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**OPA-PA-23-002 in re Appeal of JMI (GIAA)**

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Thu, Oct 26, 2023 at 10:13 PM

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Hafa Adai Mr. Hernandez,

Please see the attached for e-filing in the subject matter on behalf of GIAA.

GIAA's Supplemental Brief dated 10.26.23

Thanks,

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

**In the Appeal of**

APPEAL CASE NO.: OPA-PA-23-002  
GIAA 2021 Emergency Procurement

**Johndel International, Inc. dba. JMI-  
Edison,**

**SUPPLEMENTAL BRIEF**

Appellant.

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

**COMES NOW** the A.B. Won Pat Guam International Airport Authority (“GIAA”), through the undersigned counsel, who pursuant to the Order of the Hearing Officer in this matter, submits this supplemental brief addressing the following issues:

1. An analysis of the definition of “emergency” under the Guam procurement law, in the context of the procurement at issue in this appeal.
2. The permissible term of a contract solicited in response to an emergency procurement solicitation.
3. Whether an emergency procurement has been used to respond to emergencies similar to the “human-made” circumstances presented in this case?

The issues raised by the Hearing Officer highlight an important point related to this appeal. Guam’s emergency procurement method of source selection and related procedure were recently amended by Public Law 35-109, which went into effect 90 days after February 1, 2020. That law

repealed and reenacted 5 G.C.A. Section 5215 of the Guam Procurement Code to amend the requirements for an emergency procurement, the procedure to be followed to solicit a contract using an emergency procurement, and the procedure for administration of the contract resulting from the emergency procurement. The law also amended 5 G.C.A. Section 5030(x), which contains the definition of “emergency” as used in the procurement code. See P.L. 35-109 attached hereto.

The substantive law enacted by P.L. 35-109 touches on all parts of this case. Additionally, this case and the issues raised by the Hearing Officer appear to bear directly on matters raised during the legislative process leading to the enactment of Public Law 35-109. GIAA’s actions were in compliance with Guam law, and the analysis of the issues identified by the Hearing Officer supports that conclusion.

**I. Recognizing a valid emergency exists here does not mean all procurement stays merit emergency procurement.**

Emergency under the Guam procurement law is defined as “a condition posing an imminent threat to public health, welfare, or safety, or the health and safety of the environment, 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 G.C.A. Section 5030(x). Public Law 35-109 added language to include threats to the health and safety of the environment as bases for emergency under the Guam procurement law. The language used in the definition of emergency is not further defined in the procurement law. This means that the language is accorded its plain meaning absent legislative intent to the contrary. See Sumitomo Constr., Co. v. Gov’t of Guam, 2001 Guam 23 ¶ 27 (citation omitted). Based on the definition above, an emergency under the procurement code has three separate requirements:

1. A condition posing an imminent threat to,
  - a. Public health, welfare or safety, or
  - b. The health and safety of the environment,

2. Which could not have been foreseen through the use of reasonable and prudent management procedures, and
3. Which cannot be addressed by other procurement methods of source selection.

In the context of this case, in October 2021, GIAA determined that the imminent interruption of services caused by the expiration of its Management and Infrastructure Support Services provider's contract on October 31, 2021 and the lack of provider after that date posed an emergency.<sup>1</sup> The imminent interruption was due to a procurement protest that automatically stayed GIAA RFP-5-FY21, which solicited a provider to provide the services at issue upon expiration of the previous contract.

Specific to the requirements above, GIAA's Determination of Need for Emergency Procurement at pages 27-29 of the procurement record found that the emergency condition was: the lack of a provider for management and infrastructure support services to GIAA's Baggage Conveyance systems which would shut down the airport, and therefore which posed an imminent threat to, public health, welfare or safety because the island's only commercial airport, the sole air gateway for important civilian and commercial personnel and commodities, would shut down. GIAA's baggage conveyance systems are critical to GIAA operations. The systems move baggage in and out of the airport's sterile and secure areas with strict security requirements. The systems are integral to security screening pre flight departure, customs screening for outbound and incoming air traffic, and provide for the orderly and efficient movement of thousands of items from users and customers, through GIAA tenant processes, through Government security and regulatory inspections, to and from aircraft, and back to users on a daily basis.

As testified to on October 12, 2023, the flow of people in various critical capacities, goods – including medication and necessary commodities of a similarly critical and important nature, that

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<sup>1</sup> This was testified to by GIAA and other witnesses during the hearing in this matter on October 12, 2023, and will be more fully discussed in GIAA's Proposed Findings of Fact and Conclusions of Law.

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traverse the airport's baggage conveyance systems on a daily basis, would be stopped without a provider of the services. The shutting down of the airport would have significant repercussions beyond leisure travel, felt throughout the island community.

