

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Mr. John M. Quinata Executive Manager Guam International Airport Authority P.O. Box 8770 Tamuning, Guam 96931 Phone: (671) 646-0300 Fax: (671) 646-8823 Email: john.quinata@guamaiport.net	From:	Joseph B. McDonald Hearing Officer Office of Public Accountability
	Mr. William B. Brennan, Esq. Attorney for Guam International Airport Authority Arriola Law Firm 259, Martyr Street, Suite 201 Hagåtña, Guam 96910 Phone: (671) 477-9730/33 Fax: (671) 477-9734 Email: attorneys@arriolafirm.com	Pages:	9 (including cover page)
CC:	Mr. Joshua D. Walsh, Esq. Attorney for Appellant JMI-Edison Razano Walsh & Torres, P.C. 139 Murraby Blvd. Hagåtña, Guam 96910 Phone: (671) 989-3009 Email: jdwalsh@rwtguam.com	Date:	December 18, 2023
	Mr. R. Marsil Johnson, Esq. Attorney for Interested Party Menzies Aviation Blair Sterling Johnson & Martinez A Professional Corporation 238 Archbishop Flores St. Ste.1008 Hagåtña, Guam 96910 Phone: (671) 477-7857 Fax: (671) 472-4290 Email: rmarsjohnson@bsjmlaw.com	Phone:	(671) 475-0390 x. 204
		Fax:	(671) 472-7951

Re: OPA-PA-23-002 Decision

For Review
 Please Comment
 Please Reply
 Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
 Jerrick Hernandez, Auditor
jhernandez@guamopa.com

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

1
2
3
4
5
6
7 In the Appeal of) **Appeal No: OPA-PA-23-002**
8 Johndel International, Inc. dba JMI-Edison,) **DECISION**
9 Appellant.)
10 _____)

11
12 **To: Purchasing Agency:**
13 Guam International Airport Authority
14 C/O William B. Brennan, Esq.
15 Arriola Law Firm
16 259, Martyr Street, Suite 201
Hagåtña, Guam 96910
Phone: (671) 477-9730/33
Fax: (671) 477-9734
Email: wbrennan@arriolafirm.com

17 **Appellant:**
18 Johndel International, Inc. dba. JMI-Edison
19 C/O Joshua D. Walsh, Esq.
20 Razzano Walsh & Torres, P.C.
21 Suite 100, 139 Murray Blvd.
Hagatna, Guam 96910
Phone: (671) 989-3009
Fax (671) 989-8750
Email: jdwalsh@rwtguam.com

22 **Interested Party:**
23 Menzies Aviation
24 C/O R. Marsil Johnson, Esq.
25 Blair Sterling Johnson & Martinez
26 A Professional Corporation
27 238 Archbishop Flores St. Ste.1008
28 Hagåtña, Guam 96910
Phone: (671) 477-7857
Fax: (671_ 472-4290
Email: rmarsjohnson@bsjmlaw.com

DECISION

1
2 In this appeal to the Public Auditor (“Pub. Aud.”), Johndel International Inc., dba JMI
3 Edison (“JMI”) takes issue with the continuing nature of the emergency procurement by the Guam
4 International Airport Authority (hereinafter, “GIAA” or “Airport”) of management and
5 infrastructure, and support services for its baggage conveyance system. This is JMI’s second
6 appeal related to GIAA RFP 005-21 but is in protest of the emergency-nature of expenditure of
7 government funds. JMI asks the Pub. Aud. to disqualify Menzies Aviation (“Menzies”) and award
8 GIAA RFP 005-21 to it.
9

10 The protested extension of the Airport’s emergency procurement is determined in this
11 decision to be a violation of the Procurement Law. The authorities cited by JMI in its supplemental
12 brief support this conclusion. *See* Appellant’s Supplemental Brief, 2-8. However, disqualification
13 of Menzies as non-responsible is denied because that issue is before the Superior Court in CV0095-
14 22 and because the requested remedy is not authorized under 5 GCA § 5452.
15

