



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-21-010 Motion to Dismiss

William B Brennan <wbrennan@arriolafirm.com>

Wed, Nov 24, 2021 at 4:01 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>, Tracy Cantimbuhan <tcantimbuhan@arriolafirm.com>

Hafa Adai,

Please see the attached document for efilng in the subject matter.

Best,

 **OPA-21-010 JMI v. GIAA OPA Appeal Motion to Dismiss.pdf**
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ANITA P. ARRIOLA, ESQ.
WILLIAM B. BRENNAN, ESQ.
ARRIOLA LAW FIRM
259 MARTYR STREET, SUITE 201
HAGÁTÑA, GUAM 96910
TEL: (671) 477-9730/33
FAX: (671) 477-9734
attorneys@arriolafirm.com
Counsel for Agency
Guam International Airport Authority

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

In the Appeal of

APPEAL CASE NO.: OPA-21-010

Johndel International, Inc. dba. JMI,

MOTION TO DISMISS

Appellant.

COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”) through the undersigned counsel, who hereby respectfully moves the Public Auditor to dismiss this matter for lack of subject matter jurisdiction.

INTROUCTION

GIAA issued a Request for Proposals, seeking to procure Management and Support Services to GIAA’s Baggage Conveyance Systems. Two firms responded to the RFP, Johndel International, Inc. dba JMI (“JMI”) and Aircraft Services International Group, Inc. dba Menzies Aviation (“Menzies”). JMI alleges Menzies (the highest ranked offeror) should have been disqualified because JMI further alleges Menzies does not have a contractor’s license. The RFP did not specifically require a “contractor’s license.” As shown herein, the OPA does not have jurisdiction to determine whether a contractor’s license is required to perform the scope of work under the RFP, the Guam Contractor’s

License Board does. Additionally, JMI’s argument on this basis was untimely because it was not raised within 14 days from when JMI should have known of this basis for protest. Finally, JMI makes general allegations about the maintenance of the procurement record but fails to allege any materiality to the ranking of offerors or to the procurement itself. Therefore, this appeal should be dismissed for lack of subject matter jurisdiction.

FACTUAL BACKGROUND

On July 20, 2021, GIAA issued Request for Proposal number RFP 05-FY21 seeking offers/proposals from offerors for Management and Support Services to GIAA’s Baggage Conveyance Systems. Procurement Record (“PR”) at 195. GIAA received two proposals. See PR at 638-640. On August 26, 2021, GIAA publicly announced the ranking of the two offerors. See PR at 661-665; see also Agency Statement n. 1 (Oct. 25, 2021). A JMI representative was virtually present at the Board Meeting. See Agency Statement Ex. 1 (Oct. 25, 2021). Aircraft Service International Group, Inc. dba Menzies Aviation (“Menzies”) was the highest ranked offer. PR at 666-667.

On September 21, 2021, JMI filed a protest related to RFP 05-FY21 raising two issues as the bases for protest: (1) that Menzies lacked a specialty license from the Guam Contractor’s License Board and (2) that the procurement record for RFP 05-FY21 was improperly maintained based on GIAA’s response to a request by JMI under the Sunshine Reform Act of 1999. See Notice of Appeal Ex G (Oct. 8, 2021). GIAA denied JMI’s protest in its entirety on September 30, 2021. Notice of Appeal Ex H, at 1-3 (Oct. 8, 2021). JMI appealed the denial of its protest to the Office of Public Accountability (“OPA”) on October 8, 2021. Notice of Appeal 1-9 (Oct. 8, 2021).

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ARGUMENT

I. The OPA Does Not Have Jurisdiction Over JMI’s License-Related Claim.

JMI argues in this Appeal that Menzies’ alleged lack of an “appropriate contractor’s license” renders it a non-responsive and non-responsible Offeror. Notice of Appeal 6 (Oct. 8, 2021). JMI cites to portions of the RFP that require that the selected offeror be duly authorized and licensed to conduct business in Guam. Id. at 6-7.

The OPA does not have subject matter jurisdiction over JMI’s complaint related to a lack of license it alleges is required. Additionally, JMI did not raise this argument as a ground for protest in the time allowed by Guam law.

a. *The OPA does not have Jurisdiction Over Complaints re Contractor’s Licensing Requirements*

Menzies’ Comments to the Agency Report reveal that they are currently in communication with the Guam Contractor’s License Board (“GCLB”) related to JMI’s allegations.

