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

10 IN THE APPEAL OF :

11 JMI Edison,

12 Appellant.

CASE NO: OPA-PA 13-009

**GMHA'S REPLY PURSUANT TO
OPA'S OCTOBER 29, 2013 ORDER**

13 On November 4, 2013, the Office of Public Accountability ("OPA") issued an Order re JMI-
14 Edison's Motion for Issuance of Stay finding that JMI's protest was timely, and that an automatic stay
15 was triggered and remains in effect until final resolution of JMI's protest. The OPA reserved ruling on
16 the issue of whether or not the contract awarded to MedPharm is void.

17 The Guam Memorial Hospital Authority ("GMHA") rejected protest by bidder JMI-Edison as
18 untimely and awarded contract to another bidder, MedPharm, based on the Office of Public
19 Accountability's ("OPA") decision *In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007
20 (automatic stay is not triggered when an award is completed between the rejection of the protest and the
21 appeal to the OPA). In recent decisions however, the OPA has determined that a timely protest triggers
22 automatic stay which remains in effect until final resolution of the protest – to include timely filing of
23 appeal to the OPA and the Superior Court of Guam. *In the Appeal of JMI Edison*, OPA-PA-13-010; *In*
24 *the Appeal of K Cleaning*, OPA-PA 13-004.

25 Because the OPA has now found that JMI's protest was timely and an automatic stay was in
26 effect, the GMHA, pursuant to 5 GCA § 5425(g)(1)-(3) and 26 GAR § 16901(e)(1)-(3), has provided
27 written determination that the award of the contract was necessary to protect the substantial interests of
28

1 the Guam Memorial Hospital and the Territory of Guam. A true and correct copy of said written
2 determination is attached herein as Exhibit A.

3 In conjunction with 5 GCA § 5425(g), subsection 5452(a) states in part, “[i]f after an award it is
4 determined that a solicitation or award of a contract is in violation of law, then: (1) if the person
5 awarded the contract has not acted fraudulently or in bad faith: the contract may be ratified and
6 affirmed, provided it is determined that doing so is in the best interests of the Territory.” The OPA’s
7 recent decision regarding the GMHA’s failure to stay renders the award to MedPharm an “award of
8 contract in violation of law” that may be ratified and affirmed. The GMHA submits that based on the
9 reasons set forth in the written determination attached as Exhibit A, the contract awarded was in the best
10 interests of the Guam Memorial Hospital and the Territory of Guam and should not be voided.
11

12 Further, in determining whether or not to void an awarded contract, the Superior Court of Guam
13 has ruled against voiding the actions of an agency from the onset of the contract but stayed any further
14 action under the contract pending the result of the appeal. In its November 4, 2013 Order, the OPA
15 references *Teleguam Holdings LLC, et al. vs. Territory of Guam, et al.*, Sup. Ct. Civil Case No. 0334-
16 13. The government in that case issued purchase orders pursuant to a bid awarded after the OPA’s
17 decision but before the end of the 14-day appeal window. Plaintiffs sought temporary restraining order
18 enjoining the issuance of further purchase orders and voiding those already issued. The Court denied
19 Plaintiffs motion and accepted assurances that the government would stay further action until resolution
20 of the appeal. *Id.*, Decision and Order filed April 29, 2013.

21 Based on the foregoing, the GMHA submits that the contract awarded to MedPharm was
22 necessary to protect the substantial interests of the Guam Memorial Hospital and the Territory of Guam,
23 and should not be voided.

24 Respectfully submitted this 14th day of November 2013.

25 FISHER & ASSOCIATES

26 
27 _____
28 MINAKSHI V. HEMLANI, ESQ.

Exhibit A




Guam Memorial Hospital Authority Aturidåt Espetåt Mimuriåt Guåhan

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OKA, TAMUNING, GUAM 96913
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MEMORANDUM

TO: Office of Public Accountability
JMI-Edison, Appellant

FROM: Joseph P. Verga, MS, FACHE
Hospital Administrator/CEO 

DATE: November 14, 2013

RE: GMHA IFB 020-2012 (Portable Kidney Machines with Reverse Osmosis Water Purification Machines) - written determination pursuant to 5 GCA § 5425(g) and 26 GAR § 16901(e)

With regards to the above-referenced procurement, the Guam Memorial Hospital Authority (“GMHA”) rejected protest by bidder JMI-Edison as untimely and awarded contract to another bidder, MedPharm, based on the Office of Public Accountability’s (“OPA”) decision *In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007 (automatic stay is not triggered when an award is completed between the rejection of the protest and the appeal to the OPA).

On November 4, 2013, the OPA found JMI-Edison’s protest was timely, that an automatic stay was triggered, and now finds that an automatic stay remains in effect until final resolution of a protest – to include timely filing of appeal to the OPA and the Superior Court of Guam. The OPA has reserved further ruling on the issue of whether or not the contract awarded to MedPharm is void.

Pursuant to 5 GCA § 5425(g)(1)-(3) and 26 GAR § 16901(e)(1)-(3), this memorandum provides written determination that the award of the contract was necessary to protect the substantial interests of the Guam Memorial Hospital and the Territory of Guam for the following reasons:

1. Procurement funding for GMHA IFB 020-2012 (Portable Kidney Machines with Reverse Osmosis Water Purification Machines) was provided by the FY11 Hospital Preparedness Program (“HHP”) Grant and FY11 Compact Impact (DOI) funding. The total contract price of \$380,925.00 was funded as follows: \$107,266.53 from FY11 HHP Grant and \$273,658.47 from FY11 Compact Impact funds.
2. The HPP Grant funds expired on June 30, 2013; however, an extension was granted for ninety (90) days with a new expiration date of September 30, 2013. The GMHA issued a check for \$107,266.52 to MedPharm on September 5, 2013 exhausting funds from the FY11 HHP Grant. These funds were specifically used to purchase four (4) of the fifteen (15) total hemodialysis machines, fifteen (15) water purifications units,

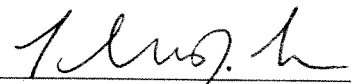
and went towards training expenses.

