



Jerrick Hernandez <jhernandez@guamopa.com>

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

Claire Pollard <cpollard@rwtguam.com>

Fri, May 5, 2023 at 4:56 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

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

Dear Mr. Hernandez:

Please see the attached document for e-filing in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

--

Regards,
Claire Pollard

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 671-989-3009

(F): 671-989-8750

<http://rwtguam.com>

 **5.5.23 Comments on Agency Report.pdf**
1454K

RAZZANO WALSH & TORRES, P.C.
JOSEPH C. RAZZANO
JOSHUA D. WALSH
139 MURRAY BLVD.
HAGATNA, GUAM 96910
TELEPHONE: (671) 989-3009
FACSIMILE: (671) 989-8750

Counsel for Appellant JMI-Edison

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

DOCKET NO. OPA-PA-23-002

COMMENTS ON AGENCY REPORT

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant Johndel International, Inc. dba. JMI-Edison (“JMI” or “Appellant”) submits its Comments on the Agency Report submitted by the Guam International Airport Authority (“GIAA”) to the Office of Public Accountability on April 25, 2023. These comments are submitted to address the positions taken by GIAA in its Agency Report and Statement regarding the March 15, 2023, Emergency Procurement issued for services described in GIAA RFP 005-FY21 for Management & Infrastructure Support Services to GIAA’s Baggage Conveyance Systems originally issued on July 20, 2021.

//

II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.¹

GIAA remains before the Superior Court of Guam on a procurement appeal raised by JMI regarding Request for Proposals (“RFP”) GIAA RFP 005-FY21. That appeal seeks judicial review of the dismissal, with prejudice, of the prior procurement appeal brought by JMI challenging the award of the RFP to Menzies Aviation (“Menzies”) — an entity that was neither responsive to the RFP nor responsible to perform the work contemplated. Citing an imminent threat to public health, safety, and welfare, GIAA declared the existence of an emergency on October 26, 2021, and pushed forward with entering into a contract for emergency services provided by Menzies to perform the same functions contemplated by the RFP. The initial 30-day term of that emergency contract has been extended multiple times since then. On March 15, 2023, GIAA published notice that it would be seeking to extend the contract again during the March 22, 2023, GIAA board meeting for an additional 90-day period (the “ERFP”).

On March 16, 2023, the Guam Contractors Licensing Board made public a legal opinion it received from the Office of the Attorney General of Guam confirming 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.” More, the Attorney General instructed that the CLB should “begin enforcement proceedings to protect the public against this unlicensed contractor....”

¹ Much of this history is contained in JMI’s Notice of Appeal, but is recounted here for ease of reference for the reader.

It has become clear that Menzies cannot continue to perform the work contemplated by the RFP, or its subsequent emergency iterations, for the airport. Because of this, and the fact that GIAA's use of emergency procurement power for more than 500 days directly contradicts the procurement code, JMI initiated an Agency level protest. On March 27, 2023, the Agency denied the protest. This appeal to the OPA followed.

The agency admits that, rather than undertake procurement procedures to justify new emergency procurements, GIAA has instead "extended the contract for 30 days at a time." Agency Statement, 4.

The agency admits that on March 15, 2023, it declared in a public notice "its intent to extend the emergency procurement for an additional ninety (90) day period. Agency statement, 4.

No law has been cited by the agency allowing such maneuvers in contravention of the plain emergency procurement language provided for in Guam's procurement code.

B. GIAA'S POSITION THAT JMI'S PROTEST WAS BOTH PREMATURE AND MOOT.

GIAA claims that JMI's protest was somehow not ripe, since "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." Agency statement, 5. GIAA acknowledges that the CLB's legal counsel, the Office of the Attorney General, had found that Menzies was illegally operating without an appropriate licensee, but splits that hair by proclaiming that "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." Agency Statement, 5.²

Seeking to also eat the cake that it just had, GIAA then claims that JMI's protest is moot, since "On April 7, 2023, Menzies transmitted to GIAA a copy of a C-13 license purportedly issued by the CLB to Menzies." That license, of course, was transmitted 10 days *after* GIAA denied JMI's protest, and could not have played any role in GIAA's decision to deny JMI's protest and continue to allow Menzies to operate.

C. THE 500-DAY EMERGENCY.

The Agency report acknowledges that its emergency determination is, as of the date of these comments, 555 days. GIAA determined an emergency existed and the need for an emergency procurement on October 27, 2021. GIAA baldly claims that it has extended its original emergency procurement in 30-day increments "as allowed by law." Agency Statement, 3; 6. No law allows such a tortured view of emergency procurement.

GIAA's reliance upon 5 GCA §5215 to support its 555-day emergency procurement misapprehends the statute. 5 G.C.A. §5215 (e) allows for a 90-day extension "immediately following the date of the determination of Need for

² GIAA claims that the GCLB had not yet "taken action" on Menzies' improper licensure raised in the March 21, 2023, JMI protest to GIAA while acknowledging that the GCLB was aware of the opinion on March 15, 2023. Agency Statement, fn2. The GCLB then took action on March 28, 2023, to order Menzies to cease and desist from operating — the day after GIAA denied JMI's protest.

