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OPA-PA23-002; Hearing Brief

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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; OPA-PA-23-002.

1. Hearing Brief. (9 pages)

Thank you!

Kind regards,*Brittney Quinata*

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**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,**

HEARING BRIEF

Appellant.

COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”) to file its
Hearing Brief in this matter.

INTRODUCTION

Since the inception of what is becoming a never-ending saga, GIAA has maintained that the Guam Contractor’s License Board has jurisdiction to classify contractor licenses and to take action on Johndel International, Inc. dba JMI’s (“JMI”) initial license-related claim against an almost decades-long provider of services to GIAA. The GCLB took over a year and a half to come to a decision and to fully flesh out what their procedure is. JMI’s initial 2021 procurement protest was also dismissed by the Public Auditor for JMI’s fraudulent conduct in presenting a GCLB document as dispositive evidence, that JMI had a hand in creating. JMI appealed that decision to the Superior Court which continues to stay GIAA’s 2021 underlying procurement for management and infrastructure support

services to GIAA's baggage conveyance systems. The stay has this been imposed and has remained in place since September 2021.

But GIAA had to operate in the meantime. In October 2021 GIAA utilized the emergency procurement method of source selection to keep the Airport open and running while the Superior Court does its work in the underlying appeal. This emergency procurement and the resulting contract in November 2021 were lawful when entered, without any protest. GIAA has strictly complied with Guam Law to extend the November 2021 contract. Subsequent April 2023 action by the GCLB related in part to the contract was also addressed by GIAA in accordance with the Procurement Law and the Contract.

Thus, JMI's March 2023 protest that the Airport should not have used an emergency procurement, that the contract should not have been extended, and that Menzies cannot legally perform is meritless, and a frivolous abuse of the protest and appeal process. GIAA's denial of JMI's protest should be affirmed.

PROCEDURAL BACKGROUND

For several years preceding July 2021, GIAA contracted with Aircraft Services International, Inc. ("Menzies") to provide management and infrastructure support services to GIAA's baggage conveyance systems to GIAA. This work entailed operation of the technical, mechanical, and digitized aspects of the baggage conveyance systems. The "services" also encompass staffing the control room for the system with computer operators familiar with the software and technology, maintaining and engaging with the manufacturer of the system components to diagnose and troubleshoot issues as they arise, and the periodic and maintenance of the system – which is one of a kind in Guam. The previous contract for the services was set to expire on October 31, 2021. Thus, in July 2021 GIAA issued a request for proposals ("RFP") to secure a provider of the services beginning November 2021, as

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required by the Guam Procurement law. That RFP resulted in an agency level protest filed with the Airport by JMI on September 21, 2021, a subsequent appeal to the OPA in (OPA-PA-21-010) which was dismissed in favor of GIAA, and then an ensuing appeal to the Superior Court in (CV0095-22) which remains pending as of the date of this writing.

The July 2021 procurement was and has been stayed since September 21, 2021. Thus, GIAA initiated an emergency procurement in October 2021 and entered into a contract with Menzies, the sole responsive bidder who responded to the Emergency Procurement Solicitation on November 1, 2021, JMI did not respond to the October 2021 Emergency Procurement Solicitation. GIAA extended that November 2021 contract in compliance with the law, as the contract was entered into specifically because of the stay imposed by JMI's September 1, 2021 Protest. That stay remains in effect as CV0095-22 is still pending.

ISSUES PRESENTED

1. Whether GIAA complied with Guam law related to the October 2021 emergency procurement?
2. Whether GIAA extended the November 2021 contract in accordance with law?
3. Whether the GCLB's 18 months post award action and other subsequent events affected Menzies' ability to perform under the November 2021 contract?

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. ("Menzies") 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.

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 components that support GIAA's and tenant operations related to arriving and departing aircraft, and the necessary movement of baggage and cargo 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 the plane side of the terminal, 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. JMI did not submit a proposal in response to the emergency procurement solicitation. 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.

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 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 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 emergency solicitation. 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 timely 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.

