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**THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Procurement Appeal of )  
 )  
 MORRICO EQUIPMENT, LLC, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

Docket No. OPA-PA-14-010  
**APPELLANT'S COMMENTS  
 ON AGENCY REPORT**

Morrigo Equipment, LLC (“Morrigo”), hereby submits its comments on the Guam Solid Waste Authority’s (“GSWA”), Agency Report & Agency Statement (“Agency Report”).

**I. The OPA Owes No Deference to GSWA Determinations.**

The GSWA argues that the OPA should uphold its determination to require a cab forward specification as reasonable, even if the OPA would itself have determined that the specification was unreasonable. *See*, Agency Report, pp. 3-4. It is essentially arguing that the OPA must defer to the GSWA’s determination. The GSWA cites to *TRC Environmental Corporation v. Office of the Public Auditor*, Superior Court of Guam Special Proceedings Case No. SP160-07 (November 24, 2008, Decision and Order, p. 3), for the proposition that “[i]f the court finds a reasonable basis for the agency’s action, the court should stay its hand even though, it might, as an original proposition, have reached a different conclusion as to the proper administration and application of the procurement regulations.”

However, the OPA is not a court and the OPA has the power to review and determine *de novo* any matter properly submitted to it. *See*, 5 GCA § 5703 (“The Public Auditor shall have the

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power to review and determine *de novo* any matter properly submitted to her or him.”); 2 GAR § 12103 (“The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him.”)(emphasis in original). Accordingly, the OPA does not owe any deference to the GSWA’s determination to restrict competition to only those vendors offering a cab forward model of refuse trucks.

## **II. The GSWA Procurement Record Does Not Support the Cab Forward Specification.**

Neither the GSWA’s Agency Report nor its procurement record supports the arguments that the GSWA is now making in support of its cab forward restriction. Most importantly, there is no justification in the procurement record for the adoption of a cab forward specification or the GSWA’s hindsight justification that it really needs these refuse trucks to be “maneuverable.”

For example, 5 GCA § 5267 provides that “[t]he specifications contained in any invitation for bids ... for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer’s brochures relied upon by the responsible person in drafting the specifications.” The information utilized by an agency in the development of specifications must be made a part of the procurement record. 5 GCA § 5249(d) provides that the procurement record shall contain “brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications.”

There is no document in the GSWA procurement record which discloses this required information with respect to the development of a specification allowing only a cab forward design.

We have no idea who drafted the specifications or what technical literature or manufacturer's brochures they relied on in coming up with their restrictive cab forward specification. This is of great benefit to the GSWA as it allows it to make up justifications after the fact for its restrictive and competition crushing specifications. For example, the GSWA now argues that "due to the increased maneuverability of the cab forward trucks, operators are able to reduce the route times by up to two hours, thereby decreasing the wear and tear of the trucks." *See*, GSWA Agency Report, p. 6. If that was the justification for the cab forward specification, it is nowhere illustrated by the mandatory specification development information that must be included in an IFB procurement record.

What we should be able to see from the GSWA procurement record is that the developer of the specification relied on particular technical literature establishing that a cab forward refuse truck can get through a route two hours faster than a conventional cab refuse truck. Since the GSWA decided to ignore the mandatory requirements of the Guam procurement code regarding the justification for specifications included in an IFB, it should not be allowed to reach outside of its own procurement record to now come up with reasons for a restrictive specification in hindsight.

In addition, 2 GAR § 4102(a)(2) provides that:

Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the territory. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met.

Here, the GSWA did not emphasize, or even include, a functional or performance criteria regarding "maneuverability." Instead, it has elevated to hallowed status, the design and physical description



of a cab forward model. This is not allowed. The main specification contained in the GSWA IFB regarding maneuverability was a requirement for a "turning radius of ... 31 ft. maximum." This turning radius specification is met by the Freightliner refuse trucks that Morrigo intends to bid.

There is absolutely no documentation in the procurement record regarding specification development which illustrates that only a cab forward model would satisfy the legitimate needs of the GSWA. See, e.g., *L.P. Ganacias, Inc., dba RadioCom vs. GIAA and Guam Cell Communications*, CV 1787-00 (Decision and Order, November 13, 2000, p. 22) ("It appears that GIAA undertook no evaluation which lead (sic) to the conclusion that only Motorola pagers would meet the needs of the agency. Moreover, there was no written documentation prepared which would support a conclusion that no other brand of pager would suffice here. Thus, while GIAA may have had legitimate reasons for focusing its IFB on the Motorola brand pagers, there is absolutely no documentation to support such decision."); *In the Appeal of Guam Publications, Inc.*, OPA-PA-08-007, p. 13 (The CPO "should ensure that restrictive ad specifications that favor one bidder over another are not used, and that any specifications provided [by the using agency] are properly screened and amended when necessary to prevent such restrictive specifications from appearing in future IFBs.").