Emergency Procurement,” and commands the agency to procure services beyond that period “under a method of procurement *other than* the emergency procurement authorized in this Chapter.” 5 G.C.A. §5215 (e) (emphasis added). While an emergency procurement beyond the 90 days is contemplated in true emergency situations, such would only be limited to occurrences where “...a condition posing an imminent threat to public health, welfare, or safety which could not have been foreseen through the use of reasonable and prudent management procedures, and which cannot be addressed by other procurement methods of source selection.” (5 GCA § 5030(x); 2 GAR § 1106(47). GIAA cannot credibly maintain that it could not prudently procure baggage conveyor services “by other procurement methods of source selection” beyond a 555-day “emergency.” The compilers note to Chapter 5 explains that “This Chapter is essentially the Model Procurement Code.” Comment, Chapter 5, Guam Code Annotated.

D. UNTIMELINESS.

GIAA claims that since JMI representatives knew on December 28, 2021, that GIAA was securing services through an emergency procurement, JMI needed to protest with 14 days of that knowledge. Agency Statement, 7. GIAA misapprehends its own conduct giving rise to the basis of JMI’s protest.

First, while an emergency justification might have made sense in December of 2021, the basis of JMI’s protest, i.e., a claimed 500-day emergency, did not become a reality until the airport sought its late 90-day contract extension with Menzies in March 2023. **Second**, the determination by the GCLB that the

emergency contractor — Menzies — was improperly operating without a license did not come until March.³ JMI's protest of the emergency procurement came 6 days after that GCLB legal counsel determination. GCA 5 §5425(a) requires that Protests must be made within 14 days of the issues leading to the protest being known by the Protester (JMI in this case).

On March 16, 2023, the Guam Contractors Licensing Board made public a legal opinion it received from the Office of the Attorney General of Guam confirming 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.” More, the Attorney General instructed that the CLB should “begin enforcement proceedings to protect the public against this unlicensed contractor....”⁴

The issues documented by JMI in this protest became known to JMI on March 15, 2023, when GIAA published notice about initiating another emergency procurement period with Menzies. JMI's other protest ground became known the Office of the Attorney general issued its conclusions regarding Menzies's illegal performance. JMI raised its protest to GIAA on March 21, 2023. This Appeal comes

³ To be certain, JMI has always contended that Menzies needed a license. This was the basis of JMI's original protest in October 2021. GIAA refused to engage with the question, and the first GCLB determination that Menzies was operating improperly was rescinded following the OPA's prior incorrect determination based upon inuendo submitted by Menzies that the first GCLB determination was somehow improperly obtained. It was not. *See*, Declaration of Cecil Orsini attached as **Attachment A**.

⁴ The Attorney General Opinion released by the CLB is attached to this Notice of Appeal as **Attachment B**.

within fifteen days after GIAA issued its protest decision to JMI, and is within the fifteen day protest appeal period set by 5 GCA § 5425(e). Therefore, both JMI's agency level protest and subsequent appeal to the OPA meet the timeliness standards required by applicable law and regulation.

E. GIAA'S AGENCY REPORT AND STATEMENT DO NOT CONTEST THAT MENZIES LACKS A VALID CONTRACTOR'S LICENSE, OR THAT THE SCOPE OF WORK CONTEMPLATED BY THE IFB REQUIRED A CONTRACTOR'S LICENSE.

GIAA describes the work it is procuring as "Infrastructure Support Services" that require "technical expertise and guidance." Procurement Record ("PR"), 08. On Guam, a "contractor" needing a contractor's license 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). 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). 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).

GIAA does not contest that Menzies does not have a valid contractor's license. GIAA Agency Statement, 3. GIAA also does not contest that the terms and

conditions of the IFB require responsive offerors to be knowledgeable and observe “Federal and Local regulations and/or codes.” PR, 10. GIAA’s procurement mandates compliance with “federal and local laws, codes, ordinances, and regulations which, in any manner, affect those engaged or employed in the work. No misunderstanding or ignorance on the part of the Offeror will in any way serve to modify any provisions of the resulting contract.” PR, 207. GIAA also does not contest that offerors must be appropriately licensed. Procurement Record, 68; 9; 76.

GIAA should have, in preparing its RFP, apprised itself of what licenses would be required by offerors. At a minimum, once the proposals of the offerors were received, and at least after JMI’s protest was lodged, GIAA should have substantively engaged in a review of the bids in order to make its own determination that all offerors were responsive to the specifications of the bid. *See* 5 G.C.A. 5201(g) (“Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.”). Rather, GIAA simply explains that “Menzie’s was deemed qualified due to their capacity, based on their proposal and qualifications, to provide the services sought.” Agency Statement, 7. GIAA’s agency statement, like its procurement effort, has ignored its obligation to determine if Menzie’s, by submitting a bid for contracting work despite not having a contractor’s license, is in fact a non-responsive and non-responsible offeror. GIAA simply emphasizes that it told offerors to comply “with the Guam Licensing Law” and that “specific information on Licenses may be obtained from the Directory of the Department of Revenue and Taxation.” Agency Statement, 6. This is as vapid as

instructing an offeror to “do the right thing,” and as derelict as if GIAA had sought to obtain legal counsel without making sure that the legal counsel it hired was licensed to practice law on Guam.

Guam law makes it plain that GIAA's contracting officer is required to make a responsibility determination based on standards that are not specifically in the bid envelope. *See*, 5 GCA § 5230; 2 GAR § 3116. (setting factors to consider such as “*appropriate* financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them” as well as “a satisfactory record of integrity”). GIAA is also ignoring the mandate to make sure that “Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.” 2 GAR § 3116 (b)(4). GIAA's Agency report confirms that, while being made aware of the possibility that Menzies has submitted a bid for contracting work despite not having a contractor's license, GIAA has taken the position that the issue was not for GIAA, or the OPA, to resolve. Agency Statement, 3. GIAA is wrong, as the agency can only make an award to a responsive and responsible offeror and was required to move beyond the Menzies bid envelope, if need be, to make that determination.

