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In the Appeal of JMI-Edison; OPA-PA-23-002

Sosanbra Salas <ssalas@rwtguam.com>

Thu, Oct 26, 2023 at 1:55 PM

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Cc: "Edwin J. Torres" <etorres@rwtguam.com>, "Tabitha H. Madarang" <tmadarang@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached documents to be filed in the above-referenced matter.

1. *Brief on Emergency Procurement.*

Please feel free to contact our office if you have any questions. Thank you

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Regards,

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**PLDG - Brief on Emergency Procurement.pdf**

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

DOCKET NO. OPA-PA-23-002

**BRIEF ON EMERGENCY
PROCUREMENT**

Pursuant to the Office of Public Accountability’s (OPA) oral order at the hearing held on October 12, 2023, Appellant, Johndel International, Inc. dba JMI-Edison (“JMI”), hereby files its brief providing the OPA with relevant law evaluating what is an emergency for purposes of procurement.

BRIEF ON EMERGENCY PROCUREMENT

I. Definition of an “Emergency”

Guam law is clear that “Emergency means 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). An emergency arises out of an “unforeseen occurrence or condition” that is “not anticipated, which creates a situation which cannot be remedied by the exercise of reasonable care or which is fortuitous.” *CTS Contracting, Inc. v. Town of Cheektowaga*, 148 A.D.3d 1642, 1643 (Sup.Ct.App.Div.N.Y. 2017).¹ “An emergency is, by its very nature, a sudden, unexpected onset of a serious condition.” *Sloan v. Department of Transp.*, 666 S.E.2d 236, 243 (S.C. 2008) (citing *The American Heritage Dictionary* and *Black’s Law Dictionary*).²

An emergency is not present when the condition or situation claimed to be an emergency is the result of “lack of foresight and failure to take proper precaution to meet conditions which any prudent person would anticipate might occasion a

¹ In *CTS*, the court interpreted the following statute: “in the case of a public emergency arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants of a political subdivision or district therein [] require immediate action which cannot await competitive bidding or competitive offering, contracts for public work ... may be let by the appropriate officer, board or agency of a political subdivision or district therein.” *CTS Contracting*, 148 A.D.3d at 1643 (citing General Municipal Law § 103(4)).

² In *Sloan*, the court interpreted the following statute: “Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements **only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board**; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.” *Sloan*, 666 S.E.2d at 242.

South Carolina’s regulations define an emergency as “a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a purchasing agency or a designee of either office. The existence of such conditions must create an immediate and serious need for supplies, services, information technology, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten: (1) the functioning of State government; (2) the preservation or protection of property; or (3) the health or safety of any person.” *Id.*

condition which would jeopardize public health and safety, and to which the words of the statute would be applicable.” *Safford v. City of Lowell*, 151 N.E. 111, 113 (Mass. 1926)³; see also *Scatuorchio v. Jersey City Incinerator Authority*, 100 A.2d 869, 877 (N.J. 1953) (“The emergency contemplated by the Legislature is not one created by the conception of the need of the local body, and due in great measure to the perversity and antagonism of local conditions, or the want of foresight of the (local) body at the proper time in failing to respond to conditions as they were represented.”).⁴

The procurement authority may not simply “avoid advertising for bids for public work by merely delaying to take action to meet conditions which they can foresee” in an effort to create a “danger to public health and safety [that] has become so great that the slight further delay caused by advertising will entail public calamity.” *Safford*, 151 N.E. at 113.

Emergency is “not synonymous with expediency, convenience, or best interests, and it imports more ... than merely a general public need.” *Marshall v. Pasadena Unified School Dist.*, 119 Cal.App.4th 1241, 1258 (2004) (internal citations and

³ In *Safford*, the court interpreted the following statute: “[n]o contract for construction work or for the purchase of apparatus, supplies or materials, whether for repairs or original construction, the estimated cost of which amounts to two hundred dollars or more, except in cases of special emergency involving the health or safety of the people or their property, shall be awarded unless proposals for the same have been invited by advertisements. * * * No bid or contract shall be split or divided for the purpose of evading any provision of this chapter.” *Safford*, 151 N.E. at 113.

⁴ In *Scatuorchio*, the court interpreted the following statute: “[t]his section shall not prevent any municipality from having any work done by its own employees, nor shall it apply to repairs, or to the furnishing of materials, supplies or labor, or the hiring of teams or vehicles, when the safety or protection of public property or the public convenience require, or the exigency of the public service will not admit of such advertisement. In such case, however, the board shall, by resolution, passed by the affirmative vote of four-fifths of all the members of the board or body having charge thereof, declare the exigency or emergency to exist, and set forth in the resolution the nature thereof and the approximate amount to be so expended.” 100 A.2d at 875-76.

quotations omitted).⁵ “[A] condition which may or may not arise in the future or one that is about to arise or may be expected to arise” is also not an emergency. *Raynor v. Commissioners for Town of Louisburg*, 17 S.E.2d 495, 499 (N.C. 1941).⁶ Additionally, “the governing board of a municipality cannot declare an emergency where none exists and thus defeat the provisions of a law.” *Id.*

