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FILE NO OPA-PA: 17-011

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9 PHIL-GETS (GUAM) INTERNATIONAL TRADING CORP.  
10 dba J & B MODERN TECH

11 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**

12 IN THE APPEAL OF

Appeal No. OPA-PA-17-011

13 PHIL-GETS (GUAM)  
14 INTERNATIONAL TRADING CORP.  
15 dba J & B MODERN TECH,

**PHIL-GETS (GUAM) INTERNATIONAL  
TRADING CORP. dba J & B MODERN  
TECH'S OPPOSITION TO MOTION TO  
STRIKE APPELLANT'S AMENDED  
OPPOSITION**

16 Appellant.

17 COMES NOW Appellant Phil-Gets (Guam) International Trading Corp. dba J &  
18 B Modern Tech (herein "Appellant"), by and through counsel undersigned, and hereby  
19 opposes the Purchasing Agency Guam Community College's (herein "GCC") Motion to  
20 Strike Appellant's Amended Opposition filed December 11, 2017. For the reasons  
21 below, the GCC Motion should be denied without hearing.

22 **BACKGROUND**

23 On December 1, 2017, Friday, Appellant filed an Opposition to GCC's Motion to  
24 Dismiss for Lack of Jurisdiction or, Alternatively, for Expeditious Disposition.

25 On December 4, 2017, Monday, the next business day, Scheduling Order stated  
26 in pertinent part as follows:

27 1. Regarding Purchasing Agency's Motion to Dismiss for  
28 Lack of Jurisdiction or, Alternatively, for Expeditious  
Disposition, J&B has filed an opposition to the motion  
and the deadline for GCC to file any reply to J&B's  
opposition is December 11, 2017.

2. For all other motions:

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- a. The deadline for parties to file motions is December 13, 2017;
- b. Oppositions to the motions shall be filed by December 20, 2017;
- c. Replies to oppositions shall be filed by December 27, 2017.

Based on a reading of the above Scheduling Order, and participation in the Scheduling Order, the Appellant has filed its Amended Opposition to Motion to Dismiss for Lack of Jurisdiction on the day after next business day: December 6, 2017. The Amended Opposition contained one (1) additional page of legal authority beginning at the last paragraph of page 1 and the second to last paragraph at page 2 to distinguish it from the Appellant's December 1, 2017 Opposition. Therein, Appellant stated that that a reading of the Scheduling Order granted the parties time up through December 20, 2017 for oppositions to motions. See Amended Opposition at p. 1.

The Scheduling Order did not prohibit nor bar an amendment to the Opposition to the Motion for, among other relief, Expeditious Disposition.

Accordingly, the Motion to Strike revolves around the single page of additional legal authority submitted two (2) business days after December 4 by Appellant to avoid dismissal by Expeditious Disposition.

**POINT AND AUTHORITIES**

**A. JUST CAUSE OR EXCUSABLE NEGLIGENCE: STANDARD**

Appellant J&B submits that good cause or excusable neglect exists in omitting the one page of supplemental legal authorities on the subject of no jurisdiction. This is so because GCC had initiated a race or speedy demand to end the case without further proceedings on their Expedited request. And, as a consequence, Appellant J&B expedited their Opposition to the Motion to Dismiss - before any deadline was set - for the very reason that GCC sought "expeditious" dismissal of their whole protest and appeal. While researching, assembling and drafting J&B's first Opposition filed on

1 December 1, 2017, J&B overlooked some substantial relevant legal authority of the *JMI*  
2 *Edison* Decision and related Federal Court precedent that supports the existence of  
3 jurisdiction over this procurement protest.

4       Apparently, GCC's procedural plan was to immediately and expeditiously  
5 terminate the protest and appeal. In order to avoid this expedited and immediate relief  
6 demanded by GCC, Appellant rushed and submitted their first Opposition to the  
7 Motion to Dismiss for Lack of Jurisdiction for filing on December 1, 2017 at the implied  
8 urging of GCC. After having realized that oppositions to all other motions may be filed  
9 as late as December 20, 2017, Appellant interpreted the Scheduling Order as allowing a  
10 minor supplement or amendment to the existing December 1<sup>st</sup> filed Appellant's  
11 Opposition to GCC's Motion to Dismiss. In the event this view is mistaken, then J&B  
12 moves for leave to supplement their Opposition based on the record herein.

