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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 11/27/13
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FILE NO OPA-PA: 13-009

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8 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**
9 **GOVERNMENT OF GUAM**

10 IN THE APPEAL OF :

11 JMI Edison,

12 Appellant.

CASE NO: OPA-PA 13-009

**GMHA'S REPLY TO AFFIDAVIT
RE FEES AND COSTS**

13 At status hearing held November 18, 2013, the Office of Public Accountability ("OPA") orally
14 issued a notice of ruling wherein it "ratified and affirmed the contracts awarded to MedPharm" by the
15 Guam Memorial Hospital Authority ("GMHA") in IFB 020-2012 (Portable Kidney Machines with
16 Reverse Osmosis Water Purification Machines). *In the Appeal of JMI-Edison, OPA-PA-13-009,*
17 *Status Hearing Audio (11.18.13) at 5:54.* The OPA also awarded JMI Edison ("JMI") "costs and fees
18 incurred in connection with its protest and appeal" to the OPA, and ordered further briefing on the issue.
19 *In the Appeal of JMI-Edison, OPA-PA-13-009, Status Hearing Audio (11.18.13) at 6:18.*

20 On November 22, 2013, instead of filing documents detailing costs and fees incurred in
21 connection with its protest and appeal, JMI filed an affidavit summarizing its attorney's fees. The
22 GMHA objects and respectfully submits that (1) the OPA does not have the authority to award
23 attorney's fees to a protestant and (2) JMI is not entitled to an award of costs and fees as is further
24 analyzed below.

25 Title 5 GCA § 5425 (h) provides in relevant part:

26 "Entitlement to Costs. In addition to any other relief or remedy...the protestant shall be entitled
27 to the reasonable costs incurred in connection with the solicitation and protest, including bid
28 preparation costs, excluding attorney's fees, if:

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

3 (2) there is a reasonable likelihood that the protestant may have been awarded the
4 contract but for the breach of any ethical obligation imposed by Part B of Article 11 of
5 this Chapter or the willful or reckless violation of any applicable procurement law or
6 regulation. The Public Auditor shall have the power to assess reasonable costs including
7 **reasonable attorney fees incurred by the autonomous agencies** and public
8 corporations, **against a protestant** upon its finding that the protest was made
9 fraudulently, frivolously or solely to disrupt the procurement process.”

10 5 GCA § 5425(h) (Emphasis added).

11 First, Subsection (h) is only triggered when a protestant prevails on its appeal. The subsection
12 begins, “[i]n addition to any other relief or remedy” and thereby assumes that a protestant has prevailed
13 on appeal and may therefore be entitled to costs. JMI did not prevail on its appeal as the OPA ratified
14 and affirmed the contracts awarded to MedPharm.

15 Second, if a protestant prevailed on appeal, it would be entitled to reasonable costs **only if** (1) it
16 should have been awarded the contract under the solicitation, **or** (2) there is a reasonable likelihood the
17 it would have been awarded the contract but for breach of an ethical obligation imposed by Part B of
18 Article 11 or the willful or reckless violation of any applicable procurement law or regulation. In this
19 appeal, there were no findings as to whether JMI should have been awarded the solicitation or whether
20 there was a reasonable likelihood that it would have been awarded the solicitation. There were no
21 findings against the GMHA regarding the Standards of Conduct set forth in Part B or Article 11 of
22 Chapter 5 – Guam Procurement Law¹, nor were there any findings that the GMHA willfully or
23 recklessly violated any applicable procurement law or regulation.

24 On the contrary, the OPA “ratified and affirmed” the contracts award to MedPharm pursuant to
25 5 GCA § 5452(a) which states in part, “if after an award it is determined that a solicitation or award of a
26 contract is in violation of law, then: (1) if the person awarded the contract has not acted fraudulently or
27 in bad faith: (A) the contract may be ratified and affirmed, provided it is determined that doing so is in

28 ¹ Specifically, there were no findings against the GMHA regarding § 5627. Criminal Sanctions, § 5628. Employee
Conflict of Interest, § 5629. Employee Disclosure Requirements, § 5630. Gratuities and Kickbacks, § 5631. Prohibition
Against Contingent Fees, § 5632. Restrictions on Employment of Present and Former Employees, or § 5633. Use of
Confidential Information.

1 the best interests of the Territory..." The OPA's authority to ratify and affirm the contracts awarded to
2 MedPharm necessarily relies on a finding that the GMHA and MedPharm did not act fraudulently or in
3 bad faith.

4 Third, 5 GCA § 5425 (h) specifically excludes an award of attorney's fees to a protestant. The
5 OPA only has the authority under subsection (h) to assess reasonable attorney fees incurred *by the*
6 *autonomous agencies* and public corporations *against a protestant* upon its finding that the protest was
7 made fraudulently, frivolously or solely to disrupt the procurement process.

8 Based on the foregoing, the OPA does not have the authority to award attorney's fees to a
9 protestant and should reject JMI's affidavit summarizing its attorney's fees. Furthermore, the OPA may
10 only award reasonable costs incurred with the solicitation where (1) the protestant prevailed on its
11 appeal and (2) there is a finding that the solicitation would or should have been awarded to the
12 protestant. Here, JMI did not prevail on its appeal and there were no findings as to whether JMI should
13 have been awarded the solicitation or whether there was a reasonable likelihood that it would have been
14 awarded the solicitation.
15

16 Respectfully submitted this 27th day of November 2013.

17 FISHER & ASSOCIATES

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19 
20 MINAKSHI V. HEMLANI, ESQ.