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Subsequent to the denial, GIAA learned through public media reports that the GCLB took some action related to JMI's license-related complaint against Menzies. Procurement Record at 802-807. GIAA was not served with any document by the GCLB as a result of such action at this point.¹ However, due to the pending litigation, GIAA through counsel inquired of Menzies' awareness and position on any GCLB action, and requested a meeting between GIAA and Menzies. GIAA and Menzies' representatives met virtually throughout the day on Friday, March 31, 2023. An agreement was reached where GIAA was satisfied that Menzies could continue to perform under the November 2021 contract, as Menzies would contract with a subcontractor to perform work in compliance with any GCLB requirement issued to Menzies, while also reserving its right to challenge the GCLB decision as allowed by Guam law. GIAA, through counsel correspondence, also requested that if Menzies was served with any cease and desist or similar correspondence from the GCLB, that GIAA be made aware of such service and document. Subsequently, on April 7, 2023, Menzies submitted a GCLB contractor's license to GIAA. *Id.* at pp. 808-810.

LAW & ARGUMENT

a. GIAA complied with the requirements to enter into 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); PR at p. 26-32. The Governor approved a certificate of emergency based on such determination. 5 G.C.A. § 5215(b)(2); PR at p. 26-32. 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

¹ Subsequent to the March 2023 protest, on April 14, 2023 JMI did send to GIAA a letter with a GCLB cease and desist order attached. The Cease and Desist Order appears to be dated April 4, 2023.

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 was 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 also argues the length of the emergency procurement somehow is relevant but Guam law makes clear that GIAA has complied with Section 5215(e) in order to extend the current contract. GIAA's denial of JMI's protest on the use of the emergency procurement method of source selection should therefore be affirmed.

Additionally, JMI's allegations related to the length of extension are also not well plead. GIAA has been clear that so long as the procurement stay is in place, GIAA shall continue to extend the November 2021 contract, since that was expressly a part of the scope of the emergency determined by GIAA and certified by *I Maga'hågan Guåhan*. Thus, JMI's protest alleging the length of the contract is unlawful should be denied.

b. *JMI's GCLB protest is moot, was made before the GCLB made any relevant determination, which GIAA addressed in accordance with its contract and the procurement law.*

GIAA has maintained throughout these 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. Notably, it does not appear that the OAG or the GCLB reviewed the November 2021 contract scope

of services. Rather, the GCLB and OAG appear to have focused on the July 2021-RFP scope of services.² 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.

The GCLB did subsequently 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 receiving the cease and desist order, GIAA took steps to assure that work done related to the November 2021 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. 802-807.³ 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. 808-810. Therefore, while JMI's protest was initially premature, it appears JMI's concerns about Menzies performing work requiring a C-13 GCLB license prospectively is now moot.⁴

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

² This is in conflict with the Superior Court's pronouncement in CV0095-22, where the Court stated ". . . the CLB may regulate individual contractor licensing and behavior. **But it has not been empowered with the ability to settle a dispute between two parties regarding the necessity for a license in responding to a specific proposal.**"

³ 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>).

⁴ 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.

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. Therefore, JMI is incorrect that its protest is pre-award.⁵ To be clear, there is no procurement stay on the award of a contract to Menzies in November 2021. The March 21, 2023 protest was post award.

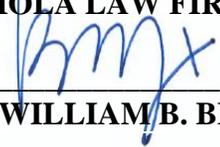
CONCLUSION

Based on the foregoing, JMI’s appeal should be denied in its entirety. Specifically, consistent with its Agency Statement, 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 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.
3. 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);
4. Enter any other and further relief as the OPA may deem appropriate.

Dated: August 4, 2023.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 
WILLIAM B. BRENNAN

⁵ GIAA reserves and does not waive its position that JMI’s March 21, 2023 protest was untimely pursuant to 5 G.C.A. § 5425 as all the facts relevant to its protest were known, as conceded by JMI in this proceeding, since at least December 2021 which was more than 14 days before the March 21, 2023 protest. GIAA recognizes that the Hearing Officer has denied its Motion to Dismiss, but wishes to avoid any argument that the timeliness argument is waived for not addressing the same in this Hearing Brief.