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

Claire Pollard <cpollard@rwtguam.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

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

Dear Mr. Hernandez:

Please see the attached *Oppositions* below 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,
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2 attachments **12.3.21 JMI Opposition to GIAA's Motion to Dismiss.pdf**
544K **12.3.21 JMI Omnibus Opposition to Menzies Motions.pdf**
1140K

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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

**OPPOSITION TO GUAM
INTERNATIONAL AIRPORT
AUTHORITY'S MOTION TO DISMISS**

I. INTRODUCTION

On October 8, 2021, Johndel International, Inc. dba. JMI-Edison (“JMI” or “Appellant”) appealed the decision of the Guam International Airport Authority (“GIAA”) denying JMI’s agency level protest of GIAA RFP 005-FY21 issued on September 30, 2021 (the “RFP”). The RFP was seeking contractors to provide management and infrastructure support services to GIAA’s Baggage Conveyance Systems. JMI had protested the intended award to Aircraft Service International, Inc, doing business as “Menziess Aviation,” (“Menziess”), since that entity was selected to perform work falling under Guam’s Contractor licensing laws despite not having any licensing from the Guam Contractors Licensing Board (“CLB”).

On November 24, 2021, GIAA filed a motion seeking to dismiss the appeal because of an alleged lack of jurisdiction of the Office of Public Accountability (“OPA”) to review the merits of JMI’s claim, a renewed allegation that JMI was untimely in making its protest, and GIAA’s view regarding the propriety of the procurement record kept in this case. This opposition is submitted to address the failings of GIAA’s motion.

II. OPPOSITION TO MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A. THIS IS A PROCUREMENT APPEAL, AND THE OPA HAS SUBJECT MATTER JURISDICTIONS OVER SUCH APPEALS.

GIAA contends that this matter must be dismissed since this “[t]he Public Auditor is not explicitly or implicitly granted any authority to adjudicate whether a business is operating without a license issued by the Guam Contractors License Board.” Motion 1, 2. Instead, GIAA claims that the question of whether or not Menzies is a responsive offeror is best left to the Contractors License Board, since “The GCLB is empowered to ‘investigate, classify and qualify applicants for contractor’s licenses, and investigate for compliance with the rules and regulations of the Board and the provisions’ of the [contractor’s Licensing -related Chapter of the Guam Code.]” Motion 1, 2, *citing* 21 G.C.A. §70109 (emphasis omitted). Even though this matter is before the OPA on an appeal from an agency protest denial, GIAA argues that the matter must be dismissed “for lack of subject matter jurisdiction.” Motion, 5. This position ignores the fundamental jurisdictional ambit of the OPA to review appeals over agency protest decisions, 5 G.C.A. § 5425(e), and ignores the key tenets of procurement law that require only responsible and

responsive offerors to receive awards from the Government. *See, e.g.*, 2 GAR § 3109(n)(1); *See also*, 2 GAR § 3116 (b)(4). (mandating that "Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.")

To be certain, JMI is appealing an agency decision on a procurement protest. GIAA called JMI's protest untimely, and also denied JMI's protest on the grounds that a contractor's license was not required for completing the GIAA job. As the RFP did not specify that a contractor's license was required, Menzies' proposal, in GIAA's view, "satisfied the requirements of the RFP." *See*, Denial of Procurement Protest, September 30, 2021, attached to the JMI Notice of Appeal as Exhibit H. GIAA ignored the fundamental requirement under procurement law that only responsible and responsive offerors receive awards under procurement law, and in now urging dismissal based upon a "lack of subject matter jurisdiction," ignores the very clear statutory role the OPA has in the appellate review of the responsibility and responsiveness of offerors.

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 G.C.A. § 5201(F). Since it cannot show a license that the scope of work of the RFP requires, Menzies is also non-responsive. Despite these procurement related challenges tied to a bidder's responsiveness and responsibility, GIAA claims that the Office of Public Accountability ("OPA") is without jurisdiction to proceed over this matter. GIAA is

simply wrong about the lack of jurisdiction, and wrong in claiming some “exclusive” role for the CLB that would cut off the OPA’s jurisdiction to perform such review.