II. Application of the Emergency Definition to Specific Facts

In *Rodin v. Director of Purchasing of Town of Hempstead*, 238 N.Y.S.2d 2, 4 (1963) the town wanted to change from renting its trash collection trucks to purchasing trucks it could own. *Rodin v. Director of Purchasing of Town of Hempstead*, 238 N.Y.S.2d 2, 4 (1963). It made this decision on June 26, 1962, and the town authorized the acquisition of 64 vehicles. *Id.* Its then-current rental contract for the trucks it was using would expire on December 31, 1962. *Id.* After deciding to purchase its own vehicles, 36 trucks were put out for bid, and two (2) companies submitted bids: O’Neil Ford, Inc. and City Tank Corporation (“City Tank”). *Id.* O’Neil Ford, Inc. submitted the lower bid, and City Tank protested the procurement on

⁵ In *Marshall*, the court interpreted the following statute: “[i]n an emergency when any repairs, alterations, work, or improvement is necessary to permit the continuance of existing school classes, or to avoid danger to life or property, the board may, by unanimous vote, with the approval of the county superintendent of schools, do either of the following: [¶] (a) Make a contract in writing or otherwise on behalf of the district for the performance of labor and furnishing of materials or supplies for the purpose without advertising for or inviting bids. [¶] (b) Notwithstanding Section 20114, authorize the use of day labor or force account for the purpose.” 119 Cal.App.4th at 1254.

⁶ In *Raynor*, the court interpreted the following statute: “municipal contracts necessitating the expenditure of \$1,000 or more to be submitted to competitive bidding upon one week's advertisement, except in case of special emergency involving the health and safety of the people or their property.” *Raynor*, 17 S.E.2d at 497.

September 4, 1962. *Id.* The protest was dismissed on September 24, 1962, City Tank appealed that dismissal, and the appeal was argued on November 7, 1962. *Id.*

On December 18, 1962, while the protest was ongoing, the town used emergency procurement to purchase 20 trucks from another vendor. *Rodin*, 238 N.Y.S.2d at 6. The town adopted the following resolution to support its declaration of an emergency:

that on August 7, 1962, the Director of Purchasing accepted bids for refuse trucks; that City Tank Corp. commenced a proceeding on September 4, 1962, and that its petition was dismissed on September 24, 1962 and a petition for rehearing denied by order dated October 4, 1962; that on October 9, 1962 City Tank served and filed notice of appeal, that the appeal was argued November 7, 1962, that on the date of the resolution no decision had been rendered by the Appellate Division, that collection of garbage is necessary to preserve health and safety and the pendency of the proceeding renders it impossible to accept delivery of the ordered trucks and it does not appear that the right of the Town to accept delivery will be finally determined in time to have trucks available by January 1, 1963, and that by reason of the foregoing facts a public emergency exists arising out of an unforeseen occurrence requiring immediate action that cannot await competitive bidding.

Id. at 4.

City Tank sought an injunction against the town to prevent the emergency purchase of the 20 trucks. *Id.* The court found that an injunction should be granted because the town knew as early as September 4, 1962, that City Tank intended to challenge the award. *Id.* at 6. The town also knew that City Tank filed an appeal to the dismissal of its initial protest as early as October 9, 1962. *Id.* The court emphasized that “[i]ndeed, it was in contemplation of law also aware that even though the Appellate Division affirmed there might be a further appeal

as of right if any Justice of the Appellate Division dissented (Civil Practice Act, § 588).” *Id.* (emphasis added). All of these facts did “not justify the conclusion that the emergency created by its failure to act was unanticipated or fortuitous.”

In *Sloan*, the government used emergency procurement to secure a new contractor after it terminated another contractor for convenience regarding a construction contract to widen a road from two lanes to five lanes. 666 S.E.2d at 238. The government argued that emergency procurement was justified because there were large number of residences and commercial businesses have been adversely impacted by the construction, traffic control devices were in place throughout the project and at high volume intersections, and frustration amongst the public and businesses in the area. *Id.* at 239.

The court rejected found that these “safety concerns” cited by the government did not support a declaration of emergency because these hazards “existed throughout the course of the construction project and likely would have been present to some degree in any major construction project of this type.” *Id.* at 243. The court held that these “safety concerns” are not a sudden, unexpected happening. *Id.* The court also stated that the termination of the previous contractor for convenience “cannot reasonably be viewed as a sudden, unexpected occurrence.” *Id.* n. 9.⁷

In *Raynor*, the town used emergency procurement to purchase new diesel engines for use at the municipal power plant. 17 S.E.2d at 499. The town argued

⁷ *Marshall* presents a similar case where the court held that the government’s use of emergency procurement to replace the contractor it terminated for convenience was improper. *Marshall*, 119 Cal.App.4th at 1258.

