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6 **OFFICE OF THE PUBLIC AUDITOR**

7 IN THE APPEAL OF
8
9 JMI MEDICAL SYSTEMS, INC.,
10
11 Appellant.

DOCKET NO. OPA-PA-07-011
12
13 APPELLANT JMI'S MOTION
FOR SUMMARY JUDGMENT

14 MOTION

15 JMI Medical Systems, Inc. ("JMI") hereby moves the Office of the Public Auditor ("OPA")
16 Hearing Officer for summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure
17 ("GRCP") and to help provide for the expeditious resolution of the instant appeal pursuant to 2 GAR
18 § 12101. This motion is based on the accompanying Memorandum of Law, the Declaration of
19 George Neil P. Valdes, all documents from the record and any and all other evidence referred to in
20 this motion.

21 MEMORANDUM OF LAW IN SUPPORT OF JMI'S
22 MOTION FOR SUMMARY JUDGMENT

23 I. INTRODUCTION.

24 This case involves the Appeal of Guam Memorial Hospital Authority's ("GMHA") rejection
of JMI's protest of GMHA's award to MedPharm of GMHA Bid 024-2007, GMHA's rejection of
JMI's request for reconsideration, as well as GMHA's failure to comply with the procurement law

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1 and its own procurement regulations, including GMHA's purchase of a second Microbiology
2 Analyzer and supplies without going through competitive sealed bidding as required by law.

3 JMI seeks a ruling from the OPA Hearing Officer that the method, selection, and award of the
4 contract to MedPharm were in violation of Guam law and that the contract should have been awarded
5 to JMI. JMI further seeks any and all remedies afforded it pursuant to the Guam Procurement Law,
6 including solicitation and protest costs, lost profits, and attorneys fees.

7 II. RELIEF SOUGHT.

8 JMI moves the OPA Hearing Officer for an order granting summary judgment in its favor
9 with respect to all the issues set forth below.

10 III. FACTUAL AND PROCEDURAL BACKGROUND.

11 This case involves the Guam Memorial Hospital Authority's ("GMHA") solicitation ("RFP")
12 for bids for the procurement of one (1) new Microbiology Analyzer to replace GMHA's current
13 equipment. See Bid Invitation and Award (Bid Invitation No. GMHA Bid 024-2007) attached as
14 Exhibit "1" to the Declaration of George Neil P. Valdes ("Valdes Declaration"). The RFP was issued
15 on June 22, 2007 and bids were initially scheduled to be submitted and opened on July 6, 2007.
16 However, pursuant to Bid Amendments #1 and #2, the submission and opening dates were first
17 moved to July 11, 2007 and then subsequently moved to July 13, 2007. See Amendments #1 and #2
18 attached as Exhibits "2" and "3" to the Valdes Declaration.

19 GMHA is a Guam public corporation engaged in the providing of hospital and medical
20 services on Guam. As a qualified health care provider, GMHA has been receiving certain monetary
21 grant awards under the National Bioterrorism Hospital Preparedness Program ("NBHPP"). GMHA
22 was allotted \$485,000.00 in grant funds for Fiscal Year (FY) 2005. See November 1, 2007 email
23 message from William Kando to PeterJohn Camacho attached as Exhibit "4" to the Valdes
24 Declaration. With extensions, GMHA was required to have committed all FY2005 funds by August
31, 2007 and liquidated said funds under no circumstances later than November 30, 2007. See

1 August 13, 2007 email message from Bea Aquino to William Kando attached as Exhibit "5" to the
2 Valdes Declaration; *see also* Exhibit "4".

3 GMHA was also allotted grant funds for FY 2006 under the NBHPP program. With expected
4 extensions, GMHA would likely have had until November 2008, to utilize these FY 2006 funds.
5 Initially, GMHA applied for and received approval to purchase one (1) new Microbiology Analyzer
6 utilizing FY 2006 program funds to replace its aging "Vitek One" analyzer. Sometime in 2006,
7 however, GMHA made a determination that approximately One Hundred Fifty Thousand Dollars
8 (\$150,000) remained of the FY2005 funds which needed to be spent before the end of November
9 2007. Soon after such a determination was made, GMHA decided and was approved to instead utilize
10 a portion of or all the remaining FY 2005 in the procurement of the new Microbiology Analyzer.

11 The RFP was issued approximately four (4) months prior to the deadline to utilize FY 2005
12 Funds. GMHA issued the RFP for the procurement of one (1) unspecified Microbiology Analyzer.
13 The RFP contained a provision for prospective bidders to include in its bid package for the analyzer,
14 a cost provision for supplies and reagents for three thousand (3000) test kits. The requirement for
15 inclusion of pricing for reagents and supplies in its bid was confirmed by GMHA prior to bid
16 opening, in Bid Amendment #3 dated July 12, 2007 that was sent to prospective bidders. This
17 Amendment stated that "the reagent and supplies cost will be separate from the instrument itself."
18 *See* Amendment #3 attached as Exhibit "6" to the Valdes Declaration. In addition, the RFP explicitly
19 contained an "All or None" provision which mandated inclusion of cost provisions for reagents and
20 supplies.

21 Three (3) bids were timely received in response to the RFP; one by JC Marketing Inc.
22 ("JCM"), one by MedPharm Corporation ("MedPharm"), and one by JMI. The bids were to be
23 evaluated by a specially organized GMHA selection committee. In contrast with JMI and JCM's bid
24 submission, MedPharm's bid failed to contain any cost provision for reagents and supplies as
required by the RFP. Despite this failure, however, MedPharm's bid was allowed to be further
considered by GMHA.

