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PROCUREMENT APPEALS

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6 IN THE APPEAL OF
7 JMI MEDICAL SYSTEMS, INC.
8 Appellant.

Appeal No. OPA-PA-07-011

**GMHA'S RESPONSE TO JMI'S MOTION
FOR SUMMARY JUDGMENT**

10 Comes now, Appellee Guam Memorial Hospital Authority (hereinafter referred to as
11 "GMHA") who opposes JMI's Motion for Summary Judgment.¹ The Summary Judgment
12 standard states that the Judgment shall be rendered forthwith if ... there is no genuine issue as to
13 any material fact and that the moving party is entitled to judgment as a matter of law. The
14 Appelle, GMHA, respectfully contends that there is a genuine issue as to material facts present.

16 The Motion for Summary Judgment pursuant to Rule 56 is seriously flawed. First, it is
17 asserted that there are no issues or facts in controversy and that Summary Judgment should be
18 issued forthwith. On the contrary, witness Jean Grape Ko, a key employee of Appellant, testified
19 that JMI was not sure what the specifics were for bidding on the test kits. See Deposition
20 Transcript of Jean Grape Ko (hereinafter "Ko Deposition") at page 19, attached hereto as Exhibit
21 A.

23
24 ¹ As an aside, Appellee, for the record, respectfully disagrees that 2 GAR § 12104 (c)(4) is controlling procedurally
25 in this matter as to the scheduling of its deadline to file this opposition. That provision deals with comments on the
agency record and the agency's response to said comments and is not applicable to the type of motion filed by
Appellant. Furthermore, the OPA rules and regulations do not address this issue. Appellee was given two (2) days
notice of when its Opposition was due. We agree with the Hearing Officer's determination that the Guam Rules of
Civil Procedure do not apply as administrative process is governed by 2 GAR, Division 4, Chapter 12 Rules for
Procurement Appeals. However, Appellee was unsure of what time period applied to the filing of its opposition and
because it was Appellant who propounded this motion for summary judgment pursuant to the GRCP Appellee
assumed it had 21 days to respond considering Appellee did not receive notice from the Hearing Officer of a
different time within which it was to file an opposition or response to Appellant's motion.

1 Ms. Grape Ko testified that she did not know what the bid prices for the test kit prices
2 were but she totally depended on the manufacturer's suggested prices and types of test kits. *See*
3 Exhibit A. The manufacturer did not specifically research nor did he know which test kits were
4 needed by Appellee GMHA. *See* Ko Deposition at pages 25-26, attached hereto as Exhibit B.
5 Neither Ms. Grape Ko nor any of the three witnesses deposed by Appellee GMHA were aware of
6 which test kit they were bidding on.

7 Second, Appellant argues that Appellee violated its own procurement regulations by
8 purchasing a second analyzer and supplies without going through competitive sealed bidding as
9 required by law. Put another way, Appellant argues that there is a second procurement of
10 machines under the initial procurement. This is the very first time that such an issue has been
11 raised. Appellant did not include this argument in its initial protest with the OPA and in
12 subsequent filings. Appellant should not be allowed to further this argument as it has failed to
13 give Appellee sufficient notice such that Appellee can properly prepare defenses to this argument
14 and Appellant has waived the ability to set forth this argument at this late date. It is rather
15 disingenuous, to bring it up at this time, since it is a new issue and this appeal is based on the
16 issues that have raised.
17

18 Third, Appellant concedes the fact that it submitted a bid that was extremely high for
19 each test kit as compared to the test kit prices submitted by MedPharm. Appellant's submission
20 of a high bid was after the request had been made for the bid prices on the specific kits by
21 GMHA. As MedPharm's bid specifications met GMHA's requirements, MedPharm was the
22 successful bidder. Appellant exhaustively argues that its bid complied in all material aspects to
23 the Invitation for Bid. In light of Appellant's concession that its bid was too high, whether
24 Appellant's bid was materially compliant is clearly in dispute.
25

Fourth, JMI's interprets events to suit its needs. JMI says that the bidder submissions
were wrongfully considered in that the additional cost information by MedPharm and also

1 wrongfully considered the ability of GMHA to consider the purchase of not one but two
2 analyzers for the purchase of one. This is a new assertion. We can posit a different scenario
3 having occurred.