F. THE PROCUREMENT RECORD SHOWS THAT JMI RAISED A TIMELY PROTEST.

GIAA contends that JMI was untimely in bringing its protest. To the contrary, the record confirms that JMI protested within 14 days of learning of the facts that gave rise to aggrievement. GIAA admits to continuing to withhold key aspects of the Menzies proposal from JMI. Agency Statement, 7. Because JMI could

not review the Menzies proposal, JMI was compelled to approach the Contractor's Licensing Board directly after learning that GIAA had selected Menzies for award. JMI learned on September 17, 2021, from the Guam Contractor's Licensing Board that Menzies was not licensed. JMI raised its protest to GIAA on September 21, 2021 — four days after learning of the key grounds for the protest. JMI's OPA Appeal came eight days after GIAA issued its protest decision to JMI — well within the fifteen-day protest appeal period set by 5 GCA § 5425(e). Therefore, both JMI's agency level protest and subsequent appeal to the OPA meet the timeliness standards required by applicable law and regulation.

G. DOE'S RECORD SUBMISSION VIOLATES THE LAW.

GIAA's submission shows further flaws with the procurement record. First, GIAA does not contest that it took an extension of time to provide a record that the law dictates should have been kept contemporaneously with the procurement. Furthermore, GIAA admits that it has held back portions of Menzies's submissions as confidential material pursuant to some purported negotiation. GIAA provides no reason why the portions of Menzies's proposal related to contractor and business licensing — the issue at the heart of this appeal — must continue to be obscured.⁵

III. CONCLUSION

GIAA issued an RFP that was noticed for award to an offeror who did not have licenses from the Contractor's licensing board, despite bidding on contractor

⁵ JMI reserves its rights, as the facts continue to develop through investigation and research, to address the failings of the procurement record as the record is eventually disclosed.

work in an RFP that required all appropriate licenses. GIAA's Agency report and accompanying statement does not alter the reality of that error, or to explain how contractor licensing is not needed. Based on the foregoing, GIAA respectfully requests that its protest appeal be sustained.

Dated this 5th day of May, 2023.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSEPH C. RAZZANO
JOSHUA D. WALSH
Attorneys for Appellant

ATTACHMENT A

RAZZANO WALSH & TORRES, P.C.

SUITE 100, 139 MURRAY BLVD.
HAGÁTÑA, GUAM 96910
TELEPHONE: (671) 989-3009
FACSIMILE: (671) 989-8750

Attorney for Petitioner
JMI-Edison

FILED
SUPERIOR COURT
OF GUAM

2023 MAR 24 PM 4:56

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 Services
International, Inc, dba MENZIES
AVIATION,

Defendant.

Civil Case No. CV0095-22

**DECLARATION OF
CECIL ORSINI**

I, Cecil Orsini, do hereby declare as follows:

1. In September 2021 I was the Director of the Contractors Licensing Board ("CLB").

2. I first met Ed Ila, President of JMI-Edison, when he filed his complaint against Menzies Aviation, Aircraft Service International, Inc. (Menzies), or Aircraft Services International Group (ASIG) in September 21, 2021.

3. Nida Bailey is the CLB's lead Investigator, and I assigned her investigative division to investigate Mr. Ila's complaint. Ms. Bailey, as she knows I have an open-door policy, introduced me to Mr. Ila and we spoke about his concerns

that the entities discussed above were operating the airport baggage system without an appropriate Contractor's license.

4. Most investigations begin, as this one did, with a complaint from the public.

5. While still at the office I had Ms. Bailey check the computer system to determine whether any of those entities had a contractor's license. It was confirmed that none of the entities in the system had a contractor's license. Therefore, the next step of an investigation would be to inspect the premises. It is also appropriate for a notice to appear to be issued in order to discuss the allegations with the party being complained of.

6. A notice to appear was issued on October 7, 2021, requesting the appearance before the Contractor's Licensing Board Investigation Unit on Thursday October 14, 2021. That notice is attached hereto as **Exhibit A**.

7. I do not recall the exact date upon which the meeting occurred, but pursuant to the notice to appear a meeting was conducted between myself, Ms. Nida Bailey, and two or three members of a team from Menzies. I also recall another investigator named Marcus in the office assisting with the investigation and attending the Menzies meeting.

8. Menzies explained they did not need a license because they had a master electrician, and they simply were operating under whatever authority he provided. Ms. Bailey explained to them that they needed a license and that they did not have one and that the use of a master electrician's license was not appropriate. Menzies

requested to adjourn the meeting and get together again to discuss the issues. Everyone agreed to that follow-up meeting.

9. No second meeting ever took place that I can recall between the CLB and Menzies.

10. I received an email from JMI President Ed Ilaio following up on the status of our investigation.

11. Mr. Ilaio included in one of his follow up communications a form letter for CLB review and use that was patterned after other correspondence that the CLB has generated from prior investigations of other contractors.

12. Attached hereto as **Exhibit B** is a true and correct copy of the December 22, 2021 email that I received and, then had Ms. Bailey and her team review it and propose changes to it, then directed my private secretary Geralynn Tennessen Stanley to send to Mr. Ilaio pursuant to his request. Moreover, I attach the entire email chain between Mr. Ilaio and my office including December 22, 2021, letter signed by me explaining the findings in case no. 2021-09-04.

