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In the Appeal of Johndel International, Inc. dba. JMI-Edison; OPA-PA-23-002

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Fri, May 19, 2023 at 3:51 PM

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

Good Afternoon:

Please see the following documents for filing in the above-referenced matter:

1. Motion for Appointment of Alternate Administrative Hearing Officer or in the Alternative an Order Directing the Superior Court to Hear this Matter
2. Declaration of Joseph C. Razzano

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**5.19.23 Motion for Appointment of Alternate Administrative Hearing Officer.pdf**

498K

**5.19.23 Declaration of Joseph C. Razzano in Support of Motion.pdf**

808K

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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-23-002

**MOTION FOR APPOINTMENT OF
ALTERNATE ADMINISTRATIVE
HEARING OFFICER OR IN THE
ALTERNATIVE AN ORDER
DIRECTING THE SUPERIOR COURT
TO HEAR THIS MATTER**

I. MOTION

Appellant JMI-Edison (“JMI”), though its undersigned counsel, respectfully moves the Office of Public Accountability (“OPA”) for an order pursuant to 2 GAR §§12109 and 12116, designating a qualified member of the OPA staff or an alternate appointed hearing officer for procurement appeals to preside over this matter instead of the Public Auditor. In the alternative, JMI requests that the Public Auditor issue an order in conformance with 5 G.C.A. §5480 directing that the matter may be taken directly to the Superior Court of Guam. This Motion is supported by the appended Memorandum in Support of Motion, the record before the OPA in both this matter and OPA-PA-21-010, the Declaration of Joseph C. Razzano submitted contemporaneously with this Motion (“Razzano Declaration”),

and any argument that the public auditor may entertain on this motion.

II. MEMORANDUM IN SUPPORT OF MOTION

A. RELEVANT PROCEDURAL AND FACTUAL HISTORY

The Appellant, as a Plaintiff, remains adverse to both the Guam International Airport Authority (“GIAA”) and the Public Auditor’s office in litigation before the Superior Court of Guam. That litigation is the latest step in a procurement appeal raised by JMI regarding Request for Proposals (“RFP”) GIAA RFP 005-FY21 (the “First Protest”). That appeal seeks judicial review of the Public Auditor’s *sua sponte* dismissal, with prejudice, of the prior procurement appeal brought by JMI challenging the award of the RFP to Menzies Aviation (“Menzies”) — an entity that was neither responsive to the RFP nor responsible to perform the work contemplated. *See, Johndel International, Inc. dba JMI-Edison v. Office of Public Accountability, et. al.*, CV0095-22 Verified Complaint, (Superior Court of Guam, February 10, 2022), attached as **Exhibit A** to the Razzano Declaration.

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The Public Auditor never reached the merits of JMI's first protest, and did not dispose of the matter pursuant to some motion filed by an appearing party.¹ Rather, the Public Auditor's decision on the First Protest declared — without the benefit of an evidentiary hearing or an opportunity to be heard on the specific issue — that the appeal was being dismissed since JMI had perpetrated a “fraud on this tribunal” and that JMI, with the assistance of its counsel, had committed “misconduct” that was “deliberate and egregious.” Decision and Order, OPA-PA-21-010, February 3, 2022, 6. More, the public auditor determined that JMI failed to show appropriate “understanding or remorse for its misconduct.” Decision and Order, OPA-PA-21-010, February 3, 2022, 6. JMI initiated its complaint against the OPA and other named defendants on February 10, 2022. *See, Johndel International, Inc. dba JMI-Edison v. Office of Public Accountability, et. al.*, CV 0095-22 Verified Complaint, (Superior Court of Guam, February 10, 2022). The