4 Fifth, under paragraph 25 of the Solicitation, GMHA can unquestionably reject bids in
5 parts. As there is an obvious conflict between paragraph 7 and 25, such a conflict is nonetheless
6 legally resolvable. There is a principle of contract law which states that: "where repugnancy is
7 found between clauses one which essentially requires something to be done to effect the general
8 purpose of the contract it is entitled to greater consideration than the other". 17 Am. Jur. 2d
9 Contracts § 384 citing International Union of Operating Engineers v. J.A. Jones Const. Co., 240
10 S. W. 2d 39 (Ky. 1951).

11 The Procurement Law allows the application of the above described contract law
12 principle. See 5 GCA § 5002 ("the principles of law and equity including the Uniform
13 Commercial Code, the law merchant shall supplement" the Guam Procurement Law.") Thus, the
14 rejection of the "reagent & supplies" part of the bid submitted is legally permissible and should
15 be upheld. GMHA has acted in good faith in handling the procurement in issue.
16

17 In summary, Appellant's motion should be DENIED as there are genuine issues as to
18 material facts of which Appellant relies upon in bringing its motion for summary judgment.

19 Dated this 24th day of October, 2008.

20
21 **The Law Offices of John S. Unpingco &
Associates, LLC**

22
23
24 By: 

25 John S. Unpingco, Esq.

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which will be after the bid evaluation of the user. They will identify which specific test they will provide.

Q. So you're basing the clarity of the specification just on the number of tests to be done per annum?

A. Yes, and that we asked our vendor, because they are the one, the expert, to identify how many kits that will be used in 3,000 tests.

Q. Okay. By vendor, you mean like Vitek, the manufacturer of the machine?

A. The dealer of the Biomerieux. Biomerieux is the manufacturer of Vitek.

Q. Biomer- --

A. Biomerieux.

Q. How do you spell that?

A. B-I-O-R-E-I-M-E-U-I-X. Like that. Oh!

B-I-O-M-E-R-I-E-U-X.

Q. So is it fair to say if you're just going by the number of tests alone, that does not tell you the specific type of tests that are to be performed, just the number?

A. Is it fair for what?

Q. Is it fair to say that when you're looking at that requirement for 3,000 tests to be done per year, it's only telling you how many tests are to be done, it doesn't tell you the exact test that are to be performed?

A. Yes, sir, because it's stated that to supplies for

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1 based on the specs given and the award is not fair due to the
2 fact that the other vendor -- Can I say the name?

3 Q. Yes.

4 A. Which is Med Pharm, is nonresponsive by not offering
5 the reagents or the kits for the 3,000 tests per annum.

6 Q. But if your offer did not specify which test you're
7 offering, are you not -- is not your bid also nonresponsive to
8 what the hospital needs?

9 MR. SISON: Well I'm going to object to that as
10 it calls for legal conclusion, speculation.

11 MR. UNPINGCO: Objection noted but I think as a
12 matter of common sense, I would like to find out her opinion
13 whether or not she felt that it was meeting the
14 specifications.

15 THE WITNESS: Should I answer?

16 MR. SISON: Answer, as you can.

17 THE WITNESS: Okay. Well in my understanding, to
18 off a general terms of the specific kits, like the GPS and
19 GNS, the lab tech or the supervisor understand that kind of
20 general terms for that and they will provide whichever the
21 vendor offered this particular award and they will provide
22 which test they will use.

23 Q. (By Mr. Unpingco) So there's still a missing piece
24 of information?

25 A. Yes, and in my opinion, this bid should compose on

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EXHIBIT B⁽¹⁾

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1 that from the hospital. They should notify which specific
2 test they want.

3 Q. So their specs were ambiguous, because they -- it was
4 not complete?

5 A. I don't think it's ambiguous, because they said to
6 provide tests or supplies, then we ask our vendor to provide
7 the test or the kits for that 3,000 test per annum because
8 they're our expert on that particular area, on that laboratory
9 equipment and they can provide how many kits on the 3,000
10 tests per annum.

11 Q. But it was not the vendor that was purchasing the
12 kits. The problem I guess I'm struggling with here is that
13 you satisfied the requirement for 3,000 tests, that I can see
14 you doing, you're turning to your vendor, but the other part
15 is of those 3,000, are those the correct 3,000 that the
16 hospital is seeking, and what I'm asking you is that the
17 hospital, and I think you've answered that already so forgive
18 me if I'm repeating it, but the hospital never specified what
19 particular test those 3,000 were to consist of.

20 They never said a thousand tests of this particular
21 type. Until the August 10th letter, that's when you first
22 received an idea of what test, which specific tests the
23 hospital was after. Is that fair to say?

24 A. Yes, sir, that's after.

25 Q. After the fact, after the bid opening. Right?