

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Mr. John M. Quinata Executive Manager Guam International Airport Authority P.O. Box 8770 Tamuning, Guam 96931 Phone: (671) 646-0300 Fax: (671) 646-8823 Email: john.quinata@guamaiport.net	From:	Joseph B. McDonald Hearing Officer Office of Public Accountability
	Mr. William B. Brennan, Esq. Attorney for Guam International Airport Authority Arriola Law Firm 259, Martyr Street, Suite 201 Hagåtña, Guam 96910 Phone: (671) 477-9730/33 Fax: (671) 477-9734 Email: attorneys@arriolafirm.com	Pages:	8 (including cover page)
CC:	Mr. Joshua D. Walsh, Esq. Attorney for Appellant JMI-Edison Razano Walsh & Torres, P.C. 139 Murraby Blvd. Hagåtña, Guam 96910 Phone: (671) 989-3009 Email: jdwalsh@rwtguam.com	Date:	July 27, 2023
	Mr. R. Marsil Johnson, Esq. Attorney for Interested Party Menzies Aviation Blair Sterling Johnson & Martinez A Professional Corporation 238 Archbishop Flores St. Ste.1008 Hagåtña, Guam 96910 Phone: (671) 477-7857 Fax: (671) 472-4290 Email: rmarsjohnson@bsjmlaw.com	Phone:	(671) 475-0390 x. 204
		Fax:	(671) 472-7951

Re: OPA-PA-23-002 Decision on Purchasing Agency’s Motion to Dismiss; Interested Party’s Motion to Dismiss and Motion for Summary Judgment

For Review
 Please Comment
 Please Reply
 Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency’s receipt stamp, date, and initials of receiver.

Thank you,
 Jerrick Hernandez, Auditor
jhernandez@guamopa.com

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In the Appeal of)
)
)
Johndel International, Inc. dba JMI-Edison,)
)
Appellant.)
)
_____)

Appeal No: OPA-PA-23-002

**DECISION ON PURCHASING AGENCY'S
MOTION TO DISMISS; INTERESTED
PARTY'S MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT**

To: **Purchasing Agency:**
Guam International Airport Authority
C/O William B. Brennan, Esq.
Arriola Law Firm
259, Martyr Street, Suite 201
Hagåtña, Guam 96910
Phone: (671) 477-9730/33
Fax: (671) 477-9734
Email: attorneys@arriolafirm.com

Appellant:
JMI-Edison
C/O Joshua D. Walsh, Esq.
Razzano Walsh & Torres, P.C.
Suite 100, 139 Murray Blvd.
Hagatna, Guam 96910
Phone: (671) 989-3009
Fax (671) 989-8750
Email: jdwalsh@rwtguam.com

Interested Party:
Menzies Aviation
C/O R. Marsil Johnson, Esq.
Blair Sterling Johnson & Martinez
A Professional Corporation
238 Archbishop Flores St. Ste.1008
Hagåtña, Guam 96910
Phone: (671) 477-7857
Fax: (671_ 472-4290
Email: rmarsjohnson@bsjmlaw.com

1 **INTRODUCTION**

2 What follows are the undersigned hearing officer’s rulings on Purchasing Agency Guam
3 International Airport Authority’s (“GIAA’s”) Motion to Dismiss (“MTD”) and on Interested Party
4 Menzies Aviation’s (“Menzies”) MTD and Motion for Summary Judgment (“MSJ”). For the
5 reasons set forth below, GIAA’s and Menzies’ MTDs both bases for JMI’s appeal are denied.
6 Menzies’ MSJ seeking judgment on five separate issues will be heard and decided after the hearing
7 on the merits of the appeal, which is to be held on Aug. 7, 2023.

9 **RELEVANT BACKGROUND**

10 The parties are as of the time of this ruling in litigation in CV0095-22, the action brought
11 after the decision in OPA-PA-21-010 in which JohndelInt’l, Inc. dba JMI-Edison (“JMI”)
12 appealed the solicitation and selection of Menzies for GIAA RFP 05-FY-21, which was the
13 GIAA’s procurement related to its baggage handling system. While this appeal also relates to
14 GIAA’s procurement for its baggage handling system, JMI in this appeal seeks the Public
15 Auditor’s (“Pub. Aud’s.”) decision concerning an emergency procurement that GIAA has
16 employed to continue a state of emergency that has been extended sixteen times. The rulings
17 herein address GIAA’s and Menzies’ dispositive motions which are brought prior to the Aug. 7,
18 2023 hearing to decide the merits of JMI’s appeal. The undersigned exercises authority granted
19 by 2 GAR Div. 4 § 12109 to rule on motions and to narrow the issues on appeal.