16 GIAA TOOK THE RISK THAT AN EMERGENCY PROCUREMENT WOULD BE DECIDED
17 TO BE IN VIOLATION OF THE PROCUREMENT LAW

18 The slippery slope created by GIAA’s use of an emergency procurement when a protest is
19 lodged is apparent. GIAA defends its denial of the protest here on the basis that it has had an
20 ongoing state of emergency brought on by JMI’s September 21, 2021 protest in GIAA RFP 005-21.
21 Management and support services evidently were so important that nothing may stand in the way
22 of the Airport’s baggage conveyance operations. However, in doing so, the Airport assigned blame
23 for the emergency on JMI’s protest, not on an event or circumstances beyond its reasonable
24 control. The Airport’s reasoning means that a purchasing agency which neglects to ensure a timely
25 and proper procurement of important equipment or services can blame the protesting party for
26
27
28

1 creating the emergency: a version of “you made me do it”. An aggrieved party’s concerns with an
2 important procurement must not be the reason for conducting an emergency procurement.

3 If JMI’s were a (more) timely pre-award protest, GIAA could have taken steps to determine
4 whether the award was necessary to protect substantial interests of Guam, 5 GCA § 5425 (g), and
5 avoided the pre-award stay on procurement. The stay is automatic unless:
6

7 (1) The Chief Procurement Officer or the Director of Public Works after
8 consultation with and written concurrence of the head of the using or purchasing
9 agency and the Attorney General or designated Deputy Attorney General, makes a
10 written determination that the award of the contract without delay is necessary to
11 protect substantial interests of Guam; and (2) Absent a declaration of emergency
12 by the Governor, the protestant has been given at least two (2) days’ notice
13 (exclusive of territorial holidays); and (3) If the protest is pending before the Public
14 Auditor or the Court, the Public Auditor or Court has confirmed such
15 determination, or if no such protest is pending, no protest to the Public Auditor of
16 such determination is filed prior to expiration of the two (2) day period specified in
17 Item (2) of Subsection (g) of this Section.

18 *Id.* The Airport, however, made no such determination. By doing so, its reasoning rested on an
19 emergency procurement to expend public money. Then GIAA blamed JMI for creating the
20 emergency.
21

22 Assuming that JMI protested GIAA’s determination of a substantial interest, the agency’s
23 5 GCA § 5425 (c) decision on the protest and § 5425 (e) appeal to the Public Auditor carries
24 incentives to carefully address the basis of JMI’s protest:
25

26 **Entitlement to Costs.** In addition to any other relief or remedy granted under
27 Subsection (c) or (e) of this Section or under Subsection (a) of § 5480 of this
28 Chapter, including the remedies provided by Subarticle B of Article 9 of this
Chapter, when a protest is sustained, the protestant shall be entitled to the
reasonable costs incurred in connection with the solicitation and protest, including
bid preparation costs, excluding attorney’s fees, if:

(1) the protestant should have been awarded the contract under the
solicitation but was not; or

(2) there is a reasonable likelihood that the protestant may have been
awarded the contract but for the breach of any ethical obligation imposed
by Subarticle B of Article 11 of this Chapter or the willful or reckless
violation of any applicable procurement law or regulation.

1
2 The Public Auditor shall have the power to assess reasonable costs including
3 reasonable attorney fees incurred by the government, including its autonomous
4 agencies and public corporations, against a protestant upon its finding that the
5 protest was made fraudulently, frivolously or solely to disrupt the procurement
6 process.

7 Accordingly, if JMI's protest were sustained, it would have been entitled to reasonable
8 costs incurred in solicitation, protest, and bid preparation (but not attorney's fees) because of a
9 pre-award dispute regarding the substantial interests of Guam. The protesting party's entitlement
10 to costs helps ensure that there are substantial interests of Guam at issue when a purchasing agency
11 conducts an important procurement. On the other hand, if protest and appeal of the substantial
12 interest were denied, the costs and legal fees incurred by a purchasing agency in asserting
13 substantial interests of Guam are imposed on a party whose protest was fraudulent, frivolous, or
14 lodged solely to disrupt the procurement. In other words, § 5425 (h) serves to ensure that a protest
15 has sufficient merit through monetary incentive and disincentive. GIAA made an emergency
16 procurement instead.

