



Jerrick Hernandez <jhernandez@guamopa.com>

OPA23-PA-002 In the Appeal of Johndel International, Inc. dba. JMI Edison

William B Brennan <wbrennan@arriolafirm.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: Brittney Quinata <bquinata@arriolafirm.com>, "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>

Hafa Adai,

Please see attached documents for efilng in the subject procurement appeal:

1. Agency Report
2. Agency Statement

Please contact me if you have trouble retrieving the attachments.

Best,

*William Bucky Brennan, Esq.***ARRIOLA LAW FIRM**

259 Martyr Street, Suite 201

Calvo-Arriola Building

Hagåtña, Guam 96910

Tel: 671.477.9730/33

Fax: 671.477.9734

Email: wbrennan@arriolafirm.com

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2 attachments**OPA-PA-23-002 Agency Statement.pdf**

167K

**OPA-PA-23-002 Agency Report.pdf**

396K

WILLIAM B. BRENNAN, ESQ.
ARRIOLA LAW FIRM
259 MARTYR STREET, SUITE 201
HAGÁTÑA, GUAM 96910
TEL: (671) 477-9730/33
FAX: (671) 477-9734
attorneys@arriolafirm.com

Counsel for Appellee
Guam International Airport Authority

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

In the Appeal of

APPEAL CASE NO.: OPA-PA-23-002
GIAA 2021 Emergency Procurement

**Johndel International, Inc. dba. JMI-
Edison,**

AGENCY STATEMENT

Appellant.

COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”) which pursuant to 2 GAR Div. 4 §12105(g), and in response to the appeal of Johndel International, Inc. dba JMI (“JMI”), files this Agency Statement.

The People of Guam rely on GIAA, Guam’s only civilian airport, to maintain operations 24 hours a day, seven days a week. GIAA’s baggage conveyance systems are critical to these operations. An interruption to the baggage conveyance systems would stop the flow of people and goods through the airport. GIAA engages the services of a provider to operate and maintain the complex baggage conveyance system components. Without a provider, GIAA’s baggage conveyance systems would be shut down. When a proposer protested GIAA’s procurement of management and infrastructure support services to GIAA’s baggage conveyance systems, the procurement was stayed. The existing contract for the provider at the time was set to expire on October 31, 2021. Therefore, GIAA determined the

existence of an emergency and solicited a provider to provide the services while the procurement stay remained in place. The contract was procured on an emergency basis and was executed on November 1, 2021. On March 22, 2023 JMI protested the method of source selection, and monthly extension of the contract remains stayed notably due to JMI's appeal in the Superior Court in CV0095-22. JMI's protest was untimely, and the main basis of its protest is now moot. GIAA's denial of JMI's March 2023 protest was in accordance with law, and the OPA should dismiss this appeal.

BACKGROUND

On July 20, 2021, GIAA issued Request for Proposal number RFP 05-FY21 seeking offers/proposals for Management and Support Services to GIAA's Baggage Conveyance Systems. On September 21, 2021, JMI filed a protest related to the RFP. JMI alleged *inter alia* that the higher ranked offeror Aircraft Services International, Inc. ("Menziess") lacked certain licensure from the Guam Contractor's License Board ("GCLB") to perform work required by the RFP. GIAA denied that protest and JMI appealed GIAA's decision to the Office of Public Accountability in OPA-PA-21-010. The OPA ultimately dismissed JMI's appeal with prejudice, finding that a purported GCLB "Findings and Decision" document presented by JMI to the OPA, and the circumstances of the document's creation, constituted a fraud on the OPA. JMI appealed the OPA's decision to the Superior Court. That matter is captioned CV0095-22, and remains pending as of the date of this writing.¹

Because JMI filed a protest during the negotiation phase of RFP-05-FY21, GIAA imposed a stay on the procurement. However, GIAA's existing contract with the provider who provided management and infrastructure support services to GIAA's Baggage Conveyance Systems was set to expire on October 31, 2021. GIAA's baggage conveyance systems are comprised of the inbound and outbound

¹ Notably, JMI's counsel in CV0095-22 recently prepared and circulated a proposed briefing schedule which set the outward deadline for briefs in early August 2023. Therefore, if all Parties agree to the schedule as proposed, CV0095-22 will remain pending at least through summer 2023.

components that support GIAA's and tenant operations related to arriving and departing aircraft, and the necessary movement of baggage of various types to and from such aircraft. The system moves such baggage from point of entry, to Guam customs and Transportation Security Administration inspection points, to and from aircraft, and ultimately to and from the travelling public. The provider provides technical and operational personnel, and maintains and operates the system in support of GIAA's 24 hours a day, seven days a week operation. Without a provider in place, the system would be shut down which would shut down the Airport.

