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In the Appeal of Johndel International, Inc. dba JMI-Edison, Docket No. OPA-PA-23-002

Merlyna W. Smith <mwsmith@bsjmlaw.com>

Fri, Aug 4, 2023 at 4:42 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

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Dear Mr. Hernandez:

Attached herewith for e-filing in the above-referenced matter is the following:

- **Hearing Brief of Interested Party Aircraft Service International, Inc. dba Menzies Aviation**

Kindly acknowledge receipt via return e-mail. Thank you. Should you have any questions, please let us know.

Regards,

Merlyna Weilbacher Smith

Secretary to R. Marsil Johnson

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of)	Docket No. OPA-PA-23-002
)	
Johndel International, Inc. dba. JMI-Edison,)	
)	HEARING BRIEF OF
Appellant.)	INTERESTED PARTY AIRCRAFT
)	SERVICE INTERNATIONAL, INC.
)	dba MENZIES AVIATION
)	

Interested Party **AIRCRAFT SERVICE INTERNATIONAL, INC. dba MENZIES AVIATION** (“Menzies”) hereby submits its Hearing Brief for the evidentiary hearing in the above-captioned procurement appeal filed by **JOHNDEL INTERNATIONAL, INC. dba JMI-EDISON** (“JMI”).

PROCEDURAL HISTORY

A. GIAA’S EMERGENCY PROCUREMENT AND JMI’S SECOND PROTEST

On July 20, 2021, the Guam International airport Authority (“GIAA”) issued RFP-05-FY-21 (the “RFP”) related to management and infrastructure support services to its baggage handling system.

The RFP does not mention that a license issued by the Guam Contractor’s License Board (the “CLB”) is required to perform work under the RFP. OPA-PR-0012 to OPA-PR-0118.

The RFP includes only a general licensing requirement mandating compliance with Guam licensing laws.:

Offerors are cautioned that GIAA will not consider for award any proposal submitted by a Offeror who has not complied with the Guam Licensing Law. Offerors shall, at their own expense, procure all permits, certificates and licenses and shall give all notices and necessary reports required by law for the execution of the work. Specific information on licenses may be obtained from the Director of the Department of Revenue and Taxation.

OPA-PR-0033 (General Terms and Conditions, at 3). Licenses were not required upon submission of proposals but were instead to be presented upon contract signing. OPA-PR-0026; OPA-PR-0357 (“Offerors must show evidence of their license authorizing the Offeror to provide the solicited services in Guam at the time of contract signing.”).

On August 26, 2021, GIAA selected Menzies as the best qualified offeror. On September 21, 2021, JMI protested on the basis that Menzies was not a responsible offeror because it did not have a contractor’s license, which JMI contends is necessary to perform work under the RFP. At that point, JMI had not identified what license Menzies was required to hold. GIAA denied JMI’s protest.

On October 8, 2021, JMI appealed GIAA’s denial, thereby initiating OPA-PA-21-010.

On February 3, 2022, the Public Auditor issued a Decision and Order dismissing JMI’s appeal as a sanction. It is important to note that OPA’s dismissal was based on its determination that JMI had engaged in deliberate and egregious misconduct when it (1) obtained a document (the “Findings & Decisions”) that Cecil Orsini, the former Executive Director of the Guam Contractor’s License Board (the “CLB”), had signed as though it were an actual decision of the CLB and then (2) submitted that fraudulently obtained document to the OPA as though it were a properly issued, neutral, and independent decision of the CLB which the Public Auditor was required to follow. The Public Auditor found that the purported CLB “Findings & Decisions” constituted a fraud on this tribunal and held that JMI’s deliberate and egregious misconduct jeopardized the integrity of the procurement process.

The previous baggage handling services contract at GIAA expired on October 31, 2021. Given JMI's protest, the pending appeals by JMI, and the resulting automatic stay, GIAA (Guam's only commercial airport) was left without a baggage handling services contract. Faced with this situation, GIAA issued an emergency procurement so that incoming and outgoing baggage could be handled at GIAA. On November 1, 2021, GIAA awarded a contract based on the emergency procurement (the "Emergency Contract") to Menzies.

