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

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Fri, Nov 17, 2023 at 4:05 PM

Dear Mr. Hernandez:

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

1. *Findings of Fact and Conclusions of Law. (19 pages).*

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

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Regards,
Sosanbra Santos Salas

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 **Proposed Findings of Fact and Conclusions of Law.pdf**
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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

DOCKET NO. OPA-PA-23-002

**[PROPOSED]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

INTRODUCTION

This matter came before the Office of Public Accountability (“OPA”), through the Public Auditor’s designated hearing officer, on an appeal filed by Johndel International, Inc. dba. JMI-Edison (“JMI” or “Appellant”) regarding the Guam International Airport Authority’s (“GIAA”) use of emergency procurement procedures to obtain services described in Request for Proposals (“RFP”) GIAA RFP 005-FY21 from Aircraft Service International, Inc, doing business as “Menziés Aviation,” (“Menziés”).

The OPA conducted an evidentiary hearing on October 12, 2023. In addition to counsel for the parties, institutional representatives were physically present at the hearing. Physically present at the hearing for JMI was its corporate representative,

Ed Ila. Airport Services Manager Jean Arriola was the representative for procuring agency GIAA. Menzies' Guam General Manager Rodney Paet was present for the interested party.

The OPA has considered the evidence, including the testimony of witnesses and exhibits admitted into evidence, the procurement record maintained and prepared by GIAA, and the submissions placed into the record by the parties. The OPA has further considered the written arguments and proposed Findings of Fact and Conclusions of Law submitted by counsel for the parties, and supplemental briefing submitted on October 26, 2023, regarding the use of emergency procurement powers, or lack thereof, in analogous situations.

The OPA hereby enters the following Findings of Fact and Conclusions of Law. To the extent that Findings of Fact, as stated, may be considered Conclusions of Law, they shall be deemed Conclusions of Law. Similarly, to the extent that matters expressed as Conclusions of Law may be considered Findings of Fact, they shall also be deemed Findings of Fact

FINDINGS OF FACT

1. GIAA issued the Request for Proposals ("RFP") GIAA RFP 005-FY21 on July 20, 2021. The RFP sought contractors to perform the work of Management & Infrastructure Support Services to GIAA's Baggage Conveyance Systems.

2. While GIAA did not explicitly demand licensure from the Guam Contractor's Licensing Board (CLB), it is incontrovertible that GIAA commanded that offerors must be properly licensed in Guam.

3. GIAA was seeking professional services that required an appropriate contractor's license.

4. GIAA describes in its procurement record the work it is procuring as "Infrastructure Support Services" that requires "technical expertise and guidance." Procurement Record ("PR"), 08.

5. GIAA is seeking contractors with "extensive knowledge to mechanical aspects (sic)" who should have electricians with "sufficient experience in power, controls, and PLC software."

6. The RFP also confirms the need to both operate and maintain the "power supply conduits." RFP, pg. 4; 6.

7. The services being sought include direct interaction with significant high voltage electrical systems.

8. As the baggage system includes significant electrical systems, it can only be worked on by "a licensed Electrical Contractor or licensed General Contractor with registered Electrical Engineer or licensed Master Electrician." 29 GAR §1315.

9. A single employee who is a "master electrician" does not meet the RFP requirements, as the law requires a conjunctive — "a licensed General Contractor with registered Electrical Engineer or licensed Master Electrician." 29 GAR §1315.

10. Beyond the RFP's demand for specialized electrical contractor knowledge, GIAA's RFP also recognizes the professional nature of the contractor it will hire, as the proposed contract demands that the contractor "shall procure and maintain

professional liability insurance for the term of this Agreement, plus two (2) years after completion.” Procurement Record, 285.

11. On August 18, 2021, two offerors, JMI and Aircraft Service International, Inc, doing business as “Menziess Aviation,” (“Menziess”) submitted proposals in response to the RFP. GIAA formally informed JMI on August 30, 2021, that it was not selected for an award under the RFP. An agency level protest followed, and the matter proceeded to the Office of Public Accountability. *See*, OPA-PA-21-010. An appeal to the Superior Court of Guam followed. *See, Johndel Int’l, Inc. dba JMI-Edison. Office of Pub. Accountability*, CV 0095-22, (Sup. Ct. Guam).