13. Everything stated in the letter I signed on December 22, 2021, is true and correct, including the conclusions that Menzies did not hold a valid contractor's license, and they were informed that under the scope of work provided in the GIAA contract required a contractor's license. This letter is no different than the information provided to Menzies during the notice to appear meeting. Therefore, it is my position that Menzies knew all along that they had no contractor's License and that they were told to get one.

14. As a result of this letter as well as the OPA proceeding regarding Menzies and JMI-Edison, I was asked to resign by Acting Chief of Staff Alice Taijeron from the Office of the Governor. I understood that only the Board can request my resignation. I discussed it with Board Chairman Mr. Bernard Benavente, who told me I should not resign. Nevertheless, I did resign.

15. I've never been asked to clarify or explain my actions and instructions to the CLB staff, by any member of the OPA or any member of the executive branch, although I am happy to do so. The OPA decision made it appear as if I had the opportunity to testify before the OPA and explain what was going on but that was not true and I was never provided that opportunity.

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

Dated this 21 day of March, 2023.


CECIL ORSINI

EXHIBIT A



CONTRACTORS LICENSE BOARD

Inetnon Malsensteyen Kontraktista
542 North Marine Corp Drive A. - Tamuning, Guam 96911
649-2211, 9676, 2212, 647-2965 649-2210(Fax)



LOI BDESA, LEON GUERRERO
GOVERNOR

JOSHUA F. TENORIO
GOVERNOR

CECIL "Buddy" L. ORSINI
EXECUTIVE DIRECTOR

NOTICE TO APPEAR

COPY

Date: October 7, 2021

To: Aircraft Service International Group (ASIG) dba: Menzies Aviation

Address: Guam Integrated Air Cargo Facility,
Ste. 227, 770 E Sunset Blvd,
Tamuning, 96913, Guam

Subject: Case# 2021-09-04
Ed Ilao vs. Aircraft Service International Group (ASIG) dba Menzies Aviation

Dear Menzies Aviation,

You are hereby given a notice to appear before the Contractors License Board (CLB) Investigation Unit on **THURSDAY October 14, 2021 @ 9:00am** regarding a complaint filed against your company. The location for this meeting is at the Contractors License Board Conference Room, Department of Public Works Compound, 542 North Marine Drive, Tamuning, Guam.

Upon receipt of this notice, you are instructed to contact us by phone or by email, the Guam Contractors License Board Investigation Unit to confirm your appointment.

Investigator: Marcus G. Finona
Email: marcus.finona@clb.guam.gov
Telephone: 649-2219

Sincerely,

Cecil "Buddy" L. Orsini
Executive Director



Received by: _____
 Signature: _____
 Print Name: **MARICON ERNI**
 Date: **10/07/2021**

Cc: Board Chairman

000007

EXHIBIT B

Monday, December 19, 2022 at 16:51:31 Chamorro Standard Time

Subject: Re: FW: JMI response to Menzies' Written Statement (CLB Case No. 2021-09-04)
Date: Wednesday, December 22, 2021 at 10:36:16 AM Chamorro Standard Time
From: Geralynn Tennesen Stanley <geralynn.stanley@clb.guam.gov>
To: Ed R. Ilaio <ed_ilaio@jmiguam.com>
CC: Buddy Orsini <cecil.orsini@clb.guam.gov>, Nida Bailey <nida.bailey@clb.guam.gov>, Marcus G. Finona <marcus.finona@clb.guam.gov>
Attachments: Finding & Decision - cs#2021-09-04.pdf

Good Morning Mr. Ilaio,

Attached is the Finding & Decision document. Please review. If you have any questions please feel free to contact me or Mr. Orsini.

Kind Regards,
Geralynn Tennesen Stanley
Private Secretary
Contractors License Board

542 North Marine Corps Drive
Tamuning, Guam 96913
Tel: (671) 647-2965 Fax: (671) 649-2210

*CONFIDENTIALITY NOTICE: This email and any files transmitted with it may be legally privileged and confidential and is intended solely for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any review, dissemination or copying of this email, or taking any action in reliance on the contents of this information is strictly prohibited. If you received this transmission in error, please notify us immediately by e-mail or telephone to arrange for the return of this email and any files to us or to verify it has been deleted from your system.

On Wed, Dec 22, 2021 at 10:01 AM Ed R. Ilaio <ed_ilaio@jmiguam.com> wrote:

: Geralyn,

As per Mr. Orsini's instructions, please see the attached draft letter.

Best regards,

ED ILAIO, P.E.

JMI-EDISON

Cell #: (671)688-7601

eMail: ed_ilao@lmiguam.com

: ----- Original message -----

From: "Ed R. IlaO" <ed_ilao@lmiguam.com>

Date: 12/13/21 2:59 PM (GMT+10:00)

To: Cecil Orsini <cecl.orsini@clb.guam.gov>

Subject: Re: JMI response to Menzles' Written Statement (CLB Case No. 2021-09-04)

Bro,

We will be having a motion hearing before the OPA on Dec 27th. Last day to file documents is on Dec 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 holidays!

Best regards,

ED ILAO, P.E.

JMI-EDISON

Cell #: (671)688-7601

eMail: ed_ilao@lmiguam.com

From: "Marcus G. Finona" <marcus.finona@clb.guam.gov>
Date: Thursday, December 9, 2021 at 1:16 PM
To: "Ed R. Ilao" <ed_ilao@jmi.guam.com>
Cc: Nida Bailey <nida.bailey@clb.guam.gov>, Cecil Orsini <cecil.orsini@clb.guam.gov>
Subject: Re: JMI response to Menzies' Written Statement (CLB Case No. 2021-09-04)

Hafa Adal Mr. Ilao,

Thank you for your email. I have received the response from your Attorney, Razzano Walsh & Torres, P.C., and I will get back to you as soon as we are done reviewing the documents. Should I have any questions or concerns, I will most certainly contact you. Thanks again.

