



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **FACTUAL BACKGROUND**

3 On September 18, 2014, the GSWA issued IFB GSWA001-15, the subject of the protest  
4 in the above referenced matter. (Submission of Procurement Record, Invitation for Bid, Tab 2,  
5 Nov. 19, 2014.) The bid contained the cab forward specification. *Id.* To protest facts known or  
6 that should have been known on September, 18, 2014, the protest would need to have been filed  
7 by October 2, 2014. On or about September 19, 2014, Morrico received a copy of IFB  
8 GSWA001-15. (Submission of Procurement Record, Denial of Protest, Tab 15, Nov. 19, 2014.)  
9 To protest facts known or that should have been known on September 19, 2014, a protest would  
10 need to have been filed by October 3, 2014. On September 23, 2014, the GSWA held a  
11 mandatory pre-bid conference at which Morrico was present. (Submission of Procurement  
12 Record, Pre-Bid Conference Registry Log, Tab 5, Nov. 19, 2014.) At the Pre-Bid Conference,  
13 the cab forward specification was addressed. (Submission of Procurement Record, Pre-Bid  
14 Conference Audio Recording, Tab 6 at 3:56 – 4:34, Nov. 19, 2014.) To protest facts known or  
15 that should have been known on September 23, 2014, the protest would need to have been filed  
16 by October 7, 2014. Morrico did not file its protest of the cab forward specification until  
17 October 9, 2014.

18 **ARGUMENT**

19  
20 The jurisdiction of the Office of Public Accountability over procurement appeals is  
21 limited to “matter[s] properly submitted to her[.]” 5 G.C.A. § 5703; 2 G.A.R. § 12103.  
22 Untimely filings cannot be “properly submitted” before the OPA. *See e.g. TRC Environment*  
23 *Corporation v. Office of the Public Auditor*, Superior Court of Guam Case No. SP160-07,  
24 Decision and Order p.3, Nov. 24, 2008. The Guam Procurement Law contains provisions  
25 allowing for protests and explaining when protests are timely. The statutory language is as  
26 follows:  
27  
28

1 Any actual or prospective bidder, offeror, or contractor who may  
2 be aggrieved in connection with the method of source selection,  
3 solicitation or award of a contract, may protest to the Chief  
4 Procurement Officer, the Director of Public Works or the head of a  
5 purchasing agency. The protest shall be submitted in writing within  
6 fourteen (14) days after such aggrieved person *knows or should*  
7 *know* of the facts giving rise thereto.

8 5 G.C.A. § 5425(a) (Emphasis added.) Thus, a protest filed by a prospective bidder is timely if  
9 the protest is received by the purchasing agency within fourteen days of when the prospective  
10 bidder knew or should have known of the facts giving rise to the protest. 5 G.C.A. § 5425(a).

11 Pursuant to 5 G.C.A. § 5425(a), protests filed after the fourteen (14) day period after the  
12 protestor knows of should have known of the facts giving rise to the protest shall not be  
13 considered. Therefore, appeals of decisions on protests that cannot be considered, cannot be  
14 “properly submitted” to the OPA and the OPA lacks jurisdiction over the appeal.

15 Morrico alleges that the cab forward specification “violates Guam Procurement Code  
16 provisions governing specifications.” (Notice of Procurement Appeal p.3, Nov. 6, 2014.) The  
17 facts giving rise to the protest relate to the cab forward specification in GSWA IFB GSWA001-  
18 15. (Notice of Procurement Appeal, Nov. 6, 2014.) Therefore, in order for Morrico’s protest to  
19 have been timely, it must have been filed 14 days from when Morrico knew or should have  
20 known of the cab forward specification. Here, there is substantial support in the record before  
21 the OPA that Morrico knew, or should have known, of the facts giving rise to the protest more  
22 than fourteen days before it filed its protest on October 9, 2014. Based this factual conclusion,  
23 the matter is not “properly submitted” before the OPA, and the OPA lacks jurisdiction to hear  
24 the appeal. The appeal should be dismissed.