On March 21, 2023, JMI protested the Emergency Contract. In its protest letter, JMI repeated the claim it had raised in its first protest that Menzies could not legally perform the work required by the RFP due to CLB licensing issues and that GIAA's use of emergency procurement procedures in issuing the Emergency Contract was improper. JMI also requested that GIAA award an emergency contract instead to JMI without going through any form of procurement.

On March 27, 2023, GIAA denied JMI's protest on grounds that JMI's protest was untimely, that GIAA had properly followed emergency procurement procedures, and that the remedy requested by JMI was not permitted by Guam procurement law.

On April 10, 2023, JMI filed a Notice of Appeal with the Office of Public Accountability, thus initiating the present procurement appeal OPA-PA-23-002.

B. JMI'S COMPLAINT AGAINST MENZIES AT THE CLB

On September 21, 2021, Ed Ilao, President of JMI, submitted a Consumer Complaint Form (the "Complaint") to the CLB in which he claimed that Menzies had been performing "contractor business" without a proper license from the CLB. In the Complaint, JMI did not specify what type of work required a license nor what type of CLB license it claimed Menzies was required to hold.

On November 16, 2021, a meeting was held at the CLB regarding the claims made by JMI in the Complaint. In attendance were Marcus Finona (a CLB Investigator), Rodney Paet (an employee of Menzies), Mildred Sigaoat (an employee of Menzies), and R. Marsil Johnson (an

attorney who represents Menzies). Cecil Orsini, the Former Executive Director of the CLB, was not present at any time during the November 16, 2021 meeting.

On December 13, 2023, the President of JMI, Ed Ilao, sent an email to Cecil Orsini asking him:

Bro,
We will be having a motion hearing before the OPA on December 27th. Last day to file documents is on December 23rd. Would it be possible for CLB Investigations Section to be able to sign at least the attached sample letter by Dec 22nd? This will really help our case.
I'm sorry for following up too much...
Happy Holiday!
Best regards,
ED ILAO, P.E.
JMI-EDISON

The attached "sample letter" included the text of the subsequently issued "Findings & Decisions", including a paragraph under the heading "Decision" which stated that:

Contractor's License board will find Menzies or ASIG in violation of this Public Law 21 GCA § 70108(a) without obtaining specialty contractor license categories C-13, C-15, C-25 and C-68.

Within one hour of Mr. Ilao's email to Mr. Orsini, an email was sent by GERALYNN TENNESSEN STANLEY to Mr. Ilao and cc'd to Mr. Orsini which included a PDF of the "Findings & Decisions." The "Findings & Decisions" included the above-quoted language provided to Mr. Orsini by Mr. Ilao which noted that the CLB will find Menzies in violation of C-13, C-15, C-25, and C-68.

As noted above, the Public Auditor dismissed JMI's appeal in OPA-PA-21-010 as a sanction due to deliberate and egregious misconduct which jeopardized the integrity of the procurement process because the purported "Findings & Decisions" of the CLB had been obtained under fraudulent circumstances and by JMI and submitted to the Public Auditor as though it were a neutral, independent decision of the CLB that the Public Auditor must follow.

On March 1, 2022, the CLB rescinded the purported “Findings & Decisions” because Mr. Orsini had exceeded his authority by signing the document. *See* Contractors License Board (Guam), Contractors License Board's Personal Meeting Room, YouTube (Mar. 21, 2022), <https://www.youtube.com/live/ehrI38DgEAQ?feature=share&t=2544> at 42:24.

On April 4, 2023, the CLB issued a written citation to Menzies (the “Citation”), in which it claimed Menzies was required to hold a C-13 Electrical Contractor Specialty Contractor Subclassification License from the Guam Contractor’s License Board in order to perform the work described in the RFP. The citation quoted several sections of the Contractors License Law and its rules and regulations. However, the citation provided absolutely no analysis as to why Menzies qualified as a “Specialty Contractor” under the definition found in 21 G.C.A. § 70106(d) of the Contractors License Law, nor any analysis of why the exception to the Guam contractors license law found at 21 G.C.A. § 70101(c) did not apply to the work described in the RFP. The Citation also notified Menzies that:

If you file the Notice of Defense form within fifteen (15) days of this Citation and if you request a hearing, then an administrative hearing will be scheduled within thirty (30) days, at which time you may present any rebuttal evidence to the specified violation(s). Should a hearing be necessary, you will be advised in writing, of the scheduled date, time and place of such hearing.