B. GUAM’S CLB STATUTES DO NOT PREVENT THE OPA FROM *DE NOVO* REVIEW OF WHETHER OR NOT GIAA’S BID PROCESS AND AWARD SELECTION OF MENZIES COMPLIED WITH LAW AND THE TERMS OF ITS OWN PROCUREMENT.

Guam’s Contractor licensing laws make it clear that Menzies — the offeror slated for award in this procurement — would be a “contractor” under the law that requires a contractors license if Menzies "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).

More, Menzies, like any contractor seeking to handle or otherwise repair electrical systems¹, has been mandated since 1973 to be either “a licensed Electrical Contractor or licensed General Contractor with registered Electrical Engineer or

¹ Page 4 of the RFP contains the preliminary scope of services being procured, and mandates that the successful contractor will need “extensive knowledge to mechanical aspects” and should have electricians with “sufficient experience in power, controls, and PLC software.” Page 7 of the RFP confirms the need of the contractor to both operate and maintain electrical equipment including high voltage motor control panels, electric motors, and sensors.

licensed Master Electrician.” 29 GAR §1315. The procurement record kept by GIAA shows that Menzies is neither.²

GIAA argues that since contractor licensing is provided by the CLB, any review of the Menzies’s non-responsiveness or non-responsibility tied to its lack of an appropriate contractors license can only be done under the auspices of the CLB itself. GIAA urges, without authority, for the OPA to read an exclusive jurisdictional limit into a statute where none exists. GIAA is wrong. While Guam’s CLB statutes do provide for a complaint mechanism to address violations, the CLB is not some exclusive bar preventing review by the OPA of an agency’s intended award to a contractor. The CLB’s investigation statute reveals no exclusive or mandatory forum requirement, and explains that “The Contractors License Board **may** investigate, classify and qualify applicants for contractor’s licenses, and investigate for compliance with the rules and regulations of the Board and the provisions of this Chapter.” 21 G.C.A. § 70109. (emphasis added). Here, the Guam legislature has declined to do what GIAA urges, *i.e.*, create a statutory requirement that only the CLB can touch on issues related to a contractor’s licensing, even if those issues directly implicate procurement law. This is not the law. *See, e.g. Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012) (explaining, in the context of

² The Menzies proposal has been withheld from JMI review by GIAA. Menzies has submitted a Motion for Summary Judgment in these proceedings where Menzies avers that “if licenses were required” Menzies can perform the work since it has a single employee who is “master electrician.” Motion 2, 1. This is not enough, as the law requires a conjunctive — “a licensed General Contractor **with** registered Electrical Engineer or licensed Master Electrician.” 29 GAR §1315. (emphasis added).

federal and state court subject matter jurisdiction, the presumption of concurrent jurisdiction unless a specific statute clearly divests jurisdiction from one body in favor of another).

Rather than prevent the OPA from reviewing the question of Menzies's responsiveness *vis a vis* its lack of a contractor's license, a review of Guam law demonstrates the OPA's broad jurisdictional scope. The Supreme Court of Guam has illuminated that broad jurisdiction of the Public Auditor's office, and clarified that the Guam's legislature has given the "OPA the power to determine whether a bid award is in accordance with the terms and conditions of a bid solicitation." *Data Mgmt. Res., LLC v. Off. of Pub. Accountability*, 2013 Guam 27 (Guam Nov. 22, 2013). More, this is in keeping with the broad sweep of authority given to the public auditor. The public auditor is tasked with sitting in appeal over agency protest decisions. 5 G.C.A. § 5425(e). Part of the duties of the public auditor include the mandate to "determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation." 5 G.C.A. § 12112; 2 G.A.R. Div. 4 § 12112. Since JMI has here protested the ability of Menzies to be responsive to a bid that specifies that all Guam licensing laws must be followed, and the scope of work implicates a contractor license, the OPA's review of such an issue is necessary.