12. The parties here remain before the Superior Court of Guam on a procurement appeal. That appeal seeks judicial review of the dismissal, with prejudice, of the prior OPA procurement appeal. 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 Menziess to perform the same functions contemplated by the RFP.

13. 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”).

14. 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.”

15. The Attorney General instructed that the CLB should “begin enforcement proceedings to protect the public against this unlicensed contractor....”

16. The view of the CLB and the Attorney General of Guam is that Menzies cannot continue to perform the work contemplated by the RFP, or its subsequent emergency iterations, for the airport.

17. Both the CLB and the CLB’s legal counsel — the Attorney General— are unified in the conclusion that Menzies cannot legally perform the work described under the ERFPP without appropriate CLB licensing.

18. JMI initiated an Agency level protest based upon the findings of the Attorney General report, and the fact that GIAA’s use of emergency procurement power for more than 500 days directly contradicts the procurement code.

19. On March 27, 2023, the Agency denied the protest. This appeal to the OPA followed, and a hearing on the merits was held on October 12, 2023.

20. GIAA General Manager John Quinata confirmed that the ERFPP was issued by GIAA to address what it was anticipating would be a “long period of time” of litigation involving the appeal of JMI’s protest of the original RFP.

21. While the General Manager testified that a competitive procurement was contemplated to obtain interim services, he admitted that no memoranda or written record of such discussions exists or was kept in a procurement record. The procurement record contains no evidence of such discussions.

22. The General Manager testified that the ERFPP was an appropriate procurement vehicle in his mind since GIAA had done similar actions before. Mr. Quinata confirmed that there was no threat to health and safety of the public but that the “Emergency was JMI’s protest.”

23. GIAA procurement officer Jean Arriola testified that she understood that no RFP could be used to address an emergency situation. Similarly, Ms. Arriola confirmed Mr. Quinata’s testimony that the “Emergency was JMI’s Protest.”

24. Arriola testified that GIAA personnel did not read the CLB letter or the Attorney General Opinion regarding the illegal Menzies’ performance.

25. JMI President Ed Ilaio testified that he received no notice of the emergency procurement originally being issued and received no opportunity to compete for the ERFPP despite being previously determined to be qualified to perform the RFP by GIAA. This testimony was confirmed by Ms. Arriola who explained that JMI was not contacted because GIAA was in litigation with JMI. Therefore, even though JMI was qualified to submit a competitive bid, GIAA refused to consider JMI.

26. CLB personnel Nida Bailey and Marcus Finona confirmed that the CLB continues to stand by its determinations in its investigation and stands by the legal opinion of the Office of the Attorney General that Menzies could not legally perform the work under the RFP.

27. Menzies General Manager Rodney Paet testified about his meetings with the CLB regarding Menzies’s airport performance.

28. Menzies personnel confirmed that they undertook no investigation about whether a contractor's license was required in order to perform the work detailed in the RFP.

29. Menzies GM confirmed that his company's pricing to GIAA for the same services increased during the ERFPP period, despite the fact that, as the GIAA GM testified, passenger loads were lower due to the Covid-19 pandemic.

CONCLUSIONS OF LAW

30. A "Responsive bidder means a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids." 5 G.C.A. § 5201(g).

31. "Responsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government. To be considered for an award a bid must comply in all material respects with the invitation for bids. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. If there is material nonconformity in a bid, it must be rejected. Material nonconformity goes to the substance of the bid which affects the price, quality, quantity, or delivery of the article or service offered." *Bean Dredging Corp. v. United States* 22 Cl. Ct. 519, 522 (1991).

32. Adherence to the plain language of the RFP, and the follow on ERFPP that was issued, is essential for bidders and the integrity of the procurement system. *Baldrige v. Government Printing Office*, 513 Fed. Appx. 965, 967 (Fed. Cir. 2013) ("If the plain language of the IFB unambiguously called for delustered laminate film, that language controls."); *Professional Bldg. Concepts, Inc. v. City of Cent. Falls Housing*

Authority, 783 F.Supp. 1558, 1563 (U.S. Dist. R.I. 1992), *aff'd Professional Bldg. Concepts, Inc. v. City of Cent Falls*, 974 F.2d 1 (1st Cir. 1992). (“Unless ambiguous, it is the language of the IFB which controls the form that a bid guarantee must take.”)

33. Once the proposals of the offerors to both the RFP and the ERFPP were received, 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 that called for appropriate licensing to work on Guam as a contractor. *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.”).

