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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
BY: Anissa A.
DATE: 10-7-13
TIME: 3:52 AM PM

7
8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF :

11 JMI,

12 Appellant.

CASE NO: OPA-PA 13-009

**BRIEF PURSUANT TO OPA'S
SEPTEMBER 27, 2013 ORDER**

13 **COMES NOW** the Guam Memorial Hospital Authority ("GMHA"), by and through counsel of
14 record Fisher & Associates, and submits its brief pursuant to the Office of Public Accountability's
15 ("OPA") Order dated September 27, 2013, which ordered the parties to brief the below issues.

16
17 **I. WAS JMI'S PROTEST TIMELY?**

18 As analyzed in its Hearing Brief dated September 18, 2013, it is the GMHA's position that
19 JMI's protest was not timely because under Guam law, protests shall be submitted within 14 days after
20 a party "knows or should know of the facts giving rise thereto." 5 GCA§ 5425(a); *see also* 26 GAR §§
21 16901(c)(1); *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15. In this case, JMI knew or
22 should have known of the facts giving rise to its protest at bid opening on October 19, 2012. However,
23 the OPA has requested analysis regarding the timeliness of JMI's protest from the date JMI received
24 notice of Bid Status from the GMHA.

25 MedPharm received Notice of Intent of Possible Award from the GMHA via facsimile on June
26 6, 2013. *See Agency Procurement Record at Tab H and Exhibit A attached herein.* That same date,
27 notice of Bid Status was sent to JMI via facsimile. *See Agency Procurement Record at Tab H and*
28

1 *Exhibit B attached herein.* Despite the Confirmation Report and “Send Successful” message
2 documented, JMI did not return an acknowledgment via return fax on June 6, 2013. Therefore, a repeat
3 facsimile was sent on June 7, 2013 for which Confirmation Report and “Send Successful” message was
4 again documented. However, JMI did not return an acknowledgment via return fax for the June 7, 2013
5 notice either. *See Agency Procurement Record at Tab H and Exhibit C attached herein.*

6 On June 6, 2013, JMI did return an acknowledgment via return fax to GMHA’s Deposit Return
7 notice. *See Agency Procurement Record at Tab H and Exhibit D attached herein.* A deposit of bid
8 bond is returned to a prospective bidder when its bid has been rejected. Thus, the record supports a
9 finding that JMI had notice of GMHA’s intent to award the procurement to another bidder on June 6,
10 2013. Counting from the date of said notice, JMI had 14 days to file its protest – by June 20, 2013. In
11 this case, JMI did not file its protest until June 21, 2013 and was therefore untimely. *See Agency*
12 *Procurement Record at Tab I(a).*

13
14 **A. Did GMHA’s characterization of the Notice of Intent as “possible” rather than “actual”**
15 **award to MedPharm affect the triggering of a protest deadline?**

16 The characterization of the award to MedPharm as “possible” did not affect the triggering of
17 a protest deadline. JMI did not receive a copy of the Notice of Intent that was sent to MedPharm.
18 On June 6, 2013, JMI received notice that its bid was rejected. The notice of Bid Status to JMI
19 clearly states on its second page: “GMHA Procurement Rules and Regulations provides that the
20 contract will be awarded to the lowest responsible and responsive bidder namely MedPharm.” It
21 further states that “...bidders not selected...will maintain their prospective status with GMHA until
22 the contract with the “lowest bidder” is finalized. *See Agency Procurement Record at Tab H and*
23 *Exhibit E attached herein.* It is for this reason that that Notice of Intent is characterized as
24 “possible” rather than “actual.”

