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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI-Edison,

Appellant.

Docket No. OPA-PA13-009

**BRIEF REGARDING TIMELINESS
OF PROTEST, STATUTORY STAY,
AND FUNDING SOURCES**

I. INTRODUCTION

On September 27, 2013 the Office of Public Accountability ordered the parties to brief three issues; (1) whether or not JMI-Edison's ("JMI" or "Appellant") agency protest was timely, (2) whether or not the automatic stay was triggered and is currently in effect, and (3) the status of the funding for the procurement at issue. This brief is submitted pursuant to that order, and is supported by the Declaration of John Ilao which is contemporaneously submitted with this brief (Ilao Declaration).

II. JMI's PROTEST AND APPEAL ARE TIMELY AND PROPERLY BEFORE THE OPA

A. JMI'S PROTEST OF GMHA Bid 020-2012 WAS TIMELY BROUGHT

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. *See* Abstract of Bids, October 19, 2011, attached as exhibit "A" to the Ilao Declaration. The IFB

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sought proposals to provide GMHA with portable kidney machines with reverse osmosis purification. A Notice was received by JMI on June 7, 2013 indicating that offeror MedPharm had been awarded the contract. *See Bid Status, GMH Fax Machine Job 207, June 7, 2013, attached as exhibit "B" to the Ilao Declaration.* JMI protested that award. This protest came fourteen days after June 7, 2013.

Guam law allows for an aggrieved party to submit a protest to the head of the purchasing agency within fourteen days "after such aggrieved person knows or should know the facts giving rise thereto." 5 GCA § 5425(a). GMHA's procurement regulations mirror this 14 day timeframe. *See 26 GAR §16901.* JMI's protest is premised upon the award of GMHA Bid 020-2012 to MedPharm. *See JMI Notice of Appeal, August 7, 2013; Ilao Declaration.* Because JMI submitted its protest to the head of the procuring agency within 14 days of learning that MedPharm was the noticed awardee, JMI's protest was timely brought.

The evidence showing that JMI's protest came within 14 days of learning of the award to MedPharm is uncontroverted. Again, JMI first received word that GMHA had selected MedPharm for award on June 7, 2013. *See Bid Status, GMH fax machine Job 207, June 7, 2013, attached as exhibit "B" to the Ilao Declaration.* That notice stated that "GMHA Procurement Rules and Regulations provides that the contract will be awarded to the lowest responsible and responsive bidder namely MedPharm." *Id.* On June 21, 2013—within 14 days of learning the news of the award to MedPharm—JMI brought its protest.

GMHA did, on June 6, 2013, send a bid status update to JMI. The June 6, 2013 Bid Status transmittal came 15 days before JMI's agency level protest, but does not render JMI's protest untimely because that earlier bid status merely informed JMI that it was not selected. The notice did not give JMI any information regarding an award to MedPharm. That "bid status"

stated “GMHA Procurement Rules and Regulations provides that the contract will be awarded to the lowest responsible and responsive bidder.” Bid Status, GMH fax machine Job 126, June 6, 2013, attached as exhibit “C” to the Ilao Declaration.¹ To be clear, JMI’s protest was not brought simply because it lost the award²; JMI’s protest was brought on the discrete issue of awardee MedPharm’s responsiveness to the bid, and JMI did not know that MedPharm was the awardee until June 7, 2013. *See* Ilao Declaration. A protest brought 14 days after that date would, without question, be timely.

Further militating against finding JMI’s protest to be untimely is that JMI did not receive a response from the Agency to its Sunshine Act request until July 2, 2013— well *after* its protest was submitted. It was that Sunshine Act response—a response including the procurement record— that provided JMI with the confirming factual basis to assert that MedPharm had indeed submitted a non-responsive bid. *See* Sunshine Act Response, July 2, 2013, attached as exhibit “D” to the Ilao Declaration. Strictly speaking, JMI’s protest would have been timely filed 14 days after receiving the Sunshine Act response showing Medpahrn to be nonresponsive. Under any analysis, JMI’s protest of June 21, 2013 was timely brought.

