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		Pages:	8 (including cover page)
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		Phone: **Fax:**	(671) 475-0390 x. 204 (671) 472-7951

Re: OPA-PA-21-010 Decision and Order

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Jerrick Hernandez, Auditor

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BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

In the Appeal of Johndel International, Inc. dba JMI-Edison, Appellant.	**Appeal No: OPA-PA-21-010** **DECISION AND ORDER**

To: **Purchasing Agency:**
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INTRODUCTION

On January 27, 2022, the parties through counsel, JOSEPH C. RAZZANO, Esq., Attorney for Appellant Johndel International, Inc. dba JMI-Edison ("JMI"), WILLIAM B. BRENNAN, Esq., Attorney for the Purchasing Agency Guam International Airport Authority ("GIAA"), and R. MARSIL JOHNSON, Esq. Attorney for Interested Party Aircraft Services International, dba Menzies Aviation ("Menzies"), appeared before the Public Auditor for a continued Motion Hearing regarding the above referenced case number. At the continued hearing, the Public Auditor dismissed, for the reasons set forth herein, JMI's appeal in this case.

BACKGROUND

The following factual statements do not appear to be in dispute. On July 20, 2021, GIAA issued a request for proposals [GIAA RFP 05-FY-21] related to its baggage handling system. Two offerors submitted proposals in response: Menzies and JMI. GIAA selected Menzies as the highest ranked offeror on August 26, 2021. GIAA formally notified JMI that it had not been selected as the highest ranked offeror on August 30, 2021.

JMI filed its protest of GIAA's decision to enter into negotiations with Menzies on September 21, 2021. GIAA denied JMI's protest as untimely on September 30, 2021. JMI filed its appeal of the denial of its protest on October 8, 2021. The predominant issue raised by JMI in its appeal was that Menzies was not a responsible bidder, in that Menzies lacked a contractor's license issued by the Guam Contractor's License Board ("CLB").

Contemporaneously, Ed Ilao, an officer of JMI, filed a complaint with the CLB, alleging that Menzies lacked a required contractor's license. The CLB assigned JMI's complaint a case number [2021-09-04] and its investigator, Marcus Finona, sent Menzies a notice to appear. Menzies, though counsel, met with CLB Investigator Finona on November 16, 2021, and submitted a written response to the CLB as to Ilao's complaint three days later. On December 8,

2021, JMI, though counsel, submitted a written response to Menzies' submission of written statement to the CLB.

On December 13, 2021, Mr. Ilao sent an email to Cecil Orsini, the Executive Director of the CLB. Mr. Ilao's email read, in part:

> Bro,
> We will be having a motion hearing before the OPA on Dec 27th.
> Last day to file documents is on Dec 23. Would it be possible for CLB Investigations section to be able to sign at least the attached sample letter by Dec 22nd? This will really help our case . . .

Attached to Mr. Ilao's email was a draft document with the subject line: "Case No. 2021-09-04 Findings & Decisions." The draft document stated, *inter alia*, that the CLB had determined that Menzies required a contractor's license to perform the scope of work under GIAA RFP 05-FY-21. Mr. Ilao did not share a copy of this email or draft document to Menzies.

On December 22, 2021, Executive Director Orsini issued a document on CLB letterhead, with that same subject line ("Findings and Decisions"), which was a verbatim reiteration of the draft document previously forwarded to him by Mr. Ilao. In response, Mr. Ilao sent an email to Director Orsini, and other CLB staff, that same day:

> Thank you very much to all of you! This will help our protest appeal at the OPA a lot.
> Merry Christmas to everyone!

The following day, JMI, through counsel, submitted the Findings and Decision as supplemental authority in this case.

GIAA and Menzies had previously filed separate motions to dismiss JMI's appeal on November 24, 2021. These motions were initially set to be heard on December 27, 2021, but the hearing was continued in light of JMI's submission of the Findings and Decisions. At the continued hearing held January 6, 2022, the Public Auditor heard argument on the pending

motions, but continued the hearing until January 27, 2022, so that the parties could "find out what's going on at the CLB." Audio Recording, 54:22-54:49.

Menzies had submitted a Sunshine Act request on January 6, 2022 to the CLB related to the Findings and Decisions. On January 24, 2022, Menzies filed copies of the documents produced by the CLB in response to Menzies' Sunshine Act request, which included Mr. Ilao's December 13, 2021, email to Director Orsini. At the further continued hearing held on January 27, 2022, the Public Auditor dismissed JMI's appeal.

ANALYSIS

The Legislature has authorized the Public Auditor to take appropriate action on each procurement appeal. 5 G.C.A. §5702. The Public Auditor has the power to review and determine any matter properly submitted to him. 5 G.C.A. §5703(a). The Public Auditor's jurisdiction shall be used to promote the integrity of the procurement process. 5 G.C.A. §5703(f).

Administrative officers may exercise such powers as are necessary for the due and efficient administration of powers expressly granted by statute as may be fairly implied from the statue granting powers. Calfarm Insurance Co. v. Deukmajian, 48 Cal.3d 805, 824-25, 258 Cal.Rptr. 161, 771 P.2d 1247 (1989); Rich Vision Centers, Inc. v. Board of Medical Examiners, 144 Cal.App.3d 110, 114, 192 Cal.Rptr. 455 (1983).