25
26 The right to protest lies with “[a]ny actual or prospective bidder, offeror, or contractor who
27 *may be aggrieved* in connection with the method of source selection, solicitation or award of a
28

1 contract.” 5 GCA § 5425(a) (Emphasis added.) GMHA’s characterization of the award as “possible”
2 did not affect the triggering of a protest deadline. JMI clearly had notice that it may be aggrieved.
3

4 **B. Does the Public Auditor have jurisdiction to allow untimely protest filings?**

5 Title 5 GCA § 5703 provides that “[t]he Public Auditor’s jurisdiction shall be utilized to
6 promote the integrity of the procurement process and the purposes of the 5 GCA Chapter 5.”
7 Pursuant to 26 GAR §§ 16901(c)(1), protests filed after the fourteen (14) day period after the protestor
8 knows of should have known of the facts giving rise to the protest shall not be considered. Thus, under
9 Guam law, untimely protests shall not be considered and the Public Auditor does not have the authority
10 or jurisdiction to act contrary to Guam law.
11

12 **II. DID JMI’S PROTEST TRIGGER AN AUTOMATIC STAY?**

13 Pursuant to 5 GCA § 5425(g), “[i]n the event of a timely protest...the Territory shall not
14 proceed further with the solicitation or with the award of the contract prior to final resolution of such
15 protest...” *See also Guam Imaging Consultants, Inc. v. GMHA* ¶ 24. JMI’s protest was not timely.
16 Assuming arguendo that it was timely, an automatic stay was triggered when JMI filed its protest on
17 June 21, 2013. However, the GMHA did not proceed with award of the contract until after JMI’s
18 protest was rejected on July 17, 2013. Although the purchase order with MedPharm is dated June 4,
19 2013 (because it was prepared a day after the Notice of Intent of Possible Award is dated), it was not
20 executed until July 17, 2013 when the bid was awarded. *See Agency Report at Tab V and Exhibit F*
21 *attached herein.*
22

23 *In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007, Guam Publications, Inc., publisher
24 of the Pacific Daily News (“PDN”), appealed a decision rendered by the General Services Agency
25 (“GSA”) denying PDN’s protest of award. GSA completed its award by purchase order on May 9,
26 2008, and PDN filed its appeal to the OPA on May 14, 2008. The Hearing Officer found that automatic
27 stay provisions were not triggered as a result of the appeal to the OPA because GSA completed its
28

1 award between its denial of PDN's April 7, 2008 protest and PDN's appeal to the OPA. OPA-PA-08-
2 007, *Findings and Recommendations of Hearing Officer*, Sept. 5, 2008.

3 Thus there was no automatic stay triggered as a result of JMI's appeal to the OPA because the
4 GMHA completed its award between its rejection of JMI's protest on July 17, 2013 and JMI's appeal to
5 the OPA on August 7, 2013.

6
7 **III. WHAT IS THE STATUS OF THE PROCUREMENT FUNDING?**
8

9 Procurement funding for GMHA IFB 020-2012 was provided by the Hospital Preparedness
10 Program ("HHP") Grant and Compact Impact FY11 funding. The total contract price of \$380,925.00
11 was funded as follows:

12 FY 11 HPP - \$107,266.53

13 FY 11 DOI (Compact Impact) - \$273,658.47

14 The HPP Grant funds expired on June 30, 2013; however, an extension was granted for
15 ninety (90) days with a new expiration date of September 30, 2013 as stated on the purchase order
16 with MedPharm. *See Agency Report at Tab V and Exhibit F attached herein.*

17 The 15 portable kidney machines with reverse osmosis water purification systems are on
18 island, and GMHA biomedical personal have already been trained at the manufacture's training
19 facility. There are two additional trainings to be conducted on island, at the GMHA.

20 Respectfully submitted this 7th day of October 2013.

21
22 FISHER & ASSOCIATES

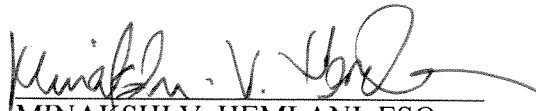
23 
24 MINAKSHI V. HEMLANI, ESQ.

