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In the Appeal of Johndel International, Inc. dba JMI-Edison; OPA-PA-21-010

Claire Pollard <cpollard@rwtguam.com>
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Mon, Nov 1, 2021 at 3:05 PM

Dear Mr. Hernandez:

Please see the attached *Comments on Agency Report* to be filed in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Claire Pollard

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**11.1.21 Comments on Agency Report.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-21-010

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 October 22, 2021. These comments are submitted to address the positions taken by GIAA in its Agency Report and Statement regarding GIAA RFP 005-FY21 for Management & Infrastructure Support Services to GIAA’s Baggage Conveyance Systems issued on July 20, 2021 (the “IFB”).

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II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.¹

GIAA issued the Request for Proposals (“RFP”) GIAA RFP 005-FY21 on July 20, 2021.² On August 18, 2021, two offerors, JMI and Aircraft Service International, Inc, doing business as “Menzie’s Aviation,” (“Menzie’s”) submitted proposals in response to the request. GIAA informed JMI on August 30, 2021, that it was not selected for an award under the RFP.³ GIAA did not inform JMI of the identity of the intended awardee. On August 31, 2021, JMI instructed its counsel to seek, in conformance with 5 G.C.A. §§10101, *et seq.*, the procurement record for the RFP as well as the proposals submitted by all offerors to the RFP.⁴ No timely response to the Sunshine Act request was provided by GIAA. Given the delay in the Sunshine Act response, JMI had moved ahead and made a formal inquiry to the Guam Contractor’s Licensing Board seeking information regarding Menzie’s licensing status and ability to perform the work detailed by the RFP — information that would be contained in the record of procurement.⁵ More than two weeks after the initial information request — on September 17, 2021 — GIAA provided counsel for JMI its response to JMI’s sunshine act request. The response did not include the

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

² The original Request for Proposals, and subsequent amendments, are attached to JMI’s Notice of Appeal as **Attachment A**.

³ The August 30, 2021, notice to JMI is attached to JMI’s Notice of Appeal as **Attachment B**.

⁴ The Sunshine Act request is attached to JMI’s Notice of Appeal as **Attachment C**.

⁵ JMI’s correspondence to the Contractor’s Licensing Board regarding Menzie’s license status is attached to JMI’s Notice of Appeal as **Attachment D**.

proposal, or parts of the proposal, submitted by Menzies.⁶ On September 17, 2021, personnel from the CLB informed JMI that neither Menzies, nor its parent, entity were licensed by the CLB.⁷ As a result of learning that Menzies was not licensed to do the job that GIAA had intended to award to Menzies under the RFP, JMI protested the issue on September 21, 2021.⁸ On September 30, 2021, the Agency denied the protest.⁹ This appeal to the OPA followed.

B. 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

⁶ GIAA’s September 17, 2021, sunshine act response cover letter is attached to JMI’s Notice of Appeal as **Attachment E**.

⁷ CLB correspondence informing JMI that Neither Menzies nor its parent entity held valid CLB licenses is attached to JMI’s Notice of appeal as **Attachment F**.

⁸ JMI’s protest letter is attached to JMI’s Notice of Appeal as **Attachment G**.

⁹ The GIAA Protest Denial of September 30, 2021, is attached to JMI’s Notice of Appeal as **Attachment H**.

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 "Menzies 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 Menzies, 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.

C. 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.

D. 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.¹⁰

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 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.

Submitted this 1st day of November, 2021.

RAZZANO WALSH & TORRES, P.C.

By: _____


JOSHUA D. WALSH

EDWIN J. TORRES

Attorneys for Appellant

¹⁰ 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.