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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI Edison,

Appellant.

Docket No. OPA-PA 13-009

**REPLY TO GMHA'S OPPOSITION
TO JMI'S BRIEF REGARDING
TIMELINESS OF PROTEST,
STATUTORY STAY, AND
FUNDSING SOURCES**

I. INTRODUCTION

On October 14, 2013 the Guam Memorial Hospital Authority ("GMHA") submitted its Opposition to Appellant JMI- Edison's ("JMI") October 7, 2013 brief regarding the timeliness of its protest and the statutory stay of this procurement. This Reply is submitted to address the continued failings presented by GMHA's understanding of Guam's procurement law.

II. GMHA CONTINUES TO ADVOCATE FOR AN UNTENABLE PROCUREMENT PROTEST REGIME

GMHA states confidently that the distinction between the June 6 and June 7 bid status notifications sent to offerors is of no consequence, since the "only difference between the June 6 and 7 bid status notices is the inclusion of the phrase 'namely Medpharm.'" Opposition, 1. According to GMHA, JMI should have appealed based upon the June 6, 2013 status update, since "the record is clear that JMI had notice of GMHA's intent to award the procurement to another bidder on June 6, 2013." Opposition, 2. Simply put, GMHA is urging the Office of Public Accountability (OPA) to adopt the rule that losing offerors are, by the fact that they lost,

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ipso facto aggrieved. This contention strains credulity, and completely ignores the statutory trigger— an “aggrieved” status— that allows a non-frivolous protest to be brought.

As GMHA itself points out, under Guam law only “aggrieved” parties may bring bid protests under Guam procurement law. See 5 GCA 5425(a). JMI was not “aggrieved” until a non-responsive offeror— “namely MedPharm”— was selected for contract award. The Guam Supreme Court has discussed what an “aggrieved party” is, and GMHA has provided no counter to the court’s definition. The court has stated that:

The term “aggrieved party” has been defined as [o]ne whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. The word ‘aggrieved’ refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation. Moreover, an aggrieved party is one who has suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power.

Tumon Partners, LLC v. Shin, 2008 Guam 15, ¶34. (internal quotations and citations omitted)

Any rights that JMI may have had *vis a vis* GMHA Bid 020-2012 were not “directly and adversely affected” until GMHA chose to make a contract award selection in violation of Guam’s procurement code. 5 GCA §5425(a) provides an aggrieved party the right to protest. A protestor must come forward, as part of that protest, with “the facts giving rise” to that protest. 5 GCA §5425(a); *see also* 2 GCAR §9101(c)(3)(c) and (d) (describing how protestor must provide “a statement of reasons for the protest” and “supporting exhibits, evidence, or documents to substantiate any claims...”). The factual basis for JMI’s aggrievement was not, as GMHA claims, Medpharm’s submission of a nonresponsive bid or even GMHA’s non-selection of JMI, but instead was GMHA’s selection of MedPharm’s nonresponsive bid for award. Simply put, JMI could not include the fact of Medpharm’s flawed selection by GMHA as a “fact giving rise”

to the protest until the flawed selection occurred. The notice of that selection did not occur until June 7, 2013. The appellant's appeal was timely filed after that.

GMHA's proffered procurement regime is untenable, and, if adopted by the Office of Public Accountability, would require that every non-winning bidder immediately protest an award on the sole basis of not being made an awardee of a particular procurement, since a loser status would be the equivalent to an "aggrieved" status. Put another way, GMHA's understanding of the law would essentially require that all protests be filed within 14 days of notice of award or bid status update indicating that some party had lost the bid. This would create protest grounds in every procurement that involved more than one offeror, and would also presumably create protest appeal rights before this body in those cases as well.¹

III. GMHA CONTINUES TO ADVOCATE FOR AN INTERPRETATION OF THE AUTOMATIC STAY THAT WOULD MAKE THE PROCURING AGENCY THE SOLE ARBITER OF WHEN THE STAY SHOULD BE IN PLACE

GMHA continues to argue that the statutory stay dissolved because GMHA rendered a protest decision and only then moved forward with contract performance. GMHA continues to ignore that the stay remains in place— absent affirmative steps taken by an agency to dissolve the stay— until "final resolution" of the protest. GMHA provides no authority for the position that GMHA is the final arbiter of a procurement protest capable of proving "final resolution," and provides no record citation that it complied with the affirmative steps mandated by law and codified at 5 GCA §5425(g)(1) prior to the casting aside of the statutory stay. Finally, GMHA continues to ignore the direct precedent from the OPA that holds that:

"The automatic stay is triggered upon the filing of a timely protest; the filing of a timely appeal to the OPA; and the filing of a timely appeal to the Superior Court of Guam. In the event of a timely protest... the Territory shall not proceed further

¹ Adding to the absurd conclusion suggested by GMHA is the fact that, under their procurement regime, there would be no such thing as a frivolous protest in the territory since every bid loser was, *ipso facto*, a properly "aggrieved" bidder and required to bring a protest within 14 days of learning it had lost.

with the solicitation or with the award of the contract prior to its final resolution. Final resolution of a protest includes the time period of an appeal after protest.”

In the Appeal of JMI Edison, Order, OPA-PA-13-010 (September 20, 2013) (internal quotations and citations omitted).

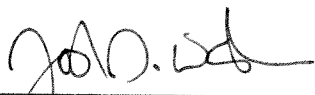
No matter how hard GMHA attempts to argue for its supremacy in the procurement regime, GMHA must comply with the procurement code and its contract performance violates the law.

IV. CONCLUSION

JMI’s protest was timely brought, and GMHA’s contract performance should have been arrested by the automatic stay mandated by 5 GCA §5425. Given the funding restrictions and time frames at work with this procurement— issues not disclosed to JMI or the OPA until GMHA’s ordered briefing on the matter— the OPA should immediately notify GMHA that the stay has in fact been in place as contemplated by Guam law. GMHA should be ordered to govern itself accordingly, and the merits of JMI’s protest should be heard.

Submitted this 21st day of October, 2013.

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By: 

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