17 JURISDICTION UTILIZED TO ENSURE EQUITABLE TREATMENT, FOSTER
18 COMPETITION AND PROVIDE SAFEGUARDS

19 "The Public Auditor's jurisdiction shall be utilized to promote the integrity of the
20 procurement process and the purposes of [the Procurement Law]." *Id.* § 5703 (f). The underlying
21 purposes and policies of the Procurement Law include ensuring the fair and equitable treatment of
22 all persons who deal with the procurement system; fostering broad-based competition within the
23 free enterprise system; and providing safeguards for the maintenance of a procurement system of
24 quality and integrity. *Id.* §§ 5001 (b) (4), (6), (7).

25
26 The Procurement Law gives aggrieved persons the right to protest and the purchasing
27 agency the authority to resolve protests under 5 GCA §§ 5425 (a), (b). When reasonable amounts
28 are staked, the protesting party and the purchasing agency have incentive to ensure their positions

1 are well founded. The Procurement Law thereby creates competition through monetary incentive
2 and disincentive that address issues with the procurement itself. Conversely, GIAA’s action to
3 conduct an emergency procurement merely served to extend the engagement of its existing,
4 longtime vendor, Menzies, and did not foster competition. The Airport’s decision also carried risk
5 of incompliant procurement.
6

7 PROCUREMENT PLANNING CONSIDERATIONS

8 An emergency is only applicable when there exists “an imminent threat to public health,
9 welfare, or safety, or the health and safety of the environment, which could not have been foreseen
10 through the use of reasonable and prudent management procedures, and which cannot be addressed
11 by other procurement methods of source selection”. 5 GCA § 5030 (x) (emphasis supplied).
12

13 The Procurement Law requires that agencies plan their procurements. 5 GCA § 5010.
14 GIAA points out that, “Consistent with the Industry Standard, GIAA has historically outsourced
15 the management, maintenance, and operation of its baggage conveyance systems (hereinafter the
16 “services”). At the time in 2021, the then most recent outsourcing contract was procured in 2015
17 and the operator of GIAA’s baggage conveyance systems pursuant to that procurement through
18 October 2021 was Aircraft Services International, Inc. which does business in Guam as Menzies
19 Aviation (“Menzies”).” GIAA’s Proposed Findings of Fact ¶ 3. GIAA also asserts that, it “does
20 not have the technical or manpower capacity to operate the system’s automated components, to
21 maintain the system, to conduct repairs and troubleshooting of the system or to manage the control
22 room of the system.” *Id.* ¶ 12. An emergency requires an event that could not have been foreseen
23 through the use of reasonable and prudent management procedures, and which cannot be addressed
24 by other procurement methods of source selection. *Id.* § 5030 (x). Reasonable and prudent
25 management will factor in reasonably foreseeable events and practical considerations in its
26 auditable financial accounts. Thus, GIAA makes accountings, provisions, statements and relevant
27
28

1 disclosures in its audits, including where predictable and unpredictable factors may have material
2 impact on its financial performance and financial condition. *See* Guam Intl'l Airport Auth. FY
3 2022 Audited Financial Statements at [https://www.opaguam.org/sites/default/files/2-](https://www.opaguam.org/sites/default/files/2-giaa_fy_2022_fs.pdf)
4 [giaa_fy_2022_fs.pdf](https://www.opaguam.org/sites/default/files/2-giaa_fy_2022_fs.pdf), 20-28, last visited 12/15/2023, and FY 2021 Audited Financial Statements
5 at https://www.opaguam.org/sites/default/files/2-giaa_fy_2021_fs.pdf,
6 20-28, last visited
7 12/15/2023.

8 Statement 62 of the Government Accounting Standards Board (hereinafter "GASB 62")
9 provides as follows:

10 [A] contingency is defined as an existing condition, situation, or set of circumstances
11 involving uncertainty as to possible gain ... or loss ... to a government that will
12 ultimately be resolved when one or more future events occur or fail to occur.
13 Resolution of the uncertainty may confirm the acquisition of an asset or the reduction
14 of a liability or the loss or impairment of an asset or the incurrence of a liability.

