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**OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEAL**

In the Appeal of

JMI-Edison,

Appellant.

Docket No. OPA-PA13-009

**JMI'S RESPONSE TO GMHA'S  
OPENING BRIEF PURSUANT TO  
OPA'S OCTOBER 29, 2013 ORDER**

**I. INTRODUCTION**

On October 29, 2013 the Office of Public Accountability (“OPA”) ordered the parties to brief the following: (1) What would be the impact on the procurement funding if the contracts awarded by GMHA are deemed void; (2) If an automatic stay was in effect and violated, why the contracts should not be voided. Since the issuance of that order, the OPA has determined that “GMHA violated the automatic stay when it simultaneously rejected JMI’s Protest and awarded the contract to MedPharm prior to the expiration of the fifteen day appeal period.” Order, November 4, 2013.<sup>1</sup>

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<sup>1</sup> Because the OPA determined that the automatic stay has been in effect since the inception of JMI’s bid protest, this Response to GMHA’s brief of November 4, 2013 will not address GMHA’s arguments in its brief that “there was no automatic stay in effect.”

This Response is submitted pursuant to the OPA's October 29, 2013 order, and is offered to address the funding for this procurement and GMHA's argument that the OPA should not "deem the contract awarded to MedPharm void." GMHA Opening Brief, 2.

## **II. ARGUMENT IN RESPONSE**

### **A. GMHA'S VIOLATION OF THE AUTOMATIC STAY RENDERS ITS CONTRACT WITH MEDPHARM VOID, NOT MERELY VOIDABLE**

The Guam Memorial Hospital Authority ("GMHA") states that, even if it did violate the automatic stay, "the contract should not be voided." Opening Brief, 4. GMHA then makes arguments that such a determination would "not be in the best interests of the Territory of Guam...." Opening Brief, 4. Those arguments are irrelevant, since Guam's procurement laws make a clear distinction between those awards that are "void," as opposed to those awards that are "voidable." This distinction, though ignored by GMHA, is a well-developed tenet of law. "A contract that is void never attains legal effect as a contract and cannot be enforced, whereas a contract that is voidable is one where one or more of the parties have the power, by the manifestation of an election to do so, to avoid the legal relations created by the contract." 17A *C.J.S. Contracts* § 169. The OPA itself has also ruled that contracts awarded in violation of the automatic stay are void *ab initio*. *In the Appeal of K Cleaning Services* OPA-PA-13-004, the OPA determined that "The awards of the IFB by (the contracting agency) while this appeal was pending is void." OPA-PA-13-004, 7.

Here, the OPA has made it clear that the contract execution that occurred only occurred through the disregard of the law mandating the existence of an automatic stay of procurement. The contract was never properly entered into, and as such, is void from its inception. Since "(a) void contract is no contract at all; it binds no one and is a mere nullity. Consequently, such a contract cannot be enforced." *Fergus v. Songer*, 150 Cal. App. 4th 552, (2d Dist. 2007).

The remedies provision of the Guam procurement code also reflects the distinction between void and voidable procurement awards. 5 GCA § 5451, in describing remedies “prior to an award,” states that “If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be: (a) cancelled; or (b) revised to comply with the law.” Here, the OPA has already determined that the contract award to MedPharm occurred in violation of the statutorily mandated automatic stay. Therefore, this award is void, *i.e.*, it must be cancelled or revised to comply with law. The law provides no discretion to ratify and confirm the illegal contract since the automatic stay keeps this procurement on a “pre-award” footing.

GMHA’s arguments about contract affirmation being appropriate here and “in the best interests of the Territory” are rooted in 5 GCA §5425’s codification of **post award** remedies—a provision that is irrelevant given the fact that the contract award to Medpharm, as a legal matter, never was properly consummated. 5 GCA § 5452 states:

“Remedies After an Award. (a) If after an award it is determined that a solicitation or award of a contract is in violation of law, then: (1) if the person awarded the contract has not acted fraudulently or in bad faith: (A) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory....”

This provision is inapplicable here, since a contract award and execution to Medpharm occurred in violation of law, and this protest remains in a “pre-award” procedural stance. Finally, even if the contract were indeed somehow voidable, the law does not allow the wrongdoer— GMHA— to elect to ratify the contract. The decision on whether or not a voidable contract should be voided or not lies with those with clean hands. *See White Dragon Productions, Inc. v. Performance Guarantees, Inc.*, 196 Cal. App. 3d 163, 241 Cal. Rptr. 74

(2d Dist. 1987) “ (a) voidable contract is one which is void as to the wrongdoer but not void as to the wronged party unless he elect to so treat it.”)

