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In the Appeal of Johndel International, Inc. dba. JMI-Edison; OPA-PA-23-002

Claire Pollard <cpollard@rwtguam.com>

Fri, May 19, 2023 at 3:51 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>, tbagana@guamopa.com, vduenas@guamopa.com

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Joseph C. Razzano" <jrazzano@rwtguam.com>

Good Afternoon:

Please see the following documents for filing in the above-referenced matter:

1. Motion for Appointment of Alternate Administrative Hearing Officer or in the Alternative an Order Directing the Superior Court to Hear this Matter
2. Declaration of Joseph C. Razzano

Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
*Claire Pollard***RAZZANO WALSH & TORRES, P.C.**

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2 attachments**5.19.23 Motion for Appointment of Alternate Administrative Hearing Officer.pdf**

498K

**5.19.23 Declaration of Joseph C. Razzano in Support of Motion.pdf**

808K

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Counsel for Appellant JMI-Edison

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

DOCKET NO. OPA-PA-23-002

Johndel International, Inc. dba. JMI-Edison,

DECLARATION OF JOSEPH C. RAZZANO

Appellant.

I, JOSEPH C. RAZZANO, do hereby declare as follows:

1. I am over the age of 21 and competent to make this declaration.
2. I am counsel for Appellant Johndel International, Inc. dba JMI-Edison ("JMI").

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3. Attached as **Exhibit A** is the *Johndel International, Inc. dba JMI-Edison v. Office of Public Accountability, et. al.*, CV0095-22, Verified Complaint filed on February 10, 2022.

I declare under penalty of perjury that the foregoing is true and correct.

Submitted this 19th day of May, 2023.

RAZZANO WALSH & TORRES, P.C.

By:



JOSEPH C. RAZZANO
Attorneys for Appellant

EXHIBIT A

RAZZANO WALSH & TORRES, P.C.

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*Attorneys for Plaintiff,
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FILED
SUPERIOR COURT
OF GUAM

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CLERK OF COURT

BY: 

IN THE SUPERIOR COURT OF GUAM

JOHNDEL INTERNATIONAL, INC.
dba. JMI-EDISON

Plaintiff,

v.

OFFICE OF PUBLIC
ACCOUNTABILITY, GUAM
INTERNATIONAL AIRPORT
AUTHORITY, Aircraft Service
International, Inc, dba MENZIES
AVIATION,

Defendants.

Civil Case No. CV 0095-22

VERIFIED COMPLAINT

I. INTRODUCTION

1. This civil action brought under 5 G.C.A. § 5707 and 5 G.C.A. § 5480 arises out of Guam International Airport Authority (“GIAA”) Request for Proposals GIAA RFP 005-FY21 (the “RFP”), issued on July 20, 2021, seeking bidders to provide GIAA with proposals for Management & Infrastructure Support Services to GIAA’s Baggage Conveyance Systems.

2. Johndel International, Inc. dba. JMI-Edison (“JMI” or “Plaintiff”) protested the selection of Aircraft Service International, Inc, doing business as “Menzie’s Aviation,” (“Menzie’s”) as the highest ranked offeror under the RFP. JMI asserted that the selection of Menzie’s for possible award violated procurement law,

because Menzies was nonresponsive to the RFP by failing to have and provide necessary licensing from the Guam Contractor's Licensing Board, and further, could not responsibly perform the work of the RFP without such licensing.

3. JMI's protest was denied by GIAA, and JMI appealed GIAA's decision to the Office of Public Accountability.

4. On November 24, 2021, Menzies and GIAA filed separate motions seeking to Dismiss the JMI Appeal.

5. Following a series of continued hearings on the Motions, the Public Auditor orally ruled on January 27, 2022, that JMI's protest would be dismissed on grounds not raised in any of the Motions. A written Decision and Order was issued by the OPA on February 4, 2022.

6. This civil action is brought through a Complaint seeking judicial review of the February 4, 2022, decision by the Office of Public Accountability in appeal no. OPA-PA-21-010 that dismissed JMI's appeal.

