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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO. OPA-PA: 11-001

Attorneys for: Interested Party MedPharm

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEAL**

IN THE APPEAL OF)	DOCKET NO. OPA-PA-11-001
)	
JMI – EDISON,)	
)	INTERESTED PARTY MEDPHARM'S
Appellant.)	REMEDIES BRIEF
_____)	

Pursuant to the Order After Pre-Hearing Conference in which the Hearing Officer allowed the parties to file a Brief Re: Remedies, Interested Party MedPharm (hereafter referred to as "MedPharm") files this Brief.

Neither MedPharm or General Services Agency (hereafter referred to as "GSA") violated the procurement laws of Guam. GSA properly awarded the contract for the radiology imaging system to MedPharm based on MedPharm submitting a complete bid package and bidding a significantly lower price for the system. The OPA should deny JMI – Edison's appeal and award any costs allowed by law to MedPharm that it has incurred in fighting the appeal of the denied protest before the OPA.

If the OPA were to find a violation of the procurement laws of Guam occurred, 5 GCA §5452 provides for the remedies after an award has been made. In the case at bar, a Purchase Order was issued which is synonymous with an award of the contract. Section 5452 provides that if the party awarded the contract "has not acted fraudulently or in bad faith", there are two (2) possible remedies. The first is that the contract be ratified and affirmed based on a finding that it is in the best interest of Guam to do so.

The second is to terminate the contract. If the contract is terminated and the party awarded the contract did not act fraudulently or in bad faith, the party is awarded reasonable compensation for their actual expenses incurred while the contract was in effect, including a reasonable profit.

There is no question the remedies in this situation are those that come after an award of the contract was made based on the delivery to MedPharm of the Purchase Order, MedPharm has acted upon. If the Office of the Public Auditor finds there was a violation of the procurement law, it must determine whether the contract with MedPharm should be ratified as being in the best interest of Guam or should the contract be terminated and MedPharm awarded its actual expenses and a reasonable profit for the period the contract was in effect.

JMI – Edison's bid for the radiology imaging system was \$400,000.00. MedPharm's bid for the same system was \$323,747.00. That is a difference of \$136,253.00 between the winning bid and the next bid. This is clearly a significant saving for the Government of Guam and MedPharm contends the OPA should find that this savings alone is in the best interest of Guam. There is no question the Government of Guam requires this equipment to provide healthcare for the citizens of Guam. Furthermore, there would seem to be no question that if the equipment can be purchased at a less expensive price, the savings can be used to purchase other equipment or supplies to provide for the healthcare for the citizens of Guam. There is nothing in the records that states the equipment being sold to the Government by MedPharm is substandard in any way. In fact, it is noted in the record that the same equipment MedPharm is selling to the Government of Guam is utilized throughout the U.S. mainland. Therefore, MedPharm asks the OPA to find that the significantly better

price for comparable equipment is clearly in the best interest of Guam and the purchase order should be ratified and affirmed.

As previously noted herein, the alternative is for the Government of Guam to pay MedPharm for its actual expenses reasonably incurred while the contract was in effect and a reasonable profit. This would be a very bad choice for the Government of Guam. If the OPA made a ruling that this remedy should be applied, the Government of Guam would have to pay MedPharm for all expenses incurred in ordering and shipping the equipment and a reasonable profit for the sale of the equipment. This would seem to result in a double loss for the Government of Guam if this remedy was chosen since not only would MedPharm be paid, but the higher bidder would be paid. The taxpayers would be punished for a meritless procurement appeal. MedPharm urges the OPA to find that there was no violation of the law and that MedPharm's bid was appropriate and MedPharm properly won the contract because of the better price for the requested equipment in the Invitation For Bid.

Unfortunately, the procurement law appears to be silent on what remedy is appropriate if JMI – Edison's appeal of the protest is not sustained by the OPA. If MedPharm is missing something as to remedies available to the successful bidder if the

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protest appeal is not upheld by the OPA, MedPharm requests any appropriate remedies it and/or the Government agency may be entitled to for JMI's appeal failing to establish there was any violation of the procurement law by the Government or MedPharm.

Respectfully submitted this 8th day of March, 2011.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Interested Party
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By



JEFFREY A. COOK, ESQ.