¹ The Agency had filed a Motion to Dismiss on the grounds of a claimed lack of jurisdiction of the OPA to hear JMI's claim, a renewed allegation that JMI was untimely in making its protest, and GIAA's view regarding the procurement record. *See*, Motion to Dismiss, OPA-PA-21-010 (November 24, 2021). The Interested Party had filed its own motions seeking to both have the matter dismissed because of a claimed lack of jurisdiction and summary judgment on the merits of JMI's appeal. *See*, Interested Party Aircraft Service International, Inc. DBA Menzies Aviation's Motion to Dismiss; Motion for Summary Judgment, OPA-PA-21-010 (November 24, 2021). After the established motion deadline, Menzies subsequently filed a “response to supplemental authority” on January 24, 2022, asking that the Public Auditor disregard the Contractor License Board findings issued on December 22, 2021, and “order whatever sanctions would be appropriate... should it determine that Mr. Ilaio created evidence and offered that created evidence to the OPA for the purpose of misleading the Public Auditor in this Procurement appeal.” Interested Party Aircraft Service International, Inc. DBA Menzies Aviation's Response to Supplemental Authority, OPA -PA-21-010 (January 24, 2022), at 6. JMI was never afforded an opportunity to substantively respond to the Menzies paper, no hearing was set for the purpose of addressing the sanctions request, and no evidence was taken to help the Public Auditor determine if, in fact, evidence was “created and offered” for the purpose of “misleading the Public Auditor.” The Public Auditor made those determinations without an evidentiary or noticed hearing on the topic.

Complaint raises three claims about alleged failures of the Public Auditor in his handling of the JMI appeal to the OPA.

Following the dismissal of the case, the Public Auditor proceeded to make several media appearances across multiple media platforms to discuss the particulars of the case, and expand upon his written decision and order. The Public Auditor declared in a live media extended format interview on February 7, 2023, that JMI had committed both fraud and had significantly angered him. *See*, KUAM Interview “the link”, February 7, 2023, (“KUAM interview”), available at <https://www.youtube.com/watch?v=B44u6iwlHVY>. The Public Auditor explained that, prior to the last hearing he afforded JMI, “I was fuming for three days until the hearing.” KUAM Interview, 07:35. This was because, in the pre-hearing determination of the Public Auditor about JMI likening the company to a sex offender, “they had been caught with their pants down.” KUAM Interview, 8:02. He also explained, in language not addressed in the OPA’s written decision, that he rejected any argument that his agency owed “collegiality and probity to the other agencies and boards” and that he should not unilaterally disregard other agency determinations. KUAM Interview, 08:36. In further language harkening to intimate relationships, the Public Auditor likened JMI’s submission of the CLB decision regarding Menzies to a situation where your “significant other lies” and the alibi provided “is from someone you know is a liar.” KUAM Interview, 12:20-12:33. The Public Auditor then explained in the media forum — an interview replayed across the full panoply of KUAM traditional, radio, and social media — that he found

without a hearing that JMI had committed “fraud on the tribunal” and that JMI’s “action was so egregious that the only thing we could do was dismiss this case.” KUAM Interview 27:43; 12:56.

Beyond making public comments about his negative views about JMI, the Public Auditor expanded his decision further, and indicated that he considered evidenced and information obtained from CLB representative testimony provided in “another case.” relying on the other OPA case that JMI was not a party to, the Public Auditor explained that he was made to almost “cringe and jump out of my seat” when on December 20, 2023, he took testimony in that other matter that the Board of Directors of the Contractor’s licensing board had not regularly met. KUAM Interview, 05:35. He explained that “It was clear from the emails and the similarity of this to the other case and the fact that the [CLB] board hadn’t met, how could a decision come out? that was the reason I dismissed it.” KUAM Interview, 08:50. The Public Auditor explained that beginning on December 23, 2022, “I was fuming for three days” when he received documentary evidence in JMI’s first protest about the CLB decision regarding the improper performance of the interested party, because he compared it to evidence he had reviewed during the hearing in the other matter. KUAM Interview, 07:36²

² Beyond publicly declaring his negative views of JMI and his incorporation of evidence from another case that JMI was not a part of to make that determination, the Public Auditor also insinuated that JMI’s counsels acted inappropriately, and declared in a media interview that “I’d love for them to present it to a judge and explain it to them” and suggested that, if he were JMI, he would be “more concerned” that the “Judge is going to ask who helped write the proposed findings, I am praying to god it is not an attorney.” KUAM Interview, 20:28.