B. THE OPA HAS JURISDICTION TO PROCEED SINCE JMI’S APPEAL OF THE AGENCY’S PROTEST DENIAL WAS TIMELY BROUGHT

The OPA’s order of September 27, 2013 asks the parties to address, *inter alia*, “whether or not he Public Auditor has jurisdiction to allow an untimely protest filing and if so, under what circumstances.” The Public auditor certainly has the ability to entertain the instant appeal of JMI

¹ The Procurement Record reveals that a June 6, 2013 “Notice of Intent of Possible award” was sent to MedPharm singularly on June 6, 2013. That record is of no consequence to the timeliness of JMI’s protest as JMI did not receive that Notice, and could not have reasonably obtained it or fathomed its contents prior to the June 7 Bid Status facsimile regarding MedPharm’s award JMI eventually received.

² It would strain credulity– and the resources of the OPA– if an offeror like JMI was aggrieved merely because it was not-selected for award. If JMI’s protest was untimely merely because it came more than 14 days after JMI learned that it was not selected for award, any prudent offeror moving forward would be forced to file a potentially meritless protest simply to protect future protest rights should a meritorious reason to protest arise later.

since the jurisdictional requirements that must be met by JMI in order to bring an appeal have all been met here.

A decision denying JMI's agency level protest was issued by GMHA on July 17, 2013. JMI's Notice of Appeal was submitted to the OPA on August 1, 2013— which is “within fifteen (15) days after receipt by the protestant of the notice of decision.” 5 GCA §5425(e). The jurisdictional hurdle that an appellant must reach before coming before the OPA is two tiered: a protest to the agency and a subsequent decision on that protest by the agency. 5 GCA § 5425(e); *In the Appeal of IBSS v GPSS*, OPA-PA-08-003. There is absolutely no question that, *vis a vis* JMI's instant protest, the OPA has before it an agency decision on JMI's protest. A protest and an agency decision— both of which exist here— are the only statutorily created jurisdictional gatekeepers that allow a timely OPA appeal to move forward. JMI's appeal was preceded by an Agency protest decision and brought within the 15 days prescribed by statute, and as such, is properly before the OPA.³

III. THE AUTOMATIC STAY MANDATED BY 5 GCA §5425(g) IS IN EFFECT

A. THIS PROCUREMENT HAS BEEN STAYED AS AN OPERATION OF LAW SINCE JMI'S PROTEST WAS FILED.

Because JMI's protest was timely filed, it triggered the automatic stay mandated by 5 GCA §5425(g). 5 GCA §5425(g) provides, in relevant part, that “in the event of a timely protest... the Territory shall not proceed further with the solicitation of with the award of the contract prior to final resolution of such protest, and any such further action is void, unless there is a written determination by the Chief Procurement Officer with the written concurrent of the

³ Even if the OPA were to conclude that JMI's *agency level* protest were untimely, such a finding would not bar the OPA's ability to move forward with entertaining the timely appeal brought before it, since the jurisdictional window to an OPA appeal opens with an agency decision on a protest, and such a decision has been rendered in this case.

head of the purchasing agency and the Attorney General, that the award of the contract without delay is necessary to protect the substantial interests of the Territory. . . .” 5 GCA § 5425(g)(1). At the hearing on this matter held on September 27, 2013, GMHA informed the OPA and the appellant that it had moved forward with the procurement following the agency’s denial of JMI’s protest. No finding of necessity exists in the record. This ignoring of the stay conflicts with Guam law, and the OPA should issue an immediate decision declaring the stay to be in effect and ordering the agency to discontinue ignoring it.

Guam law provides only one way an Agency can avoid the stay mandated by 5 GCA §5425(g). These provisions of Guam Procurement Law that address the automatic stay are codified at 5 GCA §5425(g) and override any inconsistent provisions that may exist in an Agency’s own regulations. *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, 2004 Guam 15 at ¶¶ 24, 41. Guam law is clear that any further action to proceed with a solicitation or award during the period of the automatic stay is void unless the contracting officer “after consultation with and written concurrence of the head of the using or purchasing agency and the Attorney General or designated Deputy Attorney General, makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the Territory.” 5 GCA §5425(g)(1). In addition, the law requires that the protester be afforded at least 2 days notice of such a determination. 5 GCA §5425(g)(2). Guam courts have held that where an agency fails to obtain the Attorney General’s confirmation of a determination of necessity to lift the automatic stay, even where that confirmation is not required by its own regulations or procedures, the agency still must comply with 5 GCA §5425(g). *Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, 2004 Guam 15 at ¶ 41. Nothing in the record shows that the finding of necessity under 5 GCA §5425(g) has been made or that

GMHA has made any effort to comply with the statute. Nothing in the record shows JMI's protest to be finally resolved.

