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

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Hafa Adai Mr. Hernandez,

Please see attached (OPA-PA-23-002 PFFCL) for e-filing in reference to the subject matter.

Thank you,

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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-PA-23-002
 GIAA 2021 Emergency Procurement

**GIAA’S PROPOSED FINDINGS OF
 FACT AND CONCLUSIONS OF
 LAW**

COMES NOW, the A.B. Won Pat Guam International Airport Authority (“GIAA”), through the undersigned counsel, who hereby submits GIAA’s Proposed Findings of Fact and Conclusions of Law based on the record presented in this case and the testimony of the following witnesses at the hearing on the merits of this matter held on October 12, 2023: GIAA Executive Manager John Quinata, GIAA Airport Services Manager Jean Arriola, GIAA Air Terminal Manager Juan Reyes, Johndel International, Inc. dba. JMI-Edison President Eduardo Ilao, Guam Contractor’s License Board Investigator Supervisor Nida Bailey and Investigator Marcus Finona, and Aircraft Services International, Inc. dba Menzies Aviation General Manager Rodney Paet and Accounting Manager Mildred Sigaoat.

FINDINGS OF FACT

The Public Auditor makes the following findings of fact:

1. GIAA operates Guam's only civilian airport 24 hours a day, seven days a week. The airport is a hub for civilian air traffic and its flight and passenger operations include several daily incoming and outgoing flights on different airlines, cargo and other operations.
2. As part of its airport operations, GIAA maintains within its terminal a complex, one of a kind in Guam system which moves baggage throughout the airport terminal, to and from key security points, within both the sterile and nonsterile areas, and ultimately to and from airport patrons and their incoming and outgoing flights. These systems are referred to as the "Baggage Conveyance Systems" and at time here in the "systems." The GIAA baggage conveyance systems are second in complexity in the Pacific region to the Daniel J. Inouye Honolulu International Airport baggage conveyance systems, and in terms of scale are similar to the Kahului Airport's baggage conveyance systems in Maui.
3. Consistent with the Industry Standard, GIAA has historically outsourced the management, maintenance and operation of its baggage conveyance systems (hereinafter the "services"). At the time in 2021, the then most recent outsourcing contract was procured in 2015 and the operator of GIAA's baggage conveyance systems pursuant to that procurement through October 2021 was Aircraft Services International, Inc. which does business in Guam as Menzies Aviation ("Menzies").
4. On July 20, 2021, in anticipation of the October 31 expiration of the existing contract with Menzies, GIAA issued Request for Proposal number RFP 05-FY21 seeking offers/proposals for Management and Support Services to GIAA's Baggage Conveyance Systems.
5. On September 21, 2021, Johndel International, Inc. dba. JMI-Edison ("JMI") filed a protest related to the RFP. JMI alleged *inter alia* that the higher ranked offeror Menzies lacked

- certain licensure from the Guam Contractor's License Board ("GCLB") to perform work required by the RFP, specifically a C-13, C-15, and a C-68 license.
6. GIAA denied that protest and JMI appealed GIAA's decision to the Office of Public Accountability in OPA-PA-21-010. JMI also filed a complaint with the GCLB in September or October of 2021 alleging that Menzies was required to hold a C-13 license, a C-15 license and a C-68 license issued by the GCLB to carry out the work it was already performing, and was seeking to perform in response to the RFP.
 7. The OPA ultimately dismissed JMI's appeal with prejudice, finding that a purported "Findings and Decision" document presented by JMI to the OPA and purportedly issued by the GCLB, and the circumstances of the document's creation, constituted a fraud on the OPA.
 8. JMI appealed the OPA's decision to the Superior Court. That matter is captioned CV0095-22, and remains pending as of the hearing on the merits in this procurement appeal. The Superior Court heard arguments in the appeal and took the matter under advisement on September 19, 2023.
 9. Because JMI filed a protest during the negotiation phase of RFP-05-FY21, GIAA imposed a stay on the procurement on September 21, 2021. That stay remains in place.
 10. GIAA's then-existing contract with the provider who provided management and infrastructure support services to GIAA's Baggage Conveyance Systems was still set to expire on October 31, 2021.
 11. GIAA is unable to operate the baggage conveyance systems without a provider of the services. GIAA would have to manually fill in for the automated systems, siphoning resources from other core GIAA functions. GIAA witnesses testified that this was done just

after typhoon Mawar passed over Guam and after two days, GIAA was already stretched thin and could not physically handle the tasks normally handled by the Baggage Conveyance Systems for any longer period.