On Thu, Dec 9, 2021 at 8:39 AM Ed R. Ilao <ed_ilao@jmi.guam.com> wrote:

Marcus,

Please see attached response to Menzies letter. I thought my lawyers would be better suited to provide a response to the Menzies letter. I believe my lawyers already sent this to you yesterday also.

To really get a grasp on the size of the Baggage Handling System which costs GIAA \$31M to complete, I suggest that you take a tour of the facility, if you haven't already done so.

Thank you, and should you need anything else, please don't hesitate to contact me.

Best regards,

ED ILAO, P.E.

President

JMI-EDISON

Cell #: (671)688-7601

eMail: ed_ilao@jmiguam.com

--

SI Yu'us Ma'ase,

Error! Filename not specified.Error! Filename not specified.Error! Filename not specified.

Marcus G. Finona

Investigator

Guam Contractors License Board *Inelnon Malisenslayan Kontratista*

542 North Marine Corp Drive A. – Tamuning, Guam 96911

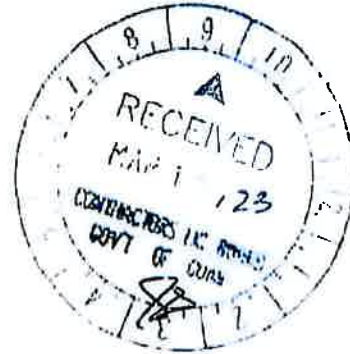
(671) 649-2219

marcus.finona@clb.guam.gov

ATTACHMENT B



March 14, 2023



Mr. Ciriaco C. Sanchez, Jr.
Executive Director
Contractors License Board
542 N Marine Corps Drive
Tamuning, Guam 96913

Subject: *JMI-Edison Administrative Complaint re: Aircraft Service International Group, Inc. dba Menzies Aviation, CLB Case No. 2021-09-04 OAG PCF No. 23-0026*

The purpose of this legal opinion is to address the request for legal opinion regarding investigative procedures conducted by the Contractors License Board ("CLB") with respect to the administrative Consumer Complaint filed by JMI-Edison in order to determine whether the investigation was conducted according to law.

Background.

Beginning approximately August 2015, the baggage handling and conveyance system at the Guam Airport Authority (GIAA) has been managed by Aircraft Service International Group, Inc. ("ASIG") *dba* Menzies Aviation. Menzies is a global corporation that provides airport and airline services around the world, including baggage handling, ground fueling, and air cargo services.

Menzies has been authorized to transact business in Guam as a foreign corporation since March 11, 2015.¹ Previously, however, between June 29, 2009 and June 30, 2010, its parent company, ASIG, held a contractor's license which has never been renewed.

On July 20, 2021, GIAA issued a Request for Proposal ("RFP") for the baggage handling system.² Two offerors responded to the RFP: (1) Menzies; and (2) Jhndel International *dba* JMI-Edison.

¹ DRT CERTIFICATE OF AUTHORIZATION to Aircraft Service International Inc., Registration No. F-2459 issued March 11, 2015; JMI Consumer Complaint to CLB at Exhibit 1.

Office of the Attorney General
Douglas B. Moylan · Attorney General of Guam

590 S. Marine Corps Drive · ITC Bldg., Ste. 901 · Tamuning, Guam 96913 · USA
671-475-3324 · 671-475-4703 (fax) · publicservice@oagguam.org · www.oagguam.org
"Guam's Toughest Law Enforcers"

On August 26, 2021, GIAA selected Menzies as the highest ranked offeror. On September 21, 2021, and before the contract could be awarded,³ JMI filed a procurement protest with GIAA over the selection of Menzies on the grounds that Menzies was not qualified because it did not hold a valid contractor's license.⁴ On the same day, JMI also filed a written complaint with the CLB reporting Menzies' alleged unlicensed activities.⁵

On September 30, 2021, JMI's procurement protest was denied by GIAA.⁶ The following week on October 8, 2021, JMI appealed the GIAA's denial to the Office of Public Accountability (OPA).⁷

With respect to JMI's Consumer Complaint filed with the CLB, on December 22, 2021, the former CLB Executive Director issued a written "*Findings & Decision*" to JMI which confirmed that Menzies was not a licensed contractor and that a license was necessary in order to do the work on the GIAA baggage handling system.

However, the Findings & Decision was not approved by the CLB Board of Directors prior to its release by the former Executive Director. At a Special Meeting held on March 1, 2022, the Board determined that the Findings & Decision exceeded the former Director's authority and ordered that it be rescinded.⁸

In the meantime, the OPA dismissed JMI's appeal over GIAA's denial of its procurement protest.⁹ On February 10, 2022, JMI filed a complaint with the Superior Court of Guam seeking judicial review of the OPA's dismissal.¹⁰ That case is ongoing.

² GIAA RFP No. 005-FY21 *Management & Infrastructure Support Services to GIAA's Baggage Conveyance Systems*.

³ Pursuant to 5 GCA § 5425(g), the contract award to Menzies has been automatically stayed pending final resolution of JMI's protest.

⁴ *JMI-Edison v. Guam International Airport Authority*, Case No. OPA-PA-21-010, NOTICE OF APPEAL at Exhibit G.

⁵ CLB CONSUMER COMPLAINT No. 2021-09-04 (filed Sept. 21, 2021).

⁶ OPA-PA-21-010, NOTICE OF APPEAL at Exhibit H.