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].*” See 21 G.C.A. § 70109 *et seq* (*emphasis added*).

As of the date of this writing, GIAA is not aware that Menzies has not been found to have violated any law by the GCLB based on JMI’s appeal. Therefore, this matter is not properly before the OPA. Finding otherwise would require the OPA to determine the applicability and enforceability of Guam contractor-licensing-related laws, and whether a violation has occurred. The OPA does not have that jurisdiction, nor does the OPA have the resources or expertise to conduct this inquiry and potentially make this finding. Perhaps more importantly, allowing the OPA to proceed on the merits of this basis

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for appeal creates the potential for conflicting decisions as to contractor's license requirements by the OPA and the GCLB.

The OPA recently found in a separate appeal matter, that an appellant cannot manufacture jurisdiction in a procurement appeal where another administrative body is empowered to determine compliance with the law the appellant alleges a violation of. See OPA-PA-21-004, In Re Appeal of Pacific Data Systems, Inc., (PDS), Order (Oct. 5, 2021) (dismissing appeal without prejudice for lack of subject matter jurisdiction where PDS alleged violation of Guam Telecommunications (Telecom) Act, and instructing PDS to seek relief from the Guam Public Utilities Commission as the proper forum before the OPA can act on the violations of the Guam Telecom Act as a basis of a procurement appeal). This is consistent with OPA precedent. See OPA-PA-10-008, In re Appeal of JRN Air Conditioning & Refrigeration, Inc., Decision 8-10 (Feb. 17, 2011) (finding OPA lacks subject matter jurisdiction to determine whether bidder's bid violated Guam Law related to wage and labor determinations submitted in response to an IFB because the enforcement of the various laws governing the wage and hour issues were not properly done "through the procurement protest and appeal process but an entirely separate administrative adjudicative process . . . entrusted to the Department of Labor.").

JMI should seek relief from the GCLB which has the jurisdiction and expertise to address alleged violations of Guam contractor-licensing-related laws. Until the GCLB takes action, speculative allegations by JMI only serve to delay this matter in an effort to manufacture a basis for protest and appeal. The OPA should find it lacks jurisdiction to consider JMI's appeal related to the argument that Menzies lacks a certain license that JMI believes is required under the RFP. As of now, that is all the OPA has before it, **JMI's belief**. Such belief is insufficient to further delay this procurement or for the

OPA to find a violation. This basis for appeal must be dismissed, in accordance with OPA precedent, for lack of subject matter jurisdiction.

b. JMI's Contractor's License Argument was Untimely made to GIAA.

The individual who executed the JMI proposal in response to the RFP, and the individual who executed the JMI letter of protest dated September 21, 2021 was virtually present at the GIAA Board Meeting on August 26, 2021, where Menzies was announced as the highest ranked, qualified offeror who submitted a proposal in response to the RFP. See Notice of Appeal Ex G; see also, Ex. 1. Additionally, GIAA delivered to JMI a notice that it was not the highest ranked offeror on August 30, 2021. Despite this, JMI waited until September 13, 2021 to investigate the highest ranked offeror's compliance with what JMI viewed as a license requirement of the RFP. See Notice of Appeal Ex G. JMI then waited even longer, until September 21, 2021 to protest the ranking announced on August 26, 2021.

Under Guam law, an aggrieved individual must submit a protest within fourteen (14) days after the individual knows or should know the facts giving rise thereto. 5 G.C.A. § 5425. JMI received notice that Menzies was the highest ranked offeror on August 26, 2021. Therefore, JMI had until September 10, 2021 to raise the issue of the highest ranked offeror's lack of a license JMI believes is required to perform the services sought by the RFP. JMI did not file its protest until September 21, 2021. Thus, JMI's protest on this basis was untimely as GIAA found at the agency-level. For that reason and alternative to the requested relief in Subsection a above, the appeal on this lack of license allegation basis should be summarily dismissed because the protest at the agency level was untimely.

II. JMI's Procurement Record-Related Allegation is Baseless, and it is also Immaterial to Menzies being deemed the Highest Ranked Responsible Offeror.