that an emergency existed because the town was growing and that demands upon the power plant would increase, consumers may not get water or working sewage if one or more engines failed, and the national emergency that existed at the time related to public defense may make the procurement of machinery more difficult in the future. *Id.* The court found that an emergency exists when there is a “present, immediate, and existing, and not a condition which may or may not arise in the future or one that is about to arise or may be expected to arise” *Id.* Using this definition, the court held that the purchase of the diesel engines did not constitute an emergency. *Id.* In *Raynor*, the court also emphasized “that the advertisement required by the statute is simply for one week, and there seems to be no reason why a successful bidder might not have been required to proceed with dispatch in making the desired replacements.” *Id.*

In *Mallon v. Board of Water Com'rs*, 128 S.W. 764, 765-66 (Ct.App.Miss. 1910), the court evaluated whether the government could use emergency procurement to purchase water meters. *Mallon v. Board of Water Com'rs*, 128 S.W. 764, 765-66 (Ct.App.Miss. 1910). The court held that the government could not use emergency procurement powers to purchase water meters because the water meters “were known to be in constant demand, and were needed, with approximately correct knowledge in advance in what quantity.” *Id.* at 765. The court emphasized that an emergency signifies some sudden or unexpected necessity requiring immediate, or, at least, quick action, whereas the meter supplies were obtained without the presence of such a situation.” *Id.* In holding that emergency procurement could not be used,

the court stated that “To call the well-known future need of water meters an emergency would be trifling with the words of the charter; and from time to time continuously to make orders for meters by private purchase is clearly a violation of the plain terms of the law requiring public competition.” *Id.* at 765-66.

III. Use of Emergency Procurement to Circumvent an Automatic Stay of Procurement has no Basis in law, and Specifically Contradicts Guam and Analogous law.

Rather than use the limited competitive regime of emergency procurement to address the existence of the automatic procurement stay that was triggered by 5 GCA § 5425, the Guam International Airport Authority (“GIAA”) could have utilized more competitive procedures to secure services needed during the pendency of the original protest litigation. If GIAA believed that significant reasons justified pushing through with obtaining services from awardee Menzies, GIAA should not have conjured an emergency where none exists, but instead followed the provisions of 5 GCA § 5425(g) regarding the lifting of the automatic stay.

Guam law provides specific steps that must be undertaken in order to proceed with services under a protested contract:

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

5 GCA 5425(g).

Here, rather than obtain concurrence from the Guam Attorney General, the Public Auditor, and the Superior Court—concurrence that would have been predicated on Notice to JMI and a hearing on the matter—GIAA created a novel procedure to address an emergency of its own making and used the continued litigation of JMI's protest to justify a long continuing series of emergency awards to Menzies. There is no legal analogue to what GIAA did, since the procedure to address the need to press forward with services despite the automatic stay already exists and was circumvented by the agency.

The Guam Code's pathway to deal with exigent circumstances caused by a procurement stay follows the acquisition law of the United States federal government. Federal law allows the contracting officer to

authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)-- (i) upon a written finding that-- (I) performance of the contract is in the best interests of the United States; or (II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and (ii) after the Comptroller General is notified of that finding.

31 USC § 3553.

The decision to override the procurement stay is reviewable. In determining whether contracting agency's decision to override automatic stay of contract award triggered by bid protest lacked a rational basis and was contrary to law, factors reviewed include:

(1) whether significant adverse consequences would occur if the agency did not override the stay, (2) whether reasonable alternatives to the override were available, (3) how the benefits of overriding the stay compared to the potential cost of the override, including the costs associated with the potential that the protestor might prevail before GAO, and (4) the impact of the override on competition and the integrity of the procurement system.

Superior Helicopter LLC v. U.S., 78 Fed. Cl. 181 (2007).

Employing emergency procurement procedures as a way to evade established legal paths for lifting procurement stays implicates accountability and transparency. While emergencies may demand swift action, deliberately bypassing established procurement procedures undermines the integrity of the procurement process. Rather than utilizing emergency measures, GIAA should have initiated competitive procurement procedures for temporary services during the stay period, or pursued the process to lift the procurement stay that prevents the award of a protested contract. There is no support in the law for what GIAA did instead.

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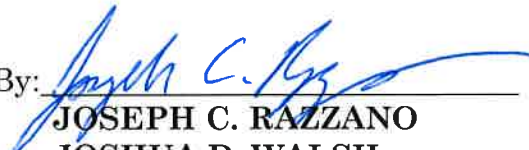
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IV. Conclusion

The cases and statutes cited herein make it clear that a human created emergency is not contemplated by procurement statutes nationwide. JMI is not alleging that the GIAA did not act in good faith. Nevertheless, good faith does not validate acts which are beyond its authority. The contracting officer here, John Quinata, should have taken steps to have competitive bids as he knew the protest could last a decade. Rather, GIAA awarded a non-competitive, forever bid purposefully excluding JMI because of the protest. The OPA should find no emergency exists and cancel the emergency procurement on a date certain.

Respectfully submitted this 26th day of October 2023.

RAZZANO WALSH & TORRES, P.C.

By: 

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