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**Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL**

PART I- To be completed by OPA

In the Appeal of _____)
) **NOTICE OF APPEAL**
)
)
(Name of Company), APPELLANT)
) Docket No. OPA-PA 13-009
)
)

PART II- Appellant Information

Name: JMI Edison
Mailing Address: 125 N. Marine Drive
Tamuning, Guam 96913
Business Address: 125 N. Marine Drive
Tamuning, Guam 96913
Email Address: _____
Daytime Contact No: 671-649-5444
Fax No.: _____

PART III- Appeal Information

- A) Purchasing Agency: Guam Memorial Hospital Authority
- B) Identification/Number of Procurement, Solicitation, or Contract: GMHA 020-2012.
- C) Decision being appealed was made on July 17, 2013 (date) by:
 Chief Procurement Officer Director of Public Works x Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
- x Decision on Protest of Method, Solicitation or Award
 - Decision on Debarment or Suspension
 - Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 - Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

ORIGINAL

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

Medpharm	_____	_____
JC Marketing	_____	_____
PBSI	_____	_____
_____	_____	_____
_____	_____	_____

PART IV- Form and Filing *See Attached

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

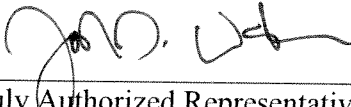
Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 1 day of Aug, 2013.

By: _____
APPELLANT

or CIVILLE & TANG, PLLC

By:  _____
Appellant's Duly Authorized Representative

(Address) 330 Hernan Cortez Ave. Ste. 200 Hagatna, Guam 96910

(Phone No.) 671-472-8868

CIVILLE & TANG, PLLC
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Attorneys for Appellant
JMI Edison

**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI Edison,

Appellant.

Docket No. OPA-PA _____

**APPELLANT'S ADDITIONAL
INFORMATION SUBMITTED
PURSUANT TO NOTICE OF
APPEAL, APPENDIX A PART IV**

This submission is offered to supplement Appendix A: Notice of Appeal Form, Part IV.

I. STATEMENT OF GROUNDS FOR APPEAL

JMI was an offeror who submitted a bid pursuant to an Invitation for Bid (“IFB”) issued by the Guam Memorial Hospital Authority (“GMHA”) and opened on October 19, 2011. The IFB sought proposals to provide GMHA with a portable kidney machine with reverse osmosis purification machine. A Notice was received by JMI on June 7, 2013 indicating that another offeror has been awarded the contract. On June 21, 2013 JMI protested that award. A decision denying the protest was issued by GMHA on July 17, 2013. Despite the numerous grounds of protest raised by JMI, GMHA denied the protest on a single ground. GMHA declares in its decision that JMI’s protest was untimely because JMI should have been aware of the other offeror’s deficiencies at the time of the bid opening in October 2012. This conclusion is unsupported by law and calls for an absurd reading of the procurement law, and necessitates this instant appeal to the Office of the Public Accountability and the Public Auditor. This appeal is

timely brought under Guam Procurement law and serves as a continuation of the Automatic Stay regarding the award of GMHA Bid 020-2012.

It is understood that there were three offerors who responded to the IFB, and that offeror Medpharm was awarded the contract at issue here. JMI protests the award on the grounds that the selected offeror submitted an unresponsive bid that did not contain the required factory certifications and technical personnel qualifications. Further, the Medpharm submission did not provide specifications for the required docking station. These submission failings were mirrored by offeror JC Marketing. As the only responsive bidder, JMI should be made the awardee of Bid 020-2012. The specific nature of JMI's protest is detailed below.

a. THE AWARDEE'S SUBMISSION DID NOT PROVIDE CERTIFICATION OF MEDPHARM EMPLOYED TECHNICIANS WHO COMPLETED CERTIFICATION AND WERE ASSIGNED TO THIS PROJECT

It is unassailable that the dialysis machines that GMH are seeking are critical care units that require competent and available technical oversight. GMH confirmed this not only in the IFB, but in the third amendment to offerors that stated submissions should include "the certificates of Training with Manufacturer Training Completion Certification for the technicians assigned to this project." Amendment 3, October 12, 2012. Despite these clear requirements, no offeror other than JMI provided information to GMH regarding local and available technicians who have completed any training whatsoever. An award to any party other than JMI could only have been done by casting aside this key bid requirement.

b. THE AWARDEE'S SUBMISSION WAS COMPLETELY DEPENDENT UPON THE TECHNICAL EXPERTISE AND EXPERIENCE OF THE MANUFACTURER, RATHER THAN THE OFFEROR ITSELF