Recognizing this as a potential threat to public health and safety, GIAA determined an emergency existed and the need for an emergency procurement on October 27, 2021 in accordance with Guam law. *I Maga Hagan Guahan* reviewed GIAA's determination and approved a certificate of emergency, authorizing the emergency procurement.

GIAA then solicited proposals on an emergency basis, seeking a provider to provide services on a monthly basis due to the inability to move forward with RFP 005-FY21 and the imminent expiration of the contract, and to continue while the stay remained in place. Two offerors submitted proposals, and Menzies was ultimately awarded a contract to provide the services on November 1, 2021. The contract was for an initial term of 30 days, subject to extension as allowed by law.

In December 2021, when GIAA gave notice of a public hearing on its intent to extend the contract with Menzies, procured on an emergency basis, beyond the initial 90-day term, a JMI representative emailed the GCLB a copy of GIAA's newspaper advertisement giving notice of the public hearing on the extension. Notice of Appeal, Ex. C at pp. 3-4. Additionally, on February 10, 2022, when JMI appealed the OPA's dismissal of its protest appeal in OPA-PA-21-010, JMI verified in its complaint that currently Menzies is performing under an "emergency" contract without appropriate licensing. *Id.* at p. 7 at ¶ 41.

Because the procurement stay on RFP 005-FY21 remains in place to this date, GIAA has complied with Guam law and has extended the contract for 30 days at a time. PR at pp. 604-622. GIAA has also held the required public hearings to extend the contract for periods in excess of 90 days at a time. PR at pp. 529-540.

On March 15, 2023, GIAA gave notice of a public hearing on its intent to extend the emergency procurement for an additional ninety (90) day period. On March 21, 2023, JMI wrote to GIAA and incorrectly stated that GIAA was convening a board meeting on March 22, 2023, to extend the contract with Menzies for an additional 90-day period. Notice of Appeal, Ex. B. at p. 1 (Apr. 10, 2023). JMI attached to its protest a March 14, 2023 opinion from the Office of the Attorney General which stated that the OAG had “confirm[ed] that the work under the RFP requires that the selected offeror hold a Specialty Contractor License from the CLB in the C-13 Electrical Contractor sub-classification.” Id. at p. 2. JMI took the position that Menzies could not perform in response to the RFP. Id. at pp. 2-3. JMI also speculated that GIAA had not taken the steps necessary to use an emergency procurement. Id. at p. 3. JMI requested that it be awarded the contract beginning May 15, 2023. Id. at p. 4. JMI also incorrectly asserted its March 21, 2023 protest was untimely and “pre-award”, and issued a request under the Sunshine Reform Act of 1999, seeking records related to the emergency procurement.

GIAA denied JMI’s protest in its entirety on March 27, 2023. Specifically, GIAA found JMI’s protest to be untimely and speculative. Notice of Appeal Ex C at pp. 1-10. GIAA also found that JMI’s protest was post-award, and therefore the automatic stay provisions of Guam’s procurement law is not applicable. Id. JMI then appealed to the OPA in this matter, prompting submission of this Agency Statement.

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AGENCY POSITION

a. JMI's Protest is moot, and was made before the GCLB made any relevant determination.

GIAA has maintained throughout proceedings related to JMI's protest of RFP-005-FY21 that the GCLB has the authority to classify the requirement of a license for work within its jurisdiction. See 21 G.C.A. § 70109. GIAA previously raised that the GCLB and not the OPA must therefore act on JMI's license related basis of procurement protest.

At the time of JMI's March 21, 2023 protest to GIAA, the GCLB had not found that a license was required for the work related to the RFP. JMI attached to its protest a March 14, 2023 legal opinion from the OAG that preliminarily advised the GCLB on its review of a relevant GCLB investigation. The OAG does not have authority to classify licenses issued by the GCLB. Therefore, GIAA responded to JMI's protest and specifically stated that the GCLB had yet to take action regarding JMI's allegations of Menzies' lack of licensure.

Since JMI's protest letter was addressed by GIAA, GIAA concedes that the GCLB did issue a cease-and-desist letter to Menzies on April 4, 2023 related to work at GIAA allegedly requiring a specialty C-13 license. The letter was sent to GIAA by Counsel for JMI on April 14, 2023. Agency Report Ex. A (Apr. 25, 2023). Before that date, GIAA took steps to assure that work done related to the current contract to provide services was not interrupted and was done in compliance with GCLB action that prompted the cease-and-desist letter. See PR at pp. 802-807.² On April 7, 2023, Menzies transmitted to GIAA a copy of a C-13 license purportedly issued by the CLB to Menzies. PR at pp.

² The GCLB met on March 15, 2023 and reviewed the Letter from the Office of the Attorney General. See Meeting Recording (Mar. 15, 2023) (available at: <https://www.youtube.com/watch?v=rSAOoRaVC3g>). The GCLB convened a working session and board meeting on March 28, 2023 where they authorized the issuance of a cease-and-desist letter to Menzies. See Meeting Recording (Mar. 28, 2023) (available at: <https://www.youtube.com/watch?v=xYyj5xkW7es>). The CLB met on April 19, 2023 where Menzies' notices of defenses and request for a hearing were discussed. See GCLB Meeting Recording (Apr. 19, 2023) (available at: <https://www.youtube.com/watch?v=AMYB0wAhZdI>).

