

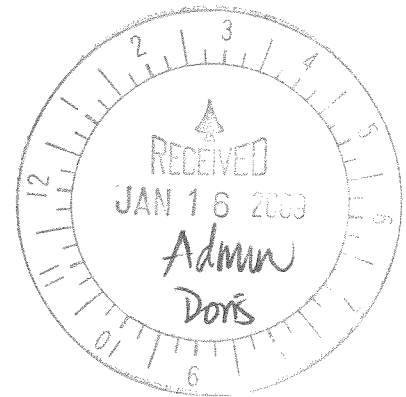
OFFICE OF THE PUBLIC AUDITOR

January 16, 2009

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X Appellee - Guam Memorial Hospital Authority  
Mr. Peter John Camacho  
Administrator  
Guam Memorial Hospital Authority  
850 Governor Carlos Camacho Rd.  
Tamuning, Guam 96913



Transmitted herewith is a copy of the Decision and Findings and Recommendations on OPA-PA-07-011 in the appeal of JMI Medical Systems, Inc. regarding the Guam Memorial Hospital Authority Bid No. 024-2007 solicitation for a Microbiology Analyzer.

A complete copy of the Decision and Findings and Recommendations will be posted on our website within the next few days and be available for public view at [www.guamopa.org](http://www.guamopa.org).

Senseramente,

Doris Flores Brooks, CPA, CGFM  
Public Auditor



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UNPINGCO & ASSOCIATES, LLC

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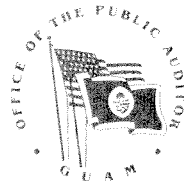
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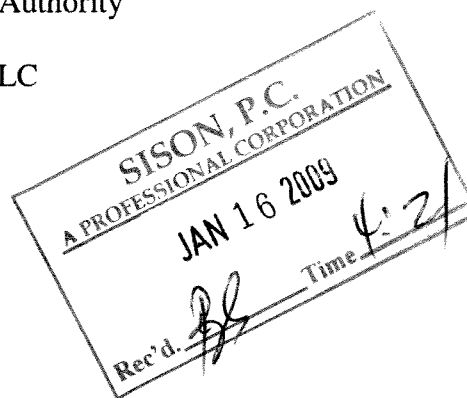
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**PROCUREMENT APPEALS**

IN THE APPEAL OF,

JMI MEDICAL SYSTEMS INC.

Appellant.

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**Appeal No: OPA-PA-07-011**

**DECISION**

**I. INTRODUCTION**

This is a Decision by the Public Auditor on a procurement appeal filed on December 12, 2007, by JMI Medical Systems, Inc., (hereafter "JMI") regarding the Guam Memorial Hospital Authority's (hereafter "GMHA") solicitation for a Microbiology Analyzer. Pre-Hearings were held on five separate dates<sup>1</sup> as issues relating to discovery required resolution before the formal Hearing could be scheduled. Present and making arguments on behalf of their clients at the Pre-Hearings were John S. Unpingco, Esq., of the Law Offices of John S. Unpingco & Associates LLC, representing GMHA, and Benjamin C. Sison, Esq., of Sison, P.C., representing JMI.

A Hearing on this procurement appeal was held on October 30, 2008. At Hearing JMI was represented by Mr. George Neil P. Valdes, Esq. of Sison, P.C. and GMHA was represented by Georgette Bello Concepcion, Esq., of the Law Offices of John S. Unpingco & Associates

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<sup>1</sup> Prehearings were held on February 6, March 27, May 15, June 20, and September 4, 2008, to attempt settlement and agree on witness lists, exhibits, subpoenas and deposition dates.

