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OPA-PA-21-010 REPLY RE GIAA MOTION TO DISMISS

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Hafa Adai,

Please see the attached document for e-filing in the subject matter.

Best,

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

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

APPEAL CASE NO.: OPA-21-010
 GIAA Procurement: RFP-005-FY21

**REPLY RE GIAA MOTION TO
 DISMISS**

COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”), through the undersigned counsel to Reply to Johndel International, Inc. dba JMI-Edison’s (“JMI”) Opposition to GIAA’s Motion to Dismiss this matter.

REPLY ARGUMENT

I. THE OPA LACKS JURISDICTION TO CLASSIFY A CONTRACTOR’S LICENSE REQUIREMENT.

GIAA contends that the OPA does not have jurisdiction over JMI’s complaint related to a lack of a Guam Contractor’s License Board-issued license (“GCLB”). GIAA Mot. Dismiss (Nov. 24, 2021). JMI has not alleged a specific license it believes is required. JMI’s meritless appeal therefore asks the Public Auditor to review the scope of services of the RFP, and then classify the GCLB-issued license(s) required to perform such services, if any. The Guam Contractor’s License Board has the authority to make that classification. See 21 G.C.A. § 70109 *et seq.*

Importantly, JMI and the highest ranked offeror Aircraft Service International Group, Inc. dba Menzies Aviation (“Menzies”), are before the GCLB related to JMI’s license-related allegations. Comments of Interested Party Menzies 1-2 (Nov. 1, 2021).

If the Public Auditor proceeds and finds it has jurisdiction over this basis for appeal, and if the Public Auditor finds that a license is (or licenses are) required by the scope of services of this RFP, the Public Auditor risks making a decision that conflicts with the prospective decision of the GCLB. Similar to the other dismissal of appeal for lack of subject matter jurisdiction, the Public Auditor should dismiss the license-required basis of this appeal until the GCLB makes a determination that a license is required as that is one of the primary functions of the GCLB. See OPA-PA-21-004, In Re Appeal of Pacific Data Systems, Inc., (PDS), Order (Oct. 5, 2021); see also, OPA-PA-10-008, In re Appeal of JRN Air Conditioning & Refrigeration, Inc., Decision 8-10 (Feb. 17, 2011) (cited in Motion to Dismiss at p. 4).

II. JMI CITES NO COMPELLING AUTHORITY SUPPORTING ITS ILLOGICAL ARGUMENT OF CONCURRENT JURISDICTION BETWEEN THE OPA AND GCLB.

JMI argues that concurrent jurisdiction exists between the OPA and GCLB to classify licensure requirements for alleged contractors as part of a procurement appeal. JMI Opp’n GIAA Mot. Dismiss 4-8 (Dec. 3, 2021). The OPA has no such jurisdiction, concurrent or otherwise.

Government Agencies, including the OPA, derive their powers from statutes expressly or by implication. Carlson v. GTA, 2009 Guam 15 ¶ 9 (reasoning “[a]s creatures of legislation, the powers of administrative agencies and their executive officers are dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication.” (Internal quotation marks and citation omitted)); see also, Data Mgmt. Res., LLC v. Office of Public Accountability, 2013 Guam 27 ¶ 34 (applying such reasoning to the OPA).

The OPA has found that it may review an agency finding of a bidder's compliance with an undisputed licensure-requirement in an Invitation for Bid in a procurement appeal, as was the case in OPA-PA-015-012, In re Appeal of PDS, and OPA-PA-21-007, In re Appeal of G4S Security Systems (Guam) Inc.¹ In those matters, there were specific and undisputed subspecialty license and certifications for grading and telecommunications at issue for telecommunication-installation related work. The exercise of jurisdiction on the factual existence of the licenses, where the Parties did not dispute the license requirement, in those cases is a far cry from the OPA assuming the role of the GCLB and classifying the requirement of the license(s) itself. JMI has pointed to no implied authority

¹ In OPA-PA-015-12, the procurement at issue was an Invitation for Bid seeking "Optical Fiber Solutions" for the office of homeland security. OPA-PA-015-12, In re Appeal of PDS, Decision (Jan. 13, 2016). The specifications in that procurement specifically called for the awarded bidder to install fiber from the Judiciary of Guam MIS Office to the Guam Homeland Security Office. The protestor in that matter alleged that the winning bidder lacked two specific specialty license certifications for its Contractor's license required by the scope of services in the IFB. These appear to be a C-17 specialty contractor license for excavating, grading and trenching and a C-68 specialist certification for telecommunications. The Public Auditor did not classify the type of license required in its decision. Instead, the Public Auditor found that the two specific licenses the protestor alleged were missing, were provided by the winning bidder. Thus, the protestor's factual allegation was expressly rebutted. The Parties appear to have conceded or agreed that two specialty certifications/licenses were required by the IFB scope of work.