⁷ OPA-PA-21-010, NOTICE OF APPEAL.

⁸ 36th Guam Legislature Messages & Communications Doc. No. 36GL-22-1761, CLB Minutes of March 1, 2022 at pp. 2-4.

⁹ OPA-PA-21-010, DECISION AND ORDER (Feb. 3, 2022).

¹⁰ *JMI-Edison v. OPA, GIAA, et al.*, VERIFIED COMPLAINT, CV0095-22 (Super. Ct. Guam Feb. 10, 2022).

Questions Presented By Jmi To The Clb & Short Answers.

It is undisputed by all parties that Menzies is not a licensed (*unlicensed*) contractor in Guam, although its parent company ASIG once held a C-13 Electrical Contractor license which expired in 2010. At the present time, however, neither Menzies nor ASIG hold a Guam contractor's license of any classification.

The CLB has requested of this Office its legal opinion as to the following:

- (1) Is Menzies required to have a contractor's license in order to do the work at GIAA involving the management and support of the airport's baggage handling and conveyance system?**
- (2) If yes, what type of contractor's license is Menzies required to have?**

In response to JMI's complaint, and pursuant to its authority under 21 GCA § 70109, the CLB conducted an investigation. Based on the facts, the CLB investigators have concluded that the work being done by Menzies on the GIAA baggage handling system, and which is sought by GIAA RFP No. 005-FY21, requires a *Specialty Contractor's License in the C-13 Electrical Contractor sub-classification*. The conclusion of the investigators is set forth in a written investigation Report that is awaiting the decision of the CLB Board of Directors.

Review of the CLB Investigation Report.

1. Overview of the CLB.

"The CLB is an administrative agency [of the Government of Guam] empowered to oversee contractor licensing and behavior and [to] promulgate Rules and Regulations to execute this power."¹¹ By legislative mandate, the purpose of the Rules and Regulations "is the protection of the general public."¹²

For purposes of coming within the CLB's jurisdiction, a "*contractor*" is defined as any person who undertakes to do construction or repair work for a fee.¹³ With the exception of

¹¹ *Id.*, CV0095-22 DECISION & ORDER DENYING GIAA MOTION TO DISMISS at p. 7.

¹² 21 GCA § 70103(b) (The CLB shall "[m]ake, amend or repeal such rules and regulations as it may deem proper to fully effectuate this Chapter and carry out the purpose thereof, *which purpose is the protection of the general public.*"); 25 GARR §12101(b).

¹³ 21 GCA § 70100(b) ("*Contractor* means 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.").

projects for less than \$2,500,¹⁴ all contractors are required to obtain and maintain a license appropriate to the classification of work being performed.¹⁵

The law expressly authorizes the CLB to oversee contractors and to "make licensing determinations, investigate compliance with its Rules and Regulations, and issue citations and cease work orders."¹⁶

2. The CLB's Investigation Process.

When handling any consumer complaint, the CLB is required to follow the procedures set forth in the Administrative Adjudication Law (AAL), Title 5 GCA Chapter 9.¹⁷ To this end, the CLB has adopted a **Standard Operating Procedure (SOP)**.¹⁸

As shown below, the SOP requires service of a **Notice to Appear** before the CLB Investigation Unit in order to allow a party to personally respond to the complaint. It also requires that if a **jobsite visit** is deemed necessary, a time and date will be scheduled.

If no violations are found after the investigation is completed, then the case is closed. If a violation is found, then the CLB Board of Directors may impose disciplinary action.

¹⁴ 21 GCA § 70101(d) (CLB law does not apply to "[a]ny project or operation for which the aggregate contract price for labor, materials and all other items is less than Two Thousand Five Hundred Dollars (\$2,500).").

¹⁵ 21 GCA § 70108(a) ("No person within the purview of this Chapter shall act, or assume to act, or advertise, as a general engineering contractor, a general building contractor or a specialty contractor without a license previously obtained under and in compliance with this Chapter and the rules and regulations of the Contractors License Board (CLB)."). *See also*, 21 GCA § 70106 (Classification).

¹⁶ *Supra*, CV0095-22 DECISION & ORDER at 7; *see also* 21 GCA § 70109.

¹⁷ 5 GCA § 9200 ("The procedure of any agency shall be conducted pursuant to the provisions of this Chapter in any proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after an agency hearing."). *See also*, *DCK Pacific v. CLB*, 2010 Guam 16 ¶ 9 (the AAL governs hearing and review procedures according to the contractors licensing law).

¹⁸ http://clb.guam.gov/wp-content/uploads/2018/05/CLB-Standard-Operating-Procedures_February-2019.pdf



CONTRACTORS LICENSE BOARD

Instituhon Malisensiyen Kontratista
342 North Marine Corp Drive A. Tamuning, Guam 96911
(644-2311, 644-4676, 647-2965 644-2311(Fax)) Website: www.clb.guam.gov



LOURDEN A. LEON GUERRERO
GOVERNOR

CECIL "Buddy" L. ORSINI
EXECUTIVE DIRECTOR

JOSHUA F. TENORIO
LIEUTENANT GOVERNOR

STANDARD OPERATING PROCEDURES

INVESTIGATION SECTION:

Application for License

1. Impose investigation on every applicant, new/additional classification by :
 - a.) Verifying each certifier on both experience and character.
 - b.) An interview must be conducted to assure that the applicant is qualified for the classification he/she is applying for.
 - c.) Applicant must know how to read the blueprint, specifications and contract documents.

