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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI-Edison,

Appellant.

Docket No. OPA-PA13-009

**COMMENTS ON
AGENCY REPORT**

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant JMI-Edison (JMI/Appellant) submits its Comments on the Agency Report submitted by the Guam Memorial Hospital Association (GMHA) to the Office of Public Accountability on August 15, 2013. These comments are submitted to address the inadequacies of that report.

II. ARGUMENT

A. JMI’S PROTEST WAS NOT UNTIMELY

GMHA continues to hold to a single ground justifying its denial of JMI’s protest: JMI’s protest was untimely because JMI’s grounds for the protest– the deficiencies of awardee MedPharm’s submission– “were known or should have been known to JMI at bid opening on October 19, 2012.” Under Guam law only “aggrieved” parties may bring bid protests under Guam procurement law. *See* 5 GCA 5425(a). JMI was not “aggrieved” until a non responsive offeror was selected for contract award. The Guam Supreme Court has discussed what an “aggrieved party” is. The court has stated that:

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The term “aggrieved party” has been defined as [o]ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. The word ‘aggrieved’ refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation. Moreover, an aggrieved party is one who has suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power.

Tumon Partners, LLC v. Shin, 2008 Guam 15, ¶34. (internal quotations and citations omitted)

Any rights that JMI may have had *vis a vis* GMHA Bid 020-2012 were not “directly and adversely affected “until GMHA chose to make a contract award selection in violation of Guam’s procurement code. 5 GCA §5425(a) provides an aggrieved party the right to protest. A protestor must come forward, as part of that protest, with “the facts giving rise” to that protest. 5 GCA §5425(a); *see also* 2 GCAR §9101(c)(3)(c) and (d) (describing how protestor must provide “a statement of reasons for the protest” and “supporting exhibits, evidence, or documents to substantiate any claims....”). The factual basis for JMI’s aggrievement was not, as GMHA claims, Medpharm’s submission of a nonresponsive bid, but instead was GMHA’s selection of that nonresponsive bid for award. Simply put, JMI could not include the fact of Medpharm’s flawed selection by GMHA as a “fact giving rise” to the protest until the flawed selection occurred. That selection did not occur until June 7, 2013. The appellant’s appeal was timely filed after that.

GMHA attempts to distinguish Tumon Corporation v. Guam Memorial Hospital Authority and the connection the court there drew between being a losing bidder and the ability to protest because of that status. No amount of distinguishing can smother the fact that the court found that a bidder could protest since the protest statute “...applies to a protest by a losing

bidder after the winning bidder has been declared.” Tumon Corporation v. Guam Memorial Hospital Authority, CV1420-01, 3, (Superior Court of Guam, Dec. 20, 2001) (Decision and Order). The right to protest the award, therefore, came when a declaration of a “winner” and “loser” was made by the contracting agency. The best that GMHA can allege of JMI is that JMI **may have been aware** on October 19, 2012 that a non-responsive offeror submitted a bid under the IFB. However, GMH can point to no evidence in the record that JMI was aware of either the detailed contents of Medpharm’s submission or of how GMHA’s contracting officer was going to treat that submission.

GMH suggests that since JMI knew that it may, in the future, be a losing bidder if GMHA’s contracting officer made a future award in violation of law, JMI should have protested the solicitation at that moment. GMHA’s flawed logic would require every offeror to protest an award within 14 days of the time of bid opening if that offeror believed that it may not be an awardee of the solicitation. GMHA’s logic would also require an offeror to file a protest if it believed that any other offeror submitted a bid that should not be selected. This, of course, is absurd since every offeror believes that its offer should be selected above the other submissions. In GMHA’s proffered procurement world, every bid must be protested immediately after bid opening because GMHA’s contracting officer may make an incorrect future contract award. Such a system would, of course, grind an already difficult procurement process to a halt.

B. GMHA HAS PROVIDED NO DEFENSE REGARDING THE MERITS OF JMI’S PROTEST.

GMHA has provided an anemic response to the deficiencies of Medpharm’s submission that JMI has illuminated. According to GMHA, MedPharm’s deficiencies “are best characterized as items of nonconformance and not nonresponse.” No detailed defense of this conclusion is offered. GMHA’s conclusion is incorrect. A “responsive bidder means a person who has

submitted a bid which conforms in all material respects to the Invitation for Bids.” G GCA § 5201(g). Medpharm’s submission has material deficiencies.

The IFB’s third amendment made it clear that submissions should include “the certificates of Training with Manufacturer Training Completion Certification for the technicians assigned to this project.” Amendment 3, October 12, 2012, attached as Tab “F” to the procurement record submitted to the OPA. Despite these clear requirements, no offeror other than JMI provided information to GMH regarding local and available technicians who have completed any training whatsoever. This material aspect of the bid was ignored by Medpharm, and GMHA provides no defense of its absence.

GMHA’s October 12, 2012 Amendment 3 also demanded that offerors provide the qualifications and performance data for “personnel of firm.” That reminder also called for “a statement of qualifications of all technician personnel...” as well as “confirmation of training by the manufacturer...” Rather than earn their award through their merit, the awardee instead merely stood on the manufacturer’s personnel and technical expertise. No firm personnel or firm technicians were offered. This material aspect of the bid was ignored by Medpharm, and GMHA provides no defense of its absence.

The IFB called for submissions regarding a portable dock and charging station. The awardee and other offeror merely informed GMH that they would provide the product “as per specs.” See Medpharm Submission, attached as Tab “B”, Book II to the procurement record submitted to the OPA. As JMI’s submission makes clear, the standard docking station requested by GMH no longer is made. This is why JMI, as opposed to the other offerors, provided substantiated specifications for the docking station. The other offerors merely submitted to GMH a vague assertion that they would meet specifications— an impossibility given the discontinued

nature of the specified docking station. This material aspect of the bid was ignored by Medpharm, and GMHA provides no defense of its absence.

III. CONCLUSION

Based on the foregoing, JMI requests that its protest be sustained, and the Agency be ordered to award it GMHA Bid 020-2012.

Submitted this 26th day of August, 2013.

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By: 

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