1 LLC. Presiding at the Hearing was Public Auditor Doris Flores Brooks and appointed Hearing  
2 Officer Robert G. P. Cruz, Esq. Witnesses subpoenaed to testify at request of the parties were  
3 Glenda Pangelinan, GMHA Laboratory Assistant Administrator, William Kando, GMHA Chief  
4 Planner, John Benavente, GMHA Medical Electronic Superintendent and Jean Grape Ko, Sales  
5 Manager for JMI.  
6

7 A Motion for Summary Judgment was filed by the Appellant on October 17, 2008, and  
8 opposed by GMHA on October 24, 2008. This Motion was denied in a written decision on  
9 October 30, 2008, on the basis that genuine issues of material fact were in dispute.  
10

11 In this matter, the Public Auditor finds that based on the record before her, GMHA's  
12 selection of Medpharm was proper as they were responsive to the bid, but also finds that the  
13 procurement of two Microbiology Analyzers, while under appeal, was improper. The Public  
14 Auditor affirms the procurement of one Microbiology Analyzer in the best interest of the  
15 territory, but overturns the procurement from Medpharm of a second, unannounced and non-  
16 competitively procured, analyzer.  
17

## 18 19 **II. FINDINGS OF FACT**

20 In reaching this Decision, the Public Auditor has considered and incorporates by  
21 reference herein the findings of the Hearing Officer, Robert G.P. Cruz, Esq.  
22

- 23 1. Bid Invitation No. GMHA Bid 024-2007(IFB) was issued on June 22, 2007.
  - 24 2. Three bids were timely received in response to the IFB by July 12, 2008 by:
    - 25 a. Medpharm Corporation (Medpharm)
    - 26 b. JC Marketing, Inc. (JCM)
    - 27 c. JMI
- 28

1 3. At opening, GMHA recorded the following price bids:

2 a. Medpharm

3 1. \$79,238 for Option 1, "Vitek 2 Compact 60 analyzer with Observa  
4 system software" to include installation, training, kit startup and  
5 other accessories

6 2. \$69,528 for Option 2, "Vitek 2 Compact 60 analyzer without  
7 Observa system software" to include installation, training, kit  
8 startup and other accessories

9  
10 b. JCM

11 1. \$128,450 for a "Becton-Dickinson Phoenix 448100" analyzer  
12 (\$90,200) to include installation, training and test panels (\$38,250)

13 c. JMI

14 1. \$145,900 for Option 1, "Vitek 60 System" analyzer (\$64,665) to  
15 include 300 test kits/panels (\$67,635), and technical support,  
16 training, and installation (\$13,600)

17 2. \$189,950 for Option 2, "Vitek 2 Compact 60 Configuration"  
18 analyzer (\$98,590) to include 300 test kits/panels (\$77,760) and  
19 technical support, training, and installation (\$13,600)

20 4. GMHA found JCM non-responsive as the required non-collusion affidavit was  
21 not submitted<sup>2</sup> as part of the bid package. Both Medpharm and JMI were deemed responsive.

22 5. On August 10, 2007, GMHA sent letters to Medpharm and JMI requesting  
23 additional cost information for three specific types of reagents cards.

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<sup>2</sup> JMI Notice of Appeal pg. 2

1 6. JMI and Medpharm both submitted the requested cost information to GHMA as  
2 follows:

3 **a. Gram Positive Susceptibility Test Cards**

4 **AST-GP63 (22101)**

5 Medpharm: \$92.51  
6 JMI: \$259.20 / Bx.

7 **AST-GP66 (22175)**

8 Medpharm: \$92.51  
9 JMI: \$259.20 / Bx.

10 **b. Gram Negative Susceptibility Test Cards**

11 **AST-GN20 (22184)**

12 Medpharm: \$92.51  
13 JMI: \$259.20 / Bx.

14 **AST-GN07 (22006)**

15 Medpharm: \$92.51  
16 JMI: \$259.20 / Bx.

17 **c. Streptococcus Pneumoniae Susceptibility Test Cards**

18 **AST-GP65 (22149)**

19 Medpharm: \$92.51  
20 JMI: \$259.20 / Bx.

21 7. In an August 14, 2007, recommendation letter from the Lab Assistant  
22 Administrator to the GMHA Hospital Administrator it was indicated that “the competitive  
23 pricing offered by Medpharm makes it possible for [GMHA] to purchase two instruments.”  
24  
25 (August 14, 2007 letter from Glenda Pangelinan to Peter John D. Camacho)  
26  
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1           8. On August 17, 2007, a decision was made by GMHA to award Medpharm a  
2 contract for the purchase of **two** “Vitek 2 Compact 60’s with Observa software” Microbiology  
3 Analyzers, as they were the lowest priced bidder.

