



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

BEFORE THE PUBLIC AUDITOR

PROCUREMENT APPEAL

In the Appeal of

JMI Edison,

Appellant

Docket No. OPA-PA-13-009

DECISION

INTRODUCTION

Hearings on this appeal were held on August 26, 2013, September 27, 2013, October 29, 2013, and November 18, 2013, before Public Auditor Doris Flores Brooks, CPA, CGFM, and Hearing Officer Peter C. Perez. Joshua D. Walsh, Esq. appeared on behalf of and with appellant JMI Edison's ("JMI") representative Eduardo R. Ila. Minakshi V. Hemlani, Esq. appeared on behalf of and with Guam Memorial Hospital Authority ("GMHA") representative, Roland Lumongsud. This appeal arises from GMHA's rejection of JMI's protest for un-timeliness and GMHA's award to another vendor.

FINDINGS OF FACT

The Public Auditor issues this Decision based upon the procurement record, the parties' briefs and arguments, and the documents and exhibits submitted by the parties, and makes the following Findings of Fact:

1. JMI is an offeror which submitted a bid pursuant to Invitation for Bid No: GMHA IFB # 020-2012 ("IFB").

- 1 2. The IFB sought bids for portable kidney machines with reverse osmosis water purification
2 machines. [Agency Procurement Record (“APR”), Exhibit F].
- 3 3. Procurement funding for the IFB was provided by FY11 Hospital Preparedness Program
4 (“HHP”) Grant and FY11 Compact Impact (DOI) funding. The total contract price of
5 \$380,925.00 was funded as follows: \$107,266.53 from FY11 HHP Grant and \$237,658.47
6 from FY11 Compact Impact funds. [GMHA Brief, November 4, 2013].
- 7 4. On June 6, 2013, GMHA transmitted to JMI a Bid Status advising JMI that JMI’s bid was
8 rejected for nonconformance with specifications and high price. [JMI Declaration of John
9 Ilao, October 7, 2013].
- 10 5. On June 7, 2013, GMHA transmitted to JMI another Bid Status, this time advising JMI
11 that its bid was rejected and that the contract was being awarded to MedPharm. [APR,
12 Exhibit H].
- 13 6. On June 21, 2013, within fourteen days of the June 7, 2013 GMHA’s Bid Status
14 transmittal advising that the contract was being awarded to MedPharm, JMI filed a
15 protest. [APR, Exhibit I(a)]. The protest grounds were not based upon GMHA’s rejection
16 of JMI’s bid, which GMHA advised on June 6, 2013, but instead were based upon
17 GMHA’s award to MedPharm, which GMHA advised on June 7, 2013. JMI’s protest
18 asserted: (a) the awardee’s submission did not provide certification of MedPharm
19 employed technicians who completed certification and were assigned to this project; (b)
20 the awardee’s submission was completely dependent upon the technical expertise and
21 experience of the manufacturer, rather than the offeror itself; (c) the awardee’s failure to
22 provide specific information regarding the required docking station precluded it from
23 obtaining an award; and, (d) the award to MedPharm calls into question the fairness of the
24 procurement process.
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- 1 7. The HPP Grant funds expired on June 30, 2013; however, an extension was granted for
2 ninety (90) days with a new expiration date of September 30, 2013. [GMHA Brief,
3 November 4, 2013].
- 4 8. On July 17, 2013, GMHA rejected JMI's Protest as untimely and simultaneously awarded
5 the contract to MedPharm. [APR, Exhibit I(a) and Agency Report, Exhibit V]. In doing
6 so, GMHA: (a) did not address the merits of JMI's protest; (b) deprived JMI of the
7 opportunity to appeal the rejection of its protest prior to the award of the contract to
8 MedPharm; and, (c) disregarded the automatic stay that was triggered by JMI's timely
9 protest.
- 10 9. On August 1, 2013, JMI filed this Procurement Appeal.
- 11 10. On September 5, 2013, prior to the final resolution of JMI's protest, GMHA issued a
12 check for \$107,266.52 to MedPharm, exhausting the FY11 HHP funds. These funds were
13 specifically used to purchase four (4) of the fifteen (15) kidney machines, fifteen (15)
14 water purification units, and went towards training expenses. [GMHA Brief, Exhibits A
15 and B, November 4, 2013].
- 16 11. GMHA represents, if the MedPharm contract were deemed void, it could result in the
17 following: (a) the FY11 HHP funds could be lost; (b) the four (4) dialysis machines and
18 fifteen (15) water purification units that are currently on island and stored in GMHA's
19 warehouse could be wasted because each bid offeror proposed machines from different
20 manufacturers; (c) monetary loss would also result from the travel expenses and leave
21 already provided for two of GMHA's biomedical personnel to attend training; (d) it would
22 delay commissioning the machines which are of vital importance to GMHA; (e) it would
23 imperil patient care and safety; (f) it could detrimentally impact GMHA's ability to
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1 comply with standards of medical care. [GMHA Brief, November 4, 2013, November 14,
2 2013].