JMI next alleges that in its view the procurement record related to GIAA RFP 005-FY21 was "not kept as mandated by law, and instead created after the fact." Notice of Appeal at 7-8 (Oct. 8,

2021). However, again JMI admits it has not had the opportunity to review certain documents related to this procurement. This is critical since JMI also fails to offer that any part of its allegation related to the procurement record was material to the procurement or to the ranking of offerors. Materiality is a requirement for seeking relief under the procurement law protest and appeal procedure for record related defect allegations. See e.g., Teleguam Holdings LLC v. Guam, 2018 Guam 5, ¶¶ 39-40.

GIAA denies any and all of JMI’s allegations related to the alleged improper keeping of the procurement record in this matter. On September 17, 2021, GIAA responded to a request by JMI’s attorneys Joshua Walsh and Joseph Razzano for documents under the Sunshine Reform Act of 1999 (the “FOIA Request”). GIAA provided digital copies of 252 pages of documents that may have fell within the items specifically enumerated in 5 G.C.A. Section 5249 and which may have been responsive to the FOIA request. GIAA requested an extension to respond to the FOIA request as JMI sent a FOIA in the midst of ongoing negotiations. This procurement is still pre-award, and thus the treatment of documents related to the procurement is specifically governed by Guam procurement law and regulations. 5 G.C.A. § 5249 *et seq.* Additionally, because no award had been made related to the procurement, GIAA also invoked the deliberative process privilege over certain documents. GIAA’s response also considered the competitive playing field contemplated by the Guam procurement law and regulations in this pre award, negotiation phase.

Specifically, JMI’s attorneys requested copies of “the proposals submitted by all bidders to the RFP, and the evaluation sheets from all GIAA Evaluators, and questions and answers submitted for the RFP.” In response, GIAA relied on Guam Procurement regulations which specify that “[p]roposals shall not be opened publicly nor disclosed to unauthorized persons . . .” 2 GARR § 3114(h) (further mandating that “[a] Register of Proposals shall be established [which] shall be opened to public inspection only after award of the contract. *Proposals of offerors who are not awarded the contract*

shall not be opened to public inspection” (emphasis added)). These regulatory provisions governing the handling of proposals are supported by statutory provisions in the Guam Procurement law. See 5 G.C.A. § 5216(d) (stating while the head of a purchasing agency may have discussions with any offeror who submitted a proposal, such “[d]iscussions shall not disclose any information derived from proposals submitted by other offerors”) 5 G.C.A. § 5216(d); see also, 5 G.C.A. § 5230(b) (mandating that certain information related to responsibility determinations “shall not be disclosed” outside of the purchasing agency without the offeror’s consent);

GIAA also made clear that the disclosure was made as of September 16, 2021 and was subject to change because the procurement process was ongoing. Thus, contrary to JMI’s baseless assertion that procurement records were created in response to its FOIA, the record of this procurement was kept in accordance with law, and what was provided in response to the FOIA request was clearly described as a point in time disclosure of disclosable documents in response to the FOIA request.

JMI’s appeal based on meritless allegations related to the procurement record should be denied in its entirety. JMI failed to allege materiality of their alleged record-related violations to the procurement or ranking of offerors. This is likely because JMI concedes that it has not reviewed the procurement record in its entirety. Simply put, JMI says because they have not been able to review the entire procurement record in this matter, something must be wrong. This demonstrates that the allegations are not meritorious. The allegations are not material to the procurement or the ranking, they are just generalized and speculative grievances. These allegations are no basis to disturb the procurement or the ranking of offerors by GIAA.

As evidenced by the procurement record submitted on October 15, 2021, GIAA has complied with Guam law and a record of this procurement is intact and was properly maintained. However, the procurement is ongoing, and certain documents related to this procurement are not public at this time

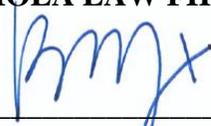
pursuant to the Guam Procurement law and implementing regulations. JMI is aware of the authorities GIAA relies on since they were cited specifically in response to JMI's protest. However, JMI offers only a conclusory notice of appeal and fails to offer a legal argument that GIAA was wrong to comply with applicable law and regulations. Thus, JMI's appeal is meritless related to the procurement record allegations and must be dismissed.

CONCLUSION

Based on the foregoing, GIAA respectfully requests that JMI's appeal be dismissed for lack of subject matter jurisdiction.

Dated: November 24, 2021, at Hagatna, Guam.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 

WILLIAM B. BRENNAN

ARRIOLA LAW FIRM HAGATNA, GUAM 96910