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DATE: Sept. 13, 2013
TIME: 4:40 AM PM BY: R. Feld
FILE NO OPA-PA: 13009

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8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF :

11 JMI,

12 Appellant.

CASE NO: OPA-PA 13-009

HEARING BRIEF

13 **COMES NOW** the Guam Memorial Hospital Authority (“GMHA”), by and through counsel of
14 record Fisher & Associates, and submits its Hearing Brief pursuant to the Office of Public
15 Accountability’s (“OPA”) Order after Hearing/Scheduling Order dated August 27, 2013.

16 **STATEMENT OF FACT**

17 On September 21, 2012, the GMHA issued an invitation for interested parties to submit bids for
18 portable kidney machines with reverse osmosis water purification machines. *See Agency Procurement*
19 *Record at Tab F*. Bids were submitted by three offerors: JMI Edison (“JMI”), MedPharm, and JC
20 Marketing. *See Supplemental Procurement Record*. On October 19, 2012, the bids were opened in the
21 presence of representatives from all three offering companies. *See Agency Procurement Record at Tab*
22 *A at Bid Opening Sign in Sheet, and Tab C – Sound Recording of Bid Opening*¹. During bid opening,
23 each submission was checked for inclusion of material requirements of the solicitation. *See Agency*
24 *Procurement Record at Tab G – Abstract of Bids dated Oct. 19, 2012*.

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26 On October 31, 2012, MedPharm timely submitted a bid protest alleging noncompliance by JMI
27 and JC Marketing. *See Agency Procurement Record at Tab I(b)*. In its protest, MedPharm alleged

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¹ GMHA submitted a copy of the sound recording to the Office of Public Accountability on August 26, 2013.

1 through counsel that “based on available information...JCME’s [JC Marketing’s] bid was
2 nonresponsive to the bid specifications because it provides no confirmation of training from the
3 manufacturer as required at No. 3, on Page No. 22, of the invitation for bid...” and “JMI’s bid packet
4 did not contain the Declaration Re: Compliance with U.S. DOL Wage Determination as required by the
5 bid specifications.” *See Agency Procurement Record at Tab I(b)*. MedPharm’s protest was rejected by
6 the GMHA on November 15, 2012, and on December 31, 2012, MedPharm confirmed in writing that it
7 would not pursue its bid protest. *See Agency Procurement Record at Tab I(b)*.

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9 In June of 2013, the GMHA sent a Notice of Intent of Possible Award to MedPharm, and Bid
10 Status letters to JMI and JC Marketing. *See Agency Procurement Record at Tab H*.

11 On June 21, 2013, JMI submitted a bid protest through counsel alleging that MedPharm’s bid
12 did not contain factory certifications and technical personnel qualifications, and did not provide
13 specifications for the docking station. *See Agency Procurement Record at Tab I(a)*. JMI’s protest was
14 rejected by the GMHA on July 17, 2013 as untimely.

15 **MEMORANDUM OF POINTS & AUTHORITIES**

16 A. JMI’S PROTEST IS NOT TIMELY.

17 Title 5 GCA § 5425(a) Right to Protest states in part, “[a]ny actual or prospective bidder,
18 offeror, or contractor who may be aggrieved in connection with the method of source selection,
19 solicitation or award of a contract, may protest...The protest shall be submitted in writing within
20 fourteen (14) days after such aggrieved person knows or should know of the facts giving rise
21 thereto.” *See also* 26 GAR §§ 16901(c)(1); *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam
22 15.

23 The bid at issue was publicly opened on October 19, 2012, in the presence of representatives
24 from all three offering companies. During bid opening, each submission was checked for the inclusion
25 of material requirements of the solicitation. The Abstract of Bids for each submission contains a
26 checklist of material requirements including those items JMI’s protests: Statement of Qualification,
27 Performance, Technician Personnel, Confirmation of Training, etc. *See Agency Procurement Record*
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1 at Tab G. Moreover, pursuant to 2 GAR § 3109(1)(2), the “opened bids shall be available for public
2 inspection except to the extent the bidder designates trade secrets or other proprietary data to be
3 confidential as set forth in Subsection 3109(1)(3) of this section.”

