



OFFICE OF THE PUBLIC AUDITOR

**PROCUREMENT APPEALS**

IN THE APPEAL OF,  
JMI MEDICAL SYSTEMS INC.  
  
Appellant.

**APPEAL NO: OPA-PA-07-011**  
**FINDING AND RECOMMENDATIONS  
OF HEARING OFFICER**

**I. INTRODUCTION**

This is the Finding of the Hearing Officer, ROBERT G.P. CRUZ, ESQ. on a procurement appeal filed on December 12, 2007, by JMI Medical Systems, Inc., (hereafter "JMI") regarding the Guam Memorial Hospital Authority's (hereafter "GMHA") solicitation for a Microbiology Analyzer. Pre-Hearings were held on five separate dates<sup>1</sup> as issues relating to discovery required resolution before the formal Hearing could be scheduled. Present and making arguments on behalf of their clients at the Pre-Hearings were John S. Unpingco, Esq., of the Law of Offices of John S. Unpingco & Associates LLC, representing GMHA, and Benjamin C. Sison, Esq., of Sison, P.C., representing JMI.

A Hearing on this procurement appeal was held on October 30, 2008. At Hearing JMI was represented by Mr. George Neil P. Valdes, Esq. of Sison, P.C. and GMHA was represented

<sup>1</sup> Prehearings were held on February 6, March 27, May 15, June 20, and September 4, 2008, to attempt settlement and agree on witness lists, exhibits, subpoenas and deposition dates.

1 by Georgette Bello Concepcion, Esq., of the Law Offices of John S. Unpingco & Associates  
2 LLC. Witnesses subpoenaed to testify at request of the parties were Glenda Pangelinan, GMHA  
3 Laboratory Assistant Administrator, William Kando, GMHA Chief Planner, and John  
4 Benavente, GMHA Medical Electronic Superintendent and Jean Grape Ko, Sales Manager for  
5 JMI.  
6

7 A Motion for Summary Judgment was filed by the Appellant on October 17, 2008, and  
8 opposed by GMHA on October 24, 2008. This Motion was denied in a written decision on  
9 October 30, 2008, on the basis that genuine issues of material fact were in dispute.  
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11 In this matter, the Hearing Officer recommends that the Public Auditor hold that  
12 GMHA's selection of Medpharm was proper as they were responsive to the bid, but the  
13 procurement of two Microbiology Analyzers, while under appeal, was improper. Accordingly,  
14 the Hearing Officer recommends that the Public Auditor affirm the procurement of one  
15 Microbiology Analyzer in the best interest of the territory, but overturn the procurement from  
16 Medpharm of a second, unannounced and non-competitively procured, analyzer.  
17

## 18 19 **II. FINDINGS OF FACT**

20 These findings are based on the Procurement Record, all documents submitted by the  
21 parties in the appeal, as well as all testimony and arguments presented at the October 30, 2008,  
22 Hearing in this matter.  
23

24 Based on the record in this matter, the Hearing Officer recommends that the Public  
25 Auditor make the following findings of fact:

- 26 1. Bid Invitation No. GMHA Bid 024-2007(IFB) was issued on June 22, 2007.
- 27 2. Three bids were timely received in response to the IFB by July 12, 2008 by:
  - 28 a. Medpharm Corporation (Medpharm)



1 4. GMHA found JCM non-responsive as the required non-collusion affidavit was  
2 not submitted<sup>2</sup> as part of the bid package. Both Medpharm and JMI were deemed responsive.

3  
4 5. On August 10, 2007, GMHA sent letters to Medpharm and JMI requesting  
5 additional cost information for three specific types of reagents cards.

6 6. JMI and Medpharm both submitted the requested cost information to GHMA as  
7 follows:

8  
9 **a. Gram Positive Susceptibility Test Cards**

10 **AST-GP63 (22101)**

11 Medpharm: \$92.51  
12 JMI: \$259.20 / Bx.

13 **AST-GP66 (22175)**

14 Medpharm: \$92.51  
15 JMI: \$259.20 / Bx.

16 **b. Gram Negative Susceptibility Test Cards**

17 **AST-GN20 (22184)**

18 Medpharm: \$92.51  
19 JMI: \$259.20 / Bx.

20 **AST-GN07 (22006)**

21 Medpharm: \$92.51  
22 JMI: \$259.20 / Bx.

23 **c. Streptococcus Pneumoniae Susceptibility Test Cards**

24 **AST-GP65 (22149)**

25 Medpharm: \$92.51  
26 JMI: \$259.20 / Bx.

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<sup>2</sup> JMI Notice of Appeal pg. 2