12. GIAA does not have the technical or manpower capacity to operate the system's automated components, to maintain the system, to conduct repairs and troubleshooting of the system or to manage the control room of the system.
13. Without a provider in place, outbound flights would immediately be delayed by the substitution of physical conveyance of baggage in lieu of the automated systems. The initial delay would likely be in the 6–8-hour range. However, the delays would cascade into arriving flights not having gates available. Ultimately, GIAA would shut down if the entire baggage conveyance systems were shut down without a provider for an extended period of time.
14. A critical inlet and outlet of goods would also be plugged if the systems and the airport were shut down. Persons needing critical medical treatment off island, or critical personnel coming into Guam, critical materials that traverse the systems to and from flights, and transit passengers and goods, including on lifeline flights to other pacific islands would be halted.
15. Between JMI's October 8, 2023 appeal to the OPA and October 27, 2021, GIAA personnel reviewed GIAA's options given the imminent expiration of the contract, including a review of the different methods of source selection under the Guam procurement law.
 - a. Due to the pending litigation, GIAA determined that it could not issue a new RFP while the scope of services was subject to protest. JMI conceded if GIAA used the same scope of services without a license requirement, JMI would have probably

lodged a protest. Menzies maintains its position that no license is required to provide the services. Thus, GIAA could not avoid a protest one way or the other.

- b. GIAA's price estimate for one month of services exceeded the \$25,000.00 threshold for small purchase procurement.
- c. The nonrecurring maintenance, repair and labor costs accounted for in the professional services contract also were not conducive to an invitation for bid, since GIAA had determined the need for and historically had utilized a contract which allowed the provider of services to pass nonrecurring costs related to the systems on to GIAA in addition to the monthly fee to provide the services.
- d. Because GIAA was aware that more than one offeror was interested in offering the services to GIAA, GIAA was also unable to employ the sole-source method of source selection.
- e. Finally, as recognized in Paragraph 12 above, GIAA did not have the in-house capacity to operate the systems, and could only physically implement a manpower driven substitution of the automated services on a short-term and temporary basis.

16. Recognizing the imminent interruption of services and the realistic likelihood that the airport could be shut down, as a potential threat to public health and safety, GIAA determined the need for an emergency procurement on October 27, 2021 in accordance with Guam law. The determination was the result of a deliberative process conducted by an internal working group represented by the Procurement/Administration, Operations, Engineering and Facilities and Maintenance Divisions of GIAA.

17. The GIAA Executive Manager presented the determination of need and request to conduct an emergency procurement to *I Maga Hagan Guahan* who reviewed GIAA's determination and approved a certificate of emergency, authorizing the emergency procurement.
18. GIAA then solicited proposals on an emergency basis, seeking a provider to provide services on a monthly basis due to the inability to move forward with RFP 005-FY21, the imminent expiration of the contract, and to continue while the stay remained in place. GIAA considered the immediate need for the services, and the limited time to get a provider in place.
19. Two offerors submitted proposals, and Menzies was ultimately awarded a contract to provide the services on November 1, 2021. The contract was for an initial term of 30 days, subject to extension as allowed by law.
20. Because the procurement stay on RFP 005-FY21 remains in place to this date, GIAA has complied with Guam law to extend the contract, issuing a determination of need for extension every thirty days, and convening a public hearing for any extension beyond each separate ninety-day period. See e.g., PR at pp. 529-540, 604-622.
21. In December 2021, when GIAA gave notice of a public hearing on its intent to extend the contract with Menzies for the first time, beyond the initial 90-day term, a JMI representative emailed the GCLB a copy of GIAA's newspaper advertisement giving notice of the public hearing. PR at pp. 792-795.
22. Additionally, on February 10, 2022, when JMI appealed from the OPA's dismissal of its protest appeal in OPA-PA-21-010, JMI verified in its complaint that currently Menzies is performing under an "emergency" contract without appropriate licensing." PR at 796-797.