See also Duarte & Witting, Inc v. New Motor Vehicle Board, 104 Cal.App.4th 626, 128 Cal.Rptr. 501, 508-09 (2002) (Board had implied authority to dismiss a protest when undisputed facts showed no good cause for the protest).

In this case, it is undisputed that Mr. Ilao, an officer of JMI, asked Director Orsini, his "Bro" at the CLB, to issue a document which would "help our protest appeal at the OPA a lot." Mr. Ilao's "Bro" at the CLB obligingly put the proposed "findings" previously forwarded by Mr. Ilao onto CLB letterhead and issued it as requested.

At the continued hearing held January 6, 2022, counsel for both Menzies and JMI referred to testimony by CLB Investigator Nida Bailey in another procurement appeal [GS4 Security Systems (Guam), Inc. v. Department of Education, Case No. OPA-PA-21-007] ("GS4 case"). In the GS4 case, the appellant argued that the successful bidder lacked a required license from the CLB. Appellant relied on a document signed by Director Orsini, also labeled "Findings and Decisions," which stated that a contractor's license was required for the scope of work of the award, very similar in form to that submitted by JMI to Director Orsini herein. At the evidentiary hearing held therein, CLB Investigator Nida Bailey acknowledged that it is the CLB Board which is to decide such issues, and confirmed that no Board meeting had taken place regarding the issues raised in the GS4 case. Audio Recording, 2:53:09 to 2:53:29.[1]

The document at issue in the instant case states that it represents "Findings and Decisions" by the CLB. However, concurrence of four members of the CLB Board is necessary for the validity of any of its actions. 21 G.C.A. §70102(b). The CLB's executive director shall act only with the advice and consent of the Board. 21 G.C.A. §70104(a). JMI has not submitted evidence which would suggest that the CLB Board voted to authorize the issuance of the "Findings and Decisions." As such, the document represents a fraud on this tribunal, in that it purports to be official "findings and decisions," when it really is just a bro helping out another bro.

Courts have inherent authority to dismiss a plaintiff's claim when plaintiff has perpetrated a fraud on the court. Wallace v. Keldie, 249 So.2d 747, 754-55 (Fla.App. 2018); Ramey v. Haverty Furniture Co., 993 So.2d 1014, 1018 (Fla.App. 2008). Courts have dismissed claims when the claimant had engaged in misconduct similar to that engaged in by JMI herein. *See* Steven

[1] Counsel for both JMI and Menzies represented parties at the evidentiary hearing held in the GS4 case, and referenced the testimony of Investigator Bailey in their argument at the January 6, 2022 hearing held herein.

Slesinger, Inc. v. Walt Disney Co., 155 Cal.App.4th 736, 66 Cal.Rptr.3d 268, 272 (2007) (Trial court did not abuse its discretion in dismissing plaintiff's complaint when plaintiff used documents obtained by its private investigator through trespass and rummaging through defendant's trash bins); Rockdale Management. Co. v. Shawmut Bank, N.A., 638 N.E.2d 29, 31 (Mass. 1994) (trial court properly dismissed plaintiff's action when plaintiff's president had forged a letter and then submitted it to defendant in discovery).

In this case, JMI's misconduct of submitting the Findings and Decisions as purported independent, neutral "findings" by the CLB, given its provenance, was deliberate and egregious. The Findings and Decisions went to the predominant issue in this case: namely, whether Menzies should be deemed non-responsible due to its lack of a contractor's license. The ability of JMI to call on a "bro" at the CLB to reiterate JMI's desired "findings" to help its case herein raises troubling questions as to the probity and reliability of any findings from the CLB.

At the start of the further continued hearing held January 27, 2022, the undersigned gave JMI an opportunity to mitigate the harm caused by its misconduct. Audio Recording, at 01:49-03:12. Instead of doing so, JMI doubled-down by asserting that the OPA was somehow bound by the fraudulent Findings and Decisions. *Ibid*, at 12:39-13:39. Given JMI's lack of understanding or remorse for its misconduct, dismissal is the only appropriate sanction available in this case.

CONCLUSION

The Public Auditor's jurisdiction over procurement appeals is to be utilized to promote the integrity of the procurement process. Implicit in that grant of jurisdiction is the authority to dismiss an appeal for misconduct which jeopardizes the integrity of the procurement process.

IT IS HEREBY ORDERED that the above-referenced case number be DISMISSED WITH PREJUDICE. Each party shall bear their own attorneys' fees and costs**.**

This is a Final Administrative Decision for Appeal No. OPA-PA-21-010. The Parties are hereby informed of their right to appeal the Hearing Officer's Decision to the Superior Court of Guam in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website at www.opaguam.org.

SO ORDERED this 3rd day of February 2022 by:

Benjamin J. F. Cruz
Public Auditor of Guam

Gmail

Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-21-010 Decision and Order

Jerrick Hernandez <jhernandez@guamopa.com> Thu, Feb 3, 2022 at 3:34 PM
To: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Joseph C. Razzano" <jrazzano@rwtguam.com>, William Brennan <wbrennan@arriolafirm.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>
Cc: Thyrza Bagana <tbagana@guamopa.com>, Arriola Law Firm General Information <attorneys@arriolafirm.com>

Hafa Adai,

Please see attached Decision and Order for OPA-PA-21-010. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA
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