GMH's September 27, 2012 Reminder to prospective Bidders 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.¹ When asked to submit information about its personnel, the awardee pointed to the manufacturer's personnel. When asked to submit information about technical qualifications for that personnel, the awardee merely pointed to the qualifications of the manufacturer's personnel. When tasked with certifying that its personnel had completed manufacturer training, the awardee stood on the fact that the manufacturer's personnel had, of course, been trained. Put another way, the awardee did not submit the applicable responsive information required by GMH about it, and thus submitted an unresponsive bid.

c. THE AWARDEE'S FAILURE TO PROVIDE SPECIFIC INFORMATION REGARDING THE REQUIRED DOCKING STATION PRECLUDED IT FROM OBTAINING AN AWARD

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." 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.

d. THE AWARD TO MEDPHARM CALLS INTO QUESTION THE FAIRNESS OF THE PROCUREMENT PROCESS

JMI took great care in meeting the specific requirements of the IFB, and submitted the documentation requested by GMH regarding Guam personnel certification, firm expertise, and specifications for the docking station. The eventual award to an offeror who provided none of

¹ To be certain, the record does not suggest the existence of a joint venture or other joint partnership that would allow the awardee to simply sit in the shoes of the manufacturer. GMH itself recognized the fact that the awardee was not the same as the manufacturer, in that the award was made to the offeror, and not the manufacturer or some joint venture. More, to the extent that GMH selected the awardee based upon the manufacturer's skill set, the selection of the Awardee would be a *de facto* selection of an off-island offeror.

these specifics is indicative of a dangerous and growing trend of Guam procurement officers allowing the specifics of bid submissions to be filled in after an award. Public confidence in the procurement process can only be kept through a procurement process that sets specific parameters for bids and reviews those bids against those preset and defined parameters. The process at work here— a process that allowed the award of dialysis machines to an offeror who did not meet the specific bid requirements— must be corrected.

e. **GMHA’S CLAIM THAT JMI’S PROTEST IS UNTIMELY IS ABSURD, AND THREATENS THE PROCUREMENT PROCESS.**

GMHA claims that JMI’s protest is untimely since the defects JMI complains about with regard to the other offerors’ submissions existed at the time of the bid opening. This contention calls for an absurd result, since it would require JMI to, at the time of the bid opening, be aware of both the detailed contents of the other offeror’s submissions and to clairvoyantly determine how GMHA’s contracting officers would deal with those submissions. GMHA’s error necessitating JMI’s protest did not arise until GMHA failed to exclude the other non-responsive offerors. This failure did not occur until GMHA issued its bid decision and made an award to Medpharm.

To be certain, only “aggrieved” parties may bring bid protests under Guam procurement law. *See* 5 GCA §5425(a); *See also* 26 GAR § 16901(1)(A). JMI was not aggrieved until a non-responsive offerer was selected for contract award as a result of the contracting officer erring by failing to exclude improper offers. In the appeal of GCIF, the Public Auditor plainly stated that “a losing bidder is an aggrieved bidder.” **JMI was not a losing bidder until GMHA’s decision on an awardee was made on June 7, 2013.** *See also Tumon Corporation v. Guam Memorial Hospital Authority*, CV1420-01, 3, Decision and Order (Offeror is and aggrieved offeror because it was not selected as the best qualified offeror.) Attached as Exhibit “A” for ease of reference. **JMI’s protest came 14 days after that decision.** 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 its offer should be selected by the contracting officer above that of other offerors. This, of course, is absurd since every offeror believes that its offer should be selected above the other submissions. In GMHA's fanciful 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.

II. RULING REQUESTED

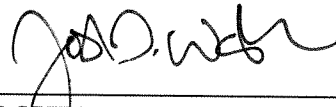
JMI requests that, as the only responsive offeror, JMI should be made the awardee under GMHA Bid 020-2012.

III. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS

JMI anticipates providing further documentation to substantiate its claims when GMHA submits the procurement record to the OPA and its agency report.

Submitted this 1st day of August, 2013.

CIVILLE & TANG, PLLC

By: 


JOSHUA D. WALSH, ESQ.
Attorneys for Appellant
JMI Edison

VERIFICATION

Hagatna, Guam) ss:

I, JOHN ILAO being first duly sworn, do hereby depose and state that I am the Vice President of JMI Edison and that I have read the foregoing **APPELLANT'S ADDITIONAL INFORMATION SUBMITTED PURSUANT TO NOTICE OF APPEAL, APPENDIX A PART IV** and it is true of my own knowledge except as to those matters alleged upon information and belief and as to those matters, I believe them to be true.

DATED this 1st day of August, 2013.



JOHN ILAO

SUBSCRIBED AND SWORN to before me this 1st day of August, 2013.