1           7. In an August 14, 2007, recommendation letter from the Lab Assistant  
2 Administrator to the GMHA Hospital Administrator it was indicated that “the competitive  
3 pricing offered by Medpharm makes it possible for [GMHA] to purchase two instruments.”  
4 (August 14, 2007 letter from Glenda Pangelinan to PeterJohn D. Camacho)  
5

6           8. On August 17, 2007, a decision was made by GMHA to award Medpharm a  
7 contract for the purchase of two “Vitek 2 Compact 60’s with Observa software” Microbiology  
8 Analyzers, as they were the lowest priced bidder.  
9

10           9. On August 31, 2007, JMI issued a protest letter to GMHA regarding the award to  
11 Medpharm. The basis of the protest was that Medpharm’s bid was non-responsive. Specifically,  
12 that MedPharm did not include the cost of reagents and test supplies in its initial bid submission  
13 in contravention of GMHA 024-2007 IFB requirements under the “all or none” provision  
14 expressly provided for in the IFB.  
15

16           10. On September 11, 2007, GMHA responded to JMI’s protest and concluded that  
17 the “protest was without merit and should not be sustained.” JMI submitted a September 13,  
18 2007, letter in response offering additional information for reconsideration on GMHA’s  
19 September 11 decision.  
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21           11. In response to JMI’s September 13, 2007, letter for reconsideration and their  
22 initial August 31, 2007, letter of protest GMHA issued a November 27, 2007, decision on the  
23 protest reaffirming the Hospital’s award to Medpharm for the procurement of an automated  
24 microbiology analyzer. The November 27 decision also indicated that “the [price] bids for [the]  
25 reagent supplies [were] all rejected.” Only the award of the equipment was to be made.  
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1 was only to procure an Automated Microbiology Analyzer to replace its current equipment.”  
2 GMHA Laboratory Assistant Administrator, Glenda Pangelinan, further testified during the  
3 Hearing, that the reference within the scope of services to “provide reagents and supplies for a  
4 minimum of 3,000 tests per year for use with Microbiology Analyzer” was only to ensure that  
5 the successful bidder was able to provide reagent supplies for the analyzer being offered. This  
6 testimony reaffirmed Ms. Pangelinan’s statements made in a September 6, 2007, Memorandum  
7 to the GMHA Supply Management Administrator in response to the filed protest, where she  
8 wrote that no cost request or requirement was made in the initial IFB on the reagents and  
9 supplies themselves. Based on the testimony received from Hearing and the record presented  
10 before her, the Public Auditor has determined that Medpharm was responsive to the IFB since  
11 the initial bid had no requirement to provide a cost or price bid for reagents and supplies.  
12 Medpharm firmly responded with the lowest priced analyzer at \$79,238 for a “Vitek 2 Compact  
13 60 analyzer with Observa system software” with installation and training included. Medpharm’s  
14 submitted proposal fulfilled the scope of services requested by the IFB regarding the equipment,  
15 installation/ validation, technical support, and training of the IFB.  
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19           Only in their August 10, 2007, letter request to JMI and Medpharm did GMHA request  
20 price quotations for specific reagent cards from Medpharm and JMI. GMHA stated that the  
21 request was necessary as it did not state what reagents and supplies were to be obtained in the  
22 initial IFB. This information was requested after bid opening but prior to completing the  
23 selection evaluation. The Hearing Officer recommends that the Public Auditor has determine that  
24 August 10 request for price quotations had no effect on the initial award to Medpharm for the  
25 purchase of the Vitek 2 Compact 60 Analyzer as Medpharm was also the lower priced bidder on  
26 the reagents and supplies in comparison to JMI.  
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1 **B. Halting of Procurement During Pendency of Appeal with OPA**

2 Normally, a timely appeal would result in the government agency halting further action  
3 on the procurement pending a determination by the Public Auditor or Superior Court that the  
4 procurement was in order. 5 G.C.A. Chapter 5 Section 5425 (g) states:  
5

6 In the event of a timely protest under Subsection (a) of this Section or under Subsection  
7 (a) of Section 5480 of this Chapter, the Territory shall not proceed further with the solicitation or  
8 with the award of the contract prior to final resolution of such protest, and any such further  
9 action is void, unless:  
10

