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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

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Attorneys for General Services Agency, Department of Administration

**OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

In the Appeal of)	Docket No. OPA-PA-13-001
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)	
MORRICO EQUIPMENT, LLC)	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION FOR RECONSIDERATION AND FOR CLARIFICATION OF THE DECISION of APRIL 19, 2013
)	
Appellant.)	
)	

The Government of Guam, Department of Administration, General Services Administration (“GSA”) requests the Public Auditor for reconsideration clarification of the Decision entered in this matter on April 19, 2013 (“Decision”) so that the Decision of the Public Auditor may be carried out in an expeditious manner with little or no further disruption of the underlying solicitation, or inconvenience to the Appellant and the Interested Parties hereto.

I.

On April 19, 2013 the Public Auditor issued her Decision in this matter, ruling on and determining the Appeal filed in this matter by Morrico Equipment Co. LLC. (“Morrico”).

ORIGINAL

The Decision sustained Morrico on its appeal, and provided a number of rulings giving direction to GSA on the manner in which to proceed in this solicitation.

GSA had initiated Multi-Step Bid No. GSA-005-13 (New and Current Year, Custom Cab-Forward Pumpers, New and Current Year, Urban/ Wildland Interface Pumpers, and 5 Year Extended Service/Maintenance Agreements) on November 16, 2012. On December 4, 2012, GSA received Unpriced Technical Offers from Far East Equipment (“Far East”), Mid-Pac Far East (“Mid-Pac”), and Morrico. On January 23, 2013, GSA issued a notice to Morrico (and Mid-Pac) advising it that its Unpriced Technical Offer was rejected due to non-conformance with a two-hundred and forty (240) day delivery requirement. Morrico protested the decision to reject its Unpriced Technical Offer on that same day. On January 30, 2013, GSA denied Morrico’s protest. On January 31, 2013, Morrico appealed the denial of its protest to the Office of Public Accountability. This matter proceeded to a Decision without a formal hearing or the presentation of any evidence beyond the procurement record filed by GSA, and upon the pleadings filed by the parties, Morrico and GSA.

II.

GSA does not dispute the outcome of the Decision to the extent that decision presents the resolution of the issues raised by Morrico in its appeal.

GSA does seek clarification of the instructions given to GSA concerning the manner in which the Invitation For Bids is to be amended. GSA takes no exception to the ruling by the Public Auditor that the specifications are to be amended to remove any solicitation or contract term or condition. 2 GAR, Div. 4 §4103(b)(1)(c). Further, GSA takes no exception to the ruling that the Invitation For Bids is to be amended, as to a delivery time, such that the

Unpriced Technical Offers of all three bidders will be evaluated, thereby allowing for effective price competition, as is required by 2 GAR, Div. 4 §§3109(r)(2)(b), 3109(t)(2) and 3109(t)(4). Specifically, GSA intends to amend the Invitation For Bids to enlarge the time permitted for delivery of the fire trucks being procured.

Further, the Chief Procurement Officer has determined that the amendment of the delivery time, as is necessary in order that there be sufficient acceptable Unpriced Technical Offers to assure effective price competition in the second phase of the multi-step bid process is not an amendment that will significantly change the nature of the procurement. See 2 GAR, Div. 4 § 3109(t)(2). For this reason, the amended Invitation For Bids will only be distributed to the bidders, Morrico, Far East and Mid-Pac. The Chief Procurement Officer, however, believes that this amendment might otherwise be considered a material change to the Invitation For Bids that in other circumstances would require a cancellation of the bid process and the initiation of a new solicitation to the entire marketplace. Given its current understanding of the Decision, GSA does not intend to cancel the solicitation pursuant to 2 GAR, Div. 4 §3115, but to proceed pursuant to §3109(t)(2), and issue an amended Invitation For Bids to Morrico, Far East and Mid-Pac. Is GSA's intended action, to amend an otherwise material factor in the Invitation For Bids for the benefit of only the parties that submitted Unpriced Technical Offers in response to the Invitation For Bids, consistent with the Decision? Guidance or clarification is respectfully requested.

In addition, GSA seeks a reconsideration of the instruction by the Public Auditor to amend the Invitation For Bids by striking a provision that would require the successful bidder to provide two trips for two Guam Fire Department staff to travel to and from the factory of the company awarded the contract for the fire trucks. The Public Auditor found

these inspection trips to be “unreasonably extravagant, unnecessary, and difficult to justify as valid contract terms.” Decision, page 7, line 25. GSA asserts that these trips are not unreasonable, extravagant, or unnecessary. These inspection trips are customary in the industry, and necessary to avoid the possibility of the need for a very expensive and time-consuming return, modification and redelivery of very sophisticated custom-made equipment that is delivered to Guam prior to an inspection. In addition, the inspection trips allow for the hands-on training in the use of the equipment, the maintenance of the equipment and the training of Guam Fire Department personnel directly with the engineers and technicians who build the apparatus.