Notary Public

SHEILA Z. MACATANGAY
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: **May 02, 2015**
P.O. Box 315604 Tamuning, Guam 96931

Exhibit “A”

Territorial Law Library

**IN THE SUPERIOR COURT
OF GUAM**

FILED
SUPERIOR COURT
OF GUAM

Oct 22 4 35 PM '01
CIVIL CASE NO. 1420-01

1
2
3 TUMON CORPORATION)
4)
5 Plaintiff,)
6 vs.)
7 GUAM MEMORIAL HOSPITAL)
8 AUTHORITY)
9 Defendant.)

DECISION AND ORDER

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INTRODUCTION

10 This matter came before the HONORABLE MICHAEL J. BORDALLO on October 17, 2001,
11 for a motion to intervene and the Defendant's motion to confirm the award of a bid construction
12 contract to the Plaintiff. G. Patrick Civile represented the intervenor, Rex International, Inc. (Rex).
13 Ron Moroni represented the Plaintiff, Tumon Corporation (Tumon). Phillip J. Tyndingco represented
14 the Defendant, Guam Memorial Hospital Authority (GMHA). The Court GRANTED the motion to
15 intervene. The Court took the Defendant's motion to confirm the award or ratify and affirm the award
16 under advisement.

BACKGROUND

17
18 GMHA issued an invitation to bid for the second phase of GMHA's Courtyard and Solarium
19 construction and enclosure project. On June 29, 2001, Tumon received a notice of intent to award
20 dated June 27, 2001. On July 5, 2001, Rex received notice that GMHA rejected its bid. On July 6,
21 2001, Rex filed its notice of protest with GMHA. On July 31, 2001, GMHA denied Rex's protest.
22 In its letter denying the protest, GMHA stated that it was in the best interest of GMHA to reject all
23 bids received for the project and to re-solicit the bids. In addition, that letter informed Rex that they
24 had a right to seek judicial review of GMHA's decision that Rex's protest was without merit. On July
25 31, 2001, Tumon received a letter from GMHA that GMHA was rejecting all bids for the project and
26 that GMHA was going to re-solicit the bids. On August 2, 2001, Tumon filed its protest with GMHA
27 about GMHA's refusal to proceed with the award of the contract to Tumon. On August, 17, 2001,
28 GMHA issued its written determination and denial of Tumon's protest. On August 22, 2001 Tumon
filed its complaint in this Court seeking judicial review of GMHA's decision and an order that GMHA

2 award the contract to Tumon. On September 7, 2001, GMHA began re-soliciting the bids for the
3 project by placing an ad in the Pacific Daily News.

4 **DISCUSSION**

5 The Defendant moves the Court for an order to confirm or ratify and affirm the award of the
6 contract to the Plaintiff on the basis that it is in the best interest of the Territory of Guam and/or
7 GMHA. GMHA argues that time is of the essence in resolving any procurement dispute or protest of
8 the construction project because there is a likelihood of loss of federal funding for the project in
9 addition to the possibility of a penalty of refunding federal funds expended for phase I of the project.

10 Tumon joins in GMHA's motion to confirm or ratify and affirm the award of the contract on the basis
11 that it is in the best interest of the Territory of Guam to award the contract to Tumon.

12 The Intevornor, Rex, alleges that it is not in the best interest of Guam to allow the
13 procurement process to be circumvented. Rex alleges that its bid was almost \$300,000 lower than
14 Tumon's bid. Rex further alleges that GMHA argued and represented to this Court that it is in the
15 public interest that the first invitation to bid be cancelled. Rex argues that public interest still applies
16 and the Court should require GMHA to re-bid the project. Furthermore, Rex argues that GMHA
17 offers no dates for the deadlines and no assessment of the likelihood of an extension of the deadlines
18 in expending FEMA funds for the project.

19 5 G.C.A. § 5425 (a) provides:

20 Any actual or prospective bidder, offeror, or contractor who may be
21 aggrieved in connection with the method of source selection,
22 solicitation or award of a contract, may protest to the Chief
Procurement Officer, the Director of Public Works or the head of a
purchasing agency.

23 The protest shall be submitted in writing within fourteen (14) days
24 after such aggrieved person knows or should know of the facts giving
rise thereto.