On August 10, 2007, GMHA sent letters to MedPharm and JMI requesting cost information
for certain reagents and supplies in the form of test cards specifically for the "Vitek 2" analyzer, a
particular Microbiology Analyzer model being proposed by both JMI and MedPharm in their bids.

1 See August 10, 2007 Request for Information attached as Exhibit "7" to the Valdes Declaration.
2 JCM proposed a different machine which GMHA determined would not be feasible based on its
3 current equipment and procedures. JMI and MedPharm both submitted the requested cost
4 information to GMHA. See Responses to Request for Information from JMI and MedPharm attached
5 as Exhibits "8" and "9" to the Valdes Declaration. On August 17, 2007, a decision was made by
6 GMHA to award the contract to MedPharm. Interestingly, the award was for the purchase of two (2)
7 "Vitek 2" Microbiology Analyzers instead of one (1) analyzer as required by the RFP. See August
8 14, 2007 Letter from Glenda Pangelinan to PeterJohn D. Camacho attached as Exhibit "10" to the
9 Valdes Declaration. In rendering its decision, the selection committee wrongfully considered the
10 additional cost information provided by MedPharm and JMI for reagents and supplies for the specific
11 test cards and also wrongfully considered the ability of GMHA to purchase not one (1) but two (2)
12 Microbiology Analyzers at the price quoted by MedPharm for a single machine despite the RFP
13 specifications for the purchase of only one (1) machine.

14 On August 31, 2007, JMI issued a Protest Letter to GMHA of the award to MedPharm. The
15 primary basis of JMI's protest was GMHA's wrongful consideration of a bid by a non-responsive
16 bidder; specifically, for MedPharm's failure to include the cost of reagents and supplies in its initial
17 bid submission in contravention of RFP requirements under the "All or None" provision expressly
18 provided for in the RFP. See Exhibit "1". On September 11, 2007, GMHA delivered a letter to JMI
19 rejecting its protest of the award. See September 11, 2007 letter from PeterJohn D. Camacho to Rey
20 M. Vega attached as Exhibit "11" to the Valdes Declaration. As part of its rejection of JMI's protest,
21 GMHA, through its Administrator and CEO PeterJohn Camacho, stated that the reference to reagents
22 and supplies in the RFP was to ensure that the successful bidder is able to provide the reagent
23 supplies for the analyzer they are offering. Despite this statement, GMHA's rejection also noted that
24 pursuant to Amendment #3, the cost of reagents and supplies is separate from the equipment. In
response to the Amendment, only JMI provided pricing for reagents and supplies while MedPharm
did not. Mr. Camacho further stated that both bidders listed reagent supplies that were not
descriptive enough to ascertain whether the test kits are the ones needed. The letter goes on to state
that GMHA then sought pricing information for specific test cards and after reviewing both the prices
for the equipment and reagent supplies, MedPharm was deemed to provide the lower pricing. Most

1 telling is the fact that the letter also provides that the pricing for the reagent and supplies is one of the
2 criteria the committee looks at to award the RFP.

3 On September 13, 2007, JMI requested a reconsideration of GMHA's decision to reject JMI's
4 Protest. See September 13, 2007 letter from Rey M. Vega to PeterJohn D. Camacho attached as
5 Exhibit "12" to the Valdes Declaration. On November 27, 2007, GMHA once again rejected JMI's
6 protest. See November 27, 2007 letter from PeterJohn D. Camacho to Rey M. Vega attached as
7 Exhibit "13" to the Valdes Declaration. In its responses to JMI's protest, GMHA indicated that it
8 made a determination that the provisions concerning the reagents and supplies in the RFP were
9 "ambiguous" and because of the impending deadline in the use of federal funds in the procurement of
10 the analyzer, it was therefore authorized in the public interest to i) modify the requirements of the
11 RFP to eliminate the requirement of the "All or None" provision and the requirement to submit
12 supplies and reagents cost information by the bidders and ii) to permit the award of the contract based
13 solely on the price information of the analyzer alone as provided for in JMI and MedPharm's initial
14 bid submissions. JMI filed its appeal with the OPA on December 12, 2007.

15 Since the filing of the appeal with the OPA, GMHA has proceeded in the purchase of two (2)
16 "Vitek 2" Micro analyzer machines from MedPharm. One machine has been delivered and is
17 currently operational. See Deposition of Glenda Pangelinan p. 44 lines 1-9 attached as Exhibit "14" to
18 the Valdes Declaration. GMHA has ordered reagents and supplies for the "Vitek 2" Analyzer from
19 MedPharm without undergoing competitive procurement procedures. See Id. Lines 10-24.

17 IV. SUMMARY JUDGMENT STANDARD.

18 A motion for summary judgment is governed by Guam Rules of Civil Procedure ("GRCP")
19 Rule 56, which provides that "The judgment sought shall be rendered forthwith if...there is no
20 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of
21 law."¹ GRCP Rule 56 (c). The party who is seeking summary judgment has the burden to show that
22 there are no genuine issues of material fact. See Celotex Corp. v. Katrett, 477 U.S. 317, 106 S.Ct.
23 2548 (1986). Moreover, once the moving party has met this burden, the nonmoving party must come

24 ¹ Summary Judgment must be granted "forthwith," unless the court determines that further time for discovery should be allowed. See GRCP 56(f).