As to the foreseeability of interruption in GIAA's baggage conveyance systems via reasonable and prudent management procedures, GIAA attempted to procure services through an RFP process with a closing of July 2021 and negotiation in August 2021. This would have provided September and October 2021 for GIAA to transition services to the provider who succeeded on the RFP before the October 31, 2021 contract expiration. JMI's September 2021 protest of the underlying RFP and subsequent appeal to the Public Auditor in October 2021 was not reasonably within GIAA management's control. Additionally, the February 2022 dismissal of JMI's claims by the Public Auditor for JMI's fraud, and the ensuing appeal to the Superior Court were not within management's control. Management used the same RFP process in 2021 as it did in 2015. In 2015 there was no protest on the bases JMI raised in 2021. Therefore, Management could not have reasonably expected JMI or any other offeror would raise license-related claims for the same scope of work as was procured by GIAA without protest, in 2015.

Finally, no other method of source selection: small purchase, sole source, competitive sealed bidding, or another RFP - with a qualification requirement in litigation and disputed between two proposers, was available to GIAA to solicit a contract for the services by November 1, 2021, after the existing contract expired. Even today, two years later with the same procurement stay in place, no method of source selection is available to GIAA until the questions raised in JMI's initial 2021 appeal are resolved.

GIAA thus met the requirements of an emergency necessary to issue an emergency procurement and to extend the resulting contract while the stay remained in place. Importantly however, not every

procurement stay due to a protest will result in an emergency as defined in the procurement law. There will inevitably be situations where, notwithstanding a procurement stay, an agency may either: (1) be unable to determine under penalty of perjury that said stay creates an imminent threat to public health, welfare or safety or the health and safety of the environment, (2) have foreseen through the use of reasonable and prudent management procedures the basis and length of a procurement related stay, (3) have access to other methods of source selection, and/or (4) be unable to refer to a declaration of emergency or certificate of emergency approved by *IMaga Hagan Guahan* in accordance with Section 5215. However, in this case, those requirements are met.

**II. An emergency procurement contract's scope and duration are limited to the emergency.**

Unlike other jurisdictions, Guam does not have the equivalent of a bridge contract method of source selection. This means that agencies, when faced with an expiring contract and procurement stay, only have the recourse of the methods of source selection available under Guam law. Here, a lower ranked offeror protested GIAA's qualification requirements in its 2021 RFP, which utilized the same scope and qualifications from its 2015 RFP. After it was clear a stay would interrupt a transition of the services to a new contract, GIAA considered each alternative method of source selection in the Guam procurement law. Sole source, small purchase, competitive sealed bidding or another RFP – with the basis for protest pending, could not be employed. Thus, GIAA determined the need for emergency procurement and the Governor approved GIAA's certificate of emergency.

The recent and wholesale realigning of the emergency procurement procedure by Public Law 35-109 does not provide much time for a recent comparable case in this jurisdiction to help analyze factually analogous situations subject to the same procedure. However, the legislative history of Public Law 35-109 sheds some light on what situations the Legislature contemplated when enacting the new emergency procurement procedure.

In testimony before the Guam Legislature, the GSA Chief Procurement Officer Guam’s executive branch procurement authority expressly addressed the concern of emergency procurements due to protests and court cases being filed, with the final iteration of the bill allowing for procurements to be extended beyond 90 days when certain requirements are met – presumably acknowledging in part GSA’s concerns. Bill 90-35, Committee Report at 36-37, 50-51 (Feb. 21, 2020) (from testimony of then-acting chief procurement officer, “[i]f there is a protest, appeal [sic] the Office of Public Accountability, or a court filed case on a bid, which prevents any action, what other method is authorized to allow for such procurement other than emergency procurement? If you look at the current law, there is no other method to address issues like this).<sup>2</sup>

The Legislative Committee which reported out a substituted version of Bill 90-35, acknowledged GSA’s concerns. See id. (“The other concern that they had is if there was a protest appeal or court filed case on a bid their concern was should that extend beyond the 90-day period, how would that be addressed. These are some concerns that I would continue to work with GIAA to address them . . . .”)

The Committee’s substituted version of Bill 90-35 also initially provided a Section (d)(2) which would have required a determination of need for emergency procurement to “prominently warn all contractors that any contract or other arrangement made to extend or renew an emergency procurement or make a new emergency procurement based on the circumstances of the event of the emergency described in the instant Determination of Emergency procurement shall be void when made and unenforceable against the government. . . .” Bill 90-35, as substituted by the Committee (Sept. 4,

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<sup>2</sup> Committee Report, Bill 90-35, *available at*: [https://www.guamlegislature.com/Committee\\_Reports\\_35th/CR%20on%20Bill%20No.%2090-35%20\(COR\)%20As%20substituted\\_%20and%20amended.pdf](https://www.guamlegislature.com/Committee_Reports_35th/CR%20on%20Bill%20No.%2090-35%20(COR)%20As%20substituted_%20and%20amended.pdf)

2019).<sup>3</sup> Notably, that section (d)(2) appears to align with the position taken by JMI in this appeal, that extensions beyond 90 days are unlawful.