- 11 (1) The Chief Procurement Officer or the Director of Public Works after consultation  
12 with and written concurrence of the head of the using or purchasing agency and  
13 the Attorney General or designated Deputy Attorney General, makes a written  
14 determination that the award of the contract without delay is necessary to protect  
15 substantial interests of the Territory; and  
16
- 17 (2) Absent a declaration of emergency by the Governor, the protestant has been given  
18 at least two (2) days notice (exclusive of territorial holidays); and  
19
- 20 (3) If the protest is pending before the Public Auditor or the Court, the Public Auditor  
21 or Court has confirmed such determination, or if no such protest is pending, no  
22 protest to the Public Auditor of such determination is filed prior to expiration of  
23 the two (2) day period specified in Item (2) of Subsection (g) of this Section.  
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26 However, during the hearing OPA learned that, after the procurement appeal began,  
27 GMHA continued with the award and purchase of the Microbiology Analyzer that was the object  
28



1 of the protest, and also bought a second one, under the same procurement.<sup>4</sup> While under appeal,  
2 making any purchase without the written determination of the Attorney General or designated  
3 Deputy Attorney General is a clear violation of procurement law and procedure under Chapter 5  
4 Section 5425(g). Despite a violation, the Public Auditor may affirm a procurement, if it is in the  
5 best interests of the Territory. In this case, the Hearing Officer recommends that the Public  
6 Auditor affirm the procurement of **one** Analyzer in the best interests of the Territory given the  
7 fact that federal funds used to purchase the equipment may have expired and been lost.  
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10 **C. Objection to Discussion of Quantity Purchased by GMHA Counsel**

11 At the formal hearing, GMHA's counsel objected to Appellant's attorney raising the  
12 issue that GMHA purchased a second analyzer, which was not revealed in the initial  
13 procurement protest submitted by JMI. OPA has the authority to determine procurements de  
14 novo based upon testimony presented during the appeal process. 5 G.C.A. Section 5703. If  
15 GMHA concealed the purchase of a second analyzer using the same procurement, the Public  
16 Auditor may, sua sponte, review the matter.  
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19 With regard to the appropriate remedy, the Public Auditor is guided by 5 G.C.A. Section  
20 5703 stating that the Public Auditor's jurisdiction shall be utilized to promote the integrity of the  
21 procurement process and the purposes of Chapter 5. The Model Procurement Act requires the  
22 appropriate Policy Office to promulgate rules relating to variations in quantity, among other  
23 topics. The Guam Procurement Code is silent with regard to variations in quantity. However, the  
24 Procurement Regulations, at 2 GAR DIV. 4, do address the issue of quantity in the issuance of  
25 Definite and Indefinite Quantity Contracts. They are mirrored in GMHA's Procurement  
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<sup>4</sup> Testimony and letter of Glenda Pangelinan.

1 Regulations in sections 6-101.05.1 and 6-101.05.2. Thus, we are posed with the question as to  
2 whether a doubling of the purchase from one to two items was reasonable and necessary.  
3 Normally when quantity is uncertain, the IFB will indicate this fact, or request bids on a base  
4 quantity and have an option for additional quantities. Formation of Government Contracts,  
5 Cibinic and Nash, The George Washington University , 3<sup>rd</sup> Edition. In this instance, the  
6 procurement was for a definite quantity of **one** Microbiology Analyzer.  
7

8 It is patently unfair to potential suppliers for a change in the quantity of equipment  
9 procured when the quantity advertised and the quantity actually purchased increases by 100 per  
10 cent from the time of advertising to moment of the actual purchase. Although the instant  
11 procurement is for a definite quantity, which permits a 10 per cent (10%) increase, a doubling of  
12 the purchase remains a violation of the principle regarding definite versus indefinite quantity  
13 procurements.  
14

#### 15 **D. Procurement Using the Invitation for Bids was Flawed**

16 The procurement solicitation form issued by GMHA was also flawed as GMHA  
17 incorrectly allowed the bids to be evaluated like proposals under a Request for Proposal (RFP)  
18 solicitation, which can be distinguished from an IFB. In Fleet Services, Inc. vs. Department of  
19 Administration, Government of Guam, 2006 Guam 6, the Supreme Court of Guam distinguished  
20 between competitive sealed bids and the limited exceptions allowed for deviation from  
21 determining winning bidders due to price. In Fleet Services, at pertinent part, the Guam Supreme  
22 Court stated:  
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26 We hold that the Request for Proposal DOA RFP-03-001 to procure the operation,  
27 management and maintenance of the Guam Mass Transit system, violated the  
28 Guam Procurement Code. Title 5 G.C.A. Section 5210 mandates that government