The Public Auditor continued to give media interviews on the subject, and as JMI's Superior Court case continued to progress, GIAA continued to receive services from Menzies. Citing an imminent threat to public health, safety, and welfare, GIAA declared the existence of an emergency on October 26, 2021, and pushed forward with entering into a contract for emergency services provided by Menzies to perform the same functions contemplated by the RFP. The initial 30-day term of that emergency contract has been extended multiple times since then. On March 15, 2023, GIAA published notice that it would be seeking to extend the contract again during the March 22, 2023, GIAA board meeting for an additional 90-day period (the "ERFP"). The next day, on March 16, 2023, the Guam Contractors Licensing Board made public a legal opinion it received from the Office of the Attorney General of Guam confirming that the work under the RFP "requires that the selected offeror hold a Specialty Contractor license from the CLB in the C-13 Electrical Contractor sub-classification." More, the Attorney General instructed that the CLB should "begin enforcement proceedings to protect the public against this unlicensed contractor..." JMI subsequently initiated an Agency level protest (the "Second Protest"). On March 27, 2023, the Agency denied the protest. This appeal to the OPA followed. The Public Auditor has not provided notice of an intent to recuse himself from hearing this second protest, and this Motion has followed.

B. STANDARD GOVERNING RECUSAL OF THE PUBLIC AUDITOR

On Guam, those who hold the role of Judicial officers like the Public Auditor should disqualify themselves if their impartiality might reasonably be questioned.

As explained in *Sule v. Guam Bd. of Dental Examiners*, “Guam's judicial disqualification statutes call for the disqualification of a judge or justice in any proceeding in which his or her impartiality might reasonably be questioned. 7 G.C.A. § 6105(a) (2005); *see also* *Ada v. Gutierrez*, 2000 Guam 22 ¶ 12; *Dizon v. Super. Ct. (People)*, 1998 Guam 3 ¶ 8. A judge or justice may also be disqualified if he or she has a personal bias toward a party. 7 G.C.A. § 6105(b)(1).” 2008 Guam 20, ¶ 13.

These standards for recusal comport with Federal guidance on recusals for jurists. 28 U.S.C.A. § 455 outlines the standard for disqualification of a justice, judge, or magistrate. Under §455(a) “Any justice, judge, or magistrate judge of the US shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” According to the report of the House Judiciary Committee, the general standard of section 455(a) was designed to promote the public's confidence in the impartiality and integrity of the judicial process by saying, in effect, that if any reasonable factual basis for doubting the judge's impartiality exists, the judge “shall” disqualify himself and let another judge preside. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110–11 (5th Cir. 1980) (citing 1974 U.S. Code Cong. & Admin.News, pp. 6351, 6354-55.) 455(b) outlines other particularized scenarios in which the judge must disqualify himself which includes § 455(b)(1), “Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.”

While the Supreme Court of Guam has carved out in *Sule v. Guam Bd. of*

Dental Examiners, 2008 Guam 20, ¶ 17, an “actual bias” recusal standard for administrative law judges, that standard does not apply here. While the Public Auditor is not a member of the judicial branch of government, he is no mere agency hearing officer. The Public Auditor on Guam is akin to a Special Magistrate in that he issues legal decisions, as opposed to, for example, a Land Commissioner, which only has the power to make recommendations. More, the Public Auditor is not an internal review at a procuring agency, but rather an outside entity that has specifically been established and given the power to review and determine any matter properly submitted and protested in connection with the solicitation or award or arising from the protest decision of a procuring agency. 5 G.C.A. §§ 5425(a); 5425(e), 5703. This independent station of decision making likens the public auditor to a jurist, and he should therefore be held to the recusal standards applicable to such jurists. *See, S. Agric. Co. v. Dittmer*, 568 F. Supp. 645, 646 (W.D. Ark. 1983) (“Once a matter has been referred to a magistrate under his dispositive jurisdiction, he effectively becomes the district judge for that case. Removal of a magistrate from a case should then be governed by the same rules as a district judge where recusal becomes an issue.”). This important judicial role has been recognized by the Office of Public Accountability in past, where the Public Auditor has previously recused herself on an appearance basis, as opposed to an actual bias basis. *See, In the Appeal of Far East Equipment Co., LLC, OPA-PA-08-001* (The Public Auditor determined that recusal was the preferred course of action since “it is appropriate that the Office of the Public Auditor not be the arbiter in this