On April 7, 2023, Menzies was issued a C-13 Electrical Contractor Specialty Contractor Subclassification License by the CLB.

On April 18, 2023, Menzies filed a Notice of Defense with the CLB, contesting the Citation and requesting a hearing. In its Notice of Defense, Menzies claimed that it was not required by law to obtain a C-13 Electrical Contractor Specialty Contractor Subclassification License because (1) it was not a Specialty Contractor due to the fact it was not engaged in construction work and (2) the exception found at 21 G.C.A. § 70101(c) applied to the work it was performing under the RFP.

The CLB did not schedule an administrative hearing within thirty (30) days of Menzies filing the Notice of Defense and requesting a hearing where Menzies could present rebuttal evidence.

On June 15, 2023, Menzies was issued a C-13 Electrical Sub-specialty Contractors License issued by the Guam Contractors License Board. Said license will expire on June 30, 2024.

To date, the CLB has yet to schedule an administrative hearing where Menzies could present rebuttal evidence.

ARGUMENT

I. THE PUBLIC AUDITOR DOES NOT HAVE AUTHORITY TO MAKE DETERMINATIONS OF FACT OR LAW WITH RESPECT TO THE APPLICATION OF THE GUAM CONTRACTORS LICENSE LAW

In its Notice of Appeal, JMI requests that the Office of Public Accountability order the following:

- (1) That GIAA must disqualify Menzies from eligibility for Award under the ERFP, as Menzies's does not have a valid contractor's license and as such, it cannot perform the work of the ERFP;
- (2) That GIAA must disqualify Menzies from eligibility for Award under this RFP, as Menzies could not have legally and responsibly performed the work detailed under the RFP.

See JMI Notice of Appeal, dated April 10, 2023.

To issue the orders requested by JMI, the Office of Public Accountability would either need to make a determination of fact and law that a contractors license is required to perform work under the RFP and the Emergency Contract or rely on a final determination on the same issues made by an administrative agency with authority to make such a determination under Guam law. However, the Office of Public Accountability is not authorized to make determinations of fact or law with respect to contractor licenses. Further, no final determination on these issues has been made by the CLB, which is the only administrative agency of the government of Guam authorized

to make such determinations. In fact, a matter is currently pending before the CLB on these very issues.

The Office of Public Accountability is an administrative agency of the government of Guam and the Public Auditor is the executive officer of that agency. Administrative agencies do not hold unlimited authority to address civil or regulatory grievances. They are creatures of statute and therefore are limited by the authority conferred upon them by law:

As creatures of legislation, the powers of administrative agencies and their executive officers are “dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication.”

Carlson v. Guam Tel. Auth., 2002 Guam 15, ¶ 9 (Guam Sept. 6, 2002) (citing *Ada v. Guam Telephone Authority*, 1999 Guam 10, ¶ 11).

Under Guam’s procurement law, the “Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him.” 5 G.C.A. § 5703. This includes appeals concerning protested actual or prospective solicitation or award of contracts, pursuant to 5 G.C.A. § 54259(e), and appeals from debarment proceedings, pursuant to 5 G.C.A. § 5705(c) (“The Public Auditor shall decide whether, or the extent to which, the debarment or suspension was in accordance with the statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair.”).

No section of Guam’s procurement law provides any avenue to shoehorn or subsume the authority of any other administrative agency into that of the Office of Public Accountability or the Public Auditor. That includes the authority conveyed upon the CLB relative to regulation of contractor licenses. Only the CLB is empowered to “investigate, classify and qualify applicants for contractor’s licenses and investigate for compliance with the rules and regulations of the Board and the provisions of the [Contractor’s Licensing-related Chapter of the Guam Code].” *See* 21

G.C.A. § 70109 et seq. That authority is not held by the Office of Public Accountability or the Public Auditor.

The mere fact that the CLB has issued the Citation to Menzies, accusing it of violating Guam's contractors license law has no legal bearing whatsoever. A Notice of Appeal was filed by Menzies which included a request for hearing so Menzies could submit rebuttal evidence in its defense. The statements by the CLB in the Citation, by virtue of the fact that they are contained in a citation, are prejudicial. They were written prior to any formal adjudication of the issues mentioned therein.