1 contracts in the Executive Branch be awarded using the competitive sealed  
2 bidding process, subject to limited statutory exceptions. The procurement in this  
3 case did not fall within any of the exceptions; specifically, it was not a  
4 procurement for professional services as contemplated by 5 G.C.A. Section 5121.  
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6 Here, as in Fleet Services, there was no procurement of professional services involved. Thus, the  
7 focus should have been on awarding the bid to the lowest bidder responding to the IFB. Price  
8 negotiations are conducted for an RFP rather than an IFB where the lowest priced bidder  
9 receives the award so long as specifications are met.  
10

11 No. 25 of the “Sealed Bid Instructions” titled “Award, Cancellation, and Rejection”  
12 indicate that the “award shall be made to the lowest responsible and responsive bidder, whose  
13 bid is determined to be the most advantageous to GMHA and the Government, taking into  
14 consideration the evaluation factors set forth in this solicitation. However, under the IFB’s “Bid  
15 Specifications Section VII Proposal Evaluation and Award of Contract” it states in conflict that:  
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17 The selection committee will evaluate all proposals and select the top three  
18 companies. The top three company proposals will be forwarded to the Hospital  
19 administrator for final selection of the **most qualified company. (emphasis**  
20 **added)**. Interviews with the company may be conducted during the evaluation  
21 period. GMHA will negotiate a contract with the selected company for the  
22 required services if compensation, contract requirements and contract documents  
23 can be agreed upon with the selected company.  
24

25 Under this Specifications Section VII of the IFB it appears that when an evaluation takes place,  
26 the highest ranked and most qualified bidder will be awarded the bid, so long as they meet all the  
27 qualifications, but not necessary the lowest bidder. This procedure is not appropriate for an IFB  
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1 and should not be used. Local procurement law is clear that negotiations are conducted for RFP's  
2 not IFB's, where the procurement of professional services are involved. In an IFB the lowest  
3 priced responsible bidder receives the award so long as specifications are met. In this instance,  
4 GMHA was correct to issue the contract to the lowest priced and responsible bidder, but any  
5 negotiations that took place would have been improper.  
6

7 **E. Appropriate Remedies**

8 The Procurement Law and GMHA Procurement Regulations Section 9-203.1 relate to Remedies  
9 After an Award. It states: if after an award it is determined that a solicitation or award of a  
10 contract is in violation of law, then:  
11

- 12 1. If the person awarded the contract has not acted fraudulently or in bad faith:
  - 13 (a) the contract may be ratified and affirmed, provided it is determined that doing  
14 so is in the best interests of the Hospital; or
  - 15 (b) the contract may be terminated and the person awarded the contract shall be  
16 compensated for the actual expenses reasonably incurred under the contract, plus  
17 a reasonable profit, prior to the termination;  
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- 19 2. If the person awarded the contract has acted fraudulently or in bad faith:
  - 20 (a) the contract may be declared null and void; or
  - 21 (b) the contract may be ratified and affirmed if such action is in the best interests  
22 of the Hospital, without prejudice to the Hospital's rights to such damages as may  
23 be appropriate.  
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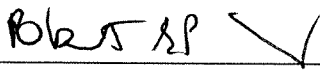
25 There is no evidence in the instant case of bad faith or fraud by Medpharm. Thus, the  
26 following GMHA rules would control: 9-203.01.1 No Fraud or Bad Faith by Contractor and 9-  
27 203.01.2 General, which states:  
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1 the Hearing Officer recommends that the Public Auditor affirm GMHA's action on the purchase  
2 of **one** Vitek 2 Analyzer. As the second analyzer was procured without announcement or full  
3 competition, the Hearing Officer recommends the Public Auditor overturn the awarding of the  
4 second Vitek 2 Microbiology Analyzer (which remains at Medpharm in storage according to  
5 testimony of Glenda Pangelinan). The purchase of the second analyzer should be procured using  
6 the Competitive Sealed Bidding procedures required by 5 G.C.A. Section 5211. As the Hearing  
7 Officer recommend that the Public Auditor find that JMI should not have been awarded the  
8 contract, the Hearing Officer further recommends that the Public Auditor deny JMI's request for  
9 lost profits and costs of filing the appeal.  
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12 A copy of this Finding of Hearing Officer shall be provided to the parties and their  
13 respective attorneys, in accordance with 5 G.C.A. Section 5702, and shall be made available for  
14 review on the OPA Website [www.guamopa.org](http://www.guamopa.org).  
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16 **DATED** this 16<sup>th</sup> day of January, 2009.  
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21 ROBERT G.P. CRUZ, ESQ.  
22 Hearing Officer  
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