1 forward and make some affirmative showing with specific acts that evidence exists to support its
2 claims and that there is a genuine issue of material fact for trial. Id. See also Matsushita Elec. Indus.
3 Co. V. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

4 “A ‘material’ fact is one that is relevant to an element of a claim or defense and whose
5 existence might affect the outcome of the suit...” T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors
6 Ass’n., 809 F.2d 626, 630 (9th Cir.1987). If the movant can demonstrate that there are no genuine
7 issues of material fact, the non-movant cannot rely merely on allegations contained in the complaint,
8 but must produce at least some significant probative evidence tending to support the complaint.
9 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986).

10 Where credibility is at issue, summary judgment may not be granted. Only after an
11 evidentiary hearing or full trial can credibility issues be appropriately resolved. S.E.C. v. Koracorp
12 Industries, Inc., 575 F.2d 692, 698 (9th Cir.1978), cert denied, 439 U.S. 953 (1978). Discretion plays
13 no real role in the grant of summary judgment. Id. In addition, the court must view the evidence and
14 draw inferences in the light most favorable to the non-movant. Tzung v. State Farm Fire and Cas.
15 Co., 873 F.2d 1338, 1339 (9th Cir. 1989). The “court’s ultimate inquiry is to determine whether the
16 ‘specific fact’ set forth by the nonmoving party, coupled with undisputed background or contextual
17 facts, are such that a rational or reasonable jury might return a verdict in its favor based on that
18 evidence.” T.W. Elec. Serv., 809 F.2d at 631.

19 V. DISCUSSION.

20 As will be discussed below, the entire evaluation, method, source selection and award of the
21 contract by GMHA to MedPharm was in violation of the procurement law and procurement
22 regulations. Essentially, GMHA opened the bids from JCM, JMI, and MedPharm and found that
23 MedPharm did not provide pricing for reagents and supplies and that JMI, although in full
24 compliance with the RFP, provided pricing for supplies which were apparently not being used by
GMHA. Instead of awarding the contract to JMI or at the very least re-soliciting the entire RFP,
GMHA improperly utilized bid provisions and procurement regulations to award the contract to
MedPharm despite the fact that MedPharm was non-responsive. Equally troubling is the fact that
after purporting to resolve JMI’s protest and request for reconsideration, GMHA purchased an
additional Microbiology Analyzer as well as supplies for both machines from MedPharm without

1 going through competitive sealed bidding as required by law.

2 In short, GMHA's handling of the RFP evaluation and award and its subsequent handling of
3 JMI's protest as well as GMHA's illegal procurement of an additional analyzer and supplies were in
4 violation of Guam law and undermined the integrity of the entire procurement process. The
5 undisputed facts of this procurement coupled with GMHA's mishandling of JMI's protest and
6 GMHA's violations of the procurement law warrant an order of summary judgment in JMI's favor.
7 Furthermore, in order to promote the integrity of the procurement process, JMI requests that the OPA
8 Hearing Officer find in favor of JMI and grant summary judgment on all the issues set forth below.
9 *See* 2 GAR § 12103 (b).

10 A. The contract should have been awarded to JMI as it was the lowest responsive and
11 responsible bidder.

12 Under Guam's Procurement law, "[u]nless other wise authorized by law, all territorial
13 contracts shall be awarded by competitive sealed bidding, pursuant to § 5211 of this Article." 5 GCA
14 § 5210. GMHA's own procurement regulations also require competitive sealed bidding for all
15 hospital contracts. *See* 26 GAR § 16308. In the present case, GMHA was therefore required to
16 procure the Microbiology Analyzer through competitive sealed bidding. Moreover:

17 [b]ids shall be unconditionally accepted without alteration or correction,
18 except as authorized in this Chapter. Bids shall be evaluated based on the
19 requirements set forth in the Invitation for Bids, which may include
20 criteria to determine acceptability such as inspection, testing, quality,
21 workmanship, delivery and suitability for a particular purpose. Those
22 criteria that will affect the bid price and be considered in evaluation for
23 award shall be objectively measurable, such as discounts, transportation
24 costs, and total or life cycle costs. The Invitation for Bids shall set forth
the evaluation criteria to be used. No criteria may be used in bid
evaluation that are not set forth in the Invitation for Bids.

5 GCA § 5211 (e). "Additionally, [a]fter bid opening, no changes in bid prices or other provisions of
bids prejudicial to the interest of the Territory or fair competition shall be permitted..." 5 GCA §.
5211 (f); *see also* 26 GAR § 16309 (m) (1). Equally important is the requirement that "[t]he contract
shall be awarded with reasonable promptness by written notice to the lowest responsible bidder

1 whose bid meets the requirements and criteria set forth in the Invitation for Bids and whose bid
2 amount is sufficient to comply with Article 13 of this Chapter, if applicable.” 5 GCA § 5211 (g).
3 GMHA’s procurement regulations are even more specific and provide that “[t]he contract is to be
4 awarded to the lowest responsible and responsive bidder whose bid meets the requirements and
5 criteria set forth in the Invitation for Bids.” 26 GAR § 16309 (n) (1). A responsive bidder is defined
6 in the procurement law as “a person who has submitted a bid which conforms in all material respects
7 to the Invitation for Bids.” 5 GCA § 5201 (g); *see also* 26 GAR § 16309 (n) (2).

8 As stated above, the RFP sought to secure a source for one (1) new automated Microbiology
9 Analyzer to replace GMHA’s current equipment. The RFP also provided in the Scope of Services
10 section that the bidder was to provide reagent and supplies for a minimum of 3000 test kits per year
11 for use with the Microbiology Analyzer. *See* Exhibit “1”. In response to JCM’s inquiry as to
12 whether the prices for said supplies are also to be provided at time of bid opening or incorporated to
13 the cost of the equipment, Amendment #3 stated that the cost of the reagents and supplies will be
14 separate from the instrument itself. Thus, pricing for the reagents and supplies was not to be
15 incorporated to the cost of the equipment and instead was to be provided separately in the bid.