23. On March 15, 2023, GIAA gave notice of a public hearing on its intent to extend the emergency procurement for an additional ninety (90) day period.
24. On March 21, 2023, JMI wrote to GIAA and incorrectly stated that GIAA was convening a board meeting on March 22, 2023, to extend the contract with Menzies for an additional 90-day period. PR at pp. 772-776. JMI attached to its protest a March 14, 2023 opinion from the Office of the Attorney General which stated that the OAG had “confirm[ed] 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.” PR at pp 778-788.
25. JMI took the position that Menzies could not perform in response to the RFP. PR at pp.772-776. JMI also speculated that GIAA had not taken the steps necessary to use an emergency procurement. Id. JMI requested that it be awarded the contract beginning May 15, 2023. Id. JMI also incorrectly asserted its March 21, 2023 protest was “pre-award”.
26. GIAA denied JMI’s protest in its entirety on March 27, 2023. Specifically, GIAA found JMI’s protest to be untimely and speculative. PR at pp 790-791. GIAA also found that JMI’s protest was post-award, and therefore the automatic stay provisions of Guam’s procurement law is not applicable. Id. JMI then appealed to the OPA in this matter,
27. Subsequent to the denial, GIAA learned through public media reports that the GCLB took some action related to JMI’s license-related complaint against Menzies. PR at 802-807.
28. GIAA was not served with any document by the GCLB as a result of such action at this point.¹
29. However, due to the pending litigation, GIAA through counsel inquired of Menzies’ awareness and position on any GCLB action, and requested a meeting between GIAA and

¹ Subsequent to the March 2023 protest, on April 14, 2023 JMI did send to GIAA a letter with a GCLB cease and desist order attached. The Cease and Desist Order appears to be dated April 4, 2023.

Menzies. GIAA and Menzies' representatives met virtually throughout the day on Friday, March 31, 2023.

30. An agreement was reached where GIAA was satisfied that Menzies could continue to perform under the November 2021 contract, as Menzies would contract with a subcontractor to perform work in compliance with any GCLB requirement issued to Menzies, while also reserving its right to challenge the GCLB decision as allowed by Guam law.
31. GIAA, through counsel correspondence, also requested that if Menzies was served with any cease and desist or similar correspondence from the GCLB, that GIAA be made aware of such service and document. Subsequently, on April 7, 2023, Menzies submitted a GCLB contractor's license to GIAA. Id. at pp. 808-810.
32. JMI through its President Mr. Ed Ilao, admitted that:
 - a. JMI does not have 5 years of maintenance and operation experience handling baggage conveyance systems.
 - b. JMI would need between 30-60 days to transition to provide the services to GIAA.
 - c. That the circumstances presented to GIAA in October 2021, when JMI appealed the dismissal of its protest to the OPA constituted an emergency situation meriting an emergency procurement.
33. The GCLB witnesses Ms. Bailey and Mr. Finon testified that:
 - a. The GCLB has only issued a citation, claiming that Menzies needs a C-13 license issued by the Contractor's license board to provide the services sought in RFP FY05-21.
 - b. The GCLB did not review the scope of services for the October 2021 emergency procurement.

- c. The GCLB did not follow standard operating procedure and waited for an OAG Opinion before presenting its investigation to the Guam Contractor's License Board of Directors in March of 2023
- d. While the complaint was filed in September/October 2021, GCLB did not conduct a site inspection until September 2022. Investigator Finona stated this is because his review of the RFP FY05-21 scope of services against the definitions in the GCLB regulations already determined Menzies needed a C-13 license. Mr. Finona admitted he has not seen and thus he has not reviewed the Emergency Procurement Scope of Services.
- e. The GCL Board has only issued a citation, and the next step will be for a hearing to be held on the citation. Currently, the GCLB is awaiting the appointment of a hearing officer by the Attorney General. There is no estimate for when a hearing will take place.

CONCLUSIONS OF LAW

I. JMI's Claim that Menzies is required to hold a C-13 license is moot.

At the time of JMI's March 21, 2023 protest to GIAA, the GCLB had not found that a license was required for the work related to the RFP. JMI attached to its protest a March 14, 2023 legal opinion from the OAG that preliminarily advised the on its review of a relevant GCLB investigation. The OAG does not have authority to classify licenses issued by the GCLB. Therefore, GIAA responded to JMI's protest and specifically stated that the GCLB had yet to take action regarding JMI's allegations of Menzies' lack of licensure.

Since JMI's protest letter was addressed by GIAA, GIAA concedes that the GCLB issued to Menzies a citation and cease and desist letter related to its work at GIAA requiring a specialty C-13

license. The letter was sent to GIAA by Counsel for JMI on April 14, 2023. Agency Report Ex. A (Apr. 25, 2023). Before that date, GIAA took steps to assure that work done related to the current contract to provide services was not interrupted and was done in compliance with GCLB action that prompted the cease-and-desist letter. See PR at pp. 802-807.² On April 7, 2023, Menzies transmitted to GIAA a copy of a C-13 license issued by the CLB to Menzies. PR at pp. 808-810.