The eventual version of Bill 90-35 passed by the Legislature as Public Law 35-109<sup>4</sup> removed the proposed (d)(2) cited above, and clarified that where requirements are met, an emergency procurement can be extended beyond the initial 90 days from the determination of need for emergency so long as the contract remains limited in scope and duration to respond to the emergency. See 5 G.C.A. § 5215(e) (2020).

The Legislature appears to have directly addressed the GSA Chief Procurement Officer's concern that where a protest or appeal is filed, a stay is imposed and the requirements of an emergency procurement are met, an emergency procurement is the only appropriate method of source selection to address the emergency condition created by the procurement stay, if any. Supra note 3.

Implied in this legislative history is a recognition that specifically, there is room for an agency to utilize emergency procurement where a procurement stay and appeal to the superior court is in place, and where there is an emergency situation that meets the requirements of Sections 5215 and 5030(x). That is exactly what occurred here, and GIAA strictly complied with the procurement law's requirements, and acted accordingly in conducting an emergency procurement and extending the contract solicited through such procurement. No other method of source selection exists to allow GIAA to procure the services in a different manner while the 2021 litigation remains pending, and nothing has changed with regard to the existence of the stay imposed since 2021 and the imminent interruption in GIAA's critical baggage conveyance systems due to the stay.

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<sup>3</sup> Bill 90-35 as substituted by Committee, *available at*:

[https://www.guamlegislature.com/Bills\\_Introduced\\_35th/Bill%20No.%2090-35%20\(COR\)%20As%20substituted.pdf](https://www.guamlegislature.com/Bills_Introduced_35th/Bill%20No.%2090-35%20(COR)%20As%20substituted.pdf)

<sup>4</sup> Public Law 35-109, *available at*: [https://www.guamlegislature.com/Public\\_Laws\\_35th/P.L.%20No.%2035-109.pdf](https://www.guamlegislature.com/Public_Laws_35th/P.L.%20No.%2035-109.pdf)



**III. The newly amended emergency procurement procedure does not limit emergencies to acts of god.**

As discussed above, procurement protests and appeals were specifically contemplated during the legislative process of Public Law 109-35, as a basis for potential emergency procurements where Section 5215's requirements are met. In other jurisdictions, emergency is not defined exactly like Guam law, but the use of similar emergency procurement methods of source selection can extend to human-caused emergencies beyond acts of nature. See Daves Ins. Agency, Inc. v. State Through Div. of Admin., 488 So. 2d 705, 708 (La. Ct. App.), writ denied, 489 So. 2d 236 (La. 1986) (finding emergency procurement appropriate response for anticipated loss of state automobile insurance coverage.); see also, Sloan v. Dep't of Transp., 666 S.E.2d 236, 243 (Supr. Ct. S.C. 2008) (discussing meaning of emergency and finding no emergency existed in delayed roadway construction project where hazards complained of would exist in any construction project of a similar type); Cannon Point N., Inc. v. City of New York, 87 A.D.3d 861, 863 (2011) (denying summary judgment where property owner alleged no emergency existed for city to bypass competitive bidding in repairing known deteriorating structures because city was aware of state and deterioration of the structures over long period of time, and finding genuine issue of material fact existed of whether circumstances constituted an emergency).

It is important to note that as alluded to above, other jurisdictions handle emergencies and procurement very differently than Guam. For example, in New York, government bodies can extend existing contracts even when presented with emergency situations. See e.g., Civ. Serv. Emps. Ass'n, Inc. v. O'Rourke, 660 N.Y.S.2d 929, 936 n. 12 (Sup. Ct. NY), aff'd in part, 240 A.D.2d 572, (NY Ct. App. 1997) (discussing lack of emergency due to foreseeability of crisis, but also recognizing alternative to avoid crisis instead of emergency procurement was unilateral extension). This renders any limitation on emergency procurement in such jurisdictions in a different legal scheme, with

plausible alternatives to emergency procurement that are not present in Guam law. Therefore a wholesale adoption of reasoning from such other jurisdictions would be problematic.

Thus, while there is some factual similarity to other jurisdictions, the plain language in the Guam procurement code and the relevant legislative history are superior authorities to other jurisdictions. The Guam Legislature expressly contemplated procurement protests and appeals in some circumstances could give rise to a basis for emergency procurement. The Legislature expressly removed any arbitrary line drawing on the length of a contract resulting from such procurement, and instead attached the scope and duration of the contract to the emergency basis that gave rise to the emergency procurement.

**CONCLUSION**

Based on the foregoing, the evidence presented at a hearing on this matter, and the record, GIAA requests that the Court deny JMI's appeal and find that GIAA's actions related to the emergency procurement now on appeal were in compliance with Guam law.

Dated: October 26, 2023.

Respectfully submitted,  
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By:   
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