Any claim by JMI that the Citation means the CLB has verified, confirmed, or given any legally meaningful credence to JMI's claim that Menzies violated Guam law is entirely false. The CLB merely issued a citation. No hearing has ever been scheduled or held and Menzies has never been afforded any opportunity to defend itself or state its position in response to the Citation. The Citation is merely the beginning of a process set forth in Guam's Contractors Law and the Administrative Adjudication Act whereby a final determination will ultimately be made. It is a mere accusation, not a determination of fact or law. It should be afforded no deference by the Office of Public Accountability in determining this procurement appeal.

Given the facts that the OPA is not legally authorized to make the determinations necessary to issue the relief requested by JMI and the fact that the CLB (which does have that authority) has not yet issued a final determination on those very issues which are pending before it, the OPA must either dismiss JMI's procurement appeal or suspend that appeal until a final determination is reached by the CLB with respect to the Citation, which is currently pending before it.

II. ASSUMING FOR THE SAKE OF ARGUMENT THAT THE OPA BELIEVES IT DOES HAVE AUTHORITY TO ADDRESS CONTRACTOR LAW ISSUES WITHIN THE SCOPE OF THIS PROCUREMENT APPEAL, THE OPA SHOULD DETERMINE THAT A C-13 ELECTRICAL CONTRACTOR SPECIALTY CONTRACTOR SUBCLASSIFICATION LICENSE IS NOT REQUIRED TO PERFORM UNDER THE RFP OR THE EMERGENCY CONTRACT

A C-13 Electrical Contractor Specialty Contractor Subclassification License is not required to perform work under the RFP or the Emergency Contract, because (1) the work does not involve construction and (2) the RFP, at most, required installation of finished products, materials, or articles of merchandise which do not become a permanent, fixed part of the structure of the airport which is specifically exempted from Guam's contractors licensing requirements.

JMI's claim that Menzies was operating illegally because it does not have a C-13 Electrical Contractor Specialty Contractor Subclassification License is an empty one. While this may be JMI's incorrect opinion on the matter, this opinion has not been rendered into a final determination by any administrative body or court with jurisdiction to make such a determination.

A. MENZIES DOES NOT NEED A C-13 ELECTRICAL CONTRACTOR SPECIALTY CONTRACTOR SUBCLASSIFICATION LICENSE BECAUSE MENZIES IS NOT ENGAGED IN CONSTRUCTION WORK AND THUS CANNOT BE A SPECIALTY CONTRACTOR.

1. THE C-13 ELECTRICAL CONTRACTOR SUB-CLASSIFICATION LICENSE IS A SPECIALTY CONTRACTOR SUB-CLASSIFICATION LICENSE

The description of the C-13 Electrical Contractor Specialty Contractor Subclassification License specifically states that a C-13 Electrical Contractor is a type of Specialty Contractor who performs work requiring the ability to work with electrical wires, fixtures, appliances, etc.:

(C-13) Electrical Contractor: An **Electrical Contractor is a specialty contractor** whose contracting business is the execution of contracts requiring the ability to place, install, erect or connect any electrical wires, fixtures, appliances, apparatus, raceways or conduits and lines which transmit, transform or utilize electrical energy. This classification also includes the work of the C-19 Fire and Burglar Alarm Contractor.

25 G.A.R. § 12106(a)(4)(C-13) and 29 G.A.R. § 1421(4)(C-13) (emphasis added). Therefore, for the CLB to require a C-13 Electrical Contractor Specialty Contractor Subclassification License from any party, that party must also be a Specialty Contractor.

2. TO BE A SPECIALTY CONTRACTOR, A CONTRACTOR MUST BE ENGAGED IN CONSTRUCTION WORK.

The Contractors License Law defines a “Specialty Contractor” as “a contractor whose operations as such are **the performance of construction work** requiring special skill **and** whose principal contracting business involves the use of specialized building trades or crafts.” 21 G.C.A. § 70106(d) (emphasis added). This type of rule is known as a “conjunctive rule” because it contains an “and” between two requisite elements. This means that both elements must be satisfied for a contractor to meet the statutory definition of a Specialty Contractor.

Thus, for Menzies to be a Specialty Contractor, Menzies’ operations must be such that (1) they involve the performance of construction work requiring special skill **and** (2) Menzies’ principal business must involve the use of specialized building trades or crafts.

