



Jerrick Hernandez <jhernandez@guamopa.com>

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

Sosanbra Salas <ssalas@rwtguam.com>
To: jhernandez@guamopa.com
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Fri, Aug 4, 2023 at 4:52 PM

Dear Mr. Hernandez:

Please see the attached documents to be filed in the above-referenced matter.

1. *Appellant's Hearing Brief.*

Please feel free to contact our office if you have any questions. Thank you.

--

Regards,
Sosanbra Santos Salas

RAZZANO WALSH & TORRES, P.C.

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 671-989-3009

(F): 671-989-8750

 **Appellant's Hearing Brief.pdf**
383K

RAZZANO WALSH & TORRES, P.C.
JOSHUA D. WALSH
JOSEPH C. RAZZANO
SUITE 100, 139 MURRAY BLVD.
HAGÁTÑA, GUAM 96910
TELEPHONE: (671) 989-3009
FACSIMILE: (671) 989-8750

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

APPELLANT'S HEARING BRIEF

I. INTRODUCTION AND ISSUES ON APPEAL.

Johndel International, Inc. dba. JMI-Edison ("JMI" or "Appellant") submits this Trial Brief in conformance with the Order of the Office of Public Accountability ("OPA") issued on June 29, 2023. This Trial Brief will assist the OPA in addressing the following list of issues to be resolved in this appeal:

- A. Does' GIAA's procurement of emergency services from Menzies conform with applicable law governing the use of emergency procurement procedures?

- B. Does GIAA's selection of Menzies violate the legal requirement to only select responsible offerors to perform procured work?
- C. Does GIAA's selection of Menzies violate the legal requirement to only select responsive offerors to perform procured work?

II. SERVICES UNDER GIAA RFP 005-FY21

GIAA issued the Request for Proposals ("RFP") GIAA RFP 005-FY21 on July 20, 2021. The RFP sought contractors to perform the work of Management & Infrastructure Support Services to GIAA's Baggage Conveyance Systems. While GIAA did not explicitly demand licensure from the Guam Contractor's Licensing Board (CLB), it is incontrovertible that GIAA commanded that offerors must be properly licensed in Guam; numerous facts that show that GIAA was seeking services from a professional would need an appropriate professional contractor's license.

GIAA describes in its procurement record the work it is procuring as "Infrastructure Support Services" that requires "technical expertise and guidance." Procurement Record ("PR"), 08. GIAA is seeking contractors with "extensive knowledge to mechanical aspects (sic)" who should have electricians with "sufficient experience in power, controls, and PLC software." The RFP also confirms the need to both operate and maintain the "power supply conduits." RFP, pg. 4; 6. To be sure, the services being sought include direct interaction with significant electrical systems. As the baggage system includes significant electrical systems, it can only be worked on by "a licensed Electrical Contractor or licensed General Contractor with

registered Electrical Engineer or licensed Master Electrician.” 29 GAR §1315. A single employee who is a “master electrician” does not meet the RFP requirements, as the law requires a conjunctive — “a licensed General Contractor with registered Electrical Engineer or licensed Master Electrician.” 29 GAR §1315. Beyond the RFP’s demand for specialized electrical contractor knowledge, GIAA’s RFP also recognizes the professional nature of the contractor it will hire, as the proposed contract demands that the contractor “shall procure and maintain professional liability insurance for the term of this Agreement, plus two (2) years after completion.” Procurement Record, 285.

III. RELEVANT PROCEDURAL AND FACTUAL HISTORY

On August 18, 2021, two offerors, JMI and Aircraft Service International, Inc, doing business as “Menziess Aviation,” (“Menziess”) submitted proposals in response to the RFP. GIAA formally informed JMI on August 30, 2021, that it was not selected for an award under the RFP. An agency level protest followed, and the matter proceeded to the Office of Public Accountability. *See*, OPA-PA-21-010. An appeal to the Superior Court of Guam followed. *See*, *Johndel Int’l, Inc. dba JMI-Edison. Office of Pub. Accountability*, CV 0095-22, (Sup. Ct. Guam).

The parties here remain before the Superior Court of Guam on a procurement appeal. That appeal seeks judicial review of the dismissal, with prejudice, of the prior OPA procurement appeal. 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”).

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...”¹ It has become clear that Menzies cannot continue to perform the work contemplated by the RFP, or its subsequent emergency iterations, for the airport. Because of this, and the fact that GIAA’s use of emergency procurement power for more than 500 days directly contradicts the procurement code, JMI initiated an Agency level protest. On March 27, 2023, the Agency denied the protest. This appeal to the OPA followed, and following a period of motion practice, the matter has been set for a hearing on the merits.

¹ The Attorney General Opinion released by the CLB is attached to Notice of Appeal filed in this action.

IV. BASIS FOR PROTEST AND APPEAL

A. Menzies cannot legally perform the work required by the RFP.

Contractors working on Guam may not do so, or even present themselves as being able to do so, “without a license previously obtained under and in compliance with this Chapter and the rules and regulations of the Contractor’s License Board (CLB).” 21 G.C.A. § 70108(a). GIAA’s March 15, 2023, notice indicates that GIAA is seeking to explicitly violate Guam law and the plain terms of the original RFP by the appointment of Menzies. This is especially troubling now given the clarity provided by the Attorney General that Menzies was an unlicensed contractor at the time of its selection by GIAA, and the nature of the work required by GIAA’s RFP does indeed require a contractor’s license. To be sure, both the CLB and the CLB’s legal counsel — the Attorney General— are unified in the conclusion that Menzies cannot legally perform the work described under the ERFPP without appropriate CLB licensing.