4 JMI argues that the GMHA “can point to no evidence in the record that JMI was aware
5 of...the detailed contents of MedPharm’s submission.” *See Comments to Agency Report, August 26,*
6 *2013 at 3.* As stated above, the bids were publicly opened in the presence of representatives from all
7 three offering companies, each submission was checked for the inclusion of material requirements of
8 the solicitation at bid opening, and the opened bids were then available for public inspection. How
9 was JMI able to submit its protest regarding the contents of MedPharm’s submission on June 21, 2013?
10 That same information – the facts giving rise to JMI’s protest – was available to JMI since bid opening
11 on October 19, 2012. Under Guam law, protests shall be submitted after a party “**knows or should**
12 **know** of the facts giving rise thereto.” 5 GCA § 5425(a) (Emphasis added.) JMI is not entitled to an
13 extension of time because it chose to wait until after the GMHA issued its Notice of Intent of
14 Possible Award to examine the contents of bids that were available for inspection.
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16 Further evidence that the facts giving rise to JMI’s protest were known or should have been
17 known to JMI at bid opening is MedPharm’s timely protest. MedPharm alleged deficiencies on
18 October 31, 2012, similar to those that JMI did not allege until June 21, 2013. Therefore, JMI
19 cannot contend that their protest – filed almost 8 months after bid opening - was timely.

20 B. A PARTY DOES NOT HAVE TO BE AGGRIEVED TO PROTEST A BID.

21 JMI misstates Guam law by stating, “[u]nder Guam law only ‘aggrieved’ parties may bring
22 bid protests under Guam procurement law. *See* 5 GCA 5425(a).” *See Comments to Agency Report,*
23 *August 26, 2013 at 1.* In fact, 5 GCA § 5425(a) clearly states that the right to protest lies with “[a]ny
24 *actual or prospective bidder, offeror, or contractor who may be aggrieved* in connection with the
25 method of source selection, solicitation or award of a contract.” (Emphasis added). The statute does
26 not require that a bidder be aggrieved in order to have a right to protest. Indeed, bid protests can be,
27 and are, made before the award of a contract and at other times during the procurement process. In
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1 this case, MedPharm submitted its timely protest after bid opening (after the facts giving rise to its
2 protest became known), but before award of the contract. It is the OPA or the courts that will
3 ultimately determine whether a protesting party has been, in fact, aggrieved, i.e., wronged or denied
4 its legal rights. The statute only requires that a party “may be aggrieved.” 5 GCA § 5425(a).

5 JMI provides a definition of an “aggrieved party” from *Tumon Partners, LLC v. Shin*, 2008
6 Guam 15, to support its contention that its right to protest was not triggered until GMHA issued its
7 Notice of Intent of Possible Award to MedPharm. *See Comments to Agency Report, August 26,*
8 *2013 at 2.* However, the Supreme Court in *Tumon Partners* examined the definition of an aggrieved
9 party in relation to 7 GCA § 25104; to determine whether appellants in that case had standing to
10 bring their appeal. The *Tumon Partners* case is an appeal of an ex-parte motion to modify an
11 amended preliminary injunction – it has absolutely nothing to do with the procurement process or
12 procurement appeals.

13 JMI also cites *Tumon Corporation v. GMHA*, CV1420-01 in support of its contention;
14 however, the Superior Court in that case examined the issue of whether a winning bidder could be an
15 “aggrieved” party under 5 GCA § 5425(a) or (g). The Court did not, as JMI suggests, define an
16 aggrieved bidder as a losing bidder.

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18 C. UNTIMELY PROTESTS SHALL NOT BE CONSIDERED.

19 Pursuant to 26 GAR §§ 16901(c)(1), protests filed after the fourteen (14) day period after the
20 protestor knows of should have known of the facts giving rise to the protest shall not be considered.
21 Based on the foregoing, JMI’s protest is untimely. Should the OPA wish to examine the merits of
22 JMI’s protest despite its untimeliness, the GMHA will have available at hearing a representative
23 from its Materials Management Department to explain how MedPharm’s bid was responsive and
24 conformed in all material respects to the invitation for bid; that is it offered to supply a portable
25 kidney machine with reverse osmosis water purification machine in conformity with all *material*
26 terms and conditions of the solicitation.

1 Respectfully submitted this 18th day of September 2013.

2 FISHER & ASSOCIATES

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5 MINAKSHI V. HEMLANI, ESQ.

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