II. JURISDICTION

7. This Court has jurisdiction over this matter under 7 G.C.A. § 3105, 5 G.C.A. § 5707, and 5 G.C.A. § 5480.

III. PARTIES

8. Plaintiff is a corporation operating in Guam, is licensed to do business in Guam by all appropriate entities, currently operates as a contractor to various government of Guam agencies, and is an entity receiving an adverse decision from the Office of Public Accountability ("OPA").

9. This Action is timely pursuant to 5 G.C.A. § 5481(a).

10. The Territory of Guam need not be a defendant in this action, as the Guam International Airport Authority is the procuring agency for the Territory in this matter.

11. Defendant, Guam International Airport Authority (“GIAA”), is an autonomous agency of the Government of Guam, and issued the RFP for Management & Infrastructure Support Services to GIAA’s Baggage Conveyance Systems.. GIAA is a proper party and has waived sovereign immunity pursuant to 5 G.C.A. § 5480.

12. The OPA is an instrumentality of the Government of Guam, has exercised jurisdiction over the procurement protests denied by GIAA, including the procurement at issue here, and is a proper party.¹

13. Menzies is an interested party in this procurement, and, upon information and belief, is a foreign corporation. Menzies was improperly named the intended awardee of GIAA RFP 005-FY21.

IV. RELEVANT PROCEDURAL HISTORY AND FACTS

14. GIAA issued the Request for Proposals (“RFP”) GIAA RFP 005-FY21 on July 20, 2021.

¹ The OPA is named as a party here as the administrative agency issuing a decision from which an appeal lies. The OPA’s position on whether or not it is a proper defendant in such an action is unclear. In *GlidePath Marianas Operations, Inc. v. Office of Public Accountability, Guam Power Authority, the Territory of Guam, and ENGIE Solar*, CV0767-20, the OPA has participated in the case through various filings, including, but not limited to, executing a stipulation to extend briefing schedules, certifying records, executing stipulations on dismissing parties, and signing a scheduling order and discovery plan. However, in *Pacific Data Systems, Inc. v. Office of Public Accountability, Guam Housing and Urban Renewal Authority, et. al.*, CV0594-21, the OPA has conversely argued that is not a proper defendant in these appeals.

15. On August 18, 2021, two offerors, JMI and Menzies submitted proposals in response to the request.

16. GIAA informed JMI on August 30, 2021, that it was not selected for an award under the RFP. GIAA did not inform JMI of the identity of the intended awardee.

17. On August 31, 2021, JMI instructed its counsel to seek, in conformance with 5 G.C.A. §§10101, *et seq.*, the procurement record for the RFP as well as the proposals submitted by all offerors to the RFP.

18. No timely response to the Sunshine Act request was provided by GIAA.

19. Given the delay in the Sunshine Act response, JMI, through its President Mr. Ed Ilaio, moved ahead and made a formal inquiry to the Guam Contractor's Licensing Board seeking information regarding Menzies's licensing status and ability to perform the work detailed by the RFP — information that would be contained in the record of procurement that was not provided by GIAA. That request was submitted to the CLB on September 13, 2021.

20. In addition to his formal inquiry, Mr. Ilaio lodged a complaint with the CLB about the license status of Menzies, and Menzies's work without a license.

21. More than two weeks after the initial information request to GIAA — on September 17, 2021 — GIAA provided counsel for JMI its response to JMI's sunshine act request.

22. The response from GIAA did not include the proposal, or parts of the proposal, submitted by Menzies.

23. On September 17, 2021, personnel from the CLB informed JMI via email that neither Menzies, nor its parent entity, were licensed by the CLB.

24. As a result of learning that Menzies was not licensed to do the job that GIAA had intended to award to Menzies under the RFP, JMI protested the issue on September 21, 2021.

25. JMI's protest also illuminated the failings of GIAA's procurement record; GIAA needed to create the record in response to JMI's sunshine act request, and the created record was deficient in what was made part of it.

26. On September 30, 2021, the Agency denied the protest. An appeal to the OPA followed and was filed on October 11, 2021.