808-810. Therefore, while JMI's protest was premature, it appears JMI's concerns about Menzies performing work requiring a C-13 GCLB license prospectively is now moot.³

b. GIAA complied with the requirements to award and extend the November 2021 contract.

GIAA complied with the requirements laid out in Guam law to conduct an emergency procurement. See 5 G.C.A. § 5215. GIAA determined the existence of a threat to public health or safety, in writing. 5 G.C.A. § 5215(a). The Governor approved a certificate of emergency based on such determination. 5 G.C.A. § 5215(b)(2). The provider of services solicited through that emergency procurement was competitively selected, on an emergency basis. See 5 G.C.A. § 5215(d). The extension of the contract has also occurred in compliance with the Guam procurement law. 5 G.C.A. § 5215(e); See P.R. at pp. 529-540, 604-622. The contract remains limited in scope and duration to the emergency certified by *I Maga'hågan Guåhan*.

JMI's allegations that GIAA has not taken the steps to trigger an emergency procurement are not well plead. They do not specifically allege what is wrong with GIAA's procurement, and instead only allege that "it is not clear that the government has undertaken steps necessary to trigger the emergency procurement. . ." Notice of Appeal at p. 5-6. JMI argues the length of the emergency procurement somehow is relevant but Guam law makes clear that GIAA has complied with Section 5215€ in order to extend the current contract. GIAA's denial of JMI's protest should therefore be affirmed.

c. JMI's Protest was Untimely.

Under Guam law, an aggrieved individual must submit a protest within fourteen (14) days after the individual knows or should know the facts giving rise thereto. 5 G.C.A. § 5425.

³ GIAA is aware from the GCLB meeting recordings that Menzies has requested a hearing and will challenge some or all parts of the GCLB's action. *Supra* note 2. Notably, the GCLB appears to have issued a monetary penalty against Menzies for past conduct. Agency Report Ex. A. GIAA's concerns are for the continued operation of its Baggage Conveyance Systems and GIAA takes no position on the GCLB's procedures and penalty, its cease-and-desist letter, or Menzies' defenses or challenges to the GCLB actions. GIAA reserves and does not waive any defense or right available under existing or past agreements at law or in equity.

On December 28, 2021, a JMI representative sent an email to the GCLB expressly acknowledging JMI knew as of that date, (1) that GIAA had engaged Menzies to perform work on an emergency basis since November of 2021, (2) that GIAA would extend the contract while the procurement stay of RFP-05-FY21 remained in place, and (3) that Menzies lacked the license JMI alleged was necessary to perform the work. Notice of Appeal Ex C at 1-10. On February 10, 2022, JMI filed a verified complaint appealing the OPA’s dismissal of its procurement appeal to the Superior Court and alleged that Menzies was performing work at GIAA as a result of an emergency procurement, and was doing so without the license JMI alleged was required to perform such work.

Id. Therefore, JMI’s protest was made more than 14 days after when they knew of the bases for their protest and its protest is untimely.

d. JMI’s March 2023 protest was neither timely or post-award, therefore no stay is in place.

Under 5 G.C.A. Section 5425(g) “in the event of a *timely* protest . . .the territory shall not proceed with the [award of the contract] prior to final resolution of such protest” 5 G.C.A. § 5425(g). The contract with Menzies at issue here was entered into on November 1, 2021 and has been extended in accordance with 5 G.C.A. Section 5215(e) since then. Additionally, as stated above, the protest here was untimely. Supra section c. Therefore, JMI is incorrect that its protest is pre-award. To be clear, there is no procurement stay on the award of a contract to Menzies in place. The March 22, 2023 protest was post award.

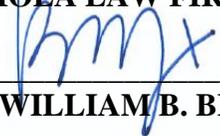
CONCLUSION

Based on the foregoing, JMI’s appeal should be denied in its entirety. Specifically, GIAA requests that the OPA:

1. Find that JMI's arguments related to the C-13 contractor's license to Menzies are moot as related to Menzies ability to prospectively perform under the contract entered into under an emergency procurement.
2. Find that JMI's protest was untimely and is therefore barred.
3. Find that GIAA's actions related to the emergency procurement were in accordance with applicable law and regulations and expressly reject JMI's allegations to the contrary.
4. Find that JMI's appeal is a frivolous abuse of the protest and appeal process and award fees to GIAA pursuant to 5 G.C.A. § 5425(h)(2);
5. Enter any other and further relief as the OPA may deem appropriate.

Dated: April 25, 2023.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 
WILLIAM B. BRENNAN