13       5 Wright Miller Kane, *Fed. Prac. Proc.* Rule 7, § 1194 (Amendment of Motions)  
14 (2004) at 66 provides:

15               The use of judicial discretion seems especially appropriate if  
16 the adverse parties will not be prejudiced by the amendment  
17 to the motion, or if the amendment is necessary to insure  
18 that the case is adjudicated fairly and justly or if it will help  
19 resolve the litigation at an early date. Thus, although there  
20 may be valid policy reasons for not granting the movant an  
21 absolute or automatic right to amend his motion, there is no  
22 reason to deny the amendment when the trial judge believes  
it would be in the interests of justice to permit it. The use of  
discretion seems especially appropriate if the adverse parties  
will not be prejudiced by the amendment, or if the  
amendment is necessary to insure that the case is  
adjudicated fairly and justly or if it will help resolve the  
litigation at an early date. (footnotes omitted).

23 *See Polaroid Corp. v. Feely*, 889 F.Supp. 21 (D.C. Mass. 1995) (Judicial discretion  
24 appropriate).

25       The OPA, like a Court, should have the discretion to permit supplementation of  
26 the record. *See, e.g., Tremont LLC v. Halliburton Energy Servs.*, 696 F.Supp.2d 741, 788 n.

1 50 (S.D. Tex. 2010) (“Both the local and federal rules permit this court to exercise its  
2 discretion to consider evidence filed as a supplement.” (citing Fed. R. Civ. P. 56(e) and  
3 S.D. Tex. L. R. 7.8)); *Stemcells, Inc. v. Neuralstem, Inc.*, No. 8:06-cv-01877, 2012 WL  
4 1184545, 2012 U.S. Dist. LEXIS 48937, at \*31 (D. Md. Apr. 6, 2012) (“[T]he Court sees no  
5 harm in granting the Parties’ cross-motions to supplement the record. Although the  
6 supplemental evidence that the Parties seek to submit fails to resolve these factual  
7 disputes, such evidence only enhances the Court’s truth-finding function.”); *Steven N.S.*  
8 *Cheung, Inc. v. United States*, No. C04-2050RSM, 98 A.F.T.R.2d (RIA) 5870, 2006 U.S. Dist.  
9 LEXIS 51755, at \*6 (W.D. Wash. July 28, 2006) ([P]laintiff asserts that new facts have  
10 come to light and the Court would benefit from having the most complete record  
11 available to it when resolving the instant motion for summary judgment. The Court  
12 agrees.”); *Givens v. Waffle House, Inc.*, No. 1:03-cv-3367, 2006 WL 211710, 2006 U.S. Dist.  
13 LEXIS 5204, at \*11-13 (N.D. Ga. Jan. 25, 2006) (granting motions to supplement record  
14 with deposition testimony of witness who was previously unavailable).

15 Given that the Amended Opposition with its single page of additional legal  
16 authority was filed and served on December 6, 2017, GCC had substantial additional  
17 time to either respond to the Amended Opposition on the merits; or, request additional  
18 time in the event that the one-page of legal authority required much more time for  
19 Reply than December 27, 2017. GCC took no steps to request additional time nor  
20 requested a continuance of the briefing schedule. Without a showing of any prejudice,  
21 GCC’s Motion to Strike should be denied; and if some additional time is requested, and  
22 none has been, for an opportunity to amend or supplement the GCC Reply  
23 Memorandum, then added time may be available and possible to Reply to J&B’s one  
24 page of added legal authority.

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2           **B. APPELLANT'S AVAILABLE SUPPLEMENTAL AUTHORITY**  
3           **BESTOWS JURISDICTION**

4           Contrary to the Motion to Strike at 3, Appellant J&B's supplemental authority of  
5 *In the Appeal of JMI Edison*, OPA-PA-13-009 (Nov. 27, 2013), bestows jurisdiction on the  
6 OPA. Therein, GMH and JMI Edison were parties to a protest. On the date of a June 6,  
7 2013, GMH rejected JMI's bid for non-conformity and high price; and, the next day June  
8 7, 2013, GMH issued notice of award of the contract to Med Pharm. JMI Edison filed its  
9 Notice of Protest within the time allowed from the June 7, 2013 Notice of Award to Med  
10 Pharm on June 21, 2013 which set forth four grounds for a protest to the award. *See JMI*  
11 *Edison* at p. 2.

12           Dispositively, OPA ruled that the JMI protest was timely because the protest was  
13 based on the award to Med Pharm. *JMI Edison* at 4, 5 at ¶¶ 4 and 5. The OPA analyzed  
14 the issue as a protest "not based on the rejection of JMI (6/6/13), but based on the  
15 award to Med Pharm (6/7/13)." That JMI knew earlier (one day), that its bid was  
16 rejected, and could have been a possible source of appeal was clearly irrelevant.  
17 Identically here, Appellant J&B's protest is based on the GCC award to Pacific - on  
18 many grounds - the leading of ground of which is the high price of Pacific calculated  
19 based on the Unit Price Rule of Law. Identically, any allegation against Appellant J&B  
20 that it could have protested earlier based on the response to FOIA that disclosed the bid  
21 of Pacific is also not relevant, as it was in *JMI Edison*. Copy of the *JMI Edison* Decision  
22 (Nov. 27, 2013) is attached for ease of reference.