Consumer Complaints:

1. Receive stamped copy of complaints filed.
2. Log in complaint and assign case number.
3. Forward complaint to Supervisor/Director who will assign an Investigator.
4. OPEN a file.
5. The Investigator assigned will examine alleged violation(s).
6. The investigator will send a Notice to Appear (NTA) to the contractor.
7. If jobsite visit is necessary, the Investigator will advise the contractor & the consumer within ten (10) working days of the scheduled time & date.
8. If the Investigator concludes that the allegations have no merit, the consumer and contractor will be notified in writing (Findings & Recommendation) and the case is closed.
9. Notice to Correct: If there are any violations to the Rules & Regulations, a Citation will be issued to the contractor stating the nature of the violation & the penalty. The contractor can either pay the penalty & correct the violation or can contest the Citation.
10. Notice of Hearing: If the contractor decides to make an appeal, a formal "Notice of Hearing" before the Contractors License Board of Directors will be scheduled. The consumer will be requested to appear at the hearing to testify to the facts of the case.
11. Decision & Order: At the conclusion of the hearing the Board of Directors will make a decision regarding the alleged violation(s) and may impose disciplinary action (Suspension, Revocation or Refusal to renew the License (21 GCA Chapter 70 §70116).

CLB STANDARD OPERATING PROCEDURES (INVESTIGATION SECTION)

In JMI's Consumer Complaint Case No. 2021-09-04, the following timeline of events in accordance with the SOP were documented by the CLB:

2021 September 21	JMI files Consumer Complaint against Menzies.
2021 October 07	Notice to Appear on October 14, 2021, for a meeting with CLB Investigative Unit is issued to Menzies.
2021 November 16	Meeting with CLB Investigative Unit held (rescheduled from 10/14/21 at request of Menzies' legal counsel).
2021 November 19	Menzies files a Written Statement responding to the Notice to Appear and the allegations made by JMI in its Consumer Complaint.
2021 December 8	JMI files a written reply to Menzies' Statement.
2021 December 21	Former CLB Executive Director issues a Findings & Decision that the scope of work at GIAA requires Menzies to have a contractor's license.
2022 March 1	The CLB Board rescinds the Findings & Decision dated 12/21/2021 for being issued without authority.
2022 September 23	CLB Investigators conduct a field/jobsite inspection at GIAA.
2022 September 26	CLB written Investigation Report is completed.

3. The CLB's Findings and Conclusion.

The CLB's Investigation Report documents that there were several obstacles to the field/jobsite inspection conducted at GIAA on September 23, 2022.

In one instance, the Menzies electrician would *not* permit the CLB to look at the troubleshooting log for the baggage handling system without prior approval "from the higher ups." Although CLB Investigators were able to photograph the electrical panel boxes, they were not able to access and observe the electrical panels that power part of the baggage conveyor system because of "passcode problems" with the security door.

Nevertheless, the investigators were able to examine the baggage conveyor system and take pictures of the system's conveyors and motors. They noted that the system is "*composed of hundreds of 480 volt electric motors, motor control panels, electronic sensors driving thousands of feet of conveyor belts inside the airport facility.*"

Based on the inspection, together with information received from Menzies at the Notice to Appear meeting in November 2021 and in Menzies' Written Statement, the CLB found that Menzies is a "*contractor*" as defined by 21 GCA § 70100(b) because it is doing alteration and repair work on the GIAA baggage handling system for a fee.¹⁹

This work is described in Attachment 1 (Preliminary Scope of Services) to GIAA RFP No. 005-FY21 which is excerpted below. The services sought to be rendered by the RFP and expected to be performed by Menzies includes among other things, preventative maintenance services and repairs, compliance with Federal and Local regulatory codes, and the staffing of certified technical personnel with "extensive knowledge to mechanical aspects":

¹⁹ 21 GCA § 70100(b) ("*Contractor* means 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.").

GIAA RFP No. 005-FY21 at Attachment No. 1, pp. 3-4 (Preliminary Scope of

B. The Support Services Program must:

1. Be sufficiently staffed with trained or certified technical personnel.
2. Include complete inspection and the scheduled preventive maintenance services to be provided. Include the relevant manufacturer's schedule of recommended preventative and regular maintenance, if any. The frequency of the inspection and the maintenance service shall be consistent with the requirements of the equipment, or it shall be established so the reliability and proper operation characteristics of the equipment are not degraded.
3. Include handling of incidental servicing, minor repairs and emergency service of equipment. Services shall include, but not be limited to, the provision of qualified labor; supervision, transportation, establishment of maintenance records, all parts, tools, equipment and cleaning.
4. Must have good recording system. Maintenance records shall include service date; work performed, spare parts used, identification of technical personnel and recommendations.

PRELIMINARY SCOPE OF SERVICES

PAGE 3 of 8

MANAGEMENT & INFRASTRUCTURE SUPPORT SERVICES
TO GIAA'S BAGGAGE CONVEYANCE SYSTEMS

RFP No. RFP-005-FY21

5. All work to be performed shall be patterned and conform to any required/applicable then-existing Federal and Local regulations and/or codes.
6. The support services program schedules shall minimize, to the extent practicable, any impacts to the Airport's operational schedule and security requirements (i.e. flight schedules, peak and non-peak hours, and security access to secured areas).

C. Quality Control Program:

1. The Proposer shall have an effective quality control program.
2. The Q.C. Program shall ensure all of the measures and elements of an inspection and / or test is performed in accordance with the requirements of the applicable Manufactures Specifications.

