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OPA-PA-23-002; Rebuttal to JMI's Comment's on Agency Report

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Fri, May 12, 2023 at 4:28 PM

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Hafa Adai Mr. Hernandez,

Please see attached document for e-filing regarding: In The Appeal Of Johndel International, Inc. dba: JMI-Edison.

1. Rebuttal to JMI's Comment's on Agency Report. (12 pages)

Thank you!

Kind Regards,

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When JMI appealed from denial and its procurement protest, GIAA recognized that the 2021 procurement for management and infrastructure support services for its baggage conveyance systems would remain stayed pursuant to Guam law. An interruption in those services would effectively shut down Guam's only civilian airport and significantly hamper airport operations. GIAA thus determined there was a need for emergency procurement, and *I Maga'hågan Guåhan* certified the existence of the emergency. The procurement stay remains in place as JMI's appeal is still pending before the Superior Court in CV0095-22. Thus, the emergency circumstance due to the procurement stay still exists. Therefore, GIAA has extended the contract entered into through the 2021 emergency procurement as allowed by Guam law, to date.

JMI incorrectly calls this procurement a "March 15, 2023 procurement" and in the same breath complains that the contract has been extended unlawfully. JMI is wrong on both fronts. The procurement solicitation occurred in October 2021. JMI has no authority to determine the existence or duration of an emergency. Guam law expressly contemplates an agency may determine additional time is necessary to address an emergency, and allows for a contract procured through an emergency procurement to be extended so long as the contract remains limited in scope and duration to the emergency. Finally, JMI has known (1) of GIAA's use of an emergency procurement to procure the services from Menzies at issue and (2) of GIAA's extension of the contract, since December 2021.

REBUTTAL ARGUMENT

GIAA responds to JMI's comments on its agency report in like-numbered sections below.

A. JMI misstates the relevant factual background in this matter.

1. GIAA did not award the contract related to GIAA RFP 005-FY21. See JMI's Comments at 2. JMI's 2021 protest was made pre-award and based on a ranking of offerors who responded to the RFP. The procurement was stayed during GIAA's negotiation with

Menzies on the preliminary scope of services and price. See 2 GARR§ 3114(i). That matter remains stayed as JMI’s appeal to the Superior Court in CV0095-22 remains pending.

2. On March 15, 2023 GIAA published a notice of public hearing on its intent to extend the contract with Menzies entered into through emergency procurement beyond April 2023. See 5 G.C.A. § 5215(e) (requiring purchasing agency to convene public hearing for intent to extend contract beyond 90 days, no later than 30 days prior to the execution of the extension, and to publish notice of such hearing at least five (5) days before such public hearing). JMI incorrectly asserts that GIAA gave notice of a board meeting to extend the contract from March 22, 2023. JMI’s Comment at 2.
3. JMI contends that GIAA did not cite to any law allowing extension of emergency procurement beyond a ninety-day period. JMI’s Comments at 3. On the contrary, in its decision on JMI’s protest and in its Agency Statement, GIAA has clearly relied on 5 G.C.A. Section 5215 and has cited to the same. See Agency Statement at 7 § b; Notice of Appeal Ex. C at p. 1.

B. The GCLB acted *after* JMI filed its protest, and has since issued Menzies a license.

GIAA has maintained that the Guam Contractor’s License Board (“GCLB”) has jurisdiction to address JMI’s license-related basis of protest since the initial protest in 2021. Once the GCLB took action, Menzies requested a hearing before the GCLB and has informed GIAA that it intends to challenge the GCLB decision. Id. However, once the GCLB made a determination, GIAA took steps in accordance with the procurement law and the November 2021 contract to assure that work carried out at GIAA by Menzies was in compliance with the GCLB Decision. Id. JMI points to no authority

that states GIAA acted improperly. JMI simply argues GIAA should have acted in a different way. JMI does not run the airport.

C. The contract was extended in accordance with the procurement law.

JMI next argues that because the emergency procurement was initiated in October 2021, GIAA's contract has been extended for too long. JMI appears to also assert there is no longer an emergency. Again, these are not JMI's determinations to make. The emergency certified by *I Maga'hågan Guåhan* recognized that interruption of GIAA's baggage conveyance systems created a condition that posed a threat to public health, welfare or safety as GIAA operates Guam's only civilian airport, and the baggage conveyance systems are critical to such operations. See PR at 27-29, 84-89; 5 G.C.A. § 5030(x) (defining emergency for procurement purposes).

