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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI-Edison,

Appellant.

Docket No. OPA-PA13-009

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

I. INTRODUCTION

On October 7, 2013, the Guam Memorial Hospital Authority (GMHA) filed its Brief Pursuant to OPA's September 27, 2013 Order. This Opposition is filed pursuant to the Office of Public Accountability's (OPA) order, and is submitted to address the factual errors and legal inadequacies of GMHA's submission.

II. GMHA FAILS TO THE GRASP THE DISTINCTION BETWEEN ITS JUNE 6 AND JUNE 7 BID STATUS NOTICES SENT TO JMI

While GMHA admits that Appellant JMI-Edison (JMI) "did not receive a copy of the Notice of Intent that was sent to MedPharm" on June 6, 2013, GMHA declares that since JMI received a bid status notice that its bid was rejected on June 6, 2013, its subsequent protest was untimely. *See* GMHA Brief, 2. GMHA's contention that JMI had notice on June 6, 2013 that it "may be aggrieved" flows from the second page of the June 6, 2013 bid status sent to offerors. According to GMH, the second page of that notice states "GMHA Procurement Rules and Regulations provides that the contract will be awarded to the lowest responsible and responsive bidder namely MedPharm." GMHA Brief, 2. This is factually incorrect.

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The June 6, 2013 Bid Status transmittal does not render JMI's protest untimely because that earlier bid status merely informed JMI that it was not selected. **Contrary to the facts presented by GMHA, the June 6 Bid Status notice did not give JMI any information regarding an award to MedPharm.** That notice stated "GMHA Procurement Rules and Regulations provide that the contract will be awarded to the lowest responsible and responsive bidder." Bid Status, GMH fax machine Job 126, June 6, 2013, attached as exhibit "C" to the Ila Declaration filed on October 7, 2013. **The language regarding an award to MedPharm that GMHA relies upon to argue that JMI's protest was untimely was sent on June 7— a date within 14 days of JMI's protest.** See Bid Status, GMH Fax Machine Job 207, June 7, 2013, attached as exhibit "B" to the Ila Declaration filed on October 7, 2013.¹ Again, JMI's protest was brought on the discrete issue of awardee MedPharm's responsiveness to the bid, and JMI did not know that MedPharm was the awardee until June 7, 2013. Ila Declaration filed on October 7, 2013. A protest brought 14 days after that date would, without question, be timely.

III. GMHA'S POSITION REGARDING THE AUTOMATIC STAY IS INCORRECT, AND UNDERMINES THE PROCUREMENT PROTEST AND APPEAL PROCESS.

GMHA exclaims that the contract performance that is has moved forward with conforms with the law since "GMHA did not proceed with award of the contract until after JMI's protest was rejected on July 17, 2013." GMHA Brief, 3. That purchase order was executed on the very same day that JMI's protest was rejected.² GMHA Brief, 3. GMHA would have the OPA hold that such a quick contract execution— a contract execution designed to make it impossible for a

¹ It must be noted that the "evidence" submissions of GMHA do not match the fax confirmation sheets with the actual content of the faxes, and do not provide to the OPA the text of the earlier June 6, 2013 bid status notification that was later edited to include a specific reference to MedPharm.

² To be clear, GMHA provides no evidence that its contract award was undertaken following any determination of need or review by the Governor, the procuring Agency, or the office of the Attorney General. GMHA provides no evidence that any formal notice was provided to any interested party that contract performance would occur.

meaningful intervening appeal to this office to occur— conforms with the goals and purposes of the procurement code. Such a result cannot stand.

The denial of a protest followed immediately by an award of a contract prior to the expiration of the time to appeal to the OPA, in this case within hours of the denial, would mean, if the stay did not continue in place, that every appeal reaching the OPA would resolve itself into a post-award protest completely excluding from the OPA’s consideration— and depriving the protesting party of— the remedies available under 5 GCA § 5451 regarding pre-award protests when the protest itself was made before an award. Such a result would neuter the appeal process, and diminish the role of the public auditor to promote the integrity of the procurement process and the purposes of Guam’s procurement laws. *See* 5 GCA §5703 (“The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.”).

Federal procurement law, while not controlling, is instructive on the important role the statutory stay plays in procurement regimes. The United States Court of Federal Claims, examining the similar statutory stay of procurement that is triggered in federal bid protests and continues through the appeal process before the Government Accountability Office (GAO), has written that “The automatic stay is intended to preserve the status quo during the pendency of the protest so that an agency would not cavalierly disregard the GAO's recommendation to cancel the challenged award. The overarching goal of the stay is to preserve competition in contracting and ensure a fair and effective process at the GAO.” *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 30-31 (Fed. Cl. 2006) (internal quotations and citations omitted). If GMHA could, as it apparently did here, ignore the statutory stay and move forward with contract

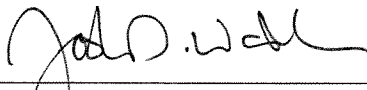
execution prior to final resolution of an offeror's protest, the goal of our procurement laws would be frustrated, and competition cannot be preserved.

IV. CONCLUSION

GMHA has argued that JMI's protest is untimely, but has relied upon an incorrect factual understanding of the communications sent to JMI to make such a conclusion. GMHA has also argued that an agency can singularly determine that a procurement protest has been finally resolved and has advocated a position on the automatic stay that would, in effect, reduce the OPA to a body only capable of hearing post award procurement appeals. GMHA's positions lie outside the law, and the OPA should rule accordingly.

Submitted this 14th day of October, 2013.

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By: 

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