D. Safety Program must include:

1. Compliance with the Occupational Safety and Health Act of 1970 and/or any other Federal and Local Department of Labor, Safety and Health Regulations.
2. Handling and regulations pertaining to Material Safety Data Sheets (MSDS)

- E. In addition to the above or besides the requirement of personnel with extensive knowledge to mechanical aspects, Contractor should also hire electronic technician and electricians who has sufficient experience in power, controls, and PLC software.

Based on the Scope of Services sought by the RFP and the observations made of the baggage handling system operations during the field/jobsite inspection at GIAA, the CLB concluded that the repair and maintenance work is of the type that falls within the **Specialty Contractor classification** as defined by 21 GCA §70106(d):

21 GCA §70106. Classification. ****

(d) A *Specialty Contractor* is 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.

See also, 25 GARR § 12016(a)(3).

The CLB additionally concluded that within the Specialty Contractor classification, the work further falls under the **C-13 Electrical Contractor subclassification**:

25 GARR § 12016(a)(4). Definitions of Sub-Classifications. ****

(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 C19 Fire and Burglar Alarm Contractor.

CLB Enforcement Responsibility.

Guam law under Chapter 70, of Title 21 Guam Code Annotated, provides that as part of its administrative enforcement responsibilities that the CLB:

§ 70109.1. Investigation Citation Authority.

(a) In addition to any other remedy available, the Investigator of the Contractors License Board may issue citations to acting contractors, licensed or unlicensed, in violation of the provisions of this Chapter and rules promulgated pursuant to the requirements of the Administrative Adjudication Law.

(b) Each citation *shall* be in writing and *shall* describe the basis of the citation, including the statutory provisions alleged to have been violated. The citation *shall* also contain an order to cease and desist from the violation, and an assessment of civil penalties of *no less than* Two Hundred Dollars (\$200.00), but *not to exceed* fifty percent (50%) of the value of the project.

(c) Citations for unlicensed contractors shall each contain an order to cease and desist from the violation, and an assessment of civil penalties of

fifty percent (50%) of the value of the project – of which no less than fifty percent (50%) shall be used to compensate affected consumers. Payments shall be made in accordance with rules promulgated by the CLB in accordance with the requirements of the Administrative Adjudication Law.

(d) Recipients of contractual work shall be notified of each violation in a timely manner. (Emphasis added).

21 G.C.A. § 70109.1. It appears clear that the CLB's Investigator's determination was well founded that a violation of Guam law occurred. It further appears that the violation was knowing, willful and intentional given the fact that ASIG was previously licensed and how it seemingly interfered with CLB's investigation. That violation resulted in injury to a properly licensed contractor on Guam that has previously followed the statutory and regulatory requirements set forth by the legislature. Moreover, the unlicensed contractor is by virtue of not applying for and obtaining a license required under Guam law, is conducting business operations that endanger the public's safety at the Guam Airport. CLB should therefore immediately begin enforcement proceedings to stop the injury. Section 70109.1(c) sets forth the following mandatory CLB remedies once a citation issues (in addition to other remedies):

1. issue cease and desist order from conducting business in the unlicensed activity; and
2. assess a penalty of Fifty Percent (50%) of the project.

21 G.C.A. § 70109.1(c). Without enforcement against willful violations, not only will ASIG dba Menzies Aviation continue to operate in derogation of Guam's law thereby endangering the public, but such allowance will make meaningless the statutory purposes and existence for the CLB.

Summary.

The CLB exists to regulate the construction industry and to safeguard consumers in matters related to construction. By law, it is authorized to conduct investigations into complaints about unlicensed contractors and to take appropriate disciplinary action which may include fines, injunctions, or cease & desist orders.²⁰

Upon receiving the Consumer Complaint filed by JMI, the CLB followed its Standard Operating Procedures. This included:

- Issuing a Notice to Appear and personally meeting with Menzies and its legal counsel.
- Permitting Menzies to submit a Written Statement responding to the allegations made by JMI.

²⁰ 21 GCA § 70109.1 (citation, civil penalty, cease & desist), § 70109.3 (cease work order), § 70121 (fine equaling 50% of project value), § 70122 (injunction); 25 GARR § 12101(e) (injunction).

- Permitting JMI to submit a reply to the Written Statement filed by Menzies.
- Conducting a field/jobsite inspection at GIAA to observe and photograph the baggage handling and conveyance system; and
- Preparing a written Investigation Report of its findings for consideration by the CLB Board of Directors.

As an administrative body of the government of Guam, the CLB "*has primary jurisdiction to make determinations of matters within its authority, and such decisions are entitled to deference unless contrary to law or unsupported by substantial evidence.*" *Govt. of Guam v. Gutierrez ex rel Torres*, 2015 Guam 8 ¶ 16, *citing* the AAL at 5 GCA §§ 9239-9240.

The ongoing Superior Court of Guam proceedings do not affect the ability and responsibility of the CLB to proceed with its administrative duties in enforcing all of Guam's laws under its jurisdiction. Protection of the public against unlicensed contractors remains paramount in the CLB's mandate and responsibilities.

In this matter, and absent the presentation of anything to the contrary, it appears that the CLB followed all applicable administrative due process requirements and that substantial evidence exists to support its conclusion that under Guam law, the scope of work described in GIAA RFP No. 005-FY21 requires that the selected offeror hold a Specialty Contractor license from the CLB in the C-13 Electrical Contractor sub-classification. Further, that it appears appropriate that the CLB begin enforcement proceedings to protect the public against this unlicensed contractor, and to assess fines as required by Guam law. *Supra*.

Respectfully,



Joseph A. Guthrie
Chief Deputy Attorney General