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Attorneys for Appellant JMI Edison

**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

JMI-Edison,

Appellant.

Docket No. OPA-PA13-009

**MOTION FOR INJUNCTIVE
RELIEF AND STAY OF
PROCUREMENT PENDING
FINAL RESOLUTION OF APPEAL**

**I. MOTION FOR INJUNCTIVE RELIEF AND STAY OF PROCURMENT PENDING
FINAL RESOLUTION OF APPEAL**

Appellant JMI-Edison, by Appellant's undersigned attorney, moves the Office of Public Accountability (OPA) for a temporary restraining order restraining and enjoining the Procuring Agency— the Guam Memorial Hospital Authority (GMHA), its agents, employees, successors, attorneys, and all persons in active concert and participation with them, from progressing forward with contract performance or acceptance of performance of GMHA 020-2012, pending final resolution by the Public Auditor of whether or not the statutory stay mandated by 5 GCA § 5425(g) has been in place since the inception of JMI's protest.

Unless this motion is granted, JMI will suffer immediate and irreparable injury, loss, and damage if the Procuring Agency is permitted to continue to perform and accept performance under GMHA 020-2012 prior to final resolution of JMI's protest, as more fully set forth in JMI's

Notice of Appeal and papers filed in this action.¹ This motion is filed pursuant to the OPA's briefing Order of October 29, 2013, and is supported by the appended memorandum of support, the papers on file in this matter, and any argument that the OPA may order on this issue.

II. MEMORANDUM IN SUPPORT OF MOTION

A. THE OPA CAN ISSUE THE ORDER THAT JMI SEEKS

The Public Auditor has the power to promote the integrity of the procurement process and the purposes of Guam's procurement laws. *See* 5 GCA §5703 ("The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5."). The Public Auditor has the power to review and determine "any matter properly submitted" to her. 5 GCA § 5703, and reviews *de novo* denials of protests in connection with the solicitation or award or award of a contract. *See* 5 GCA § 5425(e). Further, in the regime of procurement, the OPA holds powers akin to a court, since Guam law allows procurement matters brought before a court to be, without limitation, remanded to the OPA. *See* 2 GAR § 12103(b).

The power of the OPA has been determined by the Guam Legislature to be as broad as is necessary. As mentioned above, Guam law provides that "[t]he Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5." 5 GCA §5703. Moreover, the OPA's regulations provide that the hearing officers appointed by the OPA have the power "power, among others, to (d) Rule on motions, and other procedural items on matters pending before such officer." 2 GAR §12109. The OPA is also specifically tasked with reviewing Agency determinations to lift the statutory stay imposed by Guam law. Title 2 GAR § 12501(b) mandates that the "Public Auditor shall review and confirm

¹ Though JMI is here moving for a stay, this motion should not be construed as altering JMI's legal position that, because of its timely protest, the statutory stay mandated by 5 GCA §5425(g) has remained in place since the inception of the protest.

or reject any determination by the Chief Procurement Officer or the Director of Public Works that award of a contract without delay pending Appeal is necessary to protect the interests of the government.” 2 GAR §12501(b).

The OPA also has the power to order an agency to take certain action *vis a vis* a procurement. The OPA routinely orders agencies to take certain action or cancel certain action with regard to specific procurements. See *In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA-08-012, Decision at pp 9-10 (Feb. 10, 2009). (Ordering GSA to cancel a multi-step bid). In a prior appeal, *In the Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies* OPA-PA -08-003, Decision (July 11, 2008), the Public Auditor determined that while she lacked jurisdiction over the appeal to consider the merits of the protest because there was not yet an agency decision, she did have the power and the jurisdiction under Guam law to compel an agency to render a decision on a protest. In other words, the OPA can order Government of Guam agencies to take action and— as JMI is requesting here— cease further action regarding procurement.

