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

Claire Pollard <cpollard@rwtguam.com>

Fri, Dec 3, 2021 at 4:21 PM

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,
Claire Pollard

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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

OMNIBUS OPPOSITION TO:

- 1) INTERESTED PARTY AIRCRAFT SERVICE, INC. DBA MENZIES AVIATION'S MOTION TO DISMISS**
- 2) INTERESTED PARTY AIRCRAFT SERVICE, INC. DBA MENZIES AVIATION'S MOTION TO DISMISS MOTION FOR SUMMARY JUDGMENT**

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 "Menzies Aviation," ("Menzies"), 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, Menzies filed separate motions seeking to both (1) 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 (“Motion 1”), and (2) seeking Summary Judgment the merits of whether or not an award to Menzies was appropriate under Guam’s procurement law (“Motion 2”). This omnibus opposition is submitted to address the failings of Menzies’ arguments in its motions.

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

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

Menzies 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, Menzies claims that the question of whether or not Menzies is a responsive offeror is best left to the Contractors License Board, since “The CLB alone is authorized by statute 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 Guam Contractors law.” Motion 1, 2, *citing* 21 G.C.A. §70109. Even though this matter is before the OPA on an appeal from an agency protest denial, Menzies argues that the matter must be dismissed “for lack of subject matter jurisdiction.” Motion 1, 3. 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 Menzies, in 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, Menzies claims that the OPA is without

jurisdiction to proceed over this matter. Menzies 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).

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

Menzies 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. Menzies urges, without authority, for the OPA to read an exclusive jurisdictional limit into a statute where none exists. Menzies 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

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.

² The Menzies proposal has been withheld from JMI review by GIAA. Menzies has submitted a Motion for Summary Judgment where Menzies avers that “if licenses were required” Menzies can perform the work since it has a single employee who is a “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).

provisions of this Chapter.” 21 G.C.A. § 70109. (emphasis added). Here, the Guam legislature has declined to do what Menzies 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 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 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 Menzies 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 MENZIES RAISES HERE.

The failure to comply with 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. Menzies, in urging the dismissal based upon a lack of subject matter jurisdiction, unfortunately also ignores 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 Menzies urges here, punt the matter over to the CLB.

Similarly, and more 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 Menzies 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.

III. OPPOSITION TO MOTION TO FOR SUMMARY JUDGMENT

While urging dismissal because of a lack of subject matter jurisdiction, Menzies contemporaneously moves for “Summary Judgment” in these administrative proceedings. Menzies argues — an argument made without a single citation to the standard that would apply to such a determination—that summary judgment is appropriate because the RFP does not involve construction work, no subclassification for baggage systems exists, the RFP did not specify the need for a specific CLB license, and that Menzies employs a “master electrician.” Motion 2, 1. Summary Judgment is inappropriate in these proceedings, and even if such a maneuver were possible, genuine questions of fact must be developed at a merits hearing on this appeal.

A. THE OPA HAS PREVIOUSLY DETERMINED THAT SUMMARY JUDGMENT IS INAPPROPRIATE IN THESE TYPES OF ADMINISTRATIVE PROCEEDINGS.

Menzies moves for Summary Judgment, but declines to provide a legal standard, statute, or procedural rule justifying such a maneuver. That is because no such maneuver properly exists before the OPA. Summary Judgment on Guam is rooted in Guam R. Civ. Proc. 56. (“A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.” Guam R. Civ. Proc. 56. Summary Judgment.). The OPA has previously declared Summary Judgment under that rule inapplicable to proceedings before the OPA. In *In the Appeal of Core Tech International Corp*, OPA-PA-17-009, the Public Auditor explained that “Rule 56, Guam Rules of Civil Procedure are inapplicable to this administrative proceeding.” *In the Appeal of Core Tech International Corp*, OPA-PA-17-009, Decision and Order RE Purchasing Agency’s Motion to Dismiss³. The OPA went on to reiterate that:

Procurement Appeals hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence or by technical or formal rules of procedure. 2 G.A.R., Div. 4, Chap. 12, § 12108(d). Hence, summary judgment as permitted by Rule 56, GRCP, in civil cases being heard before the Superior Court of Guam and the cases interpreting that rule are inapplicable to this matter because this proceeding is an informal procurement appeal that is not bound by such formal rules of civil procedure.”

³ The OPA captioned its decision as one on the Agency’s “Motion to Dismiss.” The agency had called its Motion a “Motion for Summary Judgment,” but the OPA had decided to construe the procedurally infirm summary judgment motion as one instead for dismissal. *See*, Motion for Summary Judgment, OPA-PA-17-009, November 3, 2017.

In the Appeal of Core Tech International Corp, OPA-PA-17-009, Decision and Order RE Purchasing Agency's Motion to Dismiss, 2.⁴

B. EVEN IF SUMMARY JUDGMENT WERE PROCEDURALLY APPROPRIATE IN AN ADMINISTRATIVE PROCEEDING BEFORE THE OPA, SIGNIFICANT FACT ISSUES PREVENT SUCH A SUMMARY ADJUDICATION.

Menzies argues first that it is entitled to “summary judgment” since it is not a special contractor. Without reliance upon a declaration, affidavit, or single citation to the procurement record, Menzies simply avers that it “does not offer or perform construction work.” Motion 2, 2. While Menzies is correct in its recitation that a specialty contractor is an entity “whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts”, 21 GCA §70106(d), Menzies completely ignores the definitions section of the Contractor statute. 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

⁴ Summary Judgment proceedings do exist in the context of administrative proceedings, but those are allowed and controlled by specific statutes in those jurisdictions, or by judicial precedent that adopt rules of civil procedure when the administrative code is silent. *See, e.g.*, Ind. Code Ann. § 4-21.5-3-23 (“A party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding.”); *Bd. of Ethics in Matter of Monsour*, 2017-1274 (La. 5/1/18), 249 So. 3d 808, 810 (“The Louisiana Code of Civil Procedure governs civil proceedings in administrative agency proceedings where agency laws are silent.”). Here, *Liheslaturan Guåhan* has declined to provide for an administrative summary judgment proceeding, and the OPA has specifically declined to adopt Guam R. Civ. Proc. 56 that would provide a framework for summary adjudication in the administrative context.