Here, JMI protested both the responsiveness and the responsibility of Menzies in offering to do work that, if done without a contractor's license, would be

in violation of law. This is key, because the bid specifications from GIAA made clear that GIAA “will not consider for award any proposal submitted by an Offeror who has not complied with the Guam Licensing Law.” RFP General Terms and Condition, §11. GIAA ignored reviewing that matter, or Menzies’s compliance with law, and denied the protest. The full appellate review of that protest, and the grounds for denial, are properly within the ambit of the OPA. Determining if GIAA’s selection of Menzies, despite Menzies’s failure to meet the requirement of the solicitation to comply with all laws — laws that include proper CLB licensing — is properly before the OPA.

The OPA’s other powers also militate toward allowing the review that JMI seeks here. The Public Auditor has the power to promote the integrity of the procurement process and the purposes of Guam’s procurement laws. *See* 5 G.C.A. § 5703 (“The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 G.C.A. Chapter 5.”). The Public Auditor has the power to review and determine “any matter properly submitted” to him, 5 G.C.A. § 5703, and reviews *de novo* denials of protests in connection with the solicitation or award or award of a contract. *See* 5 G.C.A. § 5425(e). Further, in the regime of procurement, the OPA holds powers akin to a court, since Guam law allows procurement matters brought before a court to be, without limitation, remanded to the OPA. *See* 2 G.A.R. § 12103(b). Simply put, the OPA has been presented with a procurement appeal of an agency denial of a bid protest. Such an appellate review is the proper province of the OPA, even if the merits of that review

— Menzies’s need for licensing — touch upon the non-exclusive investigative powers of another government agency. The “subject matter jurisdiction” limits articulated by GIAA simply do not exist.

C. THE OPA HAS PREVIOUSLY ENGAGED WITH THE ISSUE OF APPROPRIATE CLB LICENSING, AND RECENTLY DENIED A MOTION TO DISMISS BASED UPON THE SAME GROUNDS GIAA RAISES HERE.

The failure to comply with the licensing law was ignored by GIAA, as was any review by GIAA of how that failure to comply with law rendered Menzies a non-responsible offeror. GIAA, in urging the dismissal based upon a lack of subject matter jurisdiction, relies upon OPA precedent declining to weigh in on the tariff structure of services overseen by the Guam Public Utilities Commissions or wage rate determinations that could be investigated by the Department of Labor. Motion, 4. GIAA makes these claims, but ignores direct OPA precedent where the OPA has reviewed the matter of appropriate CLB licensing in the context of a procurement. In *In the Appeal of Pacific Data Systems Inc.* (2015), the OPA moved forward with an analysis of whether the awardee “had a contractor's license material to the procurement” based upon evidence presented at the merits hearing on the matter. *In the Appeal of Pacific Data Systems Inc.*, OPA -PA 15-012, Decision, (January 13, 2016), pg. 7. The OPA did not, as GIAA urges here, punt the matter over to the CLB.

Recently, the OPA was presented with a motion to dismiss filed by the Guam Department of Education in *In G4S Security Systems (Guam), Inc. vs. Department of Education*, OPA-PA-21-007. DOE, like GIAA here, sought dismissal based upon

the belief that CLB licensing matters were exclusively within the purview of the CLB, and the OPA had no jurisdiction to proceed over the matter. The OPA disagreed, and denied the Motion to Dismiss so as to proceed to the merits of the appeal. Hearing recording, *G4S Security Systems (Guam), Inc. vs. Department of Education*, Case Number: OPA-PA-21-007 https://www.opaguam.org/sites/default/files/opa-pa-21-007_motion_hearing_-_november_17_2021.m4a. The same result must occur here, and the matter should proceed to a review of the merits of JMI's protest.

D. JMI'S PROTEST WAS TIMELY.

GIAA also seeks dismissal of JMI's appeal since, in the view of GIAA, JMI needed to advance its procurement protest earlier than it did. GIAA, in making this argument, ignores the fact that JMI brought its protest within 14 days of learning of the facts that gave rise to aggrievement, *i.e.*, within 14 days of learning from the CLB that Menzies did not have any licensing from the CLB. *See*, CLB Correspondence to JMI, attached as Attachment F to JMI's Notice of Appeal.³ Because JMI could not review the Menzies' proposal despite requesting it from GIAA upon learning of Menzies's selection on August 26, 2021, 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

³ JMI made efforts to determine the licensing status of Menzies earlier by seeking records from GIAA directly the day after the Notice of Award, but GIAA withheld disclosure of those documents. To this date, GIAA refuses to provide JMI with any procurement record that would illuminate what licensing, if any, Menzies has that would allow it to perform the work contemplated by the RFP. *See*, GIAA Agency Statement, 7; Motion 6-7.

