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OPA-PA-23-002; Motion to Dismiss

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Hafa Adai Mr. Hernandez,

Please see attached document for e-filing regarding: In The Appeal Of Johndel International, Inc. dba: JMI-Edison.

1. Motion to Dismiss. (4 pages)

Thank you!

Kind Regards,

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

In the Appeal of

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

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

)
) **MOTION TO DISMISS**
)
)

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) Appellant.
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COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”) which moves to dismiss this appeal for lack of subject matter jurisdiction.

As of December 28, 2021, Johndel International, Inc. dba. JMI-Edison (“JMI”) knew (1) that GIAA used an emergency procurement to secure Menzies’ performance of services at GIAA and entered a contract on November 1, 2021, (2) that GIAA intended to extend the contract with Menzies for such services beyond 90 days from November 1, 2021, and (3) that Menzies lacked a license that JMI alleged was required of Menzies to perform the work Menzies was contracted by GIAA to perform. JMI did not bring a protest to GIAA despite this knowledge until March 21, 2023, 448 days later. JMI’s protest challenges the use and extension of an emergency procurement and Menzies’ award under the emergency procurement despite its lack of license. JMI had knowledge of these facts 448 days before JMI filed its protest. Thus, JMI’s protest was untimely, and the Office of Public Accountability lacks subject matter jurisdiction over this appeal. This matter must be dismissed.

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

BACKGROUND

On September 21, 2021, JMI filed a procurement protest related to a ranking of RFP Offerors who responded to GIAA Proposal number RFP 05-FY21 for Management and Support Services to GIAA's Baggage Conveyance Systems. JMI alleged that the higher ranked offeror Aircraft Services International, Inc. ("Menzie's") 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.

When JMI filed its protest, GIAA imposed a stay on the procurement. However, GIAA's existing contract with the then-current provider was set to expire on October 31, 2021. GIAA's baggage conveyance systems are critical to GIAA Operations. Without a contractor in place, the airport would shut down. GIAA thus utilized an emergency procurement, and Menzie's was awarded a contract to provide services due to the procurement stay of RFP 05-FY21.

In December 2021, GIAA published notice of a public hearing on its intent to extend the contract with Menzie's, 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. Notice of Appeal, Ex. C at pp. 3-4.

The OPA dismissed JMI's appeal with prejudice during a hearing on January 27, 2022. The OPA issued a written decision dismissing the appeal on February 3, 2022. JMI appealed the OPA's decision to the Superior Court on February 10, 2022, in CV0095-22. JMI verified in its complaint that Menzie's was performing under an "emergency" contract without appropriate licensing." Id. at p. 7 at ¶ 41.

CV0095-22 remains pending as of the date of this writing. Thus, GIAA has extended the November 1, 2021, contract with Menzie's to the present date, in accordance with Guam law.

On March 15, 2023, GIAA published notice of another public hearing on its intent to extend the contract with Menzies for an additional ninety (90) day period from April 2023. 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 90 days. Notice of Appeal, Ex. B. at p. 1 (Apr. 10, 2023). JMI styled its letter a pre award procurement protest.

GIAA denied JMI's protest 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, and GIAA now moves the OPA to dismiss this matter.

LAW & ARGUMENT

a. *JMI's Protest was Untimely made to GIAA.*

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. A timely protest is a jurisdictional requirement of the procurement protest and appeal scheme in the Guam procurement law. Teleguam Holdings, LLC v. Guam, 2018 Guam 5 ¶¶ 20-21 (“Teleguam II”); DFS Guam L.P., 2020, Guam 20 ¶¶ 77, 81-83. The law governing procurement appeals requires the OPA to determine its subject matter jurisdiction as “a protest filed more than 14 days after the disappointed offeror or bidder had notice of the grounds for the protest is barred as untimely.” DFS Guam L.P., 2020, Guam 20 ¶ 87. The question of when a protestor knew or should have known of the facts establishing the essential elements of a protest is a mixed question of law and fact. DFS Guam L.P., 2020, Guam 20 at ¶ 88.

On December 28, 2021, a JMI representative sent an email to the GCLB expressly acknowledging JMI knew that as of that date, (1) that GIAA had engaged Menzies to perform work

on an emergency basis since November of 2021 and used an emergency procurement to secure such performance, (2) that GIAA would extend the November 1, 2021 contract with Menzies 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 therein that Menzies was performing work at GIAA because of an emergency procurement and was doing so without the license JMI alleged was required to perform such work. Id.

JMI knew that Menzies was performing under the November 1, 2021 contract on December 28, 2021. JMI knew that GIAA used an emergency procurement to secure such performance on that date. JMI knew that Menzies did not have the license JMI alleged was required to perform the work on that date. Despite this knowledge, JMI waited until March 21, 2023 - 448 days later - to file its protest with GIAA.

JMI's March 21, 2023, protest challenges the use and extension of an emergency procurement to secure Menzies performance under the November 1, 2021, contract. The basis for this challenge was known by JMI since December 28, 2021. Therefore, JMI's protest was made more than 14 days after JMI knew of the bases for its protest. Thus, JMI's March 21, 2023 protest was time barred.

CONCLUSION

Based on the foregoing, JMI's appeal should be dismissed as its agency level protest was not timely made to GIAA. A timely protest is a prerequisite to the OPA's jurisdiction over a procurement appeal.

Dated: May 19, 2023.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 
WILLIAM B. BRENNAN