4  
5           9. On August 31, 2007, JMI issued a protest letter to GMHA regarding the award to  
6 Medpharm. The basis of the protest was that Medpharm’s bid was non-responsive. Specifically,  
7 that MedPharm did not include the cost of reagents and test supplies in its initial bid submission  
8 in contravention of GMHA 024-2007 IFB requirements under the “all or none” provision  
9 expressly provided for in the IFB.

10  
11           10. On September 11, 2007, GMHA responded to JMI’s protest and concluded that  
12 the “protest was without merit and should not be sustained.” JMI submitted a September 13,  
13 2007, letter in response offering additional information for reconsideration on GMHA’s  
14 September 11 decision.

15  
16           11. In response to JMI’s September 13, 2007, letter for reconsideration and their  
17 initial August 31, 2007, letter of protest GMHA issued a November 27, 2007, decision on the  
18 protest reaffirming the Hospital’s award to Medpharm for the procurement of an automated  
19 Microbiology Analyzer. The November 27 decision also indicated that “the [price] bids for [the]  
20 reagent supplies [were] all rejected.” Only the award of the equipment was to be made.

21  
22           12. On November 28, 2007, GMHA issued Purchase Order No. 28000864 to  
23 Medpharm for one (1) Vitek 2 Analyzer, charging a FY-05 NBHPP-HRSA<sup>3</sup> grant. The purchase  
24 covered installation, validation and training of two technicians and one biomedical personnel.

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<sup>3</sup> National Bioterrorism Hospital Preparedness Program – Health Resources and Services Administration



1 13. On the same day GMHA also issued Purchase Order No. 28000865 to Medpharm  
2 for one (1) Vitek 2 Analyzer, as an “additional order” to PO 28000864, also charging the FY-05  
3 NBHPP-HRSA grant.

4  
5 14. On December 12, 2007, JMI filed this appeal with OPA fifteen days following  
6 GMHA’s November 27, 2007, decision on the protest.

### 7 8 III. ANALYSIS

9 This case involves GMHA’s solicitation for bids for a Microbiology Analyzer to replace  
10 GMHA’s current equipment.

#### 11 A. Responsiveness of Bids

12  
13 At issue is whether Medpharm’s bid was or was not responsive to the GMHA IFB and  
14 whether GMHA should have rejected MedPharm’s bid and selected JMI’s offer instead. JMI’s  
15 position is that Medpharm itself was non-responsive and should have been eliminated from  
16 competition.  
17

18 A responsive bidder is defined in Guam statutes at 5 G.C.A. Section 5201(g) as, “a  
19 person who has submitted a bid which conforms in all material respects to the Invitation for  
20 Bids”. JMI submitted a bid for the required equipment and reagents and test supplies, claiming  
21 that the IFB required both as part of its “all or none” participation. In GMHA’s September 11,  
22 2007, letter to JMI in response to the protest GMHA explained that the “intent of the solicitation  
23 was only to procure an Automated Microbiology Analyzer to replace its current equipment.”  
24 GMHA Laboratory Assistant Administrator, Glenda Pangelinan, further testified during the  
25 Hearing, that the reference within the scope of services to “provide reagents and supplies for a  
26 minimum of 3,000 tests per year for use with Microbiology Analyzer” was only to ensure that  
27  
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1 the successful bidder was able to provide reagent supplies for the analyzer being offered. This  
2 testimony reaffirmed Ms. Pangelinan's statements made in a September 6, 2007, Memorandum  
3 to the GMHA Supply Management Administrator in response to the filed protest, where she  
4 wrote that no cost request or requirement was made in the initial IFB on the reagents and  
5 supplies themselves. Based on the testimony received from Hearing and the record presented  
6 before her, the Public Auditor has determined that Medpharm was responsive to the IFB since  
7 the initial bid had no requirement to provide a cost or price bid for reagents and supplies.  
8 Medpharm firmly responded with the lowest priced analyzer at \$79,238 for a "Vitek 2 Compact  
9 60 analyzer with Observa system software" with installation and training included. Medpharm's  
10 submitted proposal fulfilled the scope of services requested by the IFB regarding the equipment,  
11 installation/ validation, technical support, and training of the IFB.  
12