B. STANDARD FOR GRANTING INJUNCTIVE RELIEF

In order for a preliminary injunction to be granted, the movant must show: “(1) irreparable injury and (2) likelihood of success on the merits.” *HongKong & Shanghai Banking Corp.*, 2005 Guam 13 ¶ 18. More specifically, the movant must demonstrate either: “a combination of probable success on the merits and the possibility of irreparable harm; or ... that serious questions are raised and the balance of hardships tips in its favor.” *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir.2001).

C. JMI SHOULD BE GIVEN THE RELIEF IT SEEKS

- 1. JMI will be irreparably injured if GMHA is not enjoined from moving forward with contract performance.**

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 and performance of 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 moved and installed by MedPharm, and more trainings occur, JMI becomes less and less likely of obtaining 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 action requested by JMI.

2. JMI will likely succeed on the merits of its argument that the Stay has been in place since the inception of its protest.

JMI has fully briefed how its protest— a protest aimed at the decision of GMHA to make MedPharm the awardee of GMHA 020-2012 — came 14 days after JMI received word

that MedPharm had been made the awardee. JMI's protest to the agency, therefore, was timely. 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 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). JMI's timely protest, therefore, resulted in the initiation of the automatic stay mandated by law. The OPA in this matter will likely conclude that the stay has since remained in place without interruption, since the OPA has articulated 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; emphasis added).

3. JMI will likely succeed on the merits of its protest.

a. The timeliness reason offered by the Agency for denying JMI's protest was without merit

JMI has put forward substantial briefing relating how the Agency erred in issuing its protest denial. GMHA's Agency Report filed on August 15, 2013, and in that report continued to hold to a single ground justifying its denial of JMI's protest: 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." GMHA's

singular reason to cast aside JMI's protest will likely fail, since under Guam law only "aggrieved" parties may bring bid protests under Guam procurement law. *See* 5 GCA 5425(a). JMI was not "aggrieved" until a non responsive offeror— MedPharm—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. 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 on October 19, 2012, but instead was GMHA's selection of that nonresponsive bid for award on June 7, 2013. Its protest on June 21, 2013, was therefore timely.

b. Awardee MedPharm did indeed submit a non-responsive bid.

GMHA has provided no substantive response to the deficiencies of Medpharm's submission. According to GMHA, MedPharm's deficiencies "are best characterized as items of nonconformance and not nonresponse." No detailed defense of this conclusion is offered.

GMHA's conclusion is incorrect, and it is likely that JMI will succeed on this underlying reason for its protest.

A "responsive bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids." G GCA § 5201(g). Medpharm's submission has material deficiencies. The IFB's third amendment made it clear that submissions should include "the certificates of Training with Manufacturer Training Completion Certification for the technicians assigned to this project." Amendment 3, October 12, 2012, attached as Tab "F" to the procurement record submitted to the OPA. Despite these clear requirements, no offeror other than JMI provided information to GMH regarding local and available technicians who have completed any training whatsoever. This material aspect of the bid was ignored by Medpharm, and GMHA provides no defense of its absence.

GMHA's October 12, 2012 Amendment 3 also 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..." Rather than earn their award through their merit, the awardee instead merely stood on the manufacturer's personnel and technical expertise. No firm personnel or firm technicians were offered. This material aspect of the bid was ignored by MedPharm, and GMHA provides no defense of its absence.

The IFB called for submissions regarding a portable dock and charging station. The awardee and other offeror merely informed GMH that they would provide the product "as per specs." *See* Medpharm Submission, attached as Tab "B", Book II to the procurement record submitted to the OPA. As JMI's submission makes clear, the standard docking station requested by GMH no longer is made. This is why JMI, as opposed to the other offerors, provided

substantiated specifications for the docking station. The other offerors merely submitted to GMH a vague assertion that they would meet specifications— an impossibility given the discontinued nature of the specified docking station. This material aspect of the bid was ignored by Medpharm, and GMHA provides no defense of its absence.