3. The expired, and now exhausted, FY11 HHP Grant funds in the amount of \$107,266.52 would be lost if the contract was deemed void. Further, the four (4) dialysis machines and fifteen (15) water purification units that are currently on island and stored in GMHA's warehouse would be wasted because each bid offeror proposed machines from a different manufacturer. Monetary loss would also result from the travel expenses and leave already provided for two (2) of GMHA's biomedical personnel to attend a five (5) day training at Gambro's (the manufacturer's) training facility in Denver, Colorado, in September of this year.
4. It is of vital importance for the GMHA to commission the fifteen (15) portable kidney (hemodialysis) machines with reverse osmosis water purification machines without delay. The GMHA currently has three (3) portable and nine (9) stand-alone hemodialysis machines manufactured by Fresenius. These machines are at least fifteen (15) years old and three (3) models behind. Each machine has a recommended total hour usage, but these machines have been utilized far beyond their life expectancy. Repairs are not possible because Fresenius no longer manufactures parts for these machines. The machines can break down at any time and further delays only increase the risks to patient care and safety in Guam.
5. The Center for Medicare and Medicare Services ("CMS") has determined that the reverse osmosis systems attached to the nine (9) stand-alone hemodialysis machines are obsolete, i.e. the reverse osmosis systems are not in conformance with acceptable standards of medical care. The GMHA has been instructed by CMS to correct this situation without delay and is currently at risk for citation. The delays that would result if the contract was voided would increase the GMHA's risk for citation by CMS and the Joint Commission, and open GMHA to the risk of litigation because GMHA is currently unable to meet the standard of medical care in this area.

Title 5 GCA § 5425(g)(1) requires concurrence of this written determination by the Attorney General or designated Deputy Attorney General. Attached is a copy of Mr. Thomas J. Fisher's appointment/designation as Special Assistant Attorney General for the GMHA, and his concurrence below.

The GMHA hereby gives notice to protestant JMI-Edison per 5 GCA § 5425(g)(2):, and requests that OPA confirm this determination per 5 GCA § 5425(g)(3): that the award of the contract to MedPharm was necessary to protect the substantial interests of the Guam Memorial Hospital and the Territory of Guam and should not be voided.

Concurrence by designated
Special Assistant Attorney General



Thomas J. Fisher, Esq.

LEONARDO M. RAPADAS
Attorney General



PHILLIP J. TYDINGCO
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

TO: Mr. Joseph P. Verga, MS, FACHE, Hospital Administrator
Guam Memorial Hospital Authority

Mr. Thomas J. Fisher, Legal Counsel
Guam Memorial Hospital Authority

FROM: Attorney General of Guam

DATE: February 3, 2013

SUBJECT: Appointment/Designation of Special Assistant Attorney General

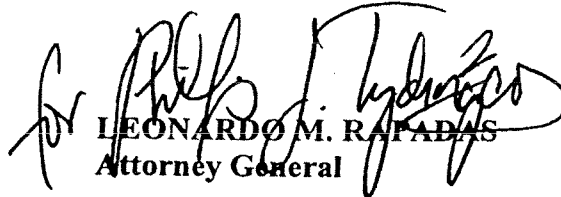
Pursuant to 5 G.C.A. § 5150, the above named attorney is hereby appointed and designated to be a Special Assistant Attorney General to act as the legal advisor during all phases of the procurement solicitation process including approving the form of, and determining the legality of such procurement contracts for the above agency for a period of one (1) year, which term may be extended thereafter. This appointment and designation may be revoked at the discretion of the Attorney General. As a Special Assistant Attorney General, the above named attorney will be required to certify in writing, for each procurement solicitation and contract that is estimated to result in an award of Five Hundred Thousand Dollars (\$500,000.00) or more, that all applicable procurement laws, rules, and regulations, have been complied with.

This appointment and designation requires adherence to the following processes for each procurement solicitation estimated to result in an award of Five Hundred Thousand Dollars (\$500,000.00) or more:

1. Submission to the Civil Division of the Office of the Attorney General, for each procurement solicitation, a notification that the Special Assistant Attorney General is to be engaged as the legal advisor to the agency. The notification shall have sufficient information to identify the procurement solicitation by topical name description, project number (Invitation For Bid number or Request For Proposal number), and the funding source and such other information as is required by the Attorney General; and

Appointment / Designation of Special Assistant Attorney General
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2. Submission to the Civil Division of the Office of the Attorney General, at the time of an award of a contract in each such procurement solicitation, the completed Procurement Checklist, as is provided to the Agency at the initiation of each procurement solicitation process by the Office of the Attorney General.


LEONARDO M. RAFADAS
Attorney General

ACCEPTANCE:

Subject to the terms and conditions as required by the Attorney General of Guam, I hereby agree and accept the appointment and designation by the Attorney General of Guam to act as a Special Assistant Attorney General and legal advisor for the **Guam Memorial Hospital Authority** pursuant to 5 G.C.A. § 5150.

Thomas J. Fisher, Legal Counsel



Signature

Date: 23 OCT 2017