Such inspection trips have been occurring for many years in the procurement of buses, fire apparatus, ambulances and other emergency response equipment. GSA respectfully requests an opportunity to present information to the Public Auditor on the nature and purpose of the proposed inspection trips, information that has not been heretofore made available to the Public Auditor as this matter proceeded to a decision without a hearing and without the Public Auditor having the benefit of seeking any explanation from either party concerning the nature of pre- and post- build inspections for highly technical equipment such as fire apparatus. A presumption of unreasonableness, extravagance, and lack of necessity without any information or evidence to substantiate such a conclusion is not a proper exercise of the *de novo* review allowed to the Public Auditor pursuant to 5 GCA §5703. With respect, the Public Auditor should rely on expert information and evidence prior to making a determination in a matter that is the subject of expertise.

III.

A Motion for Clarification and for Reconsideration is an appropriate step to take in circumstances such as this, where a party does not object to the underlying Decision or the legal basis for the Decision, but rather seeks only to clarify the means by which the decision is to be carried out and to provide to the decision-maker information that may result in the reconsideration of one instruction in the decision, to the likely benefit of all parties. Although the Rules of Procedure for procurement appeals before the Public Auditor do not make any provision for any type of motion to be made after the issuance of a final decision, the Guam Supreme Court has held, in circumstances where no provision is made for reconsideration of a decision in an administrative proceeding, that under the correct circumstances such a motion is appropriate and is to be considered by the adjudicating body. *In re Department of Agriculture v. Civil Service Commission (Rojas)*, 2007 Guam 21 (“*Dept. of Agriculture*”).

The Supreme Court, in *Dept. of Agriculture*, clarified a three prong test for assessing and determining whether a request for reconsideration of a final decision in an administrative adjudication should be considered and entertained when there is, otherwise, no statute, ordinance or rule allowing for such reconsideration. The Guam procurement statutes and the Rules of Procedure established by the Public Auditor for hearing appeals from the denial of procurement protests make no provision for a reconsideration or clarification of a final order.¹ The only remedy established in the statute and regulations is for an appeal to the Superior Court of Guam. The Court confirmed a prior Supreme Court decision, *Blas v.*

¹ The Rules of Procedure, at 2 GAR, Div. 4 §12108(d), do provide for a reliance on the Administrative Adjudication Law stating: “Where not otherwise provided for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated ...” The Administrative Adjudication Law allows for the reconsideration of hearing decisions. 5 GCA § 9235.

Guam Customs & Quarantine Agency, 2000 Guam 12, (“*Blas*”) and held that the Civil Service Commission has the inherent authority or implied authority to rehear its final decisions, although such power is by no means unlimited. *Dept. of Agriculture*, at ¶11. GSA asserts here, that, in the circumstances of this case, the Public Auditor has the same inherent authority.

The Supreme Court, in *Dept. of Agriculture* , recognized and applied a three prong test articulated in *Blas*, holding that before the power of administrative reconsideration can be exercised (1) there must be good cause shown, (2) it must be reasonably exercised, and (3) the petition seeking its exercise must be made with reasonable diligence. *Id.*, ¶11. GSA asserts that this motion is a reasonable and timely request, and meets the three prong test established by *Dept. of Agriculture* and *Blas*.

First, good cause for this clarification and reconsideration exists. GSA seeks clarification so that it may correctly carry out the Decision in this matter, and seeks reconsideration of one matter because there is information available and relevant to the decision of the Public Auditor concerning off island inspection trips which she did not have at the time of the Decision, but which is relevant to that decision and may cause a reconsideration of that order. Such clarification and reconsideration should be much preferred to proceeding to an unnecessary appeal, or proceeding contrary to the intent of the Decision.

Second, it reasonable to exercise this clarification and reconsideration now and under these circumstances. The only seeming remedy available pursuant to the statute and the rules is an expensive and time-consuming appeal to the Superior Court of Guam in a circumstance wherein the movant does not contest the underlying Decision and seeks no appeal of that

Decision, but rather seeks a timely and expedient means to communicate with the Public Auditor about the Decision in a way that seems to serve the underlying interests of the procurement process. The remedy sought by this motion is focused solely on a correct execution of the decision after all relevant facts are known.

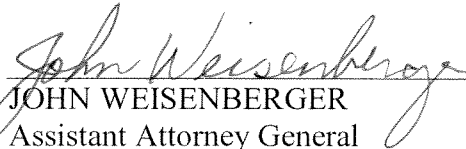
Third, this request is made with reasonable diligence, fourteen days after the Decision is rendered by the Public Auditor.

IV.

GSA requests an opportunity to be heard on this motion seeking reconsideration of one issue in the Decision of April 19, 2013, and seeking clarification that the manner in which it intends to proceed under the Decision is consistent with the intent of the Decision.

Respectfully requested this 3rd day of May, 2013.

OFFICE OF THE ATTORNEY GENERAL
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By: 
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