The Supreme Court of Guam has held that “[a] claim is moot when the issues are no longer live or the parties lack a legally cognizable interest in the outcome. Accordingly, an appeal should be dismissed as moot when, by virtue of an intervening event, the appellate court cannot grant effectual relief whatever in favor of the appellant.” In re Guardianship of Ulloa, 2014 Guam 32 ¶ 25 (internal citations and quotation marks omitted).

JMI’s clam about Menzies providing work requiring a C-13 GCLB license is now moot given Menzies production of a license.³

To the extent JMI seeks the OPA to remedy conduct of Menzies prior to its licensure, the GCLB, not the OPA, is empowered to “investigate, classify and qualify applicants for contractor’s licenses and investigate for compliance with the rules and regulations of the Board and the provisions of the [Contractor’s Licensing-related Chapter of the Guam Code].” See 21 G.C.A. § 70109 *et seq.* The Contractor’s License Board is granted the exclusive authority to penalize and to otherwise enforce Contractor’s License related laws. See 21 G.C.A. §§ 70116-70121.

² The GCLB met on March 15, 2023 and reviewed the Letter from the Office of the Attorney General. See Meeting Recording (Mar. 15, 2023) (available at: <https://www.youtube.com/watch?v=rSAOoRaVC3g>). The GCLB convened a working session and board meeting on March 28, 2023 where they authorized the issuance of a cease-and-desist letter to Menzies. See Meeting Recording (Mar. 28, 2023) (available at: <https://www.youtube.com/watch?v=xYyj5xkW7es>). The CLB met on April 19, 2023 where Menzies’ notices of defenses and request for a hearing was discussed. See GCLB Meeting Recording (Apr. 19, 2023) (available at: <https://www.youtube.com/watch?v=AMYB0wAhZdI>).

³ GIAA is aware from the GCLB meeting recordings that Menzies has requested a hearing and will challenge some or all parts of the GCLB’s action. Supra note 2. Notably, the GCLB appears to have issued a monetary penalty against Menzies for past conduct. GIAA’s concerns are for the continued operation of its Baggage Conveyance Systems and GIAA takes no position on the GCLB’s procedures, its cease-and-desist letter, or Menzies’ defenses or challenges to the GCLB actions.

The GCLB testified that Menzies is already facing a \$300,000.00 fine on its citation that is now pending appeal. The OPA has no jurisdiction to provide a remedy for past conduct. Because Menzies is now licensed, in line with the mootness finding above, the OPA is without jurisdiction to reach back to the period before Menzies was licensed to penalize Menzies.

Additionally, the OPA finds that GIAA had no other option but to wait until the GCLB took action on the JMI Complaint. Notably, if the OPA were to adopt JMI's contention that on receipt of the protest 2021 GIAA had to require licensure of Menzies, Menzies would have been required to secure a C-15, C-68 and C-13 license. The GCLB has only issued a citation related to C-13 and thus GIAA took the correct approach to allow the GCLB to conduct its investigation, which the OPA notes is still ongoing as Menzies challenge to the citation remains pending.

The OPA finds JMI's license-related claims are moot. Additionally, the OPA is without jurisdiction to penalize Menzies for past conduct. Finally, GIAA was correct to allow GCLB's investigation to proceed. Thus JMI's appeal on the license related basis is denied.

II. *GIAA complied with Guam law to award and extend the November 2021 contract.*

GIAA complied with the requirements laid out in Guam law to conduct an emergency procurement. See 5 G.C.A. § 5215. "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). Based on the definition above, an emergency under the procurement code, as relevant here, has three separate requirements:

1. A condition posing an imminent threat to public health, welfare or safety,
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.

GIAA determined the existence of a threat to public health or safety, in writing. 5 G.C.A. § 5215(a). The emergency circumstance is the imminent interruption the services caused by the expiration of its Management and Infrastructure Support Services provider's contract on October 31, 2021 and the inability to move RFP FY5-21 forward due to the procurement stay.

GIAA could not have foreseen that (1) the former Executive Director of the GCLB and JMI would commit fraud against the OPA in OPA-PA-21-010 and (2) that as a result the GCLB investigation on the JMI complaint would take over two years to be brought before the board. These circumstances are wholly outside of GIAA's control.

Finally, as laid out above in Paragraphs 15(a)-(e), GIAA had no other options under the procurement code, or through in-house capacity, to keep the systems running and the airport open. Thus GIAA determined the circumstances merited an emergency, necessitating and authorizing an emergency procurement.

