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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 12/19/14

TIME: 4:35 AM PM BY: AG

FILE NO OPA-PA: 14-010

Attorneys for Appellant
Morrigo Equipment, LLC

THE OFFICE OF PUBLIC ACCOUNTABILITY

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

**OPPOSITION OF MORRICO
EQUIPMENT, LLC, TO GSWA
MOTION TO DISMISS**

Docket No. OPA-PA-14-010

Morrigo Equipment, LLC (“Morrigo”), hereby files its opposition to the motion of the Guam Solid Waste Authority (“GSWA”), to dismiss this appeal for lack of jurisdiction.

I. GSWA’s Jurisdictional Motion is Untimely.

On November 6, 2014, Morrigo filed its appeal herein with the Office of Public Accountability (“OPA”). On November 24, 2014, GSWA filed a motion to dismiss pursuant to 5 GCA § 5703 and 2 GAR § 12104(c)(9). *See*, GSWA Motion to Dismiss & Memorandum of Points and Authorities (“GSWA Motion”), p. 1. The GSWA argues that the OPA does not have jurisdiction to hear the Morrigo appeal because Morrigo did not file a protest with the GSWA within 14 days of when it knew or should have known of the basis for the protest. *See*, GSWA Motion, p. 3.

However, the OPA’s rules require that a motion objecting to the jurisdiction of the OPA to hear an appeal must be filed within seven days after the notice of appeal has been filed. *See*, 2 GAR § 12104(c)(9)(“Objection to the Public Auditor hearing the Appeal shall be filed within seven (7) days after the Notice of Appeal is filed.”) The GSWA motion was filed 18 days after Morrigo filed

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its appeal. While Morrigo timely filed its protest with the GSWA, as explained further below, the OPA must deny the GSWA's jurisdictional motion for its own failure to timely file it within seven days from the date on which Morrigo filed its appeal.

II. Morrigo Timely Filed its Protest.

Morrigo timely filed its protest with the GSWA on October 9, 2014. However, the GSWA argues that Morrigo was required to file its protest on October 2, 2014, as this was 14 days from the September 18, 2014, release of the IFB which contained the cab forward specification and which put the public on constructive notice of that specification. *See*, GSWA Motion, pp. 3-4. The GSWA similarly argues that Morrigo had notice on September 19, 2014, when it picked up a bid package. *See, Id.*, p. 4. Alternatively, the GSWA argues that Morrigo was required to file its protest by October 7, 2014, which was 14 days from the mandatory September 23, 2014, pre-bid conference at which the participants were allowed to ask questions regarding the IFB. *See, Id.*, p. 4.

A. Constructive Notice.

The GSWA argues that it publicized the release of the IFB on September 18, 2014, and that the IFB contained the subject cab forward specification. Accordingly, the GSWA argues that Morrigo had constructive notice of the cab forward specification on that date and, therefore, had to file its protest 14 days later on October 2, 2014. It similarly argues that Morrigo had notice of the subject specification when it picked up a bid package on September 19, 2014, and should have protested by October 3, 2014. *See*, GSWA Motion, pp. 3-4.

While agencies have sometimes tried to argue that the time to file a protest runs from the date of an IFB release, Morrigo is unaware of any OPA decision upholding a constructive notice argument. There are good reasons for this. Specifications are routinely amended through input from interested vendors after the bid packages are reviewed by them. For heavy equipment

solicitations, where the products are manufactured off-island, local vendors must of virtual necessity forward the specifications to the manufacturer they represent to determine whether the manufacturer can meet the specifications. During this process it is often determined that some of the specifications are unnecessarily restrictive or proprietary. The vendors then write to the agency requesting amendments to restrictive or proprietary specifications. This interaction is undergirded by 2 GAR § 4103(b)(2)(a)(ii), which provides that “the head of a Purchasing or Using Agency preparing a specification for a common or general use item shall provide the using agencies, and a reasonable number of manufacturers and suppliers as such officer deems appropriate, an opportunity to comment on the draft specification.” Refuse trucks are a common or general use item.

Fourteen days from the release of an IFB is not sufficient time for a prospective vendor to run specifications through its manufacturer, receive input back on whether the specifications are restrictive or proprietary, submit written questions to the procuring agency outlining any concerns and await a written response from the agency. But the immediate filing of a protest is typically unnecessary because an agency’s written response often takes the form of an amendment to the specifications. Or, if the agency responds in writing that the specification will not be amended, a vendor can then timely file a protest within fourteen days thereafter.