EXHIBIT A

**GUAM MEMORIAL HOSPITAL AUTHORITY
850 GOV. CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913
PHONE: 671-647-2165 FAX: 671-649-3640**

FAX TRANSMITTAL SHEET

TO: Medpharm

FAX: 632-9000

FROM: Assistant Supply Management Administrator, Acting

DATE: June 06, 2013

SUBJECT: GMHA IFB 020-2012, Portable Kidney Machines with Portable Water Purification Machines
Notice of Intent

PAGES: 2 including cover sheet

NOTES:

An acknowledgement via a return fax would be appreciated as soon as possible. Return fax number is 649-3640

DATE / VENDOR ACKNOWLEDGEMENT

6-6-13 Arienne Loja

FACSIMILE CONFIDENTIALITY NOTICE

These documents accompanying this transmission contain confidential information that is legally privileged. This information is intended only for the use of the individual or entity named above. The authorized recipient of this information is prohibited from disclosing this information to any other party unless required to do so by law or regulation and is required to destroy the information after its stated need has been fulfilled.

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Confirmation Report - Memory Send

Page : 001
Date & Time: Jun-06-13 08:05am
Line 1 : +6716493640
Machine ID : 671 649 3640

Job number : 124
Date : Jun-06 08:05am
To : 6329000
Number of pages : 002
Start time : Jun-06 08:05am
End time : Jun-06 08:05am
Pages sent : 002
Status : OK

Job number : 124 *** SEND SUCCESSFUL ***

GUAM MEMORIAL HOSPITAL AUTHORITY
850 GOV. CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913
PHONE: 671-647-2165 FAX: 671-649-3640

FAX TRANSMITTAL SHEET

TO: Medpharm
FAX: 632-9000
FROM: Assistant Supply Management Administrator, Acting
DATE: June 06, 2013
SUBJECT: GMHA IFB 020-2012, Portable Kidney Machines with Portable Water Purification Machines
Notice of Intent
PAGES: 2 including cover sheet

NOTES:

An acknowledgement via a return fax would be appreciated as soon as possible. Return fax number is 649-3640

DATE / VENDOR ACKNOWLEDGEMENT

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EXHIBIT B

Confirmation Report - Memory Send

Page : 001
Date & Time: Jun-06-13 08:07am
Line 1 : +6716493640
Machine ID : 671 649 3640

Job number : 126
Date : Jun-06 08:05am
To : 6495685
Number of pages : 003
Start time : Jun-06 08:06am
End time : Jun-06 08:07am
Pages sent : 003
Status : OK

Job number : 126 *** SEND SUCCESSFUL ***

GUAM MEMORIAL HOSPITAL AUTHORITY
850 GOV. CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913
PHONE: 671-647-2165 FAX: 671-649-3640

FAX TRANSMITTAL SHEET

TO: JMI Edison
FAX: 649-5685
FROM: Assistant Supply Management Administrator, Acting
DATE: June 06, 2013
SUBJECT: GMHA IFB 020-2012, Portable Kidney Machines with Portable Water Purification Machines Bid Status
PAGES: 3 including cover sheet

NOTES:

An acknowledgement via a return fax would be appreciated as soon as possible. Return fax number is 649-3640

DATE / VENDOR ACKNOWLEDGEMENT

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EXHIBIT C

Confirmation Report - Memory Send

Page : 001
Date & Time: Jun-07-13 02:44pm
Line 1 : +6716493640
Machine ID : 671 649 3640

Job number : 207
Date : Jun-07 02:05pm
To : 6495685
Number of pages : 003
Start time : Jun-07 02:43pm
End time : Jun-07 02:44pm
Pages sent : 003
Status : OK

Job number : 207 *** SEND SUCCESSFUL ***

GUAM MEMORIAL HOSPITAL AUTHORITY
850 GOV. CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913
PHONE: 671-647-2165 FAX: 671-649-3640

FAX TRANSMITTAL SHEET

TO: JMI Edison
FAX: 649-5685
FROM: Assistant Supply Management Administrator, Acting
DATE: June 07, 2013
SUBJECT: GMHA IFB 020-2012, Portable Kidney Machines with Portable Water Purification Machines Bid Status
PAGES: 3 including cover sheet
NOTES:

An acknowledgement via a return fax would be appreciated as soon as possible. Return fax number is 649-3640

DATE / VENDOR ACKNOWLEDGEMENT

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EXHIBIT D

GUAM MEMORIAL HOSPITAL AUTHORITY
850 GOV. CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913
PHONE: 671-647-2165 FAX: 671-649-3640

