

The reagent and supplies cost will be separate from the instrument itself.”

Nowhere in Amendment 3 were bidders instructed to include a price for reagent and supplies on their bids. A copy of the page entitled, “Guam Memorial Hospital Authority Bid Specifications” is attached as Exhibit B.

In the bid specifications sheet there is only one item listed on which a unit price (bid price) was to be completed. The item listed was “1. Automated Microbiology Analyzer”. There was no separate line entry for reagent and supplies. Similarly, with the “Bid Offer” page attached hereto as Exhibit C.

Amendment 3 plainly and clearly instructs bidders to not include the price of reagent and supplies in their bid price for the Automated Microbiology Analyzer. Amendment 3 did not say when the prices of the reagent and supplies were to be submitted.

The General Terms and Conditions Sealed Bid Solicitation & Award Section did state the provisions that were applicable to this bid. Among the provisions checked as being applicable were Section 7 “All or None” Bids, Section 10 “Bidders Prices” and Section 25 “Award, Cancellation and Rejection”.

The “Project Description” of the solicitation states that: “The hospital is looking to secure a source for one new automated microbiology analyzer to replace its current equipment”. Section 1 (1) of the Scope of Services under the heading “Supplies” does refer to the provision of “reagent and supplies for a minimum of 3,000 tests per year for use with the Microbiology Analyzer” but provides no description of the types of reagents and supplies or the types of tests to be performed.

Sealed bids were received from three bidders: JMI Medical Systems, Inc. (hereinafter referred to as “JMI”), JC Marketing and Medpharm. Medpharm’s bid for the Automated Microbiology Analyzer for option 1 was \$79,328.00. Its option 2 bid was \$69,528.00. Medpharm did not submit a bid on reagents and supplies. JMI’s bid for the Analyzer for Option 1 was \$145,000.00 and for Option 2 was \$189,950.00 which

included the cost of reagents and supplies. JC Marketing submitted a bid for \$90,200.00 on the analyzer only.

As the test card information (reagent and supplies) provided by JMI and Medpharm were not descriptive enough to determine whether the test card being offered were the test cards currently being used by GMHA; and, as the Automated Microbiology Analyzer being proposed by both bidders used a variety of test cards, GMHA requested price quotes from both bidders on the specific test cards to be used by GMHA. JMI's proposed price was \$259.20 per box of cards for all three specific cards. Medpharm's price was \$92.51 per box.

Based on the bid prices submitted, the bids from JMI and J.C. Marketing were rejected as being too high. As Medpharm's bid met the specification requirements, Medpharm was the successful bidder.

JMI then protested prior to award being made on August 31, 2007. The protest was denied. JMI then filed a Request to Reconsider on September 13, 2007. GMHA issued its decision letter on November 27, 2007 wherein GMHA decided to award the contract to Medpharm for the Automated Microbiology Analyzer and to reject all bids for reagent supplies. In this letter GMHA also determined pursuant to GMHA 9-101.05 that the award of the contract without delay was necessary to protect the substantial interests of the hospital. A copy of the November 27, 2007 letter is attached as Exhibit D. Three work days later, a contract was awarded to Medpharm for the Analyzer only.

On November 30, 2007 JMI informed GMHA by letter that it "will exercise its right to administrative and judicial review". On December 12, 2007, JMI filed its appeal with the Office of the Public Auditor. GMHA now submits this Answer to JMI's appeal.

II. THERE WERE NO ERRORS OF FACT OR GROUNDS FOR APPEAL.

GMHA respectfully submits that GMHA's award of the contract to Medpharm was not erroneous as a matter of fact or law. GMHA correctly determined that Medpharm was the lowest responsive bidder. And, there is sufficient legal and contractual authority for GMHA to reject the portion of the bid regarding "supplies".

III. LEGAL ARGUMENT

A. The “reagents and supplies” portion of all bids were nonresponsive.

Nowhere in the solicitation and its amendments were the specific types or descriptions of “reagents and supplies” set forth. Amendment 3 clearly does not describe them as it, in pertinent part, only directed that the prices for reagents and supplies not be included in the price of the Automated Microbiology Analyzer. Equally important is the fact that the Analyzers proposed by both Medpharm and JMI utilize a variety of test cards (supplies). The description of “supplies” in Section 1 (1) of the Scope of Services in the solicitation gives little information. The fact that neither the bid specification sheet nor the “Bid Offer” page had no separate line for “reagent and supplies” further contributed to the ambiguity. Thus, the solicitation’s specification with respect to the “reagents and supplies” was ambiguous.