14 *Id.* ¶ 100. GASB 62 further states that the agency should accrue where a financial impact is probable,
15 one or more events will confirm the financial impact, and the amount of the financial impact can be
16 reasonably estimated. *Id.* ¶ 102-03. Audited financial statements are, of course, reasonably relied
17 on by creditors, regulators and others who rely on an agency's representations, notes, reported
18 accounts, and provisions in its audited financial statements

19 The Airport argues that lack of management and support services for its conveyance system
20 is important enough to constitute an emergency when a protest is filed pre-award and stays
21 procurement. However, there is no discussion of an emergency related to its baggage conveyance
22 system in its audited statements. GIAA's audited statements may objectively be seen as tending
23 to diminish the argument that the protest and appeal brought by JMI presents an emergency, or at
24 least not one material enough to require disclosure or accrual. At any rate, the Airport knew it
25 needed to outsource baggage conveyance operations because it does not have sufficient capacity
26 on its own. A likelihood of disruption in services, then, was to be reasonably expected when the
27
28

1 time to replace depreciated machines approached and or when procurement of services would be
2 necessary to sustain ongoing operations. GIAA’s showing at the hearing of a fairly estimable
3 financial impact scenario of not having these management and support services goes to whether
4 the impact could be reasonably estimated: “GIAA is unable to operate the baggage conveyance
5 systems without a provider of the services. GIAA would have to manually fill in for the automated
6 systems, siphoning resources from other core GIAA functions. GIAA witnesses testified that this
7 was done just after typhoon Mawar passed over Guam and after two days, GIAA was already
8 stretched thin and could not physically handle the tasks normally handled by the Baggage
9 Conveyance Systems for any longer period.” *Id.* ¶ 11.
10

11 All of this is to say that reasonably prudent procurement planning could have factored in
12 adequate time to resolve foreseeable contingent impacts on financial accounts, whether due to
13 earthquake, typhoon, pandemic or like emergency, or because of risk to procurement because of a
14 protest by a competing bidder. “All procurements of supplies and services shall, where possible,
15 be made sufficiently in advance of need for delivery or performance to promote maximum
16 competition and good management of resources.” 5 GCA § 5010.
17

18 CONCLUSION

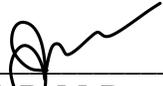
19 Since JMI’s protest in this appeal is post-award, Menzies’ (emergency) procurement
20 contract shall be terminated as of 60 days from the date of this decision to give the Airport the
21 opportunity to determine its next course of action.
22

23 The parties shall bear their respective costs and attorney’s fees.

24 This is a Final Administrative Decision for Appeal No. OPA-PA-23-002. The Parties are
25 hereby informed of their right to appeal the Public Auditor’s Decision to the Superior Court of
26 Guam in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after
27 receipt of a Final Administrative Decision.
28

1 A copy of this Decision shall be provided to the Parties and their respective attorneys, in
2 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at
3 www.opaguam.org.
4

5
6 Dated this 18th day of December 2023 by:

7 
8 _____
9 **Joseph B. McDonald**
10 **Hearing Officer for OPA-PA-23-002**

11 **CONCUR:** 
12 _____
13 **Benjamin J. F. Cruz**
14 **PUBLIC AUDITOR**



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-23-002 Decision

Jerrick Hernandez <jhernandez@guamopa.com>

Mon, Dec 18, 2023 at 9:25 AM

To: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Joseph C. Razzano" <jrazzano@rwtguam.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>, William Brennan <wbrennan@arriolafirm.com>

Cc: John Quinata <john.quinata@guamairport.net>, Thyrsa Bagana <tbagana@guamopa.com>

Hafa Adai,

Please see the attached Decision for OPA-PA-23-002. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

--

Best Regards,



Jerrick J.J.G. Hernandez, MA, CGFM, CFE, CICA, CGAP
Accountability Auditor

Office of Public Accountability
+1 671 475 0390 (ext. 204)
jhernandez@guamopa.com
<https://www.opaguam.org/>



This email and any attachments are for the sole use of the intended recipients and contain information that may be confidential or legally privileged. If you received this email in error, please notify the sender by reply email and delete the message. Any disclosure, copying, distribution, or use of this communication by someone other than the intended recipient is prohibited.

 **23-002 Decision for Transmittal.pdf**
239K