The RFP does not involve the performance of construction work at all. Therefore, the contractor performing that work (Menzies) is not a Specialty Contractor. Whether or not Menzies’ principal business involves the use of specialized building trades or crafts need not be addressed if its operations do not involve the performance of construction work.

3. NO CONSTRUCTION WORK IS CONTEMPLATED BY THE RFP OR THE EMERGENCY PROCUREMENT.

Neither the RFP nor the Emergency Contract include any construction work within their scope of work.

The term “construction” is not defined in the Guam’s Contractor Law. However, it is defined in Guam’s procurement law. The definition found in the procurement law is relevant to RFP because the RFP involves a contract with GIAA that was issued under Guam’s procurement

law. Under Guam’s procurement law, construction involves the process of building, altering, repairing, improving, or demolishing structures, buildings, real property, and improvements thereon. See 5 G.C.A. § 5030(d):

(g) Construction means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

5 G.C.A. § 5030(d).

None of the work contemplated by RFP qualifies as construction under the definition found at 5 G.C.A. § 5030(d). The term “construction” does not appear anywhere in the 96-page Request for Proposals for the RFP. *See* RFP-005-FY21, Preliminary Scope of Services. Further, nothing in the text of the RFP mentions construction or comes close to resembling anything that could be characterized as “construction” under 5 G.C.A. § 5030(d).

Even if routine repair work to a structure, building, or real property must be performed by Menzies under the RFP, that would still not be considered construction, because 5 G.C.A. § 5030(d) specifically excludes “routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property” from the definition of “construction.”

4. BECAUSE MENZIES IS NOT ENGAGED IN CONSTRUCTION WORK, MENZIES DOES NOT NEED A C-13 ELECTRICAL CONTRACTOR SPECIALTY CONTRACTOR SUBCLASSIFICATION LICENSE.

JMI relies on the April 4, 2023 CLB Citation in support of its claim that a C-13 Electrical Contractor Specialty Contractor Subclassification License is required to perform work under the RFP. JMI refers to the CLB Citation as “unequivocal”, meaning that it is unambiguous and leaving no doubt. This could hardly be further from the truth.

The supposedly “unequivocal” CLB Citation is devoid of any analysis showing how the CLB reached the conclusion that the work Menzies is engaged in requires a C-13 Electrical

Contractor Specialty Contractor Subclassification License. It does not identify or describe any electrical construction work that is part of the RFP. Further, the Citation contains no legal analysis showing how Menzies fits within the definition of a Contractor, a Specialty Contractor, or a C-13 Electrical Contractor.

Paragraph 12 of the CLB Citation simply makes the conclusory statement that “Menzies’ failure to have a valid Special Contractor’s License in the C-13 Electrical Contractor subclassification from the Guam Contractor’s License Board is a violation of the following Guam law and CLB Regulations.” The Citation then goes on to quote several sections of Guam law without any explanation of how those sections of law apply to any relevant facts that have been considered.

In contrast to the Citation, the analysis provided above shows clearly that C-13 Electrical Contractors are Specialty Contractors. *See* 25 G.A.R. § 12106(a)(4)(C-13) and 29 G.A.R. § 1421(4)(C-13) (“An Electrical Contractor is a specialty contractor...”). It also shows that to be a Specialty Contractor, a company must be engaged in the performance of construction work requiring special skill **and** the company’s principal contracting business involves the use of specialized building trades or crafts. Because the RFP does not require the winning bidder to perform any construction work under the only definition of the term “construction” that exists under Guam law, Menzies is not a Specialty Contractor and thus does not need a C-13 Electrical Contractor Specialty Contractor Subclassification License.

This argument is not addressed in JMI’s Opening Brief and its anemic analysis of Guam’s Contractor Law, which only addresses the definition of a “contractor” found in 5 G.C.A. § 70100(b) but fails to account for the definition of a “C-13 Electrical Contractor” or the definition of a “Specialty Contractor.” Further, JMI’s Opening Brief fails to address an obvious exception

under Guam’s Contractor Law found in 21 G.C.A. § 70106(d), which also applies to the work performed by Menzies.