Contractor's Licensing Board that Menzies was not licensed. *See*, CLB Correspondence to JMI, attached as Attachment F to JMI's Notice of Appeal. JMI raised its protest to GIAA on September 21, 2021 — four days after learning of the key grounds for the protest. Procurement Protest, Attached as Attachment G to JMI's Notice of Appeal. 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). Protest Decision, Attached as Attachment H to JMI's Notice of Appeal; Notice of Appeal, October 8, 2021. Therefore, both JMI's agency level protest and subsequent appeal to the OPA meet the timeliness standards required by applicable law and regulation. This appeal must proceed to its merits.

E. GIAA'S DENIALS ABOUT THE CREATION OF A STILL OPAQUE PROCUREMENT RECORD ARE DUE NO DEFERENCE.

Rather than seek an adjudication on the merits of JMI's allegations *vis a vis* the procurement record, GIAA instead simply seeks dismissal of JMI's appeal based upon the fact that GIAA "denies any and all of JMI's allegations...." Motion, 6. GIAA's Motion provides no standard or law that would allow for such a summary dismissal. This is because no such standard exists. To the contrary, when presented with a Motion to Dismiss, "the court must take as true all factual allegations underlying or contained in the claims under attack." *Sablan v. A.B. Won Pat Int'l Airport Auth.*, Guam, No. CIV. 10-00013, 2010 WL 5148202, at *1 (D. Guam Dec. 9, 2010).

The fact remains that GIAA waited over a week — longer than the four days allowed by the Guam Sunshine Reform Act — to respond to JMI's initial Sunshine

Act request seeking to obtain the procurement record and information regarding Menzies's licensure status. *See*, Attachment I to JMI's Notice of Appeal. The reason GIAA gave for the need of the extension was the fact that GIAA had "to examine over 500 pages of documents in anticipation of responding to your request." GIAA also declared "COVID-19" to be another reason for delay.

While an extension of time to gather varied documents is allowed by law, Guam law mandates that "each procurement officer **shall maintain a complete record** of each procurement." 5 GCA § 5249 (emphasis added); *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 22. Put another way, GIAA was required by Guam's procurement laws to **maintain a procurement record** during the RFP process, and not create one from 500 loose pages in response to a Freedom of Information/Sunshine Act request sent pursuant to 5 G.C.A. §§10101, *et seq.* The procurement record is a single record that must be kept current and contemporaneously with the ongoing procurement. GIAA's inability to promptly provide that record to JMI for at least two weeks, and refusal to acknowledge that the record existed at the time of the JMI Sunshine Act request, demonstrates that the record was not kept as mandated by law, and instead created after the fact. GIAA's Motion illuminates its shifting reasons for the delay in the production of the record. GIAA's motion retroactively seeks to provide further justifications for the


delay in making the record, including GIAA's averment that the record request was sent "in the midst of ongoing negotiations." Motion, 6.⁴

III. CONCLUSION

GIAA urges the OPA to dismiss JMI's appeal based upon its belief that reviewing whether or not Menzies can legally perform is somehow beyond the reach of the OPA, and that even if reviewable, a JMI's case should be dismissed based upon the factual denials of GIAA. The OPA should reject GIAA's invitation, and move this matter forward to an analysis of the merits of the JMI's protest.

Submitted this 3rd day of December, 2021.

RAZZANO WALSH & TORRES, P.C.

By: 

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Counsel for Appellant JMI-Edison

⁴ Being in the "midst of negotiations" is not a statutory reason for delay in record production allowed by Guam's Sunshine Reform Act. The two articulated exemptions allowing for an untimely response are : "(1) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; or (2) the need to search for, collect and appropriately examine more than ten (10) separate and distinct records which are demanded in a single request, or records that in total, are contained in five hundred (500) or more pages, or contain about two hundred fifty thousand (250,000) words, whichever is more." Neither would apply to the production of a single procurement record.