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Appeal of JMI-Edison - OPA-PA-23-002

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Dear Mr. Hernandez,

Please see the attached documents for filing in the above referenced matter.

Should you have any questions or concerns feel free to contact our office.

Thank you.

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Regards,
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2 attachments**6.6.23 Opposition to GIAA Motion to Dismiss.pdf**

229K

**6.6.23 Omnibus Opposition.pdf**

970K

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Counsel for Appellant JMI-Edison

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

Johndel International, Inc. dba. JMI-Edison,

Appellant.

DOCKET NO. OPA-PA-23-002

**OPPOSITION TO GUAM
INTERNATIONAL AIRPORT
AUTHORITY'S MOTION TO DISMISS**

I. INTRODUCTION

On April 10, 2023, Johndel International, Inc. dba. JMI-Edison (“JMI” or “Appellant”) appealed to the Office of Public Accountability (“OPA”) the March 27, 2023, decision of the Guam International Airport Authority (“GIAA”) denying JMI’s agency level protest. JMI protested the emergency procurement associated with GIAA RFP 005-FY21 published on March 15, 2023, where GIAA published notice that it would be seeking to extend the contract for Management & Infrastructure Support Services to GIAA’s Baggage Conveyance Systems during the March 22, 2023, GIAA board meeting for an additional 90-day period (the “ERFP”).

The ERFPP, like the original RFP that JMI protested and that is proceeding through Superior Court appellate review, was seeking to provide management and infrastructure support services to GIAA's Baggage Conveyance Systems. JMI protested the intended emergency award to Aircraft Service International, Inc, doing business as "Menziess Aviation," ("Menziess"), 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"). The non-responsiveness and non-responsibility of Menziess was confirmed by the Office of the Attorney General of Guam who concluded 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." JMI also protested the agency's avoidance of normal procurement protocol and continued reliance upon an emergency declaration dating to October 2021 to justify an emergency award in March 2023.

On May 19, 2023, GIAA filed a motion seeking to 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, and a renewed allegation that JMI was untimely in making its protest. This opposition is submitted to address the failings of GIAA's motion.

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

A. JMI'S PROTEST WAS TIMELY.

GIAA seeks dismissal of JMI's appeal since, in the view of GIAA, JMI needed to advance its procurement protest earlier than it did. The basis for GIAA's motion is that JMI knew, since December 28, 2021, that Menzies was performing under an emergency procurement regime. JMI does not contest this. However, GIAA, in making this argument, ignores the fact that JMI is not protesting the use of emergency protocols in 2021 to secure services for GIAA. Rather, JMI's protest and subsequent Notice of Appeal explain that "While it may have been arguable to GIAA to access the emergency procurement procedures in October of 2021 at the inception of JMI's first protest, more than 520 days have elapsed since then." Notice of Appeal, 5. Using emergency protocols for more than 500 days gave rise to a new legal basis for protest since the law is clear that "Emergency means a condition posing an imminent threat to public health, welfare, or safety which could not have been foreseen through the use of reasonable and prudent management procedures, and which cannot be addressed by other procurement methods of source selection." (5 GCA § 5030(x); 2 GAR § 1106(47)). GIAA's failure to rotate to "other procurement methods of source selection" beyond using a stale emergency as a procurement crutch gave rise to the new ground to protest. That ground, when coupled with the Attorney General's March 16, 2023, determination about Menzies's inability to legally perform ripened into the instant protest appeal that is before the OPA.

JMI raised its protest to GIAA on March 21, 2023 — five days after learning of GIAA’s intent to utilize for the first time an emergency procurement to a contractor that the Government of Guam’s chief legal officer determined could not perform. Therefore, both JMI’s agency level protest meets the timeliness standards required by applicable law and regulation. This appeal must proceed to its merits.

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

Even though this matter is before the OPA on an appeal from an agency protest denial, GIAA argues that the matter must be dismissed “for lack of subject matter jurisdiction” since, in the view of GIAA, JMI’s agency level protest was untimely. Motion, 5. 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 GIAA is appropriately using the emergency procurement processes. *See*, Denial of Procurement Protest, March 27, 2023, attached to the JMI Notice of Appeal as Exhibit C. GIAA ignored fundamental procurement rules regarding contractor responsibility and the nature of an emergency, and in now 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 territory’s procurement regime. JMI’s OPA Appeal came 14 days after GIAA issued its protest decision to JMI — well within the fifteen-day protest appeal period set by 5 GCA § 5425(e). GIAA is simply wrong about the lack of jurisdiction, and wrong in claiming that an agency’s determination of untimeliness is dispositive and would cut off the OPA’s jurisdiction to perform such review.¹

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¹ GIAA’s position on the OPA’s jurisdiction flips review by the OPA on its head. If, as GIAA determined in its protest decision, JMI’s protest was untimely, then the OPA should exercise its jurisdiction in upholding the agency decision. No understanding of jurisdiction beyond the one in GIAA’s mind’s eye would prevent the OPA from reaching the question of whether or not the underlying protest was timely. Certainly no jurisdictional concept would allow the OPA to make findings in a case — an administrative case where a record must be developed for eventual judicial review — where it had no subject matter jurisdiction, since “without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94, (1998) citing *Ex parte McCardle*, 7 Wall. 506, 514 (1868).

III. CONCLUSION

GIAA urges the OPA to dismiss JMI's appeal based upon its belief that reviewing whether or not Menzies can legally perform contractor work for GIAA under an emergency procurement regime is somehow beyond the reach of the OPA, and that even if reviewable, a JMI's case should be dismissed based upon the factual denials of GIAA. The OPA should reject GIAA's invitation, and move this matter forward to an analysis of the merits of the JMI's protest.

Submitted this 6th day of June, 2023.

Razzano Walsh & Torres, P.C.

By: 

JOSHUA D. WALSH

JOSEPH C. RAZZANO

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