34. Rather than determine if Menzies’s proposal was actually compliant with the specifications of the ERFPP on licensure, GIAA instead ignored the matter, and awaited Menzies to provide appropriate licensure only after a delay of more than a year, and then only after obtaining “emergency” services during that time period from Menzies. The law does not allow such a derogation of duty. *See, e.g., Tel-Instrument Electronics Corp. v. U.S.*, 56 Fed. Cl. 174 (2003), *aff'd*, 87 Fed. Appx. 752 (Fed. Cir. 2004). (Clarifications or corrections after the bids are opened do not convert a nonresponsive bid into a responsive one); *Aqua-Tech, Inc. v. U.S. Army Corps of Engineers*, 564 F. Supp. 773, 31 Cont. Cas. Fed. (CCH) P 71243 (D.D.C. 1983). (“to allow supplementation after opening would invite mischief and unduly delay award determinations.”)

35. 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).

36. GIAA's March 15, 2023, notice of the ERFPP that triggered JMI's protest indicates that GIAA is seeking to act contrary to Guam law and the plain terms of the original RFP by the appointment of Menzies, who has been determined by the CLB and the Office of the Attorney General to have been performing work impermissibly as an unlicensed contractor at the time of its selection by GIAA.

37. On Guam, Attorney General opinions are to be accorded substantial weight. *See, Guam v. Marfega Trading Co.*, 1998 Guam 4 *citing Mountain View Union High School Dist. v. City Council*, 168 Cal.App.2d 89, 335 P.2d 957, 960–61 n. 2 (Cal. Ct.App.1959) (holding that an attorney general's opinion as to statutory construction could be a factor considered by the court in applying a statute); *Prescott v. U.S.*, 731 F.2d 1388, 1393 (9th Cir.1984) (holding that attorney general opinions should be given great weight).

38. The nature of the work required by GIAA's ERFPP requires a contractor's license from the CLB.

39. Menzies's lack of appropriate contractor licensing renders it non-responsive to the RFP.

40. A "Responsive bidder means a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids." 5 G.C.A. § 5201(g). Responsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government. To be considered for an award a bid must

comply in all material respects with the invitation for bids.” *Bean Dredging Corp. v. United States* 22 Cl. Ct. 519, 522 (1991).

41. 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 also a non-responsible offeror. 5 GCA § 5201(f). To obtain such work was improper and should have been rejected by GIAA.

42. Menzies recent effort to obtain the license necessary to do the ERFPP work does not vitiate the grounds for this procurement protest.

43. The Procurement Record reveals that the C-13 license was issued on April 7, 2023, to Ignacio C. Urlanda as an RME for Menzies. Procurement Record, 810.

44. This license comes nearly a month *after* both the March 15, 2023, ERFPP contract extension and JMI’s agency level protest, and cannot be considered to have been part of a responsive bid. To the Contrary, Menzies’s reaction in obtaining a license is an acknowledgement that a license was always required. In fact, Mr. Paet’s testimony revealed that Menzies’s previously had a contractor’s license.

45. Mr. Urlanda cannot be understood to legally hold the role of responsible engineer for Menzies. While Mr. Urlanda may indeed be an excellent electrician, no evidence has been provided by Menzies that the individual is actually functioning as an RME for Menzies.

46. The law requires that an RME is the “individual responsible for the direct management of the contracting business of the licensee.” 29 GAR §1406(b).

47. There are various factual inquires laid out in the CLB regulations to determine if someone is in actual “direct management.” Those inquires include whether or not the RME is “principally employed by the licensee” or otherwise is in “common ownership of at least fifty-one percent (51%)” of the company.

48. Factual questions for review also include whether or not the RME is in fact “Familiar with all contracts the firm enters into and is responsible for all contract provisions. 29 GAR §1406(b). The RME is required to “sign or initial all contracts.” 29 GAR §1406(b) (3).

49. The procurement record shows that Mr. Uurlanda did not represent Menzies at the October 30, 2021, meeting that gave birth to the emergency procurement award to Menzies. Procurement Record, 91. His name and signature appear on no contract, and he does not appear in correspondence between GIAA and Menzies. Procurement Record 611 (correspondence from GIAA executive manager to Sanine Slivering and Rodney Paet of Menzies.)