20
21
22 On July 20, 2021, GIAA issued RFP 05-FY-21 related to its baggage handling system. On
23 Aug. 26, 2021, GIAA selected Menzies. On Sep. 21, 2021, JMI protested on the basis that Menzies
24 was not a responsible offeror because it did not have a contractor’s C-13 license, which JMI
25 contends is necessary to perform work under the RFP. GIAA denied the protest, then JMI appealed
26 the denial in OPA-PA-21-010 on Oct. 8, 2021.¹

27
28 ¹ The Pub. Aud. dismissed OPA-PA-21-010, after which JMI sought review of the dismissal in CV0095-22.

1 On Oct. 27, 2021, GIAA certified the existence of an emergency, and its Executive
2 Manager made the inaugural determination of need for an emergency procurement Management
3 and Infrastructure Support Services to GIAA’s Baggage Conveyance System. Also on that date,
4 the governor authorized an emergency procurement, after which, on Nov. 1, 2021, GIAA awarded
5 a contract for the emergency procurement to Menzies. GIAA has on Dec. 27, 2021, Jan. 27, 2022,
6 Feb. 25, 2022, Mar. 25, 2022, Apr. 25, 2022, May 25, 2022, Jun. 24, 2022, Jul. 24, 2022, Aug. 24,
7 2022, Sep. 24, 2022, Oct. 25, 2022, Nov. 23, 2022, Dec. 23, 2022, Jan. 23, 2023, and Feb. 23,
8 2023 made subsequent determinations of need extending the emergency procurement contract.
9

10 Like it has after each prior determination, on Mar. 15, 2023, GIAA gave public notice of
11 its intent to extend the emergency contract awarded to Menzies. On Mar. 16, 2023, the Contractors
12 Licensing Board (“CLB”) made public a legal opinion from the Office of the Attorney General
13 (“OAG”) that Menzies’ was required to have a contractor’s license to perform the work for GIAA’s
14 baggage handling system. On Mar. 21, 2023, JMI protested GIAA’s intent to extend the
15 emergency procurement contract. The next day, on Mar. 22, 2023, GIAA extended its emergency
16 procurement contract with Menzies. On Mar. 27, 2023, GIAA denied JMI’s protest. On Mar. 31,
17 2023, Menzies entered into an agreement with a subcontractor holding a C-13 license. On Apr. 7,
18 2023, the CLB granted Menzies a C-13 license. On Apr. 10, 2023, JMI filed this appeal and stated
19 the same bases it stated in its Mar. 21 protest.
20
21

22 **MOTIONS TO DISMISS JMI’s APPEAL AS UNTIMELY**

23 LAW

24 “Any actual or prospective bidder, offeror, or contractor who may be aggrieved in
25 connection with the method of source selection, solicitation or award of a contract, may protest to
26 the ... head of a purchasing agency. The protest shall be submitted in writing within fourteen (14)
27
28

1 days after such aggrieved person knows or should know of the facts giving rise thereto.” 5 GCA
2 § 5425 (a). The Guam Supreme Court has discussed when a party becomes aggrieved:

3 [A] party becomes “aggrieved” under the procurement law at the point at which
4 they become entitled to a remedy. See [2018 Guam 5 ¶ 37](#) (citing *Party, Black’s*
5 *Law Dictionary* (10th ed. 2014)). This remedy may be premised on the conduct or
6 “actions of [government] employees, bidders, offerors, contractors, or other
7 persons.” 2 GAR Div. 4 § 9104(a)(2). It must be based, however, on allegations
8 that the procurement is not “in accordance with the statutes, regulations, and the
9 terms and conditions of the solicitation.” [5 GCA § 5480\(a\)](#). Thus, a party becomes
10 “aggrieved” when they become aware of a violation of one of the procurement
11 law’s substantive provisions or the terms of the RFP. Cf. [MSG Grp., Inc. v. Dep’t](#)
12 [of Pub. Welfare, 902 A.2d 613, 617 \(Pa. Commw. Ct. 2006\)](#) (“[A]s an aggrieved
13 prospective bidder, any rights it has to protest the bid solicitation are derived solely
14 from the Procurement Code.”). For this reason, “[p]rotestors may file a protest on
15 any phase of solicitation or award including, but not limited to, specifications
16 preparation, bid solicitation, award, or disclosure of information marked
17 confidential in the bid or offer.” 2 GAR Div. 4 § 9101(c)(2). And “there may be
18 multiple events in any given solicitation that could legitimately trigger protests.”
19 [2004 Guam 15 ¶ 28](#) (citing 26 GAR § 16901(c)(2)).

20 *DFS Guam L.P. v. [GIAA]*, 2020 Guam 20 ¶ 84. Appeal of an adverse protest decision to the Pub.
21 Aud. must be taken within fifteen days of receipt of the decision. 5 GCA § 5425 (e).

22 DISCUSSION

23 In its Notice of Appeal, JMI points to GIAA’s Mar. 15, 2023 public notice that it intended
24 to extend the emergency procurement contract and provides two bases for its protest: (1) given the
25 OAG opinion that a C-13 license was necessary, Menzies cannot legally perform the work for the
26 baggage handling system; and (2) GIAA cannot legally engage the services of Menzies through
27 an emergency procurement.

28 GIAA points to the date that JMI sent a complaint letter to the CLB (Dec. 28, 2021) and
argues that protest on bases that Menzies lacked a C-13 contractor’s license and that, GIAA used
the emergency procurement process to award a contract to Menzies, were untimely. Menzies
argues that JMI knew of Menzies’ unlicensed status and GIAA’s use of the emergency
procurement process around Dec. 2021 as well. JMI responds that its protest is not directed

1 towards the award of the emergency procurement back in 2021 but that, the notice of intent to
2 extend the emergency procurement constitutes an instance of when it became aggrieved. In reply,
3 GIAA emphasizes that JMI knew on at least Dec. 28, 2021 that GIAA intended to extend the
4 emergency procurement because of the public notice that it would extend the contract for a period
5 beyond 90 days.
6

7 JMI became aggrieved at each instance that it could be charged with knowledge that
8 GIAA's or Menzies' conduct or actions violated the substantive procurement law or the terms of
9 the disputed procurement. 2020 Guam 20 ¶ 84. JMI would have 14 days from acquisition of such
10 knowledge to protest to GIAA's purchasing head and 15 days of receipt of GIAA's protest decision
11 to appeal to the Pub. Aud. 5 GCA § 5425 (a), (e).
12

13 While JMI can be charged on Dec. 15, 2021, the date of the first publication, *see* PR 00529,
14 with knowledge that GIAA intended to extend beyond the first 90-day emergency period, at that
15 time there were no facts to show how long or how many times GIAA had or would extend its
16 contract with Menzies under its stated emergency conditions.² There may be multiple events in
17 any given stage of a procurement that could legitimately trigger protests. 2020 Guam 20 ¶ 84. "A
18 solicitation or award may be in violation of the law due to actions of territorial employees, bidders,
19 offerors, contractors, or other persons." 5 GCA § 9104 (a) (2). As provided for under 5 GCA §
20 5215 (e), it was necessary for GIAA to provide public notices providing the opportunity to
21 comment on an extended emergency contract subsequent to the Dec. 15 notice in order to avail of
22 a subsequent contract extension period. *Viz.* PR 00529, 00607. Each subsequent extension was
23 an action by GIAA to continue patronizing Menzies' services under its declared emergency, but,
24 without more information, JMI can only be charged with knowledge that GIAA did in fact extend
25 for another period after GIAA publishes a subsequent notice of intent.
26
27

28 ² In fact, GIAA's first extension was communicated to Menzies on Nov. 24, 2021. *See* PR 606.