procurement matter as **the impartiality of the Public Auditor may be questioned**, regardless of whether any specific discussions had taken place.") (emphasis added).

C. A NEW JUDICIAL HEARING OFFICER SHOULD BE APPOINTED HERE

The Public Auditor gave several media interviews, including long format extended interviews, where he explained his determination — without a developed factual record — that JMI had committed egregious fraud regarding the protest of the GIAA baggage system protest and that his predetermination of that fraud resulted in his fuming at JMI and its counsel. This comports with his February 3, 2022, Decision declaring that JMI had committed “misconduct which jeopardizes the integrity of the procurement process” by engaging in a fraud on the Court that was similar to someone who had “forged a letter and then submitted it... in discovery.” Decision and Order, OPA-AA-21-010, at 6.

JMI is now before the public auditor again on a related protest regarding that same GIAA baggage system, and a hearing on the merits of that claim has been set for June 19, 2023. A hearing does not comport with due process if it "is totally devoid of a meaningful opportunity to be heard" because "the decision-maker has predetermined the outcome of the hearing." *Matthews v. Harney County, Or.*, 23 Sch. Dist. No. 4, 819 F.2d 889, 893-94 (9th Cir. 1987) (quoting *Washington v. Kirksey*, 811 F.2d 24 561, 564 (11th Cir. 1987)). Given the Public Auditor's extensive comments regarding his belief that JMI commits fraud, a new hearing officer should

be appointed in this matter in accordance with the Public Auditor's powers conferred in 2 GAR 12109 and 2 GAR 12116.³

D. ALTERNATIVELY, THIS MATTER SHOULD BE SENT ALONG TO THE SUPERIOR COURT

In the alternative, the JMI requests that the Public Auditor issue an order in conformance with 5 G.C.A. §5480 directing that the matter may be taken directly to the Superior Court of Guam. *See, DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, Guam, 2020 Guam 20, ¶ 15 (explaining how the OPA had issued an order that stated "Having considered the record in this matter, including certain objections to the hearing officer in this case, the limited budgetary resources available to the [OPA], and in the interest in avoiding delays in the disposition of the issues raised, the Public Auditor declines this matter.... And that it "must be taken to the Superior Court of Guam").

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³ 2 GAR 12109 provides that "The Public Auditor may appoint a Hearing Officer for Procurement Appeals. If no Hearing Officer is appointed or in the event of the Hearing Officer's recusal, the Public Auditor may appoint and contract with another Guam-licensed attorney, who may be an attorney in full time service of the government of Guam, or an attorney in private practice, to act as Hearing Officer for all further proceedings with respect to that matter." 2 GAR 12116 explains that in the context of recusal, "the Public Auditor shall designate a member of his or her staff or the appointed Hearing Officer for procurement appeals to preside over the matter. If no member of the Public Auditor's staff or the appointed Hearing Officer is able to preside over the matter due to disqualification, then such matter may be taken to the Superior Court of Guam in accordance with 5 G.C.A. §5480."

III. CONCLUSION

Based on the foregoing, JMI respectfully requests that the Public Auditor recuse and disqualify himself from hearing this appeal.

Dated this 19th day of May, 2023.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSEPH C. RAZZANO

JOSHUA D. WALSH

Attorneys for Appellant