50. GIAA’s procurement record log of communications lists 104 communications with various parties, including numerous contacts with Menzies personnel and its legal counsel. Menzies’s claimed RME appears in none.

51. Given the fact that Mr. Uurlanda is not even listed as the supervisor of the Menzies work in the Procurement Record, it does not appear that Mr. Uurlanda is functioning as an actual RME. *See*, procurement record, 513.

52. GIAA’s intention to commit to a 90-day additional emergency contract with Menzies does not comport with the law that allows emergency procurement.

53. While it may have been arguable to GIAA to access the emergency procurement procedures in October of 2021 at the inception of JMI's first protest, nearly *two years* have elapsed since then. There has been one emergency declaration issued with regard to this procurement, and that was issued on October 27, 2021.

54. More than 750 days have elapsed since that "emergency," straining the plain meaning of language beyond normal bounds.

55. It is fundamental that the emergency procurement processes cannot be used to correct management's failure to work through planned procurement. The 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)).

56. The government has not undertaken the steps necessary to trigger the emergency procurement regulations for this new period of performance more than 500 days after the original emergency performance period.

57. Even if an "emergency" were somehow still in existence after more than 750 days, the law requires that "emergency procurements shall be made with such competition as is practicable under the circumstances." 5 G.C.A. § 5215.

58. The law also requires that the procuring agency "describe with factual particularity, the nature and apparent cause of the condition posing an imminent threat ... 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.”¹

59. 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).

60. 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). “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*).

61. 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 It cannot be that, 750 days ago, GIAA could not have fathomed it would need baggage conveyor systems in 2023. An emergency must be “temporary in character.” *Jefferson Standard Life Ins. Co. v. Noble*, 188 So. 289, 293 (Miss. 1939). An emergency is “an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; a pressing necessity.” *See, e.g., Attala Cnty. v. Mississippi Tractor & Equip. Co.*, 162 Miss. 564, 139 So. 628, 628 (1932) *citing* Webster’s New International Dictionary. While various definitions of an emergency exist, no definition contemplates the GIAA’s tortured understanding of the word.

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); 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.”).

62. 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.

63. 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 quotations omitted). “[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). Additionally, “the governing board of a municipality cannot declare an emergency where none exists and thus defeat the provisions of a law.” *Id.* Under these cases GIAA’s belief that an emergency existed in October of 2021 is not reasonable.

64. 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”) — and other agencies that find themselves in similar situations— could have utilized more competitive procedures to secure services needed during the pendency of the original protest litigation.

65. GIAA also could have approached JMI for a competitive bid on the ERFP, but, without explanation, chose to ignore inviting JMI into the competition. One could argue that JMI was eliminated from the competitive bid process as a punishment for creating the “emergency.”

66. GIAA’s refusal to invite competition from JMI for the ERFP meant that GIAA was specifically avoiding obtaining the most competitive bids for the ERFP, disadvantaging the taxpayer that would pay for such services.

67. 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.

68. 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).

69. Guam law provides specific steps that must be undertaken in order to proceed with services under a protested contract. 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 illegal emergency awards to Menzies. This procedure to avoid due process can no longer stand.

70. 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.

71. 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.

72. 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).

73. 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.

74. 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.

75. A human created emergency is not contemplated by procurement statutes nationwide.

76. 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.

77. No emergency exists and GIAA's emergency procurement should be cancelled.

CONCLUSION

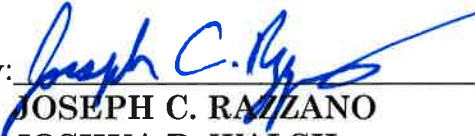
GIAA issued an RFP that was noticed for award to an offeror who did not have licenses from the Contractor's licensing board, despite bidding on contractor work in an RFP that required all appropriate licenses. When that award was protested, GIAA proceeded to make an award nonetheless under the theory that an emergency was afoot, and such a procurement was necessary. More than 600 days later, GIAA claimed the same emergency justifies a continued repeating award to Menzies, despite the ability to access non-emergency procurement protocols to secure the needed services. Based on the foregoing, the Office of Public Accountability Orders the following:

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

(3) That, after no more than 60 days from the date of this order, GIAA award the emergency procurement under GIAA RFP 005-FY21, to JMI as the only responsible and responsive bidder to the RFP.

Respectfully Submitted this 17th day of November 2023.

RAZZANO WALSH & TORRES, P.C.

By: 

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JMI-Edison