FAX TRANSMITTAL SHEET

TO: JMI Edison

FAX: 649-5685

FROM: Assistant Supply Management Administrator, Acting

DATE: June 06, 2013

SUBJECT: GMHA IFB 020-2012, Portable Kidney Machines with Portable Water
Purification Machines
Deposit Return

PAGES: 2 including cover sheet

NOTES:

An acknowledgement via a return fax would be appreciated as soon as possible. Return
fax number is 649-3640

DATE / VENDOR ACKNOWLEDGEMENT

06/06/13 Theo M. Fargelinan

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Confirmation Report - Memory Send

Page : 001
Date & Time: Jun-06-13 03:16pm
Line 1 : +6716493640
Machine ID : 671 649 3640

Job number : 155
Date : Jun-06 02:52pm
To : 6495685
Number of pages : 002
Start time : Jun-06 03:15pm
End time : Jun-06 03:16pm
Pages sent : 002
Status : OK

Job number : 155 *** SEND SUCCESSFUL ***

GUAM MEMORIAL HOSPITAL AUTHORITY
850 GOV. CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913
PHONE: 671-647-2165 FAX: 671-649-3640

FAX TRANSMITTAL SHEET

TO: JMI Edison
FAX: 649-5685
FROM: Assistant Supply Management Administrator, Acting
DATE: June 06, 2013
SUBJECT: GMHA IFB 020-2012, Portable Kidney Machines with Portable Water Purification Machines Deposit Return
PAGES: 2 including cover sheet

NOTES:

An acknowledgement via a return fax would be appreciated as soon as possible. Return fax number is 649-3640

DATE / VENDOR ACKNOWLEDGEMENT

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EXHIBIT E



Guam Memorial Hospital Authority Aturidåt Espetåt Mimuriåt Guåhan



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

June 3, 2013

BID STATUS

Mrs. Jean Grape-Ko
Sales Manager
JMI-Edison
125 North Marine Drive
Tamuning, Guam 96913

BID NO: GMHA Bid #020-2012 OPENED: October 19, 2011 @ 9:00am
FOR: Portable Kidney Machines with Reverse Osmosis Purification Machines
with two offered options.

The following is the outcome of subject bid as indicated by an

- // Canceled (in whole and in part) in the best interest of Guam Memorial Hospital Authority for reasons including, but not limited to:
- Insufficient funds
 - No longer require the supplies, services or construction;
 - Major change or amendment of specifications;
 - Insufficient number of bidders;
- /X/ The bid has been rejected in the best interest of Guam Memorial Hospital Authority for reasons including, but not limited to:
- Late submission of bid.
 - No bid deposit submitted, as required by Section 11 of the General Terms and Conditions.
 - Bid received after the time established by the invitation for bid.
 - Not meeting the delivery requirement as stated in the invitation for bid.
 - Nonconformance with specifications. Option 1**
 - Inability to provide future maintenance and services
 - Exceeds budgeted amount.
 - High Price. Option 2**

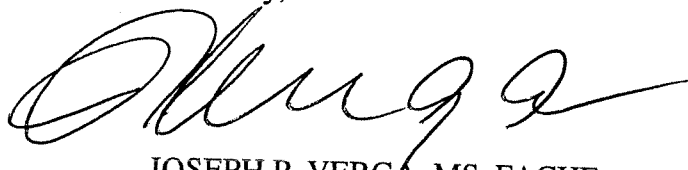
- Exceeds budgeted amount.
- High Price. Option 2

/X/ Others: JMI-Edison Option 1 was not as specified on bid requirements and Option 2 bid was not the lowest. 3-202.14.2 GMHA Procurement Rules and Regulations provides that the contract will be awarded to the lowest responsible and responsive bidder namely MedPharm.

Accordingly, bidders not selected because their bids were not the lowest will maintain their prospective status with GMHA until the contract with the "lowest bidder" is finalized.

Thank you for responding to the subject solicitation.

