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DATE: Sept. 13, 2013
TIME: 4:50 AM PM BY: R. Feld
FILE NO OPA-PA: B 009

**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI Edison,

Appellant.

Docket No. OPA-PA 13-009

APPELLANT'S HEARING BRIEF

I. INTRODUCTION

This submission of a Hearing Brief is offered as allowed by the Public Auditor's Order after hearing/Scheduling Order issued on August 27, 2013. It supplements Appellant JMI-Edison's ("JMI") Notice of Appeal submitted on August 1, 2013, as well as JMI's Comments on Agency Report submitted on August 26, 2013.

II. RELEVANT BACKGROUND

JMI was an offeror who submitted a bid pursuant to an Invitation for Bid ("IFB") issued by the Guam Memorial Hospital Authority ("GMHA") and opened on October 19, 2011. The IFB sought proposals to provide GMHA with a portable kidney machine with reverse osmosis purification machine. A Notice was received by JMI on June 7, 2013 indicating that another offeror has been awarded the contract. On June 21, 2013 JMI protested that award. A decision denying the protest was issued by GMHA on July 17, 2013. Despite the numerous grounds of protest raised by JMI, GMHA denied the protest on the single ground that JMI's protest was untimely because JMI's grounds for the protest— the deficiencies of awardee MedPharm's

submission– “were known or should have been known to JMI at bid opening on October 19, 2012.” This appeal followed.

It is understood that there were three offerors who responded to the IFB, and that offeror Medpharm was awarded the contract at issue here. JMI protests the award on the grounds that the selected offeror submitted an unresponsive bid that did not contain the required factory certifications and technical personnel qualifications. Further, the Medpharm submission did not provide specifications for the required docking station. As the only responsive bidder, JMI should be made the awardee of Bid 020-2012. The specific nature of what JMI will demonstrate at the hearing on the merits is detailed below.

III. JMI’s PROTEST WAS TIMELY

Under Guam law only “aggrieved” parties may bring bid protests under Guam procurement law. *See* 5 GCA 5425(a). JMI will show that it was not “aggrieved” until a non responsive offeror was selected for contract award. The Guam Supreme Court has discussed what an “aggrieved party” is. 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, but instead was GMHA’s selection of that nonresponsive bid for award. Simply put, JMI will show that it 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. That selection did not occur until June 7, 2013. The appellant’s appeal was timely filed after that.

GMH suggests that since JMI knew that it may, in the future, be a loosing bidder if GMHA’s contracting officer made a future award in violation of law, JMI should have protested the solicitation at that moment. GMHA’s flawed logic would require every offeror to protest an award within 14 days of the time of bid opening if that offeror believed that it may not be an awardee of the solicitation. GMHA’s logic would also require an offeror to file a protest if it believed that any other offeror submitted a bid that should not be selected. GMHA would have the offeror preempt any action taken by the contracting officer.

IV. THE AWARDEE’S SUBMISSION WAS NONRESPONSIVE

It is unassailable that the dialysis machines that GMH are seeking are critical care units that require competent and available technical oversight. GMH confirmed this not only in the IFB, but in the third amendment to offerors that stated submissions should include “the certificates of Training with Manufacturer Training Completion Certification for the technicians assigned to this project.” Amendment 3, October 12, 2012. Despite these clear requirements, no offeror other than JMI provided information to GMH regarding local and available technicians

who have completed any training whatsoever. An award to any party other than JMI could only have been done by casting aside this key bid requirement.

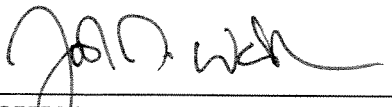
GMH's September 27, 2012 Reminder to prospective Bidders demanded that offerors provide the qualifications and performance data for "personnel of firm." That reminder also called for "a statement of qualifications of all technician personnel..." as well as "confirmation of training by the manufacturer..." JMI will show that rather than earn their award through their merit, the awardee instead merely stood on the manufacturer's personnel and technical expertise. JMI will show that nothing in the record suggests the existence of a joint venture or other joint partnership that would allow the awardee to simply sit in the shoes of the manufacturer. When asked to submit information about its personnel, the awardee pointed to the manufacturer's personnel. When asked to submit information about technical qualifications for that personnel, the awardee merely pointed to the qualifications of the manufacturer's personnel. When tasked with certifying that its personnel had completed manufacturer training, the awardee stood on the fact that the manufacturer's personnel had, of course, been trained. Put another way, the awardee did not submit the applicable responsive information required by GMH about it, and thus submitted an unresponsive bid.

V. RULING REQUESTED

JMI requests that, as the only responsive offeror, JMI should be made the awardee under GMHA Bid 020-2012.

Submitted this 18th day of September, 2013.

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By: 

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