16 It is undisputed that even after GMHA issued Amendment #3, only JMI and JCM provided
17 pricing for reagents and supplies in their respective bids. Inexplicably, MedPharm provided
18 absolutely no pricing information for reagents and supplies in its bid. Amendment #3 clearly
19 required that prices for reagents and supplies were to be included in the bids, albeit separate from the
20 price of the machine. Contrary to GMHA’s assertions, this Amendment did not state that prices for
21 reagents and supplies were not to be provided or that pricing was not necessary. Pursuant to
22 Amendment #3 and the RFP terms as originally drafted by GMHA, JCM and JMI provided pricing
23 for the reagents and supplies while MedPharm did not. MedPharm was therefore non-responsive and
24 its bid should have been rejected. *See* 2 GAR § 3115 (e) (3) (A) (ii); *see also* Exhibit “1” “All or

1 None” Bids provision of RFP. Instead, GMHA accepted MedPharm’s bid and awarded the
2 procurement to MedPharm. Even after JMI’s protest, GMHA unjustifiably continued to consider and
3 evaluate MedPharm’s non-responsive bid and continued with the award to MedPharm. GMHA’s
4 evaluation of the bids, award of the contract, and subsequent handling of JMI’s protest were therefore
5 in violation of the procurement law and in violation of GMHA’s own regulations since the contract
6 was not awarded to the lowest responsive and responsible bidder.

7 Additional improprieties involved in this RFP can be found in GMHA’s handling of JMI’s
8 request for reconsideration. GMHA claimed in its decision to reject JMI’s request for reconsideration
9 that JMI’s bid contained pricing for reagents and supplies which were different from what was
10 needed by GMHA. *See* Exhibit “13”. This is an absolute ‘red herring’ and it appears GMHA is
11 proffering this argument in an attempt to twist the issues. Whether or not JMI provided pricing for
12 reagents and supplies that GMHA needed is not the issue. The issue is whether JMI provided a bid
13 for reagents and supplies which complied in all material respects to the RFP. JMI submits that it did
14 comply with all material aspects of the RFP by offering equipment and supplies which were in
15 compliance with the specifications of the RFP. Specifically, GMHA sought bids for an unspecified
16 Microbiology Analyzer as well as reagents and supplies for a minimum of 3,000 tests per year for use
17 with the Microbiology Analyzer. This is exactly what JMI provided for in its bid, namely two bid
18 options with each including a Microbiology Analyzer and reagents and supplies which could be used
19 with each machine offered. Although the RFP could have definitely been drafted better, it is
20 undisputed that JMI submitted a bid which complied with the specifications of the RFP. Because
21 JMI complied with the RFP in all material respects and GMHA has never denied this, JMI submits
22 that its bid was responsive and therefore it should have been awarded the contract.

23 Furthermore, although the analyzer proposed by both JMI and MedPharm does utilize several
24 different supplies, regardless of what test kit is used, the price from JMI would not have changed.²
Thus, the fact that JMI provided a price for reagents and supplies that could be used by the Vitek 2

² The prices for all compatible reagents and supplies for the Vitek 2 analyzer would have remained the same (\$259.20 per box) as evidenced by the pricing information for reagents and supplies for the Vitek 2 contained in Exhibit “8” and the same pricing information contained in JMI’s bid. Although the listed test kits were different, the prices are the same.

1 analyzer and MedPharm did not, was sufficient for GMHA to award the contract to JMI as the only
2 responsive and responsible bidder. *See* 26 GAR § 16309 (n) (1). In other words, because the Vitek 2
3 was compatible with GMHA's current equipment as required by the RFP and JMI provided pricing
4 for reagents and supplies which could be used by the Vitek 2 and for which pricing would not change
5 even if different compatible supplies were used, GMHA should have awarded the contract to JMI.
6 Instead, GMHA allowed MedPharm to alter its bid by obtaining additional pricing information from
7 MedPharm, a non-responsive bidder, to the detriment of JMI and in contravention of the procurement
8 law. Bids which contain material variances from the specifications, such as MedPharm's bid, cannot
9 be amended later to cure the disqualifying defect, and the non-responsive bid must simply be
10 rejected. *See Appeal of Associated Sign & Post, Inc.*, 485 N.E. 2d 917, 925 (Ind. App. 1st Dist.
11 1985); *see also* 2 GAR § 3115 (e) (3) (A) (ii). MedPharm's failure to provide pricing for reagents
12 and supplies was a material variance in that it gave MedPharm an advantage over JCM and JMI
13 which had already provided the required pricing information. For instance, MedPharm was capable
14 of adjusting its pricing for reagents and supplies to such a level as to ensure its award of the contract.
15 *See Id.* To allow the amendment of a bid after bid opening would destroy certainty in the bid process
16 and open the process to fraud, collusion and favoritism. *See James Cape & Sons Co. v. Mulcahy*, 700
17 N.W. 2d 243, 254 (Wis. 2005).

18 Although GMHA asserted in its letters, internal memos, emails, and in its Agency Response
19 that pricing for reagents and supplies was not to be included in the bids and that GMHA simply
20 wanted to ensure that the successful bidder was capable of meeting GMHA's supply needs, the
21 record of this procurement indicates that pricing for the reagents and supplies was an integral and
22 critical part of the RFP. *See e.g.*, Exhibit "11"; *see also* September 6, 2007 Memorandum to Danny
23 Mantanane from Glenda Pangelinan attached as Exhibit "15" to the Valdes Declaration.