Despite the ambiguity in the specifications, JMI nonetheless proposed a price on reagents and supplies. Unfortunately, the reagents and supplies proposed by JMI were different from what was needed by GMHA. GMHA was then faced with two bids. One bid (Medpharm’s) did not propose a price on “reagent and supplies” while the other bid (JMI’s) proposed a price on “reagents and supplies” that were not needed by GMHA.

As the two bids were both partially non-responsive, as the primary purpose of the solicitation was to procure an Automated Microbiology Analyzer (see “Project Description” in the solicitation), and as the federal funding to be used to purchase the Analyzer was about to expire GMHA did the most logical and prudent thing to do. GMHA rejected the “reagents and supplies” part of the bids. 2 GAR § 3115 (d)(2)(a) gives legal authority for the rejection of part of bids submitted. It states that “after opening but prior to award, all bids or proposals may be rejected in whole or in part when ... the head of a Purchasing Agency determines in writing that such action is in the territory’s best interest for reasons including, but not limited to, ... ii) ambiguous or otherwise inadequate specifications were part of the solicitation”. This provision is also found in 26 GAR § 16316 (d)(2)(a). The instant case precisely fits the intent, purpose

and function of 2 GAR § 3115 (d)(2)(a) and 26 GAR § 16316 (d)(2)(a). Thus, reliance on these statutory provisions is most appropriate.

B. It is in GMHA's Best Interest to Award a Contract to Medpharm

One does not remedy a mistake by committing a far worse mistake. JMI's goal in this protest is to be awarded a contract for the Automated Analyzer and its proposed "reagents and supplies". A comparison of JMI's description of the supplies it proposes to furnish (which is found in its bid) and GMHA's description of the supplies it seeks (which is in its August 10, 2007 letter and was submitted as Exhibit D by JMI) shows that the descriptions are starkly different. For GMHA to purchase supplies it does not need is a terrible waste of government funds.

Moreover, as federal funding is involved in this procurement, there will be accountability to the U.S. Government. The U.S. Government has little tolerance for fraud, waste and abuse. It has adequate staffing and funding to enforce its programs designed to investigate and prosecute waste such as would be the case here if GMHA were to award this entire procurement to JMI.

Next, it is in the best interests of GMHA to award a contract just for the analyzer. The federal funds to be used to purchase the analyzer were about to expire. Given the constant funding shortages and problems faced by GMHA this opportunity to purchase vital diagnostic equipment cannot be missed. It is in the best interests of not only GMHA but the entire community of Guam that the analyzer be purchased.

C. JMI's Proposal for "supplies" did not comply with what was requested.

JMI in this appeal contends that its proposal for supplies complied exactly with what was requested. This is absolutely untrue. A look at JMI's description of its proposed supplies is quite telling. JMI's supplies as stated in its bid were:

“Start up kits for Vitek 60 Systems:

Compose of 40 test/grm + and –

2 box – GNI (20 cards/box)

2 box – GNS (20 cards/box)

2 box – GPI (20 cards/box)

2 box – GPS (20 cards/box)

Supplies for the 3,000 test/annum:

150 kits for 1D-GNI/GPI

150 kits for sensitivity – GNS/GPS”.

In the solicitation under the heading “Supplies” are the following descriptions:

- “1. Provide reagent and supplies for a minimum of 3,000 tests per year for use with the Microbiology Analyzer.
2. Vendor must be able to meet the delivery schedules for supplies as specified by Laboratory Administrator upon award of contract.
3. Vendor must ensure that supplies delivered are those of the latest release from manufacturer with sufficient outdates for the needs of the laboratory.”

Nowhere are the “reagents and supplies” specifically described in the solicitation. In fact, the specifications are truly ambiguous, so how can JMI honestly contend that their proposal for supplies complies exactly with the specifications? GMHA has been quite forthright in stating that its specifications were indeed deficient.

GMHA reviewed the “supplies” proposed by JMI and determined that these “supplies” were not the test cards needed by GMHA. In its August 10, 2007 letter, GMHA set forth the specific descriptions as to the test cards (supplies) GMHA needed. Its descriptions are as follows:

- “1. Gram Positive Susceptibility Test Cards
AST-GP63 (22101)
AST-GP66 (22175)

2. Gram Negative Susceptibility Test Cards
AST-GN20 (22184)
AST-GN07 (22006)
3. Streptococcus Pneumoniae Susceptibility Test Cards
AST-GP65 (22149)

Even a cursory comparison between what JMI was proposing as “supplies” and what GMHA stated in its August 10, 2007 letter leads to the inevitable conclusion that GMHA’s needs are different from what JMI wants to provide to GMHA. GMHA has been acting in good faith in this procurement.