Similarly, in OPA-PA-21-007, during a hearing on the purchasing agency's motion to dismiss, the purchasing agency issued an IFB for the Indoor and Outdoor Wireless Local Area Network Infrastructure Installation Project. See Hearing Audio, (Nov. 17, 2021) available at: https://www.opaguam.org/sites/default/files/opa-pa-21-007_motion_hearing_-_november_17_2021.m4a. The attorney for the purchasing agency represented that the winning bidder indicated subcontractors would perform work that required a contractor's license. Therefore, it did not appear that the purchasing agency disputed that a license from the GCLB was required by the scope of work in the IFB. During the hearing, the Public Auditor stated he received information and recognized that the Contractor's License Board determined that the putative awardee does not have a valid contractor's license and had not applied for one as of the date of the hearing. The Public Auditor questioned the purchasing agency as to whether the purchasing agency should determine whether subcontractors who would perform work requiring a contractor's license should be disclosed as part of the responsibility determination – and thus as part of the appeal – because the purchasing agency represented that subcontractor's had the required licenses. The Public Auditor was specifically concerned with the lack of a record of such subcontractors before the Public Auditor in the Appeal and denied the motion, but appeared to grant leave to the purchasing agency to provide such information.

There are specific specialty licenses related to telecommunications and excavating, grading and trenching that were relevant in OPA-PA-015-012 and OPA-PA-210007 (see license classification C-17 and C-68, GCLB Rules and Regulations, available at: <http://clb.guam.gov/wp-content/uploads/2020/05/Contractors-License-Board-Rules-Regulations.pdf>). Those appeals did not require the Public Auditor to determine that an RFP scope of services required a specific license from the Guam Contractor's License Board and further that a highest ranked offeror possess or could not possess such license. That is the distinguishable feature of this case. JMI asks the Public Auditor to review the scope of services, and determine which of the over one hundred GCLB licenses apply to such scope of services.

that allows the OPA to classify the type and requirement of a license where the procurement solicitation does not expressly require such license, and the parties dispute such requirement.

JMI's contention appears to be, nothing says the OPA cannot classify a license under the authority given to the GCLB, therefore the OPA must be able to do so under some sort of vaguely stated concurrent jurisdiction doctrine. JMI Opp'n Mot. Dismiss 4-8 (Dec. 3, 2021). If JMI is correct, such a doctrine would have enormous consequences. By JMI's reasoning, in addition to classifying existing licenses, the OPA could as part of a procurement appeal determine that the GCLB subspecialty license requirements should be expanded and include currently unclassified areas of work. Additionally, JMI's reasoning would also mean GCLB has similar concurrent jurisdiction by implication because there is no express provision to the contrary. As an example of this absurdity, the GCLB could investigate a contractor doing work for the Government, and the GCLB could make responsibility determinations, not just GCLB-express-authority-related determinations, under the procurement law. Finally, JMI fails to offer how conflicting decisions between the GCLB and the OPA when exercising concurrent jurisdiction would be reconciled.

This concurrent jurisdiction argument is illogical in the context of the jurisdiction of an administrative agency.² JMI cites to no express or implied authority that allows the OPA to classify the license(s) required for contractors, where no express requirement exists in Government procurement solicitation requirements. For the OPA to rule in favor of JMI's appeal, the OPA would have to find that the scope of services here requires a specific specialty contractor's license. JMI has flip flopped as to what license is required. Compare Notice of Appeal Ex. G (Oct. 8, 2021) (alleging Menzies lacked a specialty license from the GCLB) with Notice of Appeal at 5 (Oct. 8, 2021) (alleging

² This is likely why JMI could only draw a comparison to a 2012 Supreme Court decision discussing the limits of federal question jurisdiction *vis a vis* the divestment of jurisdiction between state and federal courts. See JMI Opp'n to GIAA Mot. Dismiss at 5 (Dec. 3, 2021) (citing Mims v. Arrow Fin. Services Inc., LLC, 565 US 368 (2012))

Menzies does not have a proper contractor's license). There are over 100 specialty contractor's licenses, which are distinguishable from a general building contractor's license. JMI does not even identify the specific license they allege is required. The OPA does not have jurisdiction, concurrent or otherwise, to investigate, classify and determine whether and to what extent a GCLB-issued contractor's license is required by the services sought in the procurement underlying this appeal.