27. On November 16, 2021, Menzies met with CLB personnel regarding Menzies's lack of appropriate licensing and the complaint made by Mr. Ilaio.

28. On November 19, 2021, Menzies provided a formal written response to the CLB and its investigators regarding its operations without CLB licensing.

29. On November 29, 2021, the CLB investigators provided Mr. Ilaio with a copy of the Menzies November 19, 2021, response and directed Mr. Ilaio to provide a Response. Mr. Ilaio, through counsel, provided his response to the investigators on December 8, 2021.

30. On November 24, 2021, Menzies filed separate motions seeking to both (1) dismiss the appeal because of an alleged lack of jurisdiction of the Office of Public Accountability ("OPA") to review the merits of JMI's claim ("Motion 1"), and (2)

seeking Summary Judgment the merits of whether or not an award to Menzies was appropriate under Guam's procurement law ("Motion 2").

31. On November 24, 2021, GIAA filed a motion seeking to dismiss the appeal because of an alleged lack of jurisdiction of the Office of Public Accountability ("OPA") to review the merits of JMI's claim, a renewed allegation that JMI was untimely in making its protest, and GIAA's view regarding the propriety of the procurement record kept in this case ("Motion 3").

32. The OPA, during the hearings set on the Motions, was inclined to obtain notice from the CLB regarding Menzies licensing questions prior to resolving procurement issues related to the responsiveness of Menzies to the GIAA bid, or the responsibility of Menzies to perform.

33. On December 13, 2021, Mr. Ilaio informed CLB Executive Director Cecil Orsini via email that the OPA had continued the motion hearing to December 27, 2021, and that any documents that JMI would present from the CLB regarding Menzies's lack of a license would need to be submitted before that hearing. Mr. Ilaio then offered proposed findings for consideration and use by the CLB. Those proposed findings were based upon a CLB template used by the CLB in similar prior matters involving other parties.

34. On December 22, 2021, the CLB issued its Findings & Decision regarding its review of the complaint lodged about Menzies. That administrative decision was issued in accordance with the CLB's printed and posted Standard Operating Procedures ("SOP") which can be easily obtained on the CLB website.

Additionally, this administrative decision complied in all respects with Guam Law. That decision was provided to the OPA on December 23, 2021.

35. During the continued Motion hearing, the OPA proceeded with hearing arguments on the Motions, and continued the hearing so as to allow the parties to determine what next steps, if any, were to occur before the CLB.

36. Menzies, through a Sunshine Act Response, obtained the correspondence between the CLB and Mr. Ilaog regarding the agency decision that was issued, and presented that correspondence to the OPA as indicative of an improper attempt to “create” evidence.

37. Menzies brought no action before either the CLB or a court of competent jurisdiction attacking the veracity of the CLB December 22, 2021, Findings & Decision.

38. The Public Auditor orally ruled on January 27, 2022, that JMI’s protest would be dismissed as a sanction for JMI’s assistance in the creation of the CLB December 22, 2021, Findings & Decision. No evidence was taken regarding those findings, and no opportunity for briefing the propriety of the sanction was provided.

39. A written Decision and Order was issued by the OPA on February 4, 2022. A true and correct copy of the Decision & Order is attached to this complaint as **Exhibit 1**.

40. This appeal to the Superior Court of Guam followed.

41. Currently, Menzies is performing for GIAA under an “emergency” contract without appropriate licensing. This performance is occurring despite the fact

that GIAA counsel has informed the OPA that the issue of contractor responsibility had not yet been addressed by GIAA.

V. CLAIMS FOR RELIEF

CLAIM ONE:

THE PUBLIC AUDITOR'S FINDING THAT JMI'S PROTEST SHOULD BE DISMISSED AS A SANCTION IS ARBITRARY, CAPRICIOUS, CLEARLY ERRONEOUS, OR CONTRARY TO LAW.

42. JMI realleges and incorporates by reference the allegations made in paragraphs 1 through 41 above as if fully set forth herein.

43. The OPA sanction of dismissal was improper, in that it was arbitrary, capricious, clearly erroneous, and contrary to law by being issued without notice and a meaningful opportunity for JMI to respond to the sanction.