25 **I. MORRICO SHOULD HAVE KNOWN OF THE CAB FORWARD**  
26 **SPECIFICATION WHEN IT WAS PUBLISHED ON SEPTEMBER 18, 2014.**

27 The GSWA IFB GSWA001-15 was published September 18, 2014. The bid clearly  
28 contained the cab forward specification. All of the public was on notice of the cab forward  
specification. Since publication triggered constructive notice of the cab forward specification,  
Morrico had 14 days from September 18, 2014 to timely file with GSWA a protest regarding

1 the cab forward specification.. Morrigo did not file a protest until October 9, 2014 – 21 days  
2 beyond when Morrigo knew of the facts giving rise to the protest. Therefore, Morrigo’s protest  
3 was untimely and GSWA was required by 5 G.C.A. § 5425(a) to deny it. As GSWA was  
4 statutorily required to deny the protest, an appeal of the untimely protest is not “properly  
5 submitted” to the OPA, and should be dismissed for lack of jurisdiction.

6  
7 **II. MORRICO KNEW OF THE CAB FORWARD SPECIFICATION WHEN MORRICO RECEIVED THE IFB ON SEPTEMBER 19, 2014.**

8  
9 Morrigo received IFB GSWA001-15 on or about September 19, 2014. The bid clearly  
10 contained the cab forward specification. Morrigo either knew, or certainly should have known,  
11 of the cab forward specification in the bid when it received it on September 19, 2014.  
12 Therefore, Morrigo had 14 days from September 29, 2014 to timely file with GSWA a protest  
13 regarding the cab forward specification. Morrigo did not file a protest until October 9, 2014 – 20  
14 days beyond when Morrigo knew of the facts giving rise to the protest. Therefore, Morrigo’s  
15 protest was untimely and GSWA was required by 5 G.C.A. § 5425(a) to deny it. As GSWA was  
16 statutorily required to deny the protest, an appeal of the untimely protest is not “properly  
17 submitted” to the OPA, and should be dismissed for lack of jurisdiction.

18  
19 **III. MORRICO KNEW OF THE CAB FORWARD SPECIFICATION WHEN IT WAS ADDRESSED AT THE MANDATORY PRE-BID CONFERENCE ON SEPTEMBER 23, 2014.**

20  
21  
22 At the very latest, Morrigo knew of the cab forward specification when the issue was  
23 raised at the September 23, 2014 mandatory pre-bid conference. (Submission of Procurement  
24 Record, Pre-Bid Conference Audio Recording, Tab 6 at 3:56 – 4:34, Nov. 19, 2014.) When  
25 asked whether conventional cab models would be considered, the procurement officer  
26 unequivocally said “no.” *Id.* at 4:16. It is indisputable that Morrigo did not know or should not  
27 have known that a cab forward specification was required at this time. Using this later date,  
28 Morrigo was still required to submit their protest by October 7, 2014. Again, Morrigo did not

1 file their protest until October 9, 2014 – 16 days beyond when Morrigo knew of the facts giving  
2 rise to the protest. Therefore, Morrigo’s protest was untimely and GSWA was required by 5  
3 G.C.A. § 5425(a) to deny it. As GSWA was statutorily required to deny the protest, an appeal of  
4 the untimely protest is not “properly submitted” to the OPA, and should be dismissed for lack of  
5 jurisdiction.

6  
7 **IV. THE “RESERVATION CLAUSE” IN THE IFB DID NOT MAKE MORRICO’S**  
8 **PROTEST TIMELY.**

9 As it is virtually indisputable that Morrigo knew of the cab forward specification giving  
10 rise to Morrigo’s protest well beyond the 14 days required to file the protest, Morrigo alleges it  
11 “could not know whether its specification discrepancy in offering a conventional cab model  
12 would be accepted or rejected *until the GSWA spoke on that matter.*” (Notice of Appeal p. 2,  
13 Nov. 6, 2014.) (Emphasis added.) Morrigo relies on the IFB bid package specifications which  
14 state that the GSWA “reserves the right to accept and/or reject any and all bids, to waive any  
15 defects, irregularities, or specification discrepancies and to award the bid as council deems to be  
16 in the best interest of the government” (hereinafter referred to as “the Reservation Clause”).  
17 (Notice of Appeal p. 2, Nov. 6, 2014.) Morrigo’s reliance on the Reservation Clause to save  
18 its untimely protest fails for several reasons.