JMI concedes that in an emergency, an extension beyond 90 days may be appropriate. JMI's Comments at 5. JMI disagrees that this situation is an emergency or that this emergency should last this long. Id JMI is not the Governor of Guam nor the head of the purchasing agency. *I Maga'håga* certified the emergency as required by law and the head of the purchasing agency determined the need to extend since the emergency condition still exists. Guam law vests authority for that certification and determination in those individuals. JMI may disagree, but that disagreement alone is not sufficient to warrant JMI relief. JMI cites to no authority allowing it to second-guess, without any evidence or authority, the certification and determinations that were made here.

D. JMI's Protest was Untimely.

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 cannot dispute that (1) JMI knew that GIAA used the emergency procurement method of source selection to engage Menzies to provide the services it complains Menzies is not able to perform,

since December 2021, and (2) JMI knew that GIAA extended the emergency procurement beyond the first 90 days following the determination of need for emergency procurement, since December 2021.

JMI's protest, stripped to its core, challenges (1) GIAA's use of an emergency procurement, (2) award of the November 2021 contract to Menzies, and (3) the extension of that contract beyond the first 90 days following the determination of need for an emergency procurement. Notice of Appeal at 5-6. Each basis for protest was known to Menzies as of December 2021 at the least. Thus, JMI's protest is untimely as its protest was not brought until March 2023.

To the extent JMI alleges that the March 14, 2023 OAG Opinion was somehow a new basis to protest, JMI is incorrect. The OAG does not have authority to classify GCLB license requirements. The GCLB did issue a decision, however that decision is being challenged, and GIAA has taken steps to comply with that decision. But JMI did not assert that Menzies was performing under the emergency contract improperly despite knowing of Menzies' performance in December 2021 and even asserting the same before the Superior Court in February 2022 in its Verified Complaint in CV0095-22.

Finally, as made clear above, GIAA is extending an existing contract as allowed by Guam law. GIAA is not issuing a new procurement as JMI flippantly asserts. JMI Comments at 6. Thus as to the bases raised by JMI, those bases were not raised within 14 days of when JMI knew of those bases, and touted those bases to the GCLB and the Superior Court.

E. GIAA took steps to comply with the GCLB decision.

JMI alleges that because Menzies did not possess a license prior to April 7, 2023, JMI is somehow entitled to relief in this procurement appeal. That is incorrect. Once the GCLB made a determination as to JMI's license complaint, GIAA took steps to address work being done at GIAA. Notably, the GCLB decision took 1.5 years to issue. Until that time, no entity with jurisdiction had made a determination related to the JMI's license argument. JMI is not the GCLB. Because GIAA

took steps to address a sister agency's determination once that determination was actually made, GIAA's actions were in accordance with the Guam procurement law. See 5 G.C.A. § 5427 (allowing head of purchasing agency to address disputes related to contract).

F. Menzies' proposal submitted in response to the Emergency Procurement and other relevant information is included in the procurement record.

The public auditor only has power to review matters properly submitted to him. 2 GARR § 12103. Procurement claims must be administratively exhausted, including fulfilling the agency level protest requirement and an appeal of a decision on such protest to the OPA, for the OPA to have jurisdiction. D.F.S. Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 Guam 20 ¶¶ 59-74.

JMI contends for the first time on appeal that GIAA withheld key aspects of Menzies' proposal from JMI. GIAA did no such thing. Menzies' proposal is included in the procurement record for the emergency procurement. See PR 541-603. Records of Menzies' correspondence with GIAA are also included in the procurement record. See e.g., PR at 652-656 (communication log). JMI's allegation that GIAA is withholding key aspects of Menzies' proposal is therefore baseless, in addition to being not properly before the OPA.

G. JMI did not raise a procurement record issue at the agency level.

JMI also baselessly alleges that GIAA has withheld portions of Menzies' submissions as confidential. JMI's Comments at 10. In its protest at the Agency level, JMI did not raise an issue related to the 2021 emergency procurement, procurement record. See Notice of Appeal at pp 6-7 (bases for appeal); Notice of Appeal Ex. B. JMI cannot raise a record-related allegation for the first time in this appeal. Supra Section F. Additionally, GIAA is unsure what JMI is arguing. Because an award was made in 2021, GIAA has provided Menzies' proposal in response to the 2021 Emergency Procurement. See PR 541-603. Therefore, to the extent JMI alleges a record related basis for appeal for the first time, the OPA is without jurisdiction to consider such basis in this matter.

CONCLUSION

Based on the foregoing, in addition to those arguments raised in the Agency Statement and Report, GIAA requests that the OPA grant the relief prayed for in its Agency Statement at pages 7-8.

Dated: May 12, 2023.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 
WILLIAM B. BRENNAN