44. The sanction of dismissal was improper since it was imposed without prior notice to all parties and without an opportunity for the party against whom sanctions would be imposed to be heard.

45. The OPA, in issuing its sanction, incorrectly and impulsively mischaracterized prior testimony from CLB personnel in other OPA matters, and mistakenly recounted that CLB Investigator Nida Bailey had acknowledged that it is the CLB Board which is to decide issues related to the existence or nonexistence of a contractor license, or the statutory need for such a license, and that she had confirmed that no Board meeting had taken place regarding the issues.

46. The OPA, in issuing its sanction, also incorrectly determined that the concurrence of four members of the CLB Board is necessary "for the validity of any of its actions."

47. The OPA incorrectly made no distinction between actions by the executive director or CLB staff in determining whether or not an entity is properly licensed, versus administrative hearings before the CLB regarding the issuance of CLB sanctions.

48. The OPA has ignored the fact that because dismissal is the ultimate sanction in the adversarial system, it should be reserved for those aggravating circumstances in which a lesser sanction would fail to achieve a just result.

CLAIM TWO:

THE PUBLIC AUDITOR'S FAILURE TO REVIEW AND FIND THAT MENZIES IS BOTH A NON-RESPONSIVE AND NON-RESPONSIBLE OFFEROR IS ARBITRARY, CAPRICIOUS, CLEARLY ERRONEOUS, OR CONTRARY TO LAW.

49. Guam's legislature has given the "OPA the power to determine whether a bid award is in accordance with the terms and conditions of a bid solicitation." *Data Mgmt. Res., LLC v. Off. of Pub. Accountability*, 2013 Guam 27 (Guam Nov. 22, 2013).

50. The OPA is tasked with sitting in appeal over agency protest decisions. 5 G.C.A. § 5425(e).

51. The duties of the OPA include the mandate to "determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation." 5 G.C.A. § 12112; 2 G.A.R. Div. 4 § 12112.

52. The OPA, by refusing to engage in the merits of the protest filed before it by JMI, has acted arbitrarily, capriciously, erroneously, and contrary to law.

53. The CLB has confirmed that Menzies is unable to operate as a contractor on Guam, since that entity does not have a proper contractor's license.

54. On Guam, a “contractor” is defined as “any person who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project development or improvement or do any part thereof, including the erection of scaffolding or other structure of works in connection therewith for another person for a fee.” 21 G.C.A. § 70100(b).

55. Contractors working on Guam may not do so, or even present themselves as being able to do so, “without a license previously obtained under and in compliance with this Chapter and the rules and regulations of the Contractor’s License Board (CLB).” 21 G.C.A. § 70108(a).

56. GIAA’s RFP explicitly informs offerors that only properly licensed offerors will be considered for award. GIAA explains that it “will not consider for award any proposal submitted by an Offeror who has not complied with the Guam Licensing Law.” RFP General Terms and Condition, §14, See, also, RFP General Terms and Condition, §11 (“It is the policy of GIAA to award proposals to Offerors duly authorized and licensed to conduct business in Guam.”)

57. GIAA’s intended award to Menzies violates the plain terms of the RFP, since Menzies is not properly licensed to do the work, it has offered to do under the RFP. See, RFP, Preliminary Scope of Services, §3 (explaining that a successful offeror “must show evidence that it is licensed to conduct business on Guam.”)

58. Menzies’s lack of appropriate contractor licensing renders it non-responsive to the RFP. More, since Menzies does not have “the capability in all

respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance,” Menzies is a non-responsible offeror. 5 GCA § 5201(f).

59. Menzies’ non-responsibility is further demonstrated by its inability to meet the requirement of the Draft Agreement an awardee would need to execute, that “Contractor shall be required to comply with all Federal and Guam laws and ordinances applicable to the work.” RFP Draft Agreement, Art. 11.

60. Operating as a contractor without a contractor’s license is a violation of law applicable to the work, and Menzies’s attempt to obtain such work was improper, and should have been rejected by GIAA, and the OPA sitting in review.