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). 21 G.C.A. §70100(c) makes it clear that a "Contractor includes a subcontractor and a specialty contractor."

Menzies claims it does not need a CLB license since it is not a "specialty contractor." Menzies ignores the fact that, even if it does not think of itself as a special contractor, it is a contractor nonetheless, and as such, needs an appropriate CLB license. Menzies, we are told, also does not need a CLB license since it is not performing construction but instead will be performing work under the RFP for the "operation, maintenance, troubleshooting, and repair" of the baggage system. Motion, 2, 2. A specialty license, such as "C-25," is not required in Menzies's view since it does no "installation work." Motion 2, 4. Here again Menzies ignores the obvious; repair and maintenance work often involves "installation." For instance, in this system, numerous aspects of the project, from failure of one of the numerous motors, to the need for replacement of the thousands of feet of conveyor belts, to the changing of fuses, will require installation of replacement components. *See, Attachment A* to this Opposition (Detail of 480 Volt Electric motors that would be installed as part of repair processes for failure; Detail of portion of Conveyor Belts that would be installed as part of repair processes for failure.)

Since Menzies admits that it would need a CLB license for “installation,” and it admits that it is seeking an award for repair work, factual questions must be resolved to determine if repair work involves the installation of any material that would fall under the ambit of the “C-25” license. This factual dispute alone requires that “summary judgment” not be granted.⁵

Menzies next claims that summary judgment is appropriate since GIAA did not, as part of its RFP, specifically describe the need for CLB licensure. Motion 2, 6. While it is correct to point out that GIAA did not explicitly demand CLB licensure, it is incontrovertible that GIAA commanded that offerors must be properly licensed in Guam. GIAA’s failure to recognize that CLB licensure would be an essential part of such compliance is at the heart of JMI’s appeal, and must be resolved through the taking of evidence in a hearing. While the merits of this point will be developed at trial in this matter, there are numerous facts that show that GIAA was seeking services from a professional would need an appropriate professional contractors license.

⁵ Menzies also argues that it does not need a Specialty Contractor license since no particular specialty license appears to apply to the specific work of baggage conveyor system operation, maintenance, and repair. In order to make this argument, Menzies ignores the regulatory guidance that provides for the *de facto* catch-all C-68 license. That license is for a specialty contractor whose operations as such is in the performance of construction work requiring special skills and whose contracting business involves the use of specialized building trades in crafts **not listed above** and who meets the standards set by the Board for such classification.” 25 GAR §12106 et seq. (emphasis added). The C-68 classification was implemented to prevent exactly what Menzies is attempting to do here, i.e., claim that it does not fit a particular box. The regulation makes it clear that “Temporary classifications under C-68, classified specialist may be established by the Board until the work performed is defined and the proper classification is established.

GIAA describes the work it is procuring as "Infrastructure Support Services" that requires "technical expertise and guidance." Procurement Record ("PR"), 08. GIAA is seeking contractors with "extensive knowledge to mechanical aspects (sic)" who should have electricians with "sufficient experience in power, controls, and PLC software." The RFP also confirms the need to both operate and maintain the "power supply conduits." RFP, pg. 4; 6. To be sure, the services being sought include direct interaction with significant electrical systems. *See, e.g., Attachment B* (Photo of 480 Volt Motor Control Panels from GIAA project). 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. The procurement record kept by GIAA shows that Menzies is neither, and Menzies claims that it has a single employee who is a "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).⁶

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

⁶ Menzies also incorrectly claims that GIAA procurements require specialized licenses when such licenses are required by law. This is not the case. For instance, GIAA RFP 002-FY21 sought the same management and support services for elevators, but did not explicitly call for submission of a C-16 Elevator Contractor license, despite the fact that performing the work without such a license would have violated Guam law. The RFP documents can be accessed at: <https://www.guamairport.com/corporate/business-opportunities/public-solicitation-for-services/request-for-proposals/rfp-no-002-fy2021/management-and-infrastructure-support-services-to-giaas-passenger-conveyance-systems>

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. GIAA’s specification for professional liability insurance is telling, since “unlike general liability insurance, professional liability insurance is designed to insure against claims related to acts or omissions in the provision of professional services.” *Church Mut. Ins. Co. v. Lake Pointe Assisted Living, Inc.*, 517 F. Supp. 3d 467, 476 (E.D.N.C. 2021), *motion to certify appeal granted*, No. 4:20-CV-00055-M, 2021 WL 2136419 (E.D.N.C. May 26, 2021). Professional services are “an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” *Id* (internal quotations and citations omitted). If GIAA’s Professional attorneys require appropriate licensing from the governing body overseeing Guam attorneys, then GIAA’s professional baggage contractors require appropriate licensing from the governing body overseeing Guam contractors.

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IV. CONCLUSION

Menzies 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 standardless summary judgment should be granted. The OPA should reject Menzies'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: 

JOSHUA D. WALSH
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JMI-Edison

ATTACHMENT A

**ELECTRIC MOTORS
480 Volts**



CONVEYOR BELTS



ATTACHMENT B

**MOTOR CONTROL PANELS
480 Volts**

SIEMENS