However, under the theory espoused by the GSWA, a prospective bidder would have to immediately file a protest objecting to all specifications it thought might be questionable and without awaiting input from its manufacturer or responses to pre-bid questions. Pre-bid conferences and any allowance for submission of written questions would be meaningless. A vendor would simply need to protest early and often, which obviously would lead to the wasted expenditure of time and money for all concerned. And, these protests would have to come in from all prospective

vendors, potentially swamping the agency with so many protests that no IFB could ever get off the ground.

The GSWA's constructive notice argument is not the law, would make for poor policy and must be rejected.

B. Pre-Bid Conference Notice.

GSWA alternatively argues that Morrigo was required to file its protest by October 7, 2014, which was 14 days from the mandatory September 23, 2014, pre-bid conference at which the participants were allowed to ask questions regarding the IFB. *See*, GSWA Motion, p. 4. The GSWA argues that Morrigo knew the basis for its protest at that pre-bid conference when the GSWA's Linda Ibanez orally stated "no" to a question about the acceptability of a conventional cab design. *See*, GSWA Motion p. 4; *See, also*, GSWA December 15, 2014, Rebuttal to Appellant's Comments ("GSWA Rebuttal to Comments"), p. 2 ("Morrigo should have known GSWA was including the cab forward specification as a separate and independent requirement for the procurement at the mandatory pre-bid conference on September 23, 2014. GSWA clearly and unequivocally stated it would not accept bids for conventional cabs."). However, by this argument, the GSWA seeks to ignore its own instructions to bidders on how questions regarding the specifications had to be addressed.

The terms of the GSWA's IFB expressly provided that oral explanations would not be binding and that any questions on the specifications of the IFB had to be submitted in writing.

EXPLANATION TO BIDDERS: Any explanation desired by a bidder regarding the meaning or interpretation of the Solicitation, drawings, specifications, etc., must be submitted in writing and with sufficient time allowed for a written reply to reach all bidders before the submission of their bids. *Oral explanations or instructions given before the award of the contract will not be binding.* Any information given to a prospective bidder concerning a Solicitation will be furnished to all prospective bidders in writing as an

amendment to the Solicitation if such information would be prejudicial to uninformed bidders. (Emphasis added).

See, November 19, 2014, GWSA Submission of Procurement Record (“Procurement Record”), Tab 2, Sealed Bid Solicitation Instructions, Item 3. Accordingly, anything Ms. Ibanez may have stated “orally” at the pre-bid conference is meaningless.

This point was made clear by Ms. Ibanez at the pre-bid conference. A gentleman asks at the very beginning of the conference whether “anything we discuss here would still have to be submitted in writing?” Ms. Ibanez responded “correct, you would have to address it in writing and if we feel there needs to be an addendum we will send it out to you.” *See*, Procurement Record, Tab 6, Pre-Bid Conference Audio Recording, at 1:45. Ms. Ibanez did respond “no” to someone’s question on whether a conventional cab would be accepted. However, immediately thereafter, Morrigo’s Ross Morrison asked, “what if the manufacturer offers a cab forward that can meet or improve on the turning radius of a cab forward truck?”¹ Ms. Ibanez, consistent with all of her other answers at this conference and with the express instructions of the IFB, advised Mr. Morrison to put his question in writing.

Morrigo thereafter submitted extensive questions regarding the specifications on September 25, 2014. The GSWA did not respond to the pre-bid questions of Morrigo and the other bidders until October 1, 2014, though issuance of its Addendum No. 1 which revised a number of different specifications, including specifications related to the cab. However, the GSWA did not respond to Morrigo’s written questions about the acceptability of a conventional cab design. While Morrigo still did not have a written response from the GSWA to its question about the acceptability of a conventional cab, it nonetheless filed a timely protest on October 9, 2014, out of an abundance of caution.

¹ Mr. Morrison obviously meant to compare a conventional cab to a cab forward with respect to turning radius. There is no indication that Ms. Ibanez was somehow confused.

The GSWA's IFB expressly stated that oral explanations or responses were not binding and that all specification questions had to be submitted in writing. Accordingly, the GSWA cannot now argue that an oral response from the GSWA at the September 23, 2014, pre-bid conference was binding, imparted actual knowledge to Morrigo and started the running of the 14 day protest window. Therefore, Morrigo's October 9, 2014, protest was timely.

III. The GSWA Reservations Clause.

The IFB instructions also expressly provide that the GSWA "reserves the right to accept and/or reject any and all bids, to waive any defects, irregularities, or specification discrepancies and to award the bid as council deems to be in the best interest of the government." *See*, Procurement Record, Tab 2, Specifications. This is not an uncommon instruction and would otherwise allow a bidder to note a specification discrepancy on its bid form, with an explanation of why the discrepancy should be found acceptable as an equal; something bidders have been doing in Guam procurements for years. However, the GSWA now argues that Morrigo could not rely on what the GSWA calls its "reservations clause" because that would be unreasonable. *See*, GSWA Motion to Dismiss, p. 5.

This is rather absurd and raises the question of what other express terms of the GSWA's IFB bidders could not rely on? The answer, apparently, is that bidders could not rely on the express instructions that oral responses to bidder questions were not binding and that all questions had to be submitted in writing. This is because the GSWA now asserts that the oral responses of Ms. Ibanez at the pre-bid conference were binding and that the IFB instruction that all questions had to be submitted in writing was false. Both of these outcomes are contrary to the terms of the IFB. This is certainly not equitable and would violate any notion of the good faith that GSWA must adhere to in its procurement activities.

GSWA also states with respect to its reservations clause, that “the turning radius and cab forward specifications are not ‘specification discrepancies’” because they “are independent and in addition to each other.” *See*, GSWA Motion, p. 6. In a similar vein of logic, the GSWA has stated that “[t]he greater maneuverability and visibility justifications for a cab forward truck versus a conventional cab do not stem from the turning radius or windshield size.” *See*, GSWA Rebuttal to Comments, p. 5. But the GSWA also seems to concede that turning radius is not an issue at all since it states that a “conventional cab may satisfy the turning radius requirement, [while] a cab forward design can conceivably *not* meet the turning radius requirement.” *See*, GSWA Motion, p. 6 (emphasis in original).

It is difficult to decipher exactly what the GSWA is arguing in this appeal or whether anyone can rely on anything it stated in the IFB or, for that matter, in its October 22, 2014, letter denying Morrico’s protest. For example, in denying Morrico’s protest, the GSWA stated that its “customers live in diverse areas *that are often on narrow streets and roads* requiring maximum maneuverability for GSWA’s drivers to be able to safely and efficiently navigate these roadways and driveways to serve these customers.” *See*, Notice of Appeal, Exhibit E (emphasis added). The highlighted language is, upon investigation, incorrect.

Gershman, Brickner & Bratton, Inc. (“GBB”), is the federal receiver for the GSWA. In GBB’s October 9, 2014, report to the District Court of Guam, it stated that 90% of the island was serviced by large garbage trucks. It further stated that the other 10% of GSWA customers lived on roads that large trucks could not travel because of road conditions, low hanging wires and branches or difficulty in turning around. GBB stated that it was therefore procuring two 10-cubic-yard refuse trucks to serve these areas, which it previously serviced with regular pick-up trucks having small containers in their beds.

As of June 30, 2014, GSWA had provided recycling carts to all customers serviced by the larger garbage trucks, approximately 90 percent of GSWA's curbside trash customers. Residential customers who live on roads where the large garbage trucks cannot travel because of road conditions, low hanging wires and branches or inability to turn the vehicle around, receive trash collection with what GSWA refers to as Baby Packer trucks, which are pickups with small containers on their beds. The customers on the Baby Packer trash routes were not provided recycling carts because the Baby Packer trucks cannot efficiently serve these customers for recycling. However, GSWA is concluding a bid for two 10-cubic-yard compactor trash trucks that are expected to replace the current Baby Packer trucks. Once placed into operation, GSWA will be able to provide curbside recycling service to many of the remaining 10 percent of GSWA customers.


See, **Exhibit A**, October 9, 2014, Quarterly Report of the Receiver, pp. 18-19. So, while the GSWA stated that its customers "often" lived on narrow roads, this is untrue, unless often means less than 10%. Further, it is clear that the GSWA simply has no evidence that these 10% of its customers will be better serviced with a cab forward truck having a 31 foot turning radius than with a conventional cab truck having a 31 foot turning radius. It has not been using anything other than regular pick-up trucks on these few routes.

The GSWA's motion to dismiss, its confounding interpretations of the terms of its own IFB and its chameleon-like arguments, all seem mired in something other than good faith. As demonstrated above, Morrigo timely filed its protest, the OPA has jurisdiction over Morrigo's appeal and the GSWA's motion to dismiss should be denied.

Dated this 19th day of December, 2014.

DOOLEY ROBERTS & FOWLER LLP

By: _____


KEVIN J. FOWLER
Attorneys for Appellant
Morrigo Equipment, LLC

Quarterly Report of the Receiver

Civil Case No. 02-00022
United States of America v. Government of Guam
Guam Solid Waste Authority

Prepared for:



U.S. District Court of Guam

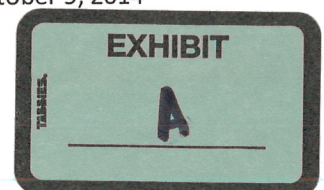
Submitted by:



Gershman, Brickner & Bratton, Inc.
8550 Arlington Blvd, Suite 304
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October 9, 2014

Printed on recycled paper



When a customer becomes 60 days behind