**B. THE IMPACT ON FUNDING FROM GMHA’S VOID CONTRACT WITH MEDPHARM**

GMHA has informed the parties that it “issued a check for \$107,266.52 to MedPharm on September 5, 2013 exhausting funds from the FY 11 HHP Grant.” Opening Brief, 1. GMHA then argues that “It would not be in the best interests of the Territory of Guam to deem the contract awarded to MedPharm void.” Opening Brief, 2. GMHA claims that the expended funds “would be lost,” but provides no substantive argument as to why those funds would be unrecoverable.<sup>2</sup>

While GMHA’s early payment to MedPharm creates difficulties *vis a vis* the procurement funding, those difficulties are the making of GMHA and can be dealt with by GMHA. The law recognizes that when the government enters the marketplace, it “contracts as does a private person, under the broad dictates of the common law.” *Torncello v. United States*, 681 F.2d 756, 762 (Ct. Cl. 1982) (en banc). When the Government “enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.” *Lynch v. United States*, 292 U.S. 571, 579 (1934). GMHA, therefore, can make full use of the general contracting law to recover the funds it expended.

In addition to using general contract law theory to recover the expended funds, GMHA may ask MedPharm to return the ill-disbursed funds and seek settlement of the matter with MedPharm.

Further, the law holds that the Government may recovery monies it mistakenly distributed in a procurement. “Money paid or other benefit conferred in the belief that it is legally due, this belief being caused by mistake of law, is recoverable just as if the mistake were

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<sup>2</sup> Presumably, the funds would be lost to GMHA if GMHA decided to take no action to recover the funds.

one of fact if the payment or benefit is given by a municipal or other governmental corporation.” *J. W. Bateson Co. v. U.S.*, 308 F.2d 510, 515 (5th Cir. 1962) *citing* 3 Corbin, Contracts § 617, p. 758 (1060 ed.) (money paid under mistaken interpretation of contract)

More, GMHA may bring an action to seek recovery of the expended funds, and the public interest is well served by allowing the Government to recover the entirety of the funds expended in violation of law. In the *Town of Boca Raton v. Raulerson* (1933) 108 Fla. 376, 379 [146 So. 576, 577], the court there allowed the Government to seek recovery of all funds improperly relayed to a contractor since the failure to allow complete recovery “would open the way and extend the invitation to fraud as well as violation of the law.” *Town of Boca Raton v. Raulerson* 108 Fla. 376, 379 (1933). The court went on to explain that complete recovery of all expended funds is appropriate because “Men inclined to such practices, which have been condemned generally by the courts, would risk violation of the statute knowing that, if detected, they would lose none of the original investment, while, if not discovered, they would reap a profit for their perfidy. They would reason that they had much to gain but naught to lose.” *Town of Boca Raton v. Raulerson* 108 Fla. 376, 379 (1933).

Finally, the Guam legislature has empowered the taxpayers of Guam to bring a civil actions to recover the ill-disbursed funds. 5 CGA § 7103 states that:

**Any taxpayer who is a resident of Guam shall have standing to sue the government of Guam and any officer, agent, contractor, or employee of the Executive Branch of the government of Guam for the purpose of enjoining any officer, agent, contractor, or employee of the Executive Branch of the government of Guam from expending money without proper appropriation, without proper authority, illegally, or contrary to law, and to obtain a personal judgment in the courts of Guam against such officers, agents, contractors, or employees of the government of Guam and in favor of the Government of Guam for the return to the Government of Guam of any money which has been expended without proper appropriation, without proper authority, illegally, or contrary to law.**

5 CGA § 7103 (emphasis added)

The policy allowing such a suit to recover the misspent funds is well founded. As the court in *S.D. Realty Co. v. Sewerage Commission of City of Milwaukee* explained:

Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss. This is because it results either in the governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from the expenditure. Though the amount of the loss, or additional taxes levied, has only a small effect on each taxpayer, nevertheless it is sufficient to sustain a taxpayer's suit.

*S.D. Realty Co. v. Sewerage Commission of City of Milwaukee* 15 Wis. 2d 15, 22 112 N.W.2d 177 (1961),

Here, the people of Guam who depend on the procurement regime to keep integrity in government contracting can initiate a suit to recover the funds GMHA improperly expended. If GMHA is content to simply throw its hands in the air and exclaim that the funds are “lost,” a taxpayer can seek a judgment against then Government officers who allowed those funds to be “lost” in the first place.


### **III. CONCLUSION**

GMHA, by ignoring the automatic stay, entered into an illegal contract with MedPharm. That illegality renders the contract void, and mandates that the procurement be cancelled. Ratification of the contract is not possible under Guam law since the stay kept this procurement on a “pre-award” footing, and the OPA should not be swayed by the difficulties that exist in this void procurement— early payments to the contractor in violation of the stay, the threatened loss of federal grant funding, GMHA’s accreditation— since those difficulties are the doing of the contracting the Agency itself. GMHA’s actions with regard to this procurement created the

problems its now complains of, and neither the law nor the OPA should be made to bend and save GMHA from laying in the bed it created.

Submitted this 8<sup>th</sup> day of November, 2013.

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