Sincerely,



JOSEPH P. VERGA, MS, FACHE
JP Hospital Administrator/CEO

ACKNOWLEDGMENT OF RECEIPT:

(Signature)

Print Name and Title

Date

EXHIBIT F



Guam Memorial Hospital Authority Aturidāt Espitāt Mimuriāt Guāhān



**850 Gov. Carlos G. Camacho Road
Oka, Tamuning, Guam 96913-3128
Tel: (671) 647-2555 thru 9
Fax: (671) 649-3640**

Vendor: MEDPHARM CORPORATION
P.O. BOX 11864

TAMUNING GU 96931
Ph 671-632-6000 Fax 671-632-9000

Ship To: GUAM MEMORIAL HOSPITAL
850 GOV CARLOS G. CAMACHO ROAD
TAMUNING, GUAM 96913

PURCHASE ORDER Number: 20132831-000

Purchase Order Date: 6/04/2013

Vendor Number: 7753

Page 1 OF 1

ASSETS	JOB ORDER # / OBJ CLASS	INVITATION # / CONTRACT #	Ship Via	FOB	Terms	
1000		GMHA IFB 020-2012	LOCAL TRANSPORT	DESTINATION	NET 60	
Buyer	EXPIRATION DATE	AUTHORITY/REMARKS		DUE DATE	TAX	
RL	9/30/2013	3-202/3-501.09.2/R13-8791-668		8/15/2013		
LINE	QTY. ORDERED	UNIT OF MEASURE	YOUR ITEM NUMBER	OUR ITEM NUMBER	UNIT PRICE	EXTENDED PRICE
	QTY. RECEIVED	QTY. OPEN	ITEM DESCRIPTION		DATE REQUIRED	
001	15	EA	X36	202012	23,795.0000	356,925.00
		15	MACHINE DIALYSIS PHOENIX 36 - THIS IS FOR 15 EACH PORTABLE KIDNEY MACHINES WITH REVERSE OSMOSIS WATER PURIFICATION SYSTEMS. EACH MACHINE COMBINATION IS MOUNTED ON ONE TRANSPORT CART FOR EASY ACCESS DURING TREATMENTS.			
002	1	EA		4400064	5,000.0000	5,000.00
		1	TRAINING - ON SITE CLINICAL - THIS IS FOR ONE ON-SITE CLINICAL TRAINER TO PROVIDE CLINICAL TRAINING FOR CLINICAL PERSONNAL HERE AT GUAM MEMORIAL HOSPITAL.			
003	1	EA		4400066	19,000.0000	19,000.00
		1	TRAINING - BIO-MED - THIS IS TRAINING FOR BIO-MEDICAL PERSONNAL TO BE CONDUCTED AT THE MANUFACTURES TRAINING FACILITY. - FUNDING SOURCE : FY 11 DOI AND FY 11 HPP - DELIVER MACHINES 45 DAYS AFTER RECEIPT OF PURCHASE ORDER.			
REMARKS:						DO NOT FILL THIS ORDER, IF YOUR TOTAL COST EXCEEDS THE TOTAL BELOW.
Send certified ORIGINAL and three (3) copies of Invoice to Materials Mgmt. Dept. 850 Gov Carlos Camacho Rd., Tamuning, Guam 96913 Payment upon receipt of merchandise in Guam in good condition. This order is subject to conditions on reverse side. This order is subject to special provisions, and Bid Conditions specified on this Bid. On all air shipments have air freight company call this number upon arrival of goods in Guam.					Subtotal	380,925.00
Contractors: Please supply promptly the above articles or services. All correspondence pertaining to this order including invoices, shipping documents and packages must bear the purchase order number shown above.					Discount	.00
SEE REVERSE SIDE FOR PURCHASE ORDER TERMS AND CONDITIONS.					Freight	.00
					Grand Total	380,925.00

Melvin Pangelinan 7/17/13
ACKNOWLEDGEMENT SIGNATURE AND DATE

ACKNOWLEDGEMENT COPY

Joseph P. Verga
Joseph P. Verga
HOSPITAL ADMINISTRATOR / CEO