23           **C. GCC MOTION TO STRIKE DENIED BEFORE**

24           Unfortunately, GCC has exploited a similar Motion to Strike procedure in the  
25 previous OPA Decision in the appeal of *1-A Guam WebZ*, Appeal No. OPA-PA-16-002  
26 (Aug. 22, 2016). Specifically, GCC's Motion to Strike portions of WebZ remedies was  
27 denied as "no merit". Decision at 20. Given that GCC had substantial time to file any  
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1 Reply to Opposition by December 27, 2017, or as it did here, file a Reply on or before  
2 December 11, 2017 without objection or request for more time, GCC shows no  
3 prejudice. Without prejudice, a Motion to Strike is without merit.

4 **CONCLUSION**

5 GCC's Motion to Strike should be denied.

6 DATED this 18 day of December, 2017.

7 Respectfully submitted,

8 **BERMAN O'CONNOR & MANN**  
9 Attorneys for Appellant  
10 **PHIL-GETS (GUAM) INTERNATIONAL**  
11 **TRADING CORP. dba J & B MODERN TECH**

12 By:



13 **DANIEL J. BERMAN**

CERTIFICATE OF SERVICE

I, Christine Pangelinan, hereby certify that on the 18 day of December, 2017, I caused the foregoing *Phil-Gets (Guam) International Trading Corp. dba J & B Modern Tech's Opposition to Motion to Strike Appellant's Amended Opposition* to be served as follows:

1) Via Hand Delivery to:  
Rebecca Wrightson, Esq.  
Cabot Mantanona LLP  
Edge Bldg., Second Floor  
929 S. Marine Corps Drive  
Tamuning, Guam 96913

2) Via U.S. Mail to:  
Propacific Builders Corporation  
750 Rt. 8, Suite 202  
Barrigada, Guam 96913

DATED this 18 day of December, 2017.

  
\_\_\_\_\_  
CHRISTINE PANGELINAN

# Attachment





OFFICE OF PUBLIC ACCOUNTABILITY  
Doris Flores Brooks, CPA, CGFM  
Public Auditor

**BEFORE THE PUBLIC AUDITOR**

**PROCUREMENT APPEAL**

In the Appeal of

Docket No. OPA-PA-13-009

JMI Edison,

Appellant

DECISION

**INTRODUCTION**

Hearings on this appeal were held on August 26, 2013, September 27, 2013, October 29, 2013, and November 18, 2013, before Public Auditor Doris Flores Brooks, CPA, CGFM, and Hearing Officer Peter C. Perez. Joshua D. Walsh, Esq. appeared on behalf of and with appellant JMI Edison's ("JMI") representative Eduardo R. Ila. Minakshi V. Hemlani, Esq. appeared on behalf of and with Guam Memorial Hospital Authority ("GMHA") representative, Roland Lumongsud. This appeal arises from GMHA's rejection of JMI's protest for un-timeliness and GMHA's award to another vendor.

**FINDINGS OF FACT**

The Public Auditor issues this Decision based upon the procurement record, the parties' briefs and arguments, and the documents and exhibits submitted by the parties, and makes the following Findings of Fact:

1. JMI is an offeror which submitted a bid pursuant to Invitation for Bid No: GMHA IFB # 020-2012 ("IFB").

- 1 2. The IFB sought bids for portable kidney machines with reverse osmosis water purification  
2 machines. [Agency Procurement Record (“APR”), Exhibit F].
- 3 3. Procurement funding for the IFB was provided by FY11 Hospital Preparedness Program  
4 (“HHP”) Grant and FY11 Compact Impact (DOI) funding. The total contract price of  
5 \$380,925.00 was funded as follows: \$107,266.53 from FY11 HHP Grant and \$237,658.47  
6 from FY11 Compact Impact funds. [GMHA Brief, November 4, 2013].
- 7 4. On June 6, 2013, GMHA transmitted to JMI a Bid Status advising JMI that JMI’s bid was  
8 rejected for nonconformance with specifications and high price. [JMI Declaration of John  
9 Ilao, October 7, 2013].
- 10 5. On June 7, 2013, GMHA transmitted to JMI another Bid Status, this time advising JMI  
11 that its bid was rejected and that the contract was being awarded to MedPharm. [APR,  
12 Exhibit H].
- 13 6. On June 21, 2013, within fourteen days of the June 7, 2013 GMHA’s Bid Status  
14 transmittal advising that the contract was being awarded to MedPharm, JMI filed a  
15 protest. [APR, Exhibit I(a)]. The protest grounds were not based upon GMHA’s rejection  
16 of JMI’s bid, which GMHA advised on June 6, 2013, but instead were based upon  
17 GMHA’s award to MedPharm, which GMHA advised on June 7, 2013. JMI’s protest  
18 asserted: (a) the awardee’s submission did not provide certification of MedPharm  
19 employed technicians who completed certification and were assigned to this project; (b)  
20 the awardee’s submission was completely dependent upon the technical expertise and  
21 experience of the manufacturer, rather than the offeror itself; (c) the awardee’s failure to  
22 provide specific information regarding the required docking station precluded it from  
23 obtaining an award; and, (d) the award to MedPharm calls into question the fairness of the  
24 procurement process.
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- 1 7. The HPP Grant funds expired on June 30, 2013; however, an extension was granted for  
2 ninety (90) days with a new expiration date of September 30, 2013. [GMHA Brief,  
3 November 4, 2013].
- 4 8. On July 17, 2013, GMHA rejected JMI's Protest as untimely and simultaneously awarded  
5 the contract to MedPharm. [APR, Exhibit I(a) and Agency Report, Exhibit V]. In doing  
6 so, GMHA: (a) did not address the merits of JMI's protest; (b) deprived JMI of the  
7 opportunity to appeal the rejection of its protest prior to the award of the contract to  
8 MedPharm; and, (c) disregarded the automatic stay that was triggered by JMI's timely  
9 protest.
- 10 9. On August 1, 2013, JMI filed this Procurement Appeal.
- 11 10. On September 5, 2013, prior to the final resolution of JMI's protest, GMHA issued a  
12 check for \$107,266.52 to MedPharm, exhausting the FY11 HHP funds. These funds were  
13 specifically used to purchase four (4) of the fifteen (15) kidney machines, fifteen (15)  
14 water purification units, and went towards training expenses. [GMHA Brief, Exhibits A  
15 and B, November 4, 2013].
- 16 11. GMHA represents, if the MedPharm contract were deemed void, it could result in the  
17 following: (a) the FY11 HHP funds could be lost; (b) the four (4) dialysis machines and  
18 fifteen (15) water purification units that are currently on island and stored in GMHA's  
19 warehouse could be wasted because each bid offeror proposed machines from different  
20 manufacturers; (c) monetary loss would also result from the travel expenses and leave  
21 already provided for two of GMHA's biomedical personnel to attend training; (d) it would  
22 delay commissioning the machines which are of vital importance to GMHA; (e) it would  
23 imperil patient care and safety; (f) it could detrimentally impact GMHA's ability to  
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1 comply with standards of medical care. [GMHA Brief, November 4, 2013, November 14,  
2 2013].

3 **CONCLUSIONS OF LAW**

- 4
- 5 1. Guam law allows an aggrieved party to submit a protest to the head of the purchasing  
6 agency within fourteen days after such aggrieved person knows or should know the facts  
7 giving rise thereto. 5 G.C.A. § 5425(a).
- 8 2. JMI's protest was filed timely. On June 21, 2013, within fourteen days of the June 7, 2013  
9 GMHA's Bid Status transmittal advising that the contract was being awarded to  
10 MedPharm, JMI filed a protest. [APR, Exhibit I(a)]. The protest grounds were not based  
11 upon GMHA's rejection of JMI's bid, which GMHA advised on June 6, 2013, but instead  
12 were based upon GMHA's award to MedPharm, which GMHA advised on June 7, 2013.  
13 JMI's protest asserted: (a) the awardee's submission did not provide certification of  
14 MedPharm employed technicians who completed certification and were assigned to this  
15 project; (b) the awardee's submission was completely dependent upon the technical  
16 expertise and experience of the manufacturer, rather than the offeror itself; (c) the  
17 awardee's failure to provide specific information regarding the required docking station  
18 precluded it from obtaining an award; and, (d) the award to MedPharm calls into question  
19 the fairness of the procurement process.
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- 22 3. By doing so, the automatic stay was triggered and remains in effect until final resolution  
23 of JMI's protest; the timely filing of a Notice of Appeal to the Public Auditor; and the  
24 timely filing of an appeal to the Superior Court of Guam; or, until the stay is lifted. "In the  
25 event of a timely protest...the Territory shall not proceed further with the solicitation or  
26 with the award of the contract prior to final resolution of such protest..." 5 G.C.A. §  
27 5425(g). Final resolution of a protest includes the time period of an appeal after protest. *In*  
28