GIAA did not take this step unilaterally. The Governor approved a certificate of emergency based on GIAA's determination of need for emergency procurement. 5 G.C.A. § 5215(b)(2). The provider of services solicited through that emergency procurement was competitively selected, on an emergency basis. See 5 G.C.A. § 5215(d).

JMI questions the length of the emergency procurement but does not offer what other option GIAA has before it. JMI conceded that in October 2021 GIAA was faced with an emergency meriting the use of an emergency procurement. The extension of the contract executed pursuant to that emergency procurement has occurred in full compliance with the Guam procurement law. 5 G.C.A. § 5215(e); See P.R. at pp. 529-540, 604-622. The contract remains limited in scope and duration to the emergency certified by *I Maga'hågan Guåhan*. Thus, JMI cannot have it both ways. JMI – through

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Mr. Ilao – conceded the emergency presented in October 2021 was sufficient to warrant an emergency procurement. Contrary to JMI’s assertion, GIAA is still faced with that emergency today as it cannot move forward with RFP FY05-21 and cannot utilize any other method of source selection, or use in house capacity to provide the services until the procurement stay is lifted. GIAA’s denial of JMI’s protest is therefore affirmed.⁴

III. JMI is not an actual or aggrieved bidder.

Under the procurement law, “[a]ny actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may” file a protest with the purchasing agency.” 5 G.C.A. § 5425. Based on the testimony, JMI would not be qualified to perform under the emergency procurement. The Emergency Procurement solicitation required an offeror to have a minimum of 5 years’ experience in the mechanical aspect of the systems **and a minimum of five years’ experience** in the maintenance and repairs of baggage conveyance systems. PR at 118. Mr. Ilao testified that JMI had experience installing the system, but conceded it did not have 5 years’ experience of operation and maintenance of the systems. E. Ilao testimony at time stamp 54:21, Formal Hearing, Part 2 (Oct. 12, 2023). Additionally, JMI conceded that it would need approximately 30-60 days to transition the services at any given time. Therefore, JMI was not qualified to submit a response to the Emergency Procurement solicitation given the short time for beginning performance in October 2021.

IV. JMI’s March 2023 protest was post-award, therefore no stay is in place.

⁴ Notwithstanding that these are proposed findings of fact and conclusions of law, for the avoidance of doubt, GIAA respectfully does not waive and hereby preserves its argument that JMI’s march 21, 2021 protest was made more than 14 days after when JMI knew or should have known of the bases for their protest, and its protest is therefore untimely.

Under 5 G.C.A. Section 5425(g) “in the event of a timely protest . . .the territory shall not proceed with the [award of the contract] prior to final resolution of such protest” 5 G.C.A. § 5425(g). The contract with Menzies at issue here was entered into on November 1, 2021 and has been extended in accordance with 5 G.C.A. Section 5215(e) since then. Therefore, JMI is incorrect that its protest is pre-award. To be clear, there is no procurement stay on the award of a contract to Menzies in place. The March 21, 2023 protest was post award.⁵

CONCLUSION

Based on the foregoing, JMI’s appeal is denied in its entirety. The OPA finds:

1. That JMI’s arguments related to the C-13 contractor’s license to Menzies are moot as related to Menzies ability to prospectively perform under the contract entered into under an emergency procurement. Additionally, the OPA is without jurisdiction to remedy past allegations of violations of the contractor’s-license-related law.
2. That GIAA’s actions related to the emergency procurement were in accordance with applicable law and regulations and JMI’s allegations to the contrary are expressly rejected. GIAA still has no option under the procurement law or with regard to its in house capacity to provide the services in another manner until the stay on RFP FY05-21 is lifted.
3. JMI is not an aggrieved bidder because JMI did not meet the minimum requirements of the emergency procurement solicitation. Additionally, JMI could not perform in the timeframe needed for GIAA to respond to the emergency.

⁵ Again, notwithstanding these are proposed findings of fact and conclusions of law, given the testimony by Mr. Ilaio that JMI will need at least 30-60 days to transition the services from the current provider were JMI to be awarded the contract to provide the services, in the event the OPA finds in favor of JMI, GIAA requests that any relief granted provide sufficient time to both transition and complete a different procurement process should the OPA’s Order affect the existing contract to provide the services. For transition and to complete a procurement, GIAA requests a period of at least 120 days, so that the critical services will not be interrupted and in order to keep the airport open.

4. JMI's March 21, 2023 protest was post award, therefore no procurement stay was or is in place as a result of said protest.

Dated: November 17, 2023.

Respectfully submitted,
ARRIOLA LAW FIRM

By: 

WILLIAM B. BRENNAN