMELY.**

23 The threshold issue of whether JMI’s protest was timely remains pending before the OPA. The  
24 parties have submitted detailed briefing setting forth their respective positions. While JMI continues to  
25 assert the timeliness of its protest, the GMHA has provided evidence on record that JMI has notice of  
26 GMHA’s intent to award the procurement to another bidder on June 6, 2013. Therefore, counting from  
27 the date of said notice, JMI had 14 days to file its protest – by June 20, 2013. In this case, JMI did not  
28 file its protest until June 21, 2013 and was therefore untimely.

1           Guam law is clear that protests must be submitted within 14 days after a party “knows or should  
2 know of the facts giving rise thereto,” and the “right to protest lies with “[a]ny actual or prospective  
3 bidder, offeror, or contractor who *may be aggrieved* in connection with the method of source  
4 selection, solicitation or award of a contract.” 5 GCA § 5425(a) (Emphasis added); *see also* 26 GAR  
5 §§ 16901(c)(1); *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15.

6           Whether or not JMI’s protest was timely will affect the issue of whether or not an automatic  
7 stay was triggered. Pursuant to 5 GCA § 5425(g), “[i]n the event of a *timely* protest...the Territory  
8 shall not proceed further with the solicitation or with the award of the contract prior to final resolution  
9 of such protest...” *Id.* (Emphasis added); *see also Guam Imaging, supra* at ¶ 24. The parties have also  
10 submitted detailed briefing on the issue of automatic stay. At the October 29 hearing, the OPA  
11 requested additional briefing regarding the automatic stay and the impact on procurement funding on an  
12 expedited schedule: GMHA’s opening brief due November 4; JMI’s response due November 8;  
13 GMHA’s reply due November 13; and tentative hearing schedule for November 18.

14           Clearly, the OPA has not yet made a determination on the threshold issue of timeliness. Yet  
15 JMI moves the OPA to impose a stay on procurement and consider its arguments in support of  
16 injunctive relief that essentially go to the merits of its appeal (i.e. the likelihood of success on the  
17 merits) – even though it has not yet been determined that JMI’s protest was timely. The OPA has not  
18 yet issued its decision on threshold matters and should not be forced to consider the merits of JMI’s  
19 appeal out of order. The GMHA will not respond to JMI’s arguments regarding the merits of its appeal  
20 disguised as arguments in support for injunctive relief, suffice to say that any “irreparable injury”  
21 alleged will be minimal as the OPA has already set forth an expedited briefing schedule to determine  
22 threshold issues. JMI’s motion is premature.

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25       **II. THE OPA DOES NOT HAVE THE AUTHORITY TO ISSUE AN INJUNCTIVE STAY  
ON PROCUREMENT.**

26           At the October 29 hearing, the OPA asked for statutory authority for its office to issue an  
27 injunctive stay on procurement during an appeal. Counsel for JMI admitted that he “could offer  
28

1 nothing absolutely specific.” *In the Appeal of JMI-Edison*, OPA-PA-13-009, Status Hearing Audio  
2 (10.29.13) at 14:25. JMI can only cite to 5 GCA § 5703, the statute that sets forth the jurisdiction of the  
3 Public Auditor, as somehow also providing the Public Auditor with the authority to issue an injunctive  
4 stay. The GMHA does not agree. Moreover, if the “[t]he Public Auditor’s jurisdiction shall be utilized  
5 to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5,” the OPA  
6 certainly should not be forced to consider the merits of JMI’s appeal when it has yet to make a  
7 determination on the threshold issue of timeliness. 5 GCA § 5703

8 In conclusion, the GMHA can find no statutory authority for the OPA to issue an injunctive  
9 stay – particularly when threshold issues have yet to be determined – and even if it did, JMI’s motion  
10 for stay is premature.

11 Respectfully submitted this 30<sup>th</sup> day of October 2013.

12 FISHER & ASSOCIATES

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14 MINAKSHI V. HEMLANI, ESQ.  
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