B. GUAM’S CONTRACTOR LAW, AT 21 G.C.A. § 70106(d), SPECIFICALLY EXCLUDES THE WORK CONTEMPLATED BY THE RFP FROM ITS LICENSURE REQUIREMENTS

Even if Menzies fell within the definition of a “specialty contractor” found in 21 G.C.A. § 70106(c), no license would be required for the work performed by Menzies at GIAA because that work falls within the exception provided in 21 G.C.A. § 70101(c). This section of the Guam Contractors Law provides that it does not apply to work done to install finished products, materials, articles, or merchandise which are not actually fabricated into and do not become a permanent fixed part of the structure. The full text of the exception is provided here:

§ 70101. Exemptions.

This Chapter *shall not* apply to

...

(c) A person who sells *or* installs any finished products, materials *or* articles *or* merchandise which are *not* actually fabricated into and *do not* become a permanent fixed part of the structure, *or* to the construction, alteration, improvement *or* repair of personal property;

See 21 G.C.A. § 70101(c) (emphasis in original). For ease of reference, this brief will refer to 21 G.C.A. § 70101(c) as the “Personal Property Exception.”

Thus, if anything installed by Menzies in performing the baggage handling contract does not become a permanent part of the fixed structure of the airport, then Menzies is exempt from the requirements of the Guam Contractor’s Law, including the requirement of having any type of Specialty Contractor license such as a C-13 Electrical Contractor Specialty Contractor Subclassification License.

In its procurement appeal before the OPA, JMI argued that the work contemplated by the RFP requires a contractor’s license because “failure of one or more of the numerous motors, to the need for replacement of the thousands of feet of conveyor belts, to the changing of fuses, will

require installation or replacement of **components.**” OPA-PR-0943 (Omnibus Opposition filed by Johndel International, Inc. dba JMI-Edison, p. 12 of 16 (emphasis added)).

Electric motors are finished products, conveyor belts are finished products, and fuses are finished products. These products are parts or elements of a larger whole (the baggage conveyor system). They are not a “fixed part of the structure” of the A.B. Won Pat International Airport. In fact, because they can be removed and replaced, they are not even a fixed part of the baggage conveyor system. Thus, installation of these finished products when the existing components break down or reach the end of their useful life clearly falls within the Personal Property Exception. This act of installation and services for the operation of the baggage conveyor system are all that the RFP contemplates. Therefore, Menzies need not obtain any kind of CLB license, because this work is exempt under the Personal Property Exception.

The Superior Court of Guam has previously found this exception to apply in the context of cooling systems because a cooling system does not become a permanent fixed part of the structure and can be removed without causing damage to the property:

Plaintiff argues that because the installations can be removed without causing damage to the property, they are not a “permanent fixed part of the structure” as defined in Exemption § 70101(c). Defendant does not disagree, but rather argues that because the air conditioning system is not a permanent fixed part of the structure, Plaintiff does not have a right to a Mechanic’s lien as a matter of law. See *infra*. Therefore the Court finds that Plaintiff is indeed exempt from the Contractors license requirement under 21 G.C.A. § 70101(c) and entitled to maintain the lawsuit. As such, dismissal is inappropriate on summary judgment.

VSST Co., Ltd, v. UFB Guam Hotel Corp. CV0552-09 (Super Ct. Guam July 7, 2011). Here, Menzies is not even installing the baggage handling system, it is simply performing incidental repairs to it. Menzies is engaging in repairing and replacing pieces that do not become a permanent and fixed part of the structure of the airport and which can be removed without causing damage to the structure of the airport.

Additionally, courts in California have held that the exemption in California law, which is substantially similar to that found in 21 G.C.A. § 70101(c), applies even to the installation of heavy equipment, cabinetry, and large appliances, so long as they do not become a fixed part of the structure. See *Costello v. Campbell*, 184 P.2d 315, 315 (Cal. Dist. Ct. App. 1947) (relating to two cold storage plants on a hatchery and poultry ranch), *E. A. Davis & Co. v. Richards*, 260 P.2d 805, 806 (Cal. Dist. Ct. App. 1953) (relating to the installation of a patented kitchen unit consisting of sink, dishwasher and cabinets, with incidental changes in electrical outlets, laying of linoleum, painting, etc.), and *Walker v. Thornsberry*, 158 Cal. Rptr. 862, 862 (Ct. App. 1979) (installation of metal prefabricated restrooms).

These California cases interpret Section 7045 of the California Business and Professions Code which read, at the time of the opinion in *Costello v. Campbell*, that “[t]his chapter does not apply to the sale or installation of any finished products, materials or articles of merchandise, which are not actually fabricated into and do not become a permanent fixed part of the structure.” This section was substantially similar to the Personal Property Exception found at 21 G.C.A. § 70101(c).