**III. The Cab Forward Specification does not Provide for Better Maneuverability or Visibility over a Conventional Cab.**

The GSWA argues that the cab forward specification provides for better maneuverability and visibility. Bids can only be analyzed against criteria expressly stated in an IFB. 2 GAR § 3019(n)(1) provides that "[t]he Invitation for Bids shall set forth the requirements and criteria which



will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids." 2 GAR § 3019(n)(3) further clarifies that "[t]he Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability." Finally, 2 GAR § 3019(n)(4) provides that "[o]nly objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder."

The IFB specifications here at issue said nothing about maneuverability and, therefore, the bids to be submitted for this IFB cannot be judged against any unstated and unannounced specification regarding some maneuverability performance characteristic. While the turning radius specification certainly affects maneuverability, the Freightliner refuse truck which Morrico will bid meets the turning radius requirement of the IFB. And the GSWA concedes that a cab forward model is not synonymous with maneuverability. *See*, GSWA November 24, 2014, Motion to Dismiss & Memorandum of Points and Authorities, p. 6 ("a conventional cab may satisfy the turning radius requirement, [while] a cab forward design can conceivably *not* meet the turning radius requirement.") (emphasis in original). And, although the GSWA now argues that a cab forward specification allows greater driver visibility, the M2 Freightliner brochure that Morrico will submit with its bid illustrates that the Freightliner refuse trucks are equipped with a 2,500 square inch windshield for excellent visibility. The GSWA specifications only call for a windshield with 2,033 square inches.

Accordingly, there is no justification for the GSWA's rejection of a conventional cab design based on any maneuverability or visibility issues.

#### **IV. Ease and Expense of Maintenance.**

The GSWA also argues that the cab forward model of refuse truck provides for easier and less expensive maintenance. However, the specifications created by GSWA nowhere reference any criteria for ease and expense of maintenance. Nonetheless, as illustrated by the Freightliner brochure for the refuse trucks Morrico will offer, the Freightliner engine is much easier to access than a cab forward model. Instead of jacking up the entire cab to get at the engine of a cab forward model, a conventional cab engine is accessed by flipping a lock on each side of the hood and pulling the hood forward and down away from the engine. The engine is not only accessible from the top, but from the sides as well. Further, Freightliner has located important engine parts to the side for the express purpose of making access to those critical parts much easier, all as shown in its manufacturer's brochure.

What the GSWA chooses to ignore is that a conventional cab is less expensive to purchase. As Morrico pointed out in the September 25, 2014, written questions that it submitted to the GSWA, the cab forward specification drove the requirement for more expensive specifications for other truck components. The GSWA does not comment on the fact that its 20,000 pound front axle capacity specification costs more than an axle would cost in a conventional cab model. The specification for a 20,000 pound front axle capacity is necessary because the engine sits over the axle in a cab forward design and must support more direct weight. The tires and wheels must also be larger and more expensive to support the increased axle weight. The Freightliner conventional cab vehicle does not require a 20,000 pound front axle, larger wheels and tires or excessive horsepower. The reduction in the size of these components reduces the cost of purchasing a

conventional cab versus a cab forward. The GSWA has also specified a steel cab that must be treated with rust proofing. The Freightliner truck Morrigo will offer has an aluminum cab that is anti-corrosive to begin with and is ideal in a tropical climate.

**V. Conventional Cabs are More Comfortable.**

The GSWA argues that its refuse truck drivers prefer a cab forward model. There is no provision of the procurement code which guides the selection of a product by the whims of government personnel. And, again, the GSWA specifications nowhere reference that their employees must really like the product offered. Nonetheless, there is no comparison between the two models of refuse trucks in terms of operator comfort. The conventional cab is far more comfortable than a cab forward model and is safer for employees while entering and exiting the cab. In the cab forward model, the cab sits directly over the front axle and the driver will feel every bump in the road. Also, the cab is much hotter and more difficult to cool because the cab is sitting directly over the hot engine.

As noted above, 2 GAR § 3019(n)(4) provides that “[o]nly objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder.” There is nothing in the GSWA procurement record to illustrate the alleged preference of its employees for a cab forward model and, in any event, a survey of employee preferences is not an objectively measurable criteria, it is a mere subjective preference that has no place in government procurement.



**VI. The Cab Forward Model Restricts Competition.**

The GSWA also argues that the cab forward specification does not restrict competition. It argues that there are a number of manufacturers that provide a cab forward model. However, only three potential vendors appeared at the mandatory pre-bid conference. *See*, November 19, 2014, Submission of Procurement Record, Tab 5. Accordingly, at most, there will only be vehicles of three manufacturers competing for an award. And, by specifying only a cab forward model, the GSWA has eliminated one-third of the competition; assuming both Mid-Pac Far East and Far East Equipment Company can offer a cab forward model. Further, the other manufacturers referenced by GSWA are not represented on Guam and do not have certified service personnel to perform the required warranty maintenance on the vehicles which is also a condition of the bid. The elimination of conventional cabs absolutely restricts competition.

**CONCLUSION**

The GSWA must be ordered to amend their competition restricting cab forward specification to allow for vendors to bid conventional cab models of refuse trucks, which will be less expensive for the GSWA to purchase and maintain.

Dated this 4<sup>th</sup> day of December, 2014.

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