24 First, in GMHA's September 11, 2007 letter to JMI and in a September 10, 2007 internal
Memo from John Benavente to the Supply Management Administrator, GMHA asserts that pricing
for reagent supplies was one of the criteria the committee looks at to award Bid 024-2007 to
MedPharm. *See* September 10, 2007 Memo from John K. Benavente to Supply Management
Administrator attached as Exhibit "16" to the Valdes Declaration (emphasis added). Second, in an
email from Glenda Pangelinan to Lola Pangelinan dated August 6, 2007, Glenda Pangelinan sought

1 pricing information for specific reagent cards. More importantly, in a hand-written note, it is
2 emphasized that the pricing for the reagent cards is necessary to complete the evaluation. See
3 August 6, 2007 email message from Glenda Pangelinan to Lola Pangelinan attached as Exhibit "17"
4 to the Valdes Declaration (emphasis added). Third, in another email from Glenda Pangelinan to
5 Lola Pangelinan dated July 9, 2007, Glenda explains the importance of obtaining pricing information
6 for reagents and supplies at the same time as obtaining the equipment price in order to get an almost
7 locked in price. See July 9, 2007 email from Glenda Pangelinan to Lola Pangelinan attached as
8 Exhibit "18" to the Valdes Declaration (emphasis added). Fourth, after bid opening on August 10,
9 2007, GMHA sought pricing information for specific reagent cards from JMI and MedPharm. See
10 Exhibit "7" (emphasis added). Fifth, during GMHA's evaluation of the bids, the pricing for reagents
11 and supplies was considered by the GMHA evaluators prior to making the award as evidenced by the
12 evaluation scoring sheet which contained JMI and JCM's reagent pricing information and as admitted
13 to by Glenda Pangelinan in her deposition. See Evaluation scoring sheet attached as Exhibit "19" to
14 the Valdes Declaration; see also Deposition of Glenda Pangelinan p. 24 lines 9-25 and p. 27 lines 1-
15 22 attached as Exhibit "20" to the Valdes Declaration. Sixth, the RFP's Special Provisions, Terms &
16 Conditions clearly state that "costs for all supplies, equipment, labor and other incidental costs
17 approved by the Hospital prior to awarding the contract must be factored in the bid price." See
18 Exhibit "1" Special Provisions, Terms & Conditions (emphasis added).

19 Based on the above, GMHA clearly intended for pricing information for the reagents and
20 supplies to be included in all bids submitted. GMHA's assertion that pricing for reagents was not to
21 be included in the bids is specious to say the least and is clearly against the great weight of the
22 documentary evidence from the record. Moreover, if pricing for reagents and supplies was not to be
23 included, GMHA would not have had to ask for specific prices for reagent cards in its August 10,
24 2007 letter. MedPharm would have been awarded the contract from the outset since its price for the
equipment alone was lower than that of JMI. The fact that GMHA sought pricing information after
opening is a clear indication that pricing for reagents and supplies was to be included in the bids
submitted.

Despite the clear evidence that pricing for reagents and supplies was a necessary component
of the RFP, GMHA never addressed MedPharm's failure to provide said pricing and as a result never

1 determined whether MedPharm was a responsive bidder. GMHA's failure to properly address
2 whether MedPharm was a responsive bidder was in violation of the procurement law and GMHA's
3 procurement regulations and resulted in JMI, the only responsive bidder, being denied the award of
4 the contract. GMHA's actions were also unfair to the other bidders and completely undermined and
5 made a mockery of the entire procurement process.

6 In addition to the above, GMHA has admitted in its Agency Response that MedPharm's bid
7 was non-responsive. See Agency Response page 4 attached as Exhibit "23" to the Valdes
8 Declaration. Based on this admission alone, summary judgment in JMI's favor would be warranted.
9 Although GMHA argues in its Response that both MedPharm and JMI were non-responsive, as
10 pointed out above, GMHA's arguments in this regard are without merit as JMI's bid complied with
11 all material aspects of the RFP while MedPharm's bid admittedly did not. In short, only MedPharm's
12 bid was non-responsive. More importantly, assuming *arguendo* that both MedPharm and JMI were
13 non-responsive, GMHA should have re-issued the solicitation rather than manipulate the procurement
14 regulations to accept a non-responsive bid and to award on an itemized basis. There is simply no
15 provision in the law that would authorize the acceptance of a non-responsive bid, especially on an
16 "All or None" solicitation. GMHA's actions were in violation of the procurement law and were
17 clearly prejudicial to JMI.

18 JMI submits that there are no genuine issues of material fact that MedPharm's bid was non-
19 responsive and that JMI should have been awarded the contract as it was the lowest responsive and
20 responsible bidder.

- 21 B. GMHA misapplied the law in rejecting JMI's protest and request for reconsideration.
22 1. GMHA misapplied the procurement law and the terms of the RFP to
23 improperly modify the RFP and bids to allow MedPharm's non-responsive bid
24 to be considered.

As noted above, in its November 27, 2007 letter, GMHA rejected JMI's request for
reconsideration. In this letter, GMHA asserts that there was a problem with the portion of the RFP
concerning prices for reagents and supplies. According to GMHA, although Amendment #3 was
intended to address the purported problem, the Amendment was ambiguous in that it did not state
what reagents and supplies were to be obtained. GMHA goes on to state that the ambiguity was

1 critical as the analyzers proposed by JMI and MedPharm could utilize a number of different test
2 cards. Thus, GMHA had a situation where MedPharm did not propose a bid or price on the reagents
3 and supplies but JMI proposed a bid on prices on reagents and supplies different from what was
4 needed by GMHA.