1 JMI's contention is not with GIAA's emergency procurement that was originally
2 conducted in 2021 but that GIAA's use of a § 5215 procurement and that extension of an
3 emergency procurement contract to an unlicensed vendor are not lawful under the facts of this
4 appeal. JMI thus became aware of the sixteenth extension of GIAA's emergency procurement
5 contract that it contends violates § 5215 on Mar. 15 and protested on Mar. 21. Its protest to GIAA's
6 purchasing head was timely. After receiving GIAA's protest decision on Mar. 27, JMI appealed
7 to the Pub. Aud. on Apr. 10. JMI's protest that GIAA cannot legally engage the services of
8 Menzies through an emergency procurement was timely, and so was its appeal to the Pub. Aud.
9

10 JMI also appealed that Menzies' is not a responsible party because it lacked a C-13
11 contractor's license. GIAA and Menzies argue that JMI has had knowledge of Menzies'
12 unlicensed status for more than 14 days prior to its Mar. 21 protest, and that, the OAG's opinion
13 that Menzies needed a C-13 license is merely an opinion and not the action of the CLB. As such,
14 JMI's appeal of this issue is untimely, and the appeal must be dismissed.
15

16 As each extension by GIAA was an action to continue accepting the services of an
17 unlicensed contractor, and as Menzies was unlicensed on the date of the protest, JMI's appeal that
18 Menzies was not responsible was timely.
19

20 **INTERESTED PARTY'S MOTION FOR SUMMARY JUDGMENT**

21 There are no provisions under the procurement law or regulations by which the Pub. Aud.
22 may decide an MSJ. Administrative bodies must employ procedures which are available to it in
23 order to decide a matter. *See Carlson v. Perez*, 2007 Guam 6 ¶¶ 27-46 (analyzing how agencies
24 should make administrative determinations when an agency has failed to promulgate procedures
25 for resolving controversies). The only expressly available procedure for deciding the merits of
26 an appeal is given by 2 GAR Div. 4 § 12108, which governs hearings procedures. While hearing
27
28

1 officers are permitted to narrow the issues, the undersigned will not at this time pass on the
2 issues which Menzies has raised in its MSJ.

3 **CONCLUSION**

4 Based on the foregoing, the Hearing Officer makes the following determinations:

- 5 1. GIAA's and Menzies' motions to dismiss are DENIED.
6
7 2. Menzies' motion for summary judgment is also DENIED.

8
9 SO ORDERED this 27th day of July 2023 by:

10
11 //s// Joseph McDonald
12 **Joseph B. McDonald**
13 **Hearing Officer for OPA-PA-23-002**
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-23-002 Decision on Purchasing Agency's Motion to Dismiss; Interested Party's Motion to Dismiss and Motion for Summary Judgment

Jerrick Hernandez <jhernandez@guamopa.com>

Thu, Jul 27, 2023 at 3:31 PM

To: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, William Brennan <wbrennan@arriolafirm.com>, "R. Marsil Johnson" <rmarsjohnson@bsjmlaw.com>

Cc: Thyrsa Bagana <tbagana@guamopa.com>, GIAA Official <official@guamairport.net>

Hafa Adai,

Please see attached Decision on Purchasing Agency's Motion to Dismiss; Interested Party's Motion to Dismiss and Motion for Summary Judgment for OPA-PA-23-002. 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.

--
Best Regards,

Jerrick J.J.G. Hernandez, MA, CFE, CGAP, CICA
Accountability Auditor

Office of Public Accountability
+1 671 475 0390 (ext. 204)
jhernandez@guamopa.com
<https://www.opaguam.org/>



This email and any attachments are for the sole use of the intended recipients and contain information that may be confidential or legally privileged. If you received this email in error, please notify the sender by reply email and delete the message. Any disclosure, copying, distribution, or use of this communication by someone other than the intended recipient is prohibited.

--
Best Regards,

Jerrick J.J.G. Hernandez, MA, CFE, CGAP, CICA
Accountability Auditor

Office of Public Accountability
+1 671 475 0390 (ext. 204)
jhernandez@guamopa.com
<https://www.opaguam.org/>



This email and any attachments are for the sole use of the intended recipients and contain information that may be confidential or legally privileged. If you received this email in error, please notify the sender by reply email and delete the message. Any disclosure, copying, distribution, or use of this communication by someone other than the intended recipient is prohibited.



23-002 Decision on Purchasing Agency's Motion to Dismiss; Interested Party's Motion to Dismiss and Motion for Summary Judgment.pdf

58K