III. JMI'S LICENSE-RELATED PROTEST IS TIME BARRED.

JMI admits that it learned of Menzies ranking as the highest ranked offeror on August 26, 2021. See JMI Opp'n to GIAA Mot. Dismiss at 9 (Dec. 3, 2021). However, JMI waited until September 13, 2021, 18 days after being made aware that Menzies was deemed the highest ranked offeror, to contact the GCLB to inquire of Menzie's licensure status. Notice of Appeal, Ex. F (Oct. 8, 2021) (JMI representative email seeks information on Menzies Aviation licensure at GCLB). What's more, is that after forwarding the request to personnel at the GCLB on September 16, 2021, the GCLB responded on the next day, September 17, 2021 with the information requested. JMI does not explain why it waited eighteen (18) days to investigate its suspicion that Menzies lacked an allegedly-required contractor's license.

JMI failed to protest Menzies ranking as the highest offeror within fourteen (14) days of when it knew or should have known of the basis for its protest. JMI had until September 10, 2021 to file its protest. The protest was filed with the agency on September 21, 2021, 26 days after Menzies was publicly announced as the highest ranked offeror, with a JMI representative present. JMI sat on its hands and waited to investigate its suspicions until September 13, 2021. JMI offers no explanation for this delay. JMI's license-related protest is time-barred. See 5 G.C.A. § 5425; see also, GIAA Mot. Dismiss 4-5 (Nov. 24, 2021).

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IV. JMI FAILS TO ALLEGE MATERIALITY RELATED TO ITS PROCUREMENT RECORD RELATED PROTEST

JMI argues that GIAA simply denies the allegations in the notice of appeal, and for this motion must accept the facts alleged as true. Even assuming *arguendo* that JMI correctly stated the standard to be used before the OPA, their procurement record basis for appeal is defective. That is, even assuming JMI’s allegation that the procurement record was improperly kept are true, JMI fails to allege the improper keeping is material to Menzies being ranked the highest ranked offeror. JMI instead focused its opposition on alleging violations of the Open Government Law. This is not the proper forum to adjudicate such allegations. See Agency Statement 8-9 n. 3 (Oct. 22, 2021). However, this also does not cure the lack of a materiality allegation to the procurement decision JMI is protesting – that Menzies was deemed the highest ranked offeror. Therefore, to the extent JMI raises the procurement-record-related allegations as a separate claim for protest and now on appeal, that basis must be dismissed for failure to allege materiality, even assuming the truth of the record related allegations. Materiality is a requirement of a procurement record related claim protest of a procurement protest. See e.g., Teleguam Holdings LLC v. Guam, 2018 Guam 5, ¶¶ 39-40; see also, GIAA Mot. Dismiss 8-12 (Nov. 24, 2021).³

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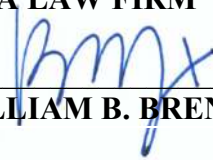
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³ JMI’s opposition also suggests that GIAA only recently added the ongoing RFP related negotiations as a basis for withholding certain documents from JMI. JMI Opp’n GIAA Mot. Dismiss 11-12, n. 4 (Dec. 3, 2021). To the contrary, GIAA has maintained that basis for the denial of production of certain documents throughout these proceedings, and as part of the protest decision at the agency level. See Agency Statement 8 (Oct. 25, 2021) (“JMI sent a FOIA in the midst of ongoing negotiations”); Notice of Appeal, Ex. E GIAA FOIA Response, p. 1 (Oct. 8, 2021) (“Additionally, GIAA is currently in negotiations with the Selected Offeror for the ongoing procurement”); Notice of Appeal Ex. H, GIAA Denial of Procurement Protest, p. 3 (Oct. 8, 2021) (“additionally, GIAA informed JMI-Edison’s attorneys that because the procurement was ongoing, (1) documents related to the price negotiations with the highest ranked offeror . . . were withheld from GIAA’s response”).

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Submitted this 10th day of December, 2021.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 
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