D. There is a Conflict between Two Provisions of the General Terms and Conditions of the Solicitation That Can Be Resolved.

Paragraph 7 of the General Terms and Conditions of the solicitation states as follows:

“7. ‘All or None’ Bids. By checking this item, the Government is requesting all of the bid items to be bid or none at all. The Government will not award on an itemized basis”

Paragraph 25 of the General Terms and Conditions of the solicitation states as follows:

“25. Award, Cancellation and Rejection: Award shall be made to the lowest responsible and responsive bidder, whose bid is determined to be the most advantageous to GMHA and the Government, taking into consideration the evaluation factors set forth in this solicitation. No other factors or criteria shall be used in the evaluation. The right is reserved as the interest of the Government may be required to waive any minor irregularity in bids received. The Hospital Administrator shall have the

authority to award, cancel or reject bids, in whole or in part for any one or more items if he determines it is in the public interest” (Emphasis added).

Under paragraph 25, GMHA can unquestionably reject bids in part. As there is an obvious conflict between paragraphs 7 and 25 such a conflict is nonetheless legally resolvable. There is a principle of contract law interpretation which states that: “Where a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other”. 17A Am. Jur. 2d Contract § 384 citing International Union of Operating Engineers v. J.A. Jones Construction Co., 240 S. W. 2d 39 (Ky. 1951).

The primary purpose of this solicitation is clearly to procure an Automated Microbiology Analyzer. (See “Project Description” in the solicitation). The paragraph of the General Terms and Conditions which effectuates this purpose far more than paragraph 7 is paragraph 25. Accordingly, paragraph 25 is entitled to greater deference and should be followed.

The procurement laws of Guam allow the application of the above-described contract interpretation principle. 5 GCA § 5002 states that the “principles of law and equity, including the Uniform Commercial Code, the law merchant ... shall supplement” the Guam Procurement Law. Thus, the rejection of the “reagent & supplies” part of all the bids submitted is legally permissible and should be allowed.

In conclusion, GMHA has not committed errors of law and/or facts in rendering its Decision on JMI’s protests and the award of the contract to Medpharm. There is a factual and legal basis for all of GMHA’s actions. GMHA therefore respectfully requests that its Notice of Decision be upheld.

Your kind attention and consideration in this matter are greatly appreciated.

Dated this 28th day of December, 2007.

The Law Offices of John S. Unpingco & Associates, LLC

By: 

John S. Unpingco, Esq.



Guam Memorial Hospital Authority Aturidåt Espetåt Mimuriåt Guåhan



850 GOV. CARLOS CAMACHO ROAD
OKA, TAMUNING, GUAM 96911
TEL: 647-2444 or 647-2330
FAX: (671) 649-0145

July 12, 2007

AMENDMENT #3 FOR GMHA Bid 024-2007

Automated Microbiology Analyzer

This amendment is being issued in regards to JC Marketings clarifications:

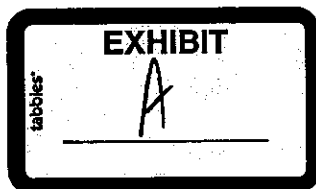
1. Prices for supplies (panels) are also to be provided at time of bid opening or it will be incorporated to the cost of the equipment with consideration of the estimated 3,000 tests per annum.

The reagent and supplies cost will be separate from the instrument itself.

2. Is the Microbiology Analyzer to be linked with the existing equipments to facilitate the laboratory's work flow or it will be stand alone. Should it be compatible and be linked, is cost of computer software to be provided at time of bid.

The one thing that is an absolute requirement in terms of interoperability is with the lab's information system. This part is stated on page 2 of the specs "Interoperability with LIS". Vendor will have to ensure that their product can link up to our LIS computer. The specs do say that they do cover the costs for the LIS interface with their equipment.

The current Lab's LIS vendor is CERNER which most major equipment vendors are able to link to the system.



3. Dimension specification limited to a specific brand or brands. Is GMHA limiting the acceptable brand of Microbiology Analyzer to be considered. Please note virtually every equipment manufacturer differ in dimensions.