The finality of administrative review— review that has not been completed here— is addressed in sections 5425(e) and (f) of the procurement code, which provide that the agency's decision on the protest may be appealed to the Public Auditor within 15 days, and the Public Auditor's decision on the protest shall be final unless the aggrieved person files an action in the Superior Court in accordance with section 5480(a). *See* 5 GCA §§5425(e), (f). Similarly, the relevant regulations in place prior to the availability of appeals to the Public Auditor also reflect that a decision is not final where judicial review of the decision is sought. Title 2 GAR §9101.1 states that "[a] decision of the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with §9103 and §9108." 2 GAR §9101.1.

Both the statutes and regulations define finality with reference to the filing of an appeal (or judicial review), and the requirement that the stay be in place prior to "final resolution" therefore logically includes the time for appeal as well through the appeal period. Any other interpretation would lead to the illogical— and absurd— result wherein the stay could be lifted after the agency's decision on the protest but prior to appeal, but resurrect itself once an appeal is filed, a result which is inconsistent with the definition of finality under the procurement laws.

The OPA has recently concurred with this analysis, and has stated clearly 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 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). This holding should be applied here, and the Agency should be informed that its actions following JMI’s timely protest must comply with the statutory stay.

B. JMI WILL BE IRREPARABLY INJURED IF THE STAY IS NOT ADHERED TO.

Guam law provides that if Appellant JMI is successful in its protest, JMI “shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney’s fees....” 5 GCA §5425(h). GMHA’s pushing forward with the procurement award to MedPharm hampers any remedy JMI may have to become an awardee of the solicitation, since the Territory may be able to merely ratify and affirm MedPharm’s contract regardless of the outcome of the instant appeal. 5 GCA § 5425(a)(1); (2). As more dialysis machines are ordered and installed by MedPharm, JMI becomes less and less likely of having a meaningful outcome to its appeal.

Since JMI will only be able to recover the costs of its bid if the stay is not honored and its protest appeal is sustained by the OPA, JMI will be irreparably injured. Irreparable injury is defined as injury for which there is no adequate remedy at law. *Shin v. Fujita Kanko Guam, Inc.*, CVA 07-002, 2007 WL 4348300 (Guam Dec. 6, 2007); *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 716-17 (Fed. Cl. 2006). The Federal Claims court has held that where an aggrieved offeror can only gain the costs of bid preparation in a suit for damages, and not anticipated profits, such a bid protester is irreparably harmed. *See Bannum, Inc. v. United States*, 60 Fed. Cl. 718, 730 (Fed. Cl. 2004) *citing Essex Electro Eng'rs, Inc. v. United States*, 3

Cl.Ct. 277, 287 (1983), aff'd, 757 F.2d 247 (Fed.Cir.1985). This is the exact situation faced by JMI, and necessitates the OPA's affirmance that the stay is in place.

IV. THE PROCUREMENT'S FUNDING SOURCE

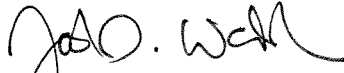
JMI has no information regarding any special situation regarding the funding source of this procurement that would affect the issues raised by the parties' briefs, this appeal, or the scheduling of this matter.

V. CONCLUSION

JMI's agency level protest came within 14 days of learning of the fact— Medpahrm's selection— giving rise to its protest. JMI's appeal to the OPA came within 15 days of GMHA's denial of its protest. These timeframes show JMI's protest and appeal to be timely. These timely submissions not only allow JMI's appeal to move forward, they also mandate that the automatic stay of procurement mandated by 5 GCA §5425(g) continues to be in effect.

Submitted this 7th day of October, 2013.

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