19 First, assuming *arguendo*, that reliance on the Reservation clause is reasonable, GSWA  
20 “spoke on th[e] matter” of “whether the specification discrepancy in offering a conventional cab  
21 model would be accepted or rejected” on September 23, 2014 at the mandatory Pre-Bid  
22 Conference at which Morrigo was present. (Submission of Procurement Record, Pre-Bid  
23 Conference Audio Recording, Tab 6 at 3:56 – 4:34, Nov. 19, 2014.) At 4:16 of the Pre-Bid  
24 Conference Audio Recording, GSWA unequivocally stated “no” in response to whether an offer  
25 of a conventional cab model would be accepted.

26 In any event, Morrigo’s interpretation of the Reservation Clause is not reasonable.  
27 First, a plain reading of the referenced language demonstrates that GSWA is reserving a right  
28 inuring to “the best interest of the government” *after* receipts of bids, and *before* award. That is,

1 GSWA was notifying prospective bidders of its right to waive defects, irregularities, or  
2 specification discrepancies in actual bids, in order to serve the best interest of the government.  
3 Here, Morrico has not submitted any bid in which to determine whether a defect, irregularity or  
4 specification discrepancy could be waived in order to serve the best interest of the government.

5 Second, assuming Morrico did submit an otherwise responsive bid with a conventional  
6 cab model, the turning radius and cab forward specifications are not “specification  
7 discrepancies.” The turning radius specification and cab forward specification are independent  
8 and in addition to each other. Indeed, there is no possible discrepancy in requiring both a  
9 specific turning radius and cab forward engine design. Just as conceded by Morrico that a  
10 conventional cab may satisfy the turning radius requirement, a cab forward design can  
11 conceivably *not* meet the turning radius requirement.

12 Finally, Morrico’s interpretation of the Reservation Clause encourages illogical results.  
13 Procurement protests are encouraged to be filed as early on as possible to reduce transaction  
14 costs. Should the OPA allow language such as the Reservation Clause to excuse *actual* prior  
15 knowledge of the facts giving rise to the protest, then the 14 day statute of limitations in 5 GCA  
16 § 5425(a) would be rendered meaningless. All vendors could conceivably file a “timely”  
17 protest against specifications in an original bid up until the time of the deadline for bid  
18 submission by alleging that a non-responsive merely contains a “specification discrepancy.” It  
19 would both discourage early protests, and actually encourage agencies to dismiss early protests  
20 for not being ripe. This is obviously not the intent of the Reservation Clause nor the  
21 Procurement Code. Where interpreting the language would lead to illogical results, such an  
22 interpretation should be rejected. This is the case here. Morrico should not be allowed to  
23 interpret the Reservation Clause so as to lead to illogical results. The OPA should find the  
24 protest was untimely, and dismiss the appeal.

25 ///

26 ///

27 ///

28 ///

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

**CONCLUSION**

For the foregoing reasons, the OPA should find that Morrico knew or should have known of the facts giving rise to the protest more than 14 days before October 9, 2014; that GSWA was required to deny the protest pursuant to. 5 G.C.A. § 5425(a); that due to the statutorily required denial of the protest, that the appeal was not “properly submitted” to the OPA ; and that the OPA lacks jurisdiction to hear the appeal under 5 G.C.A. § 5703 and 2 G.A.R. § 12103. Therefore, the appeal should be DISMISSED.

Respectfully submitted this 24<sup>th</sup> day of November, 2014.



---

VANESSA L. WILLIAMS, ESQ.  
*Attorney for Guam Solid Waste Authority under the  
Federal Receivership of Gershman, Brickner & Bratton*