25 5 G.C.A. § 5425 (g) provides:

26 In the event of a timely protest under Subsection (a) of this Section or
27 under Subsection (a) of § 5480 of this Chapter, the Territory shall not
28 proceed further with the solicitation or with the award of the contract
prior to final resolution of such protest, and any such further action is
void, unless:

2 (1) The Chief Procurement Officer or the Director of Public Works
3 after consultation with and written concurrence of the head of the using
4 or purchasing agency and the Attorney General . . . makes a written
5 determination that the award of the contract without delay is necessary
6 to protect substantial interests of the Territory; and

7 (2) Absent a declaration of emergency by the Governor, the protestant
8 has been given at least two (2) days notice (exclusive of territorial
9 holidays); and

10 (3) If the protest is pending before the Board or the Court, the Board
11 or Court has confirmed such determination, or if no such protest is
12 pending, no protest to the Board of such determination is filed prior to
13 expiration of the two (2) day period specified in Item (2) of Subsection
14 (g) of this Section. (Emphasis added).

15 GMHA relies on 5 G.C.A. § 5425(g) for its motion to confirm the award. However, the Court
16 is not convinced that § 5425 (g) is applicable in this case where the protest is by a winning bidder
17 instead of a losing bidder. Section 5425(g) applies to a protest by a losing bidder after the winning
18 bidder has been declared. In other words, § 5425(g) would have applied if Rex filed a petition
19 seeking review in connection with the award of the contract to Tumon. In this case, Tumon received
20 the notice of intent to award the contract, therefore, Tumon cannot be considered an aggrieved bidder.

21 GMHA argues in the alternative that the Court may confirm and ratify the contract under GAR
22 § 16906¹ of the GMH procurement rules and regulations, which states in part:

23 (a) If after an award it is determined that a solicitation or award of a
24 contract is in violation of law, then:

25 (i) if the person awarded the contract has not acted
26 fraudulently or in bad faith:

27 (A) the contract may be ratified and affirmed, provided
28 it is determined that doing so is in the best interests of
the hospital; or

(B) the contract may be terminated and the person
awarded the contract shall be compensated for the
actual expenses reasonably incurred under the contract,
plus a reasonable profit, prior to termination;

.....

///

¹The language in 5 G.C.A. § 5425(a)(1) is virtually identical to § 16906 of the GMH procurement regulations and § 9106 of the Guam procurement regulations.

2 However, § 16906 is inapplicable here as well because the remedies under § 16906 apply when the
3 Government has already entered into a written contract with the bidder, Tumon herein. Because no
4 written contract has been executed, the Court finds that GMHA cannot move for ratification and
5 affirmation under § 16906.

6 Even if the Court found that § 16906 were applicable, GMHA has not presented sufficient
7 evidence to show that it is in the best interest of the hospital to go forward under § 16906(i)(A). Nor
8 has GMHA made a showing entitling it to go forward under § 16906(a)(3)(A). At most, GMHA
9 claims that time is of the essence to resolve this matter because there is a likelihood of loss of federal
10 funding for the project and that there is a possibility of a penalty of refunding federal funds expended
11 for phase I of the project.

12 26 GAR § 16905² provides that “If prior to award it is determined that a solicitation or
13 proposed award of a contract is in violation of the law, then the solicitation or proposed award shall”
14 be (i) cancelled; or (ii) revised to comply with the law.

15 Where municipal body advertises for bids for public work and receives an apparently
16 satisfactory bid, it is within contemplation of both bidder and acceptor that no contractual relation
17 arises until a written contract has been entered into embodying all material terms of offer and
18 acceptance. NVC Computer Sales, Inc. v. City of Philadelphia, 695 A.2d 933, 936 (1997).

19 The only options under § 16905 are either to cancel the proposed award of a contract or to
20 revise it to comply with the law.

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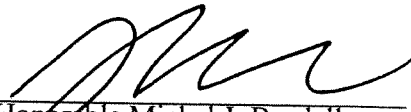
27 ///

28 _____
²The language in § 16905 is identical to 5 G.C.A. § 5451 and § 9105 of the Guam procurement regulations.


2 **CONCLUSION**

3 Based on the foregoing, the Court finds that 5 G.C.A. § 5452(g) does not apply because
4 Tumon is not an aggrieved bidder. In addition, the Court finds that 26 GAR § 16906 does not
5 apply because a contract was not executed between Tumon and GMHA. Furthermore, the Court
6 finds that even if § 16906 applied, GMHA failed to meet the requirements under it to confirm or
7 ratify the contract. Therefore the Court DENIES GMHA's motion to confirm the award or ratify
8 and affirm the award.

9 SO ORDERED this 22nd day of October 2001.

10
11 
12 Honorable Michel J. Bordallo
13 Judge, Superior Court of Guam
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I do hereby certify that the foregoing
is a full true and correct copy of the
original on file in the office of the
clerk of the Superior Court of Guam
Dated at Hagatna, Guam

 OCT 22 2001
Jessica C. Cruz
Clerk of the Superior Court of Guam