5 As part of its analysis, GMHA, citing to paragraph 25 of the RFP, 2 GAR § 3115 (d) (2) (A),
6 and 26 GAR § 16316 (d) (2) (A), purported to “cancel the portion of the solicitation concerning the
7 reagent and supplies and to reaffirm the Hospital’s previous award to MedPharm for the
8 Microbiology Analyzer.” See Exhibit “13”. In an apparent reliance on contract principles, GMHA
9 also relies on paragraph 25 of the RFP to justify its disregard of the “All or None” provision in
10 paragraph 7 of the RFP. GMHA concludes its letter by again stating the award of the automated
11 Microbiology Analyzer is made to MedPharm. As will be explained below, GMHA’s reliance on the
12 above laws, regulations, and RFP provisions are seriously misplaced.

13 2 GAR § 3115 (d) (2) (A), 26 GAR § 16316 (d) (2) (A), and paragraph 25 of the RFP provide
14 absolutely no authority for GMHA’s decision to cancel a portion of the RFP after bid opening and
15 during its consideration of a bid protest. These provisions deal with the rejection of bids or
16 proposals, in whole or in part, after bid opening under very specific circumstances. See 26 GAR §
17 16316 (d) (2) (A) and paragraph 25 of Exhibit “1”. Stated simply, these provisions have nothing to
18 do with modifying a solicitation. GMHA therefore could not rely on these provisions to modify the
19 RFP after opening and during its consideration of JMI’s request for reconsideration. Otherwise, to
20 allow GMHA to modify a solicitation after opening and during the consideration of a protest and
21 request for reconsideration would open the procurement process to substantial abuse and the effective
22 nullification of competitive sealed bidding. See generally, Danzl v. City of Bismarck, 451 N.W. 2d
23 127, 131 (N.D. 1990).

24 JMI submits that GMHA’s misplaced reliance on the above provisions was due in large part
to GMHA’s need to hastily liquidate all of FY 2005 funds in a matter of days without giving due
regard to the actual terms and proper application of the cited authority. Stated differently, because
GMHA was under pressure to resolve JMI’s protest quickly and liquidate FY 2005 funds before the
end of November 2007, GMHA manipulated the RFP through the misapplication of the above
provisions. It is therefore JMI’s position that GMHA improperly canceled the portion of the

1 solicitation concerning the reagents and supplies and improperly disregarded the “All or None”
2 provision of the RFP. It should be noted that although GMHA’s position was that the award of the
3 contract without delay was necessary to protect the interests of the hospital in light of funding
4 constraints, JMI points out that it was GMHA that decided to use FY 2005 funds for the purchase of
5 the analyzer and that even if FY 2005 funds had expired, the analyzer could have still been purchased
6 with FY 2006 funds. *See* Deposition of William Kando P. 18 attached as Exhibit “21” to the Valdes
7 Declaration.

8 In light of the clear and unambiguous terms of the above regulations and paragraph 25 of the
9 RFP, GMHA was clearly without justification to cancel or disregard any portion of the RFP.
10 Additionally, despite its best efforts to interpret the law otherwise, GMHA is prohibited from
11 rejecting the portion of MedPharm’s bid concerning reagents and supplies because, as admitted in
12 GMHA’s own letter of November 27, 2007 and in its Agency Response, MedPharm did not propose
13 a bid for reagents and supplies. Thus, GMHA could not cancel or reject something that was never
14 submitted. The failure to comply with all material bid specifications rendered MedPharm’s bid non-
15 responsive and therefore MedPharm was in effect no bidder at all. *See generally, State v. Weisz &*
16 *Sons, Inc.*, 713 P.2d 176 (Wyo. 1986); *see also* 26 GAR § 16309 (n) (2). In short, MedPharm’s bid
17 should have never been considered. The RFP was an “All or None” RFP and as a result, GMHA was
18 prohibited from rejecting portions of the bids submitted while awarding on the remainder, which is
19 exactly what GMHA has attempted to do. *See* 26 GAR § 16316 (f). To allow GMHA to manipulate
20 the bidding process to render a non-responsive bidder responsive is in violation of the procurement
21 law and would be unfair and to the detriment of the other bidders.

22 Moreover, GMHA would likewise be prohibited from utilizing paragraph 25 to claim that the
23 failure of MedPharm to submit a bid for reagents and supplies was a minor irregularity which GMHA
24 could simply waive. As explained above, the need for pricing was an essential and necessary part of
the RFP and therefore the failure of MedPharm to submit a bid for reagents and supplies could not be
considered a minor irregularity. Because MedPharm was clearly non-responsive, GMHA was
prohibited from attempting to utilize the procurement regulations and the terms of the RFP to alter
the solicitation to make a non-responsive bidder responsive. *See generally, Danzl*, 451 N.W. 2d 131.
JMI submits that to allow such abuse of the procurement regulations would completely undermine

1 the integrity of the procurement process. If GMHA desired to alter the solicitation after opening, the
2 only fair thing for GMHA to do at that point was to allow all bidders to re-bid so that all bidders
3 would be on equal footing. *Id.*