3 **CONCLUSIONS OF LAW**

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- 5 1. Guam law allows an aggrieved party to submit a protest to the head of the purchasing
6 agency within fourteen days after such aggrieved person knows or should know the facts
7 giving rise thereto. 5 G.C.A. § 5425(a).
- 8 2. JMI's protest was filed timely. On June 21, 2013, within fourteen days of the June 7, 2013
9 GMHA's Bid Status transmittal advising that the contract was being awarded to
10 MedPharm, JMI filed a protest. [APR, Exhibit I(a)]. The protest grounds were not based
11 upon GMHA's rejection of JMI's bid, which GMHA advised on June 6, 2013, but instead
12 were based upon GMHA's award to MedPharm, which GMHA advised on June 7, 2013.
13 JMI's protest asserted: (a) the awardee's submission did not provide certification of
14 MedPharm employed technicians who completed certification and were assigned to this
15 project; (b) the awardee's submission was completely dependent upon the technical
16 expertise and experience of the manufacturer, rather than the offeror itself; (c) the
17 awardee's failure to provide specific information regarding the required docking station
18 precluded it from obtaining an award; and, (d) the award to MedPharm calls into question
19 the fairness of the procurement process.
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- 22 3. By doing so, the automatic stay was triggered and remains in effect until final resolution
23 of JMI's protest; the timely filing of a Notice of Appeal to the Public Auditor; and the
24 timely filing of an appeal to the Superior Court of Guam; or, until the stay is lifted. "In the
25 event of a timely protest...the Territory shall not proceed further with the solicitation or
26 with the award of the contract prior to final resolution of such protest..." 5 G.C.A. §
27 5425(g). Final resolution of a protest includes the time period of an appeal after protest. *In*
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1 *the Appeal of IBSS*, OPA-PA-08-012, pp.9-10. The status quo is preserved by operation of
2 law, and under 5 G.C.A. § 5425(g), further action on the procurement under appeal is
3 stayed until resolution of the appeal. *Teleguam Holdings LLC and its Wholly Owned*
4 *Subsidiaries v. Territory of Guam et al.*, Superior Court of Guam, CV0334-13 (Decision
5 and Order, April 29, 2013, 2:9-3:3).

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- 7 4. On July 17, 2013, GMHA incorrectly rejected JMI's Protest as untimely and improperly
8 simultaneously awarded the contract to MedPharm. [APR, Exhibit I(a) and Agency
9 Report, Exhibit V].
- 10 5. JMI had the right to appeal GMHA's rejection of its Protest by filing a Notice of Appeal
11 to the Public Auditor within fifteen days after receipt by the protestant of the notice of
12 decision. 5 G.C.A. § 5425(e).
- 13 6. An automatic stay has been in effect since the timely filing of JMI's procurement protest
14 on June 21, 2013, continuing through JMI's timely Notice of Appeal to the Public Auditor
15 on August 1, 2013, until final resolution.
- 16 7. Pursuant to the automatic stay, GMHA was prohibited from proceeding further with the
17 solicitation or with the award of the contract until final resolution of JMI's appeals to the
18 Public Auditor and if subsequently timely filed, to the Superior Court of Guam.
- 19 8. GMHA violated the automatic stay when it simultaneously rejected JMI's Protest and
20 awarded the contract to MedPharm.
- 21 9. GMHA is admonished for its violation of JMI's rights and procurement procedures for:
22 (a) not addressing the merits of JMI's protest; (b) depriving JMI of the opportunity to
23 appeal the rejection of its protest prior to the award of the contract to MedPharm; and, (c)
24 disregarding the automatic stay that was triggered by JMI's timely protest.
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1 10. GMHA is further admonished for its failure to timely notify the Public Auditor that the
2 FY11 HHP funds were in danger of expiring or being lost.

3 11. Guam law provides, “[i]f after an award it is determined that a solicitation or award of a
4 contract is in violation of law, then: (1) if the person awarded the contract has not acted
5 fraudulently or in bad faith: (A) the contract may be ratified and affirmed, provided it is
6 determined that doing so is in the best interests of the Territory...” 5 G.C.A. § 5452(a).
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8 12. GMHA’s award to MedPharm while the automatic stay was in place violated the law.
9 There is no evidence that MedPharm acted fraudulently or in bad faith. Based upon the
10 representations and arguments of GMHA, it is in the best interests of the Territory that the
11 contract awarded by GMHA to MedPharm not be voided.
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13 13. GMHA’s actions were not fair, equitable or conducive to an open and transparent
14 procurement process. Moreover, GMHA failed to timely notify the Public Auditor that the
15 procurement funds for the IFB were in danger of expiring or being lost. The crisis created
16 in this procurement was the result of GMHA’s acts and omissions. However, at this point
17 because GMHA has imperiled the Territory’s best interests, the Public Auditor very
18 reluctantly ratifies and affirms the contract from GMHA to MedPharm.
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20 14. The parties shall bear their respective costs and fees associated with this appeal.¹
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22 This is a Final Administrative Decision. The Parties are hereby informed of their right to
23 appeal from a Decision of the Public Auditor to the Superior Court of Guam in accordance with
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26 ¹ The Public Auditor advised the parties, at the November 18, 2013 Status Hearing, that
27 the award of JMI’s costs and reasonable attorney’s fees was under consideration but by this
28 Decision declines to make such award.

1 Part D of Article 9 of 5 G.C.A. § 5481(a) within fourteen (14) days after receipt of a Final
2 Administrative Decision. A copy of this Decision shall be provided to the Parties and their
3 respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for review
4 on the OPA website at www.guamopa.org.
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6 **DATED**, this 27th day of November, 2013.

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8 **DORIS FLORES BROOKS, CPA, CGFM**
9 **Public Auditor of Guam**

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