1            *the Appeal of IBSS*, OPA-PA-08-012, pp.9-10. The status quo is preserved by operation of  
2 law, and under 5 G.C.A. § 5425(g), further action on the procurement under appeal is  
3 stayed until resolution of the appeal. *Teleguam Holdings LLC and its Wholly Owned*  
4 *Subsidiaries v. Territory of Guam et al.*, Superior Court of Guam, CV0334-13 (Decision  
5 and Order, April 29, 2013, 2:9-3:3).  
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- 7            4. On July 17, 2013, GMHA incorrectly rejected JMI's Protest as untimely and improperly  
8 simultaneously awarded the contract to MedPharm. [APR, Exhibit I(a) and Agency  
9 Report, Exhibit V].
- 10           5. JMI had the right to appeal GMHA's rejection of its Protest by filing a Notice of Appeal  
11 to the Public Auditor within fifteen days after receipt by the protestant of the notice of  
12 decision. 5 G.C.A. § 5425(e).
- 13           6. An automatic stay has been in effect since the timely filing of JMI's procurement protest  
14 on June 21, 2013, continuing through JMI's timely Notice of Appeal to the Public Auditor  
15 on August 1, 2013, until final resolution.
- 16           7. Pursuant to the automatic stay, GMHA was prohibited from proceeding further with the  
17 solicitation or with the award of the contract until final resolution of JMI's appeals to the  
18 Public Auditor and if subsequently timely filed, to the Superior Court of Guam.
- 19           8. GMHA violated the automatic stay when it simultaneously rejected JMI's Protest and  
20 awarded the contract to MedPharm.
- 21           9. GMHA is admonished for its violation of JMI's rights and procurement procedures for:  
22 (a) not addressing the merits of JMI's protest; (b) depriving JMI of the opportunity to  
23 appeal the rejection of its protest prior to the award of the contract to MedPharm; and, (c)  
24 disregarding the automatic stay that was triggered by JMI's timely protest.  
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1 10. GMHA is further admonished for its failure to timely notify the Public Auditor that the  
2 FY11 HHP funds were in danger of expiring or being lost.

3 11. Guam law provides, “[i]f after an award it is determined that a solicitation or award of a  
4 contract is in violation of law, then: (1) if the person awarded the contract has not acted  
5 fraudulently or in bad faith: (A) the contract may be ratified and affirmed, provided it is  
6 determined that doing so is in the best interests of the Territory...” 5 G.C.A. § 5452(a).  
7

8 12. GMHA’s award to MedPharm while the automatic stay was in place violated the law.  
9 There is no evidence that MedPharm acted fraudulently or in bad faith. Based upon the  
10 representations and arguments of GMHA, it is in the best interests of the Territory that the  
11 contract awarded by GMHA to MedPharm not be voided.

12 13. GMHA’s actions were not fair, equitable or conducive to an open and transparent  
13 procurement process. Moreover, GMHA failed to timely notify the Public Auditor that the  
14 procurement funds for the IFB were in danger of expiring or being lost. The crisis created  
15 in this procurement was the result of GMHA’s acts and omissions. However, at this point  
16 because GMHA has imperiled the Territory’s best interests, the Public Auditor very  
17 reluctantly ratifies and affirms the contract from GMHA to MedPharm.  
18

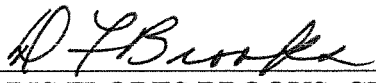
19 14. The parties shall bear their respective costs and fees associated with this appeal.<sup>1</sup>  
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21  
22 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
23 appeal from a Decision of the Public Auditor to the Superior Court of Guam in accordance with  
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25 \_\_\_\_\_  
26 <sup>1</sup> The Public Auditor advised the parties, at the November 18, 2013 Status Hearing, that  
27 the award of JMI’s costs and reasonable attorney’s fees was under consideration but by this  
28 Decision declines to make such award.

1 Part D of Article 9 of 5 G.C.A. § 5481(a) within fourteen (14) days after receipt of a Final  
2 Administrative Decision. A copy of this Decision shall be provided to the Parties and their  
3 respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for review  
4 on the OPA website at [www.guamopa.org](http://www.guamopa.org).

5  
6 **DATED**, this 27<sup>th</sup> day of November, 2013.

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8   
9 **DORIS FLORES BROOKS, CPA, CGFM**  
Public Auditor of Guam