At the time of the opinion in *Walker v. Thornsberry*, Section 7045(a) of the California Business and Professions Code had been amended to exempt “the sale or installation of any finished products, materials or articles of merchandise, which do not become a fixed part of the structure, nor shall it apply to a materialman or manufacturer furnishing finished products, materials, or articles of merchandise who does not install or contract for the installation of such items. The term ‘finished products’ shall not include installed carpets.” Even with those amendments, the exemption is substantially similar to Guam’s exemption because it also exempts

the sale or installation of any finished products, materials or articles of merchandise which do not become a fixed part of the structure.

Based on the Guam statutes mentioned above, the Guam Superior Court case law mentioned, and the California case law interpreting substantially similar sections of California law involving exceptions to California's contractor law, it is abundantly clear that the work contemplated by the RFP is exempt under the Personal Property Exemption to the Guam Contractors Law because the only installation or repair work that would be performed by Menzies (as identified by JMI itself) would ever involve affixing finished products, materials, or articles which would not become a fixed part of the structure of the airport.

III. MENZIES HAS A C-13 ELECTRICAL CONTRACTOR SPECIALTY CONTRACTOR SUBCLASSIFICATION LICENSE

Even if the OPA determined that a C-13 Electrical Contractor Specialty Contractor Subclassification License is required to perform work under the RFP or the Emergency Procurement, Menzies obtained a C-13 Electrical Contractor Specialty Contractor Subclassification License on April 7, 2023.

Furthermore, on March 31, 2023, before the CLB formally issued a Citation ordering Menzies to cease any C-13 subclassification work at GIAA, Menzies entered into an agreement with a local electrical contractor holding a C-13 Electrical Contractor Specialty Contractor Subclassification License so that the subcontractor could perform any needed C-13 work as permitted by Article 16 of Agreement No. GIAA-S22-002. Menzies then submitted its C-13 Electrical Contractor Specialty Contractor Subclassification License application to the CLB on April 5, 2023, and received its license two days later.

Menzies obtained this C-13 Electrical Contractor Specialty Contractor Subclassification License out of an abundance of caution and to limit exposure given the CLB's Citation but

continues to contest that any such license is needed. As Menzies now possesses a C-13 Electrical Contractor Specialty Contractor Subclassification License, JMI' s claims are moot.

IV. MR. ORSINI'S OPINION AS TO WHETHER MENZIES NEEDS A LICENSE OR IF A LICENSE IS NEEDED TO PERFORM UNDER THE RFP IS COMPLETELY IRRELEVANT.

JMI has identified Mr. Orsini, the former Executive Director of the CLB, as a potential witness for the hearing in this matter. It is important to note that Mr. Orsini is not the current executive director of the CLB and that after his dismissal, the "Findings & Decisions" he fraudulently signed on behalf of the CLB at Mr. Ilao's request was rescinded by the CLB because he had exceeded his authority by signing and issuing the document. *See* Contractors License Board (Guam), Contractors License Board's Personal Meeting Room, YouTube (Mar. 21, 2022), <https://www.youtube.com/live/ehrI38DgEAQ?feature=share&t=2544> at 42:24.

Therefore, Mr. Orsini's opinion with respect to Menzies and the RFP is completely irrelevant. It was not relevant when he dutifully signed the "Findings and Decisions" at Mr. Ilao's bidding so it could be submitted by JMI to defraud the Public Auditor and it is even less relevant now after the governor of Guam demanded his resignation due to that misconduct.

The fact that Mr. Orsini continues to assist JMI and Mr. Ilao in procurement matters before the OPA, should also give the OPA, the Public Auditor, and the Hearing Officer concern and reason to carefully consider, question, and doubt the origin and the veracity of any testimony given by Mr. Orsini and submitted by JMI in any hearing or official proceeding brought before the OPA.

CONCLUSION

Based on the above and the evidence to be submitted by the parties at the upcoming hearing in this procurement appeal, the OPA must dismiss the procurement appeal filed by JMI.

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DATED this 4th day of August, 2023.

BLAIR STERLING JOHNSON & MARTINEZ
A PROFESSIONAL CORPORATION

BY: 

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