Finally, GMHA confirmed the underlying basis for JMI's protest, in informing the OPA during the hearing held on October 29, 2013 that Supplier Gambro personnel— not personnel from MedPharm itself— would be conducting trainings with GMH personnel.² Again, the IFB called for submission of the qualifications and performance data for "personnel of firm." Gambro personnel are not personnel of MedPharm, and the fact that Gambro personnel are performing under GMHA 020-2012 shows that JMI will likely succeed on the merits of its protest.

4. JMI's appeal raises serious issues, and the balance of hardships tips in its favor

JMI's instant appeal provides the OPA with an opportunity to bring further clarity to two important aspects of Guam's procurement law; (1) whether or not an offeror must bring its protest within 14 days of learning it did not win an award because such knowledge means that the offeror is, *ipso facto*, aggrieved, and (2) whether or not a timely protest triggers a stay of procurement that extends through all stages of the procurement appeal process. JMI's instant attempt to gain an order from the OPA enjoining further contract performance under GMHA 020-2012 pending resolution of the larger issues that have been placed before the OPA is important in preserving the status quo. Without a stay in place, and with the procuring agency actively moving forward with contract performance, the prejudice to JMI mounts and any meaningful resolution for JMI becomes more difficult to obtain. Finally, every moment of additional contract performance by MedPharm further entangles GMHA and MedPharm with

² As of the time of this brief writing, the hearing audio was not yet available on the OPA website.

each other, creates financial commitments, and creates additional litigation difficulty— and damages claims that will be held by MedPharm against GMHA— should the OPA determine that the contract executed for GMHA 020-2012 was void. The issuance of an immediate Stay order will help remediate all of these concerns.

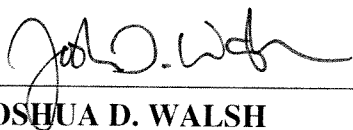
Finally, the issuance of the order that JMI seeks poses no prejudice to either GMHA or any interested party, as JMI is fully capable of providing a bond to address any damages that may be justified in the unlikely event the injunction was improperly issued. *See* Surety Bond Letter, Attached as exhibit A.

III. CONCLUSION

JMI will be irreparably injured if GMHA continues to move forward with contract performance, and this irreparable injury will come despite the likelihood that JMI will prevail on the merits of its appeal. The OPA should preserve the integrity of the procurement process, and enjoin any further contract performance by GMHA until JMI's bid protest is finally resolved.

Submitted this 29th day of October, 2013.

CIVILLE & TANG, PLLC

By: 

JOSHUA D. WALSH
Attorneys for Appellant, JMI Edison

Exhibit A



Moylan's Insurance Underwriters, Inc.

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October 29, 2013

TO : Office of Public Accountability
c/o JMI -Edison

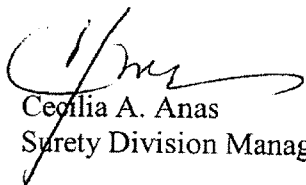
FROM : Cecilia A. Anas

RE : **IFB No. GMHA IFB-020-2012**
OPA-PA 13-009

We have been informed that JMI-Edison (JMI) has commenced a procurement appeal before the Office of Public Accountability (OPA). JMI has applied to the OPA for an injunction against the Guam Memorial Hospital, enjoining and restraining GMH from the commissioning of certain acts, as more particularly set forth and described in JMI's motion seeking injunctive relief against GMH's continued contract performance and acceptance of awardee MedPharm's performance.

We, Moylan's Insurance Underwriters, General Agent for Dongbu Insurance Co., Ltd., Surety, in consideration of the issuing of the injunction, undertake and promise to the effect that in case the preliminary injunction shall be issued, are prepared to issue a bond in an amount sufficient to pay the party directed by the OPA such established damages, not exceeding 15% of the value of the procurement award, as that party may sustain by reason of the preliminary injunction.

Sincerely,


Cecilia A. Anas
Surety Division Manager

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