61. The OPA, by failing to address the procurement failings of GIAA, has failed to perform its duty under the law.

CLAIM THREE:

THE PUBLIC AUDITOR’S FAILURE TO REVIEW AND FIND THAT GIAA’S PROCUREMENT RECORD WAS NOT KEPT IN ACCORDANCE WITH LAW IS ARBITRARY, CAPRICIOUS, CLEARLY ERRONEOUS, OR CONTRARY TO LAW.

62. On August 31, 2021, counsel for JMI requested that GIAA provide the procurement record kept for the RFP.

63. The Response from GIAA was untimely under Guam’s Sunshine Reform Act of 1999. It was not provided until September 17, 2021, and followed GIAA’s admission transmitted to JMI on September 9, 2021, that GIAA would need additional time since there were “500 pages of documents” to review and that GIAA could not “admit the existence of public records/documents in response to [JMI’s] request.”

64. Guam law mandates that “each procurement officer shall maintain a complete record of each procurement.” 5 GCA § 5249.

65. The law does not provide an exhaustive list of what a complete record contains, but instead provides a non-exhaustive list of items that “the record shall include.” 5 GCA §5249.

66. Under the law, GIAA was required by Guam’s procurement laws to maintain a procurement record during the RFP process, and not create one in response to a Freedom of Information/Sunshine Act request sent pursuant to 5 G.C.A. §§10101, *et seq.*

67. The procurement record is a single record that must be kept current and contemporaneously with the ongoing procurement. GIAA’s inability to promptly provide that record to JMI for at least two weeks, and refusal to acknowledge that the record existed at the time of the JMI Sunshine Act request, demonstrates that the record was not kept as mandated by law, and instead created after the fact.

68. More, the record provided to JMI remains incomplete and does not contain all of the documents required to be kept in accordance with 5 GCA §5249.

69. The OPA, by failing to address the procurement failings of GIAA, has failed to perform its duty under the law.

VI. PRAYERS FOR RELIEF

WHEREFORE, JMI respectfully requests that this Court issue the following relief:

1. That this Court find that the OPA's dismissal of JMI' appeal was Arbitrary, Capricious, Clearly Erroneous, or Contrary to Law;

2. That this Court determine that:

a. GIAA must disqualify Menzies from eligibility for Award under the RFP, as Menzies's does not have a valid contractor's license and as such, its proposal was non-responsive to the RFP;

b. GIAA must disqualify Menzies from eligibility for Award under the RFP, as Menzies could not have legally and responsibly performed the work detailed under the RFP.

c. GIAA's procurement record is flawed, and does not support an award to Menzies;

d. GIAA award GIAA RFP 005-FY21, to JMI as the only responsible and responsive bidder to the RFP.

3. That the matter be remanded back to the OPA with appropriate instructions.

4. That this Court award JMI its attorney's fees and costs to the extent allowed by law; and

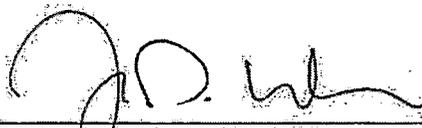
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5. That this Court award any other and further relief as may be deemed appropriate by this Court.

Respectfully submitted this 10th day of February, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSEPH C. RAZZANO
JOSHUA D. WALSH
Attorneys for Plaintiff
JMI-Edison

VERIFICATION

I, John Ilao, am the undersigned authorized representative of the Plaintiff in the above-entitled matter; and I declare under the penalty of perjury that the foregoing statements are true and correct and to the best of my knowledge, except as to matters which are therein stated on information or belief; and as to those matters I believe them to be true.

DATE: 2/9/22

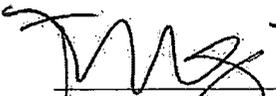


JOHN ILAO

GUAM, U.S.A.)
) ss:
HAGATNA)

On this 9th day of February, 2022, before me, a notary public in and for Guam, U.S.A., personally appeared, John Ilao, personally known to me and/or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

WITNESS my hand and official seal.



NOTARY PUBLIC

TABITHA MADARANG GARCIA
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: JAN. 08, 2024
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