13  
14 Only in their August 10, 2007, letter request to JMI and Medpharm did GMHA request  
15 price quotations for specific reagent cards from Medpharm and JMI. GMHA stated that the  
16 request was necessary as it did not state what reagents and supplies were to be obtained in the  
17 initial IFB. This information was requested after bid opening but prior to completing the  
18 selection evaluation. The Public Auditor has determined that it had no effect on the initial award  
19 to Medpharm for the purchase of the Vitek 2 Compact 60 Analyzer as Medpharm was also the  
20 lower priced bidder on the reagents and supplies in comparison to JMI.  
21  
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### 23 **B. Halting of Procurement During Pendency of Appeal with OPA**

24  
25 Normally, a timely appeal would result in the government agency halting further action  
26 on the procurement pending a determination by the Public Auditor or Superior Court that the  
27 procurement was in order. 5 G.C.A. Chapter 5 Section 5425 (g) states:  
28

1 In the event of a timely protest under Subsection (a) of this Section or under Subsection  
2 (a) of Section 5480 of this Chapter, the Territory shall not proceed further with the solicitation or  
3 with the award of the contract prior to final resolution of such protest, and any such further  
4 action is void, unless:  
5

- 6 (1) The Chief Procurement Officer or the Director of Public Works after consultation  
7 with and written concurrence of the head of the using or purchasing agency and  
8 the Attorney General or designated Deputy Attorney General, makes a written  
9 determination that the award of the contract without delay is necessary to protect  
10 substantial interests of the Territory; and  
11
- 12 (2) Absent a declaration of emergency by the Governor, the protestant has been given  
13 at least two (2) days notice (exclusive of territorial holidays); and  
14
- 15 (3) If the protest is pending before the Public Auditor or the Court, the Public Auditor  
16 or Court has confirmed such determination, or if no such protest is pending, no  
17 protest to the Public Auditor of such determination is filed prior to expiration of  
18 the two (2) day period specified in Item (2) of Subsection (g) of this Section.  
19  
20

21 However, during the hearing OPA learned that, after the procurement appeal began,  
22 GMHA continued with the award and purchase of the Microbiology Analyzer that was the object  
23 of the protest, and also bought a second one, under the same procurement.<sup>4</sup> While under appeal,  
24 making any purchase without the written determination of the Attorney General or designated  
25 Deputy Attorney General is a clear violation of procurement law and procedure under Chapter 5  
26 Section 5425(g). Despite a violation, the Public Auditor may affirm a procurement, if it is in the  
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<sup>4</sup> Testimony and letter of Glenda Pangelinan.

1 best interests of the Territory. In this case, we find that, despite the violation, the Public Auditor  
2 will affirm the procurement of **one** analyzer, as in the best interests of the Territory.

3 **C. Objection to Discussion of Quantity Purchased by GMHA Counsel**  
4

5 At the formal hearing, GMHA's counsel objected to Appellant's attorney raising the  
6 issue that GMHA purchased a second analyzer, which was not revealed in the initial  
7 procurement protest submitted by JMI. OPA has the authority to determine procurements de  
8 novo based upon testimony presented during the appeal process. 5 G.C.A. Section 5703. If  
9 GMHA concealed the purchase of a second analyzer using the same procurement, the Public  
10 Auditor may, sua sponte, review the matter.  
11