As per specifications indicated on the bid



DANIEL C. MATANANE
Administrator Supply Management

Acknowledgment of Receipt: Return acknowledgment to fax number 649-3640

Company

Print Name

Signature Date

**GUAM MEMORIAL HOSPITAL AUTHORITY
 BID SPECIFICATIONS**

Description

		Quantity	Unit	Unit Price	Extension
1.	Automated Microbiology Analyzer	1	each	_____	_____

Specs:

* See bid specifications attached

Comments:

APPROVED EQUAL BIDDING ON:

MFG: _____

+ Reference Products or Equivalent:

MAKE: _____

Manufacturer

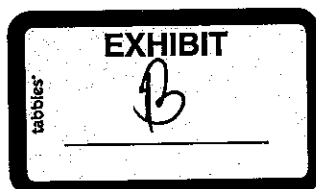
BRAND: _____

Model

PLACE OR ORIGIN: _____

DATE OF DELIVERY: _____

(GUAM) AFTER RECEIPT OF PURCHASE ORDER.



BID OFFER

TOTAL BID AMOUNT: \$ _____

BID BOND AMOUNT: \$ _____
(15% of Total Bid Amount)





Guam Memorial Hospital Authority Aturidåt Espetåt Mimuriåt Guåhan



850 GOV. CARLOS CAMACHO ROAD
OKA, TAMUNING, GUAM 96913
TEL: (671) 647-2444 or 647-2330
FAX: (671) 649-0145

November 27, 2007

Mr. Rey M. Vega
General Manager
JMI Medical Systems, Inc.
125 North Marine Drive
Tamuning, Guam 96913

RE: JMI Protest Letter dated August 31, 2007 and its Request to Reconsider dated September 13, 2007 on GMHA Bid No. 024-2007

Dear Mr. Vega,

The Guam Memorial Hospital Authority (GMHA) has carefully reconsidered its decision regarding your protest letter dated August 31, 2007. In your protest letter, you alleged that Medpharm's proposal did not comply with the solicitation as Medpharm was nonresponsive as it did not submit a price for reagent supplies in its bid. Whereas, your company did.

The solicitation's project description indicated that GMHA was seeking to procure an Automated Microbiology Analyzer. Indeed, both Medpharm and JMI correctly submitted bids or prices for the analyzer. The problem was with the bids or prices for the reagent and supplies. Amendment No. 3 sought to address this issue, but, Amendment No. 3 was ambiguous in that it did not state what reagents and supplies were to be obtained. This was critical as the respective analyzers proposed by Medpharm and JMI could utilize a number of different test cards. Thus, GMHA had a situation where Medpharm did not propose a bid or price on the reagents and supplies, but, JMI proposed a bid on prices on reagents and supplies different from what was needed by GMHA. Neither of these fulfills GMHA's needs.

Yet, GMHA's need for the analyzer itself is critical and its ability to procure one in the future is very dubious due to funding constraints. Therefore, pursuant to GMHA 9-101.05, I have determined that the award of the contract without delay is necessary to protect the substantial interests of the hospital. Furthermore, under paragraph 25 of the solicitation's General Terms and Conditions, I have decided that it is in the best interest of GMHA and the public to cancel the portion of the solicitation concerning the reagent and supplies and to reaffirm the Hospital's previous award to Medpharm for the microbiology analyzer.



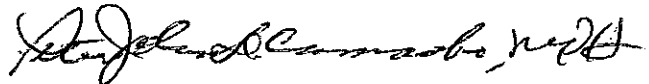
2 GAR § 3115 (d)(2)(a) also gives legal authority for the rejection of part of the bids submitted. It states that "after opening but prior to award, all bids or proposals may be rejected in whole or in part when ... the head of a Purchasing Agency determines in writing that such action is in the territory's best interest for reasons including, but not limited to, ... ii) ambiguous or otherwise inadequate specifications were part of the solicitation". See 26 GAR § 16316(d)(2)(a).

While the solicitation contains an "all or none" provision in paragraph 7 of the General Terms and Conditions, this is not dispositive in this case. Paragraph 25 of the General Terms and Conditions which allows partial acceptance or rejection comes after that paragraph. "Where a repugnancy is found between clauses, the one which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other." 17A Am. Jur.2d Contracts § 384 citing International Union of Operating Engineers v. J.A. Jones Const. Co., 240 S.W.2d 39 (Ky. 1951). As the primary purpose of the solicitation was to procure the analyzer and as paragraph 25 essentially carries out this purpose, paragraph 25 is therefore entitled to greater deference. 5 GCA § 5002 states that "the principles of law and equity, including the Uniform Commercial Code, the law merchant ... shall supplement" the Guam Procurement Law.

In sum, the award of a contract for the procurement of an automated microbiology analyzer is made to Medpharm. The bids for reagent supplies are all rejected.

Please note that you have the right to administrative and judicial review of this decision pursuant to Chapter 9 – 103.07.

Sincerely,



Peter John D. Camacho, M.P.H.
Hospital Administrator / CEO

ORIGINAL