4 GMHA has also asserted that paragraphs 7 (“All or None”) and 25 (“Award, Cancellation &
5 Rejection”) are in conflict such that the “All or None” provision should not be considered. *See*
6 Exhibit “23” attached to the Valdes Declaration. This argument is completely without merit. The
7 “All or None” provision of the RFP merely requires that all items be bid or none at all. Since
8 MedPharm did not submit a bid on reagents and supplies, its bid should have been rejected at the
9 outset. *See* 2 GAR § 3115 (e) (3) (A) (ii); *see also* “All or None” provision of Exhibit “1”. On the
10 other hand, the portion of paragraph 25 asserted by GMHA to conflict with paragraph 7 merely states
11 that GMHA shall have the authority to award, cancel, or reject bids in whole or in part. Since
12 MedPharm did not submit a bid for reagents and supplies, there was nothing for GMHA to award,
13 cancel, or reject from MedPharm since its bid should have already been rejected. Clearly, there is no
14 conflict between the two paragraphs of the RFP. Again, GMHA is attempting to manipulate the
15 provisions of the RFP to enable a non-responsive bidder to be awarded a government contract. This
16 goes against the purpose of the procurement law which, among other things, is “...to provide for
17 increased public confidence in the procedures followed in public procurement [and] to ensure the fair
18 and equitable treatment of all persons who deal with the procurement system of this Territory.” 5
19 GCA § 5001 (b) (3) and (4). It is readily apparent that GMHA has not treated all bidders fairly and
20 that its actions completely undermine the integrity of the entire procurement process.

21 Based on the above, JMI submits that there are no genuine issues of material fact that GMHA
22 misapplied the law and the terms of the RFP to award the contract to a non-responsive bidder, in clear
23 violation of the procurement law.

24 2. GMHA’s attempt to justify its award to MedPharm based on a finding of
ambiguity in the RFP was also untimely in that the determination of ambiguity
was made after award.

Although JMI has argued that GMHA’s reliance on 26 GAR § 16316 (d) (2) (A) is misplaced,
JMI finds it necessary to also point out that GMHA’s determination of ambiguity in the solicitation
was also untimely. Under this regulation, the Hospital Administrator may reject bids in whole or in

1 part after bid opening but prior to award if he or she determines in writing that such action is in the
2 hospital's best interest for reasons including ambiguous or otherwise inadequate specifications were
3 part of the solicitation. *See* 26 GAR § 16316 (d) (2) (A) 2. In the present case, JMI submits that
4 GMHA's written determination of ambiguity was not made until well after GMHA had already made
an award to MedPharm.

5 Guam's procurement law does not define what constitutes an award. The procurement law
6 merely states that for competitive sealed bids, "[t]he contract shall be awarded with reasonable
7 promptness by written notice to the lowest responsible bidder whose bid meets the requirements and
8 criteria set forth in the Invitation for Bids." 5 GCA § 5211. The code also does not describe what
9 constitutes written notice of an award. It should be noted, however, that the procurement law does
10 distinguish between a contract and an award. *See e.g.* 5 GCA § 5211 (f). JMI submits that based on
11 the agency activity report of this procurement submitted by GMHA, contract documents were signed
12 by MedPharm on August 17, 2007 and therefore the award was made to MedPharm on that date. *See*
13 Activity Report attached as Exhibit "22" to the Valdes Declaration; *see also* Exhibit "13". Because
14 GMHA's Administrator did not make the written determination of ambiguity in the RFP until
15 November 27, 2007, months after the award was already made, GMHA failed to comply with the
requirements of § 16316 (d) (2) (A) 2. GMHA is therefore time-barred from utilizing this regulation
at all.

16 JMI submits that there are no genuine issues of material fact that GMHA's written finding of
17 ambiguity in the RFP was made after an award had already been made to MedPharm. As a result,
18 GMHA could not utilize § 16316 (d) (2) (A) 2 and therefore GMHA should have reconsidered its
rejection of JMI's original protest and awarded the contract to JMI.

19 C. GMHA failed to follow the procurement law and its own procurement regulations
20 when it purchased a second Microbiology Analyzer and reagents and supplies from
MedPharm without going through competitive sealed bidding.

21 As explained above, Guam law and GMHA's own procurement regulations require that all
22 territorial contracts, including those of GMHA, subject to certain exceptions, must be by competitive
23 sealed bidding. *See* 5 GCA § 5210; *see also* 26 GAR § 16308. Based on the testimony of Glenda
24 Pangelinan and an internal memo of GMHA, GMHA desired to, and indeed purchased two (2)

1 Microbiology Analyzers from MedPharm instead of one (1), which was the specified in the RFP. *See*
2 Deposition of Glenda Pangelinan pp. 37-38 and p. 44; *see also* Exhibit "10". Additionally, the RFP
3 clearly provided that it was a "Definite Quantity Bid". *See* Exhibit "1" Special Provisions, Terms &
4 Conditions.

5 JMI submits that it is undisputed that GMHA did not obtain the second Microbiology
6 Analyzer through competitive sealed bidding and that no exception applied to allow the additional
7 purchase. In this regard, GMHA's award of the contract to MedPharm for the second analyzer was in
8 violation of the procurement regulations and in violation of the terms of the RFP. Likewise, GMHA
9 apparently purchased its reagents and supplies for its Microbiology Analyzers from MedPharm also
10 without going through competitive sealed bidding. *See* Deposition of Glenda Pangelinan p. 44. JMI
11 therefore submits that GMHA's purchase of the reagents and supplies from MedPharm was also in
12 violation of the procurement regulations. JMI further submits that GMHA's unauthorized purchase
13 of an additional Microbiology Analyzer and reagents and supplies were also unfair and detrimental to
14 both JMI and JCM and to the sole benefit of MedPharm. Clearly, the manner in which GMHA
15 handled the RFP, evaluation of bids submitted, award of the contract, and JMI's protest completely
16 undermined the integrity of the procurement process.