Menzies’s lack of appropriate contractor licensing renders it non-responsive to the RFP. A “Responsive bidder means a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids.” 5 G.C.A. § 5201(g). Responsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government. To be considered for an award a bid must comply in all material respects with the invitation for bids.” *Bean Dredging Corp. v. United States* 22 Cl. Ct. 519, 522 (1991). Moreover, since Menzies does not have “the

capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance,” Menzies is also a non-responsible offeror. 5 GCA § 5201(f). To obtain such work was improper, and should have been rejected by GIAA.

B. The C-13 licenses Menzies relies upon from 2023 do not render it responsive to a 2021 emergency procurement.

Menzies recent effort to obtain the license necessary to do the ERFPP work does not vitiate the grounds for this procurement protest. The Procurement Record reveals that the C-13 license was issued on April 7, 2023, to Ignacio C. Urlanda as an RME for Menzies. Procurement Record, 810. This license comes nearly a month *after* both the March 15, 2023, ERFPP contract extension and JMI’s agency level protest. The Procurement Record remains devoid of mention of whether or not Menzies itself has a license despite the requirement being plain that both the RME and the contracting entity — here Menzies—must be appropriately licensed with the CLB. 21 GCA § 70110(d) makes a distinction between issuing licenses to corporations, and licenses issued to an RME who will then allow the corporation to obtain its own license.

The license that was issued to Menzies’s RME comes in direct contravention of the instructions of the CLB Board. On March 15, 2023, the CLB’s executive director was delegated the specific limited authority to “approve or disapprove ... license applications where there are no complaints or other items of concern within the past year.” Correspondence, CLB Board Chairman to CLB Executive Director, March 15,

2023. That delegation specifically excising the approval of applicants with “complaints or items of concern with the past year” comes 6 months after the CLB concluded its investigation and report into Menzies’s conduct, and the same day the CLB executive director received the Attorney General Opinion regarding Menzies’s inappropriate conduct and three (3) days after Menzies received a CLB citation for its unlicensed work. Despite this, Menzies still obtained a license.

C. The Airport cannot legally engage the services of Menzies through the use of the emergency procurement process.

GIAA’s intention to commit to a 90-day additional emergency contract with Menzies does not comport with the law that allows emergency procurement. 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, nearly *two years* have elapsed since then. There has been one emergency declaration issued with regard to this procurement, and that was issued on October 27, 2021.² More than 600 days have elapsed since that “emergency,” straining the plain meaning of language beyond normal bounds.

It is fundamental that the emergency procurement processes cannot be used to correct management’s failure to work through planned procurement. 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

² The Original Package of the Emergency Declaration of Need and Certification of Emergency are attached to this Notice of Appeal as **Attachment D**.

and prudent management procedures, and which cannot be addressed by other procurement methods of source selection.” (5 GCA § 5030(x); 2 GAR § 1106(47).

The government has not undertaken the steps necessary to trigger the emergency procurement regulations for this new period of performance more than 500 days after the original emergency performance period. Even if an “emergency” were somehow still in existence after 520 days, the law requires that “emergency procurements shall be made with such competition as is practicable under the circumstances.” 5 G.C.A. § 5215. The law also requires that the procuring agency “describe with factual particularity, the nature and apparent cause of the condition posing an imminent threat ... 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.”³

V. ANTICIPATED EVIDENTIARY ISSUES

It is anticipated that the following evidentiary issues may arise:

A. The ability of Menzies to advance positions in defense of a procurement that

³ It cannot be that, 600 days ago, GIAA could not have fathomed it would need baggage conveyor systems in 2023. An emergency must be “temporary in character.” *Jefferson Standard Life Ins. Co. v. Noble*, 188 So. 289, 293 (Miss. 1939). An emergency is “an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; a pressing necessity.” *See, e.g., Attala Cnty. v. Mississippi Tractor & Equip. Co.*, 162 Miss. 564, 139 So. 628, 628 (1932) *citing* Webster's New International Dictionary. While various definitions of an emergency exist, no definition contemplates the GIAA's tortured understanding of the word.

the procuring agency has neither articulated nor advanced on its own;

B. Issues related to the ability to disclose legal advice provided to the CLB by its legal counsel.

VI. CONCLUSION

GIAA issued an RFP that was noticed for award to an offeror who did not have licenses from the Contractor's licensing board, despite bidding on contractor work in an RFP that required all appropriate licenses. When that award was protested, GIAA proceeded to make an award nonetheless under the theory that an emergency was afoot, and such a procurement was necessary. More than 600 days later, GIAA claims the same emergency justifies a continued repeating award to Menzies, despite the ability to access non-emergency procurement protocols to secure the needed services. Based on the foregoing, JMI respectfully requests that its protest appeal be sustained, and that the Office of Public Accountability Order the following:

- (1) That GIAA must disqualify Menzies from eligibility for Award under the ERFPP, as Menzies's does not have a valid contractor's license and as such, it cannot perform the work of the ERFPP;
- (2) That GIAA must disqualify Menzies from eligibility for Award under this RFP, as Menzies could not have legally and responsibly performed the work detailed under the RFP.

//

(3) That GIAA award the emergency procurement under GIAA RFP 005-FY21, to JMI as the only responsible and responsive bidder to the RFP.

Respectfully submitted this 4th day of August 2023.

RAZZANO WALSH & TORRES, P.C.

By: 
JOSHUA D. WALSH
JOSEPH C. RAZZANO
Attorneys for Appellant
JMI-Edison