12 With regard to the appropriate remedy, the Public Auditor is guided by 5 G.C.A. Section  
13 5703 stating that the Public Auditor's jurisdiction shall be utilized to promote the integrity of the  
14 procurement process and the purposes of Chapter 5. The Model Procurement Act requires the  
15 appropriate Policy Office to promulgate rules relating to variations in quantity, among other  
16 topics. The Guam Procurement Code is silent with regard to variations in quantity. However, the  
17 Procurement Regulations, at 2 GAR DIV. 4, do address the issue of quantity in the issuance of  
18 Definite and Indefinite Quantity Contracts. They are mirrored in GMHA's Procurement  
19 Regulations in sections 6-101.05.1 and 6-101.05.2. Thus we are posed with the question as to  
20 whether a doubling of the purchase from one to two items was reasonable and necessary.  
21 Normally when quantity is uncertain, the IFB will indicate this fact, or request bids on a base  
22 quantity and have an option for additional quantities. Formation of Government Contracts,  
23 Cibinic and Nash, The George Washington University , 3<sup>rd</sup> Edition. In this instance, the  
24 procurement was for a definite quantity of **one** Microbiology Analyzer.  
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1 It is patently unfair to potential suppliers for a change in the quantity of equipment  
2 procured when the quantity advertised and the quantity actually purchased increases by 100 per  
3 cent from the time of advertising to moment of the actual purchase. Although the instant  
4 procurement is for a definite quantity, which permits a 10 per cent (10%) increase, a doubling of  
5 the purchase remains a violation of the principle regarding definite versus indefinite quantity  
6 procurements.  
7

#### 8 9 **D. Procurement Using the Invitation for Bids was Flawed**

10 The procurement solicitation form issued by GMHA was also flawed as GMHA  
11 incorrectly allowed the bids to be evaluated like proposals under a Request for Proposal (RFP)  
12 solicitation, which can be distinguished from an IFB. In Fleet Services, Inc. vs. Department of  
13 Administration, Government of Guam, 2006 Guam 6, the Supreme Court of Guam distinguished  
14 between competitive sealed bids and the limited exceptions allowed for deviation from  
15 determining winning bidders due to price. In Fleet Services, at pertinent part, the Guam Supreme  
16 Court stated:  
17

18 We hold that the Request for Proposal DOA RFP-03-001 to procure the operation,  
19 management and maintenance of the Guam Mass Transit system, violated the  
20 Guam Procurement Code. Title 5 G.C.A. Section 5210 mandates that government  
21 contracts in the Executive Branch be awarded using the competitive sealed  
22 bidding process, subject to limited statutory exceptions. The procurement in this  
23 case did not fall within any of the exceptions; specifically, it was not a  
24 procurement for professional services as contemplated by 5 G.C.A. Section 5121.  
25 Here, as in Fleet Services, there was no procurement of professional services involved. Thus, the  
26 focus should have been on awarding the bid to the lowest bidder responding to the IFB. Price  
27  
28

1 negotiations are conducted for an RFP rather than an IFB where the lowest priced bidder  
2 receives the award so long as specifications are met.

3 No. 25 of the "Sealed Bid Instructions" titled "Award, Cancellation, and Rejection"  
4 indicate that the "award shall be made to the lowest responsible and responsive bidder, whose  
5 bid is determined to be the most advantageous to GMHA and the Government, taking into  
6 consideration the evaluation factors set forth in this solicitation. However, under the IFB's "Bid  
7 Specifications Section VII Proposal Evaluation and Award of Contract" it states in conflict that:  
8

9 The selection committee will evaluate all proposals and select the top three  
10 companies. The top three company proposals will be forwarded to the Hospital  
11 administrator for final selection of the **most qualified company. (emphasis**  
12 **added)**. Interviews with the company may be conducted during the evaluation  
13 period. GMHA will negotiate a contract with the selected company for the  
14 required services if compensation, contract requirements and contract documents  
15 can be agreed upon with the selected company.  
16  
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18 Under this Specifications Section VII of the IFB it appears that when an evaluation takes place,  
19 the highest ranked and most qualified bidder will be awarded the bid, so long as they meet all the  
20 qualifications, but not necessary the lowest bidder. This procedure is not appropriate for an IFB  
21 and should not be used. Local procurement law is clear that negotiations are conducted for RFP's  
22 not IFB's, where the procurement of professional services are involved. In an IFB the lowest  
23 priced responsible bidder receives the award so long as specifications are met. In this instance,  
24 GMHA was correct to issue the contract to the lowest priced and responsible bidder, but any  
25 negotiations that took place would have been improper.  
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1 **E. Appropriate Remedies**

2 The Procurement Law and GMHA Procurement Regulations Section 9-203.1 relate to Remedies  
3 After an Award. It states: if after an award it is determined that a solicitation or award of a  
4 contract is in violation of law, then:  
5

6 1. If the person awarded the contract has not acted fraudulently or in bad faith:

7 (a) the contract may be ratified and affirmed, provided it is determined that doing  
8 so is in the best interests of the Hospital; or

9 (b) the contract may be terminated and the person awarded the contract shall be  
10 compensated for the actual expenses reasonably incurred under the contract, plus  
11 a reasonable profit, prior to the termination;  
12

13 2. If the person awarded the contract has acted fraudulently or in bad faith:

14 (a) the contract may be declared null and void; or

15 (b) the contract may be ratified and affirmed if such action is in the best interests  
16 of the Hospital, without prejudice to the Hospital's rights to such damages as may  
17 be appropriate.  
18

19 There is no evidence in the instant case of bad faith or fraud by Medpharm. Thus, the  
20 following GMHA rules would control: 9-203.01.1 No Fraud or Bad Faith by Contractor and 9-  
21 203.01.2 General, which states:  
22

23 Upon finding after award that a Hospital employee has made an unauthorized  
24 award of a contract or that a solicitation or contract award is otherwise in  
25 violation of law where there is no finding of fraud or bad faith, the Hospital  
26 Administrative may ratify or affirm the contract or terminate it in accordance with  
27 this Section after consultation with the Attorney General.  
28

1 In this procurement no evidence was presented that GMHA consulted with the Attorney  
2 General to seek ratification of the contract as in the best interests of the Territory. No evidence  
3 was provided that the U.S. Department of Health and Human Services (HHS) approved the  
4 doubling of the order for a second analyzer, although Mr. Kando of GMHA testified that it was a  
5 common practice for GMHA to receive approval from HHS for variances in quantity in the  
6 procurement process.  
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8 Although no evidence was presented at the hearing that showed that GMHA sought  
9 confirmation of the procurement we conclude that the Hospital Administrator did approve it.  
10

#### 11 IV. CONCLUSION

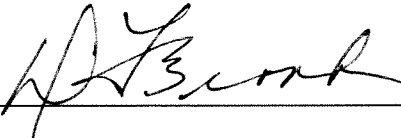
12  
13 Given the above, the Public Auditor hereby determines that although Medpharm and JMI  
14 were responsive to GMHA's IFB, JMI was not the lowest bidder. JMI's bid was higher for both  
15 the equipment and the supplies and reagents. Therefore, GMHA was not in error in rejecting  
16 JMI's bid and awarding the contract for one analyzer to Medpharm. However, GMHA did not  
17 stay the procurement after an appeal was timely filed, in violation of 5 G.C.A. 5425(g). It also  
18 purchased **not one, but two**, Microbiology Analyzers from Medpharm after publicizing to all  
19 prospective bidders that only one analyzer would be purchased. However, given the fact that  
20 federal funds were used to purchase the equipment and may have been lost, we affirm GMHA's  
21 action on the purchase of **one** Vitek 2 Analyzer. As the second analyzer was procured without  
22 announcement or full competition, we overturn the awarding of the second Vitek 2 Microbiology  
23 Analyzer (which remains at Medpharm in storage according to testimony of Glenda Pangelinan).  
24 The purchase of the second analyzer should be procured using the Competitive Sealed Bidding  
25  
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1 procedures required by 5 G.C.A. Section 5211. As we do not find that JMI should have been  
2 awarded the contract, JMI's request for lost profits and costs of appeal are denied.

3 This is a final administrative Decision. Parties are hereby informed of their right to  
4 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
5 Part D of Article 9 of 5 G.C.A. A copy of this Decision shall be provided to the parties and their  
6 respective attorneys in accordance with 5 G.C.A. Section 5702 and shall be made available for  
7 review on the OPA website [www.guamopa.org](http://www.guamopa.org).  
8

9  
10 Dated this 16th day of January 2009.  
11

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14 **DORIS FLORES BROOKS, CPA, CGFM**  
15 **PUBLIC AUDITOR**  
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