17 JMI submits that there are no genuine issues of material fact concerning GMHA's violation of
18 the procurement law through its unauthorized purchase of an additional Microbiology Analyzer and
19 supplies for both machines without going through competitive sealed bidding.

20 D. Based on GMHA's failure to follow the procurement regulations and its failure to
21 follow the terms of the RFP, JMI is entitled to costs and other damages.

22 Based on the arguments raised above, JMI asserts that it should have been awarded the
23 contract as the lowest responsive and responsible bidder. As such, JMI submits that it is entitled to
24 all remedies allowed under Guam law including its solicitation and protest costs pursuant to 26 GAR
§ 16901 (g) (2). This regulation provides in pertinent part that:

[i]n addition to any other relief, the Hospital Administrator shall award the
protestant the reasonable costs incurred in connection with the solicitation
and protest, including the bid preparation costs if, excluding attorney's
fees, if:

(i) the protestant should have been awarded the contract under the
solicitation but was not; or

1 (ii) there is a reasonable likelihood that the protestant may have been
2 awarded the contract but for the ethical breach of any ethical obligation
3 imposed herein or the willful or reckless violation of any applicable
procurement law or regulation...

4 26 GAR § 16901 (g) (2); *see also* 5 GCA § 5425 (h).

5 As detailed above, JMI should have been awarded the contract because it was the lowest
6 responsive and responsible bidder. JMI urges the Hearing Officer to rule that JMI should have been
7 awarded the contract and that GMHA's actions were improper and in violation of the procurement
8 laws and regulations. GMHA's failure to award the contract to JMI entitles JMI to its solicitation and
9 protest costs as well as any other remedies allowed under the law.

10 In addition to the above, JMI seeks a finding from the Hearing Officer that the solicitation and
11 award were in violation of law based on the numerous improprieties cited above, including the award
12 of the bid to a non-responsive bidder, the modification of the RFP after bid opening and during the
13 consideration of a protest, the failure to follow procurement regulations and the failure to comply
14 with the specific terms of the RFP. Because the Microbiology Analyzers have already been
15 purchased from MedPharm and because the violations in the solicitation and award herein cannot be
16 waived without prejudice to JMI and other bidders, JMI submits that ratification, amendment, and
17 termination of the contract are unavailable. *See* 26 GAR § 16906 (a) (3) (C). It certainly would not
18 be in the best interest of the hospital to return the analyzers, if that was even possible.

19 JMI asserts that the only proper remedy available for the violations is to award JMI a
20 reasonable amount for its profits had it been awarded the contract. Where a determination has been
21 made that a solicitation or award is in violation of law, Guam law does provide for the award of
22 profits to the party affected by the determination. *See generally*, 26 GAR § 16906 (a) (i) (B); *see also*
23 5 GCA § 5452 (a). JMI requests that the remedies provided in these provisions be extended to apply
24 to the present situation where JMI should have been awarded the contract. Moreover, JMI asserts
that the conduct of GMHA in manipulating the RFP, ignoring the clear language of the procurement
regulations, disregarding the specific terms of the RFP, and interpreting and applying the
procurement regulations to enable a non-responsive bidder to be awarded the contract supports a
finding of bad faith. *See* 26 GAR § 16904 (3). As such, JMI submits that it should, under the
circumstances, be awarded a reasonable amount for lost profits. *See generally*, Peabody Construction

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1 Co., Inc. v. City of Boston, 546 N.E. 2d 898, 902 (Mass. App. Ct. 1989). Furthermore, although it
2 appears the general rule in most jurisdictions is to deny the award of attorney's fees to aggrieved
3 bidders, JMI respectfully requests that based upon the serious violations of law committed by
4 GMHA, that reasonable attorney's fees incurred by JMI also be awarded. *See generally*, Telephone
5 Associates, Inc. v. St. Louis County Bd., 364 N.W. 2d 378, 383 (Minn. 1985). JMI submits that after
6 a review of the procurement law, it appears the award of attorney's fees in procurement cases
7 generally is not prohibited under the procurement law and therefore the decision to award attorney's
8 fees would lie within the discretion of the OPA Hearing Officer. Such an award would also go a long
9 way towards deterring the egregious violations of the procurement law exhibit by GMHA in this
10 RFP.

11 The undisputed facts on record as well as the arguments raised above conclusively
12 demonstrate that there are no genuine issues of material fact that MedPharm's bid was non-
13 responsive, that GMHA manipulated the procurement regulations and RFP terms to reject JMI's
14 protest and to award the contract to MedPharm, and that the contract should have been awarded to
15 JMI. JMI further asserts that there are no genuine issues of material fact that GMHA violated the
16 procurement law by purchasing an additional Microbiology Analyzer and supplies for both machines
17 without going through competitive sealed bidding. JMI urges the Hearing Officer to award JMI all
18 remedies afforded it pursuant to the Guam Procurement law.

19 VI. CONCLUSION.

20 Based upon the foregoing arguments and the undisputed facts on record, no genuine issue of
21 material fact exists warranting a hearing on the issues raised above and that JMI is entitled to
22 summary judgment as a matter of law.

23 Respectfully submitted this 17 th day of October, 2008

24 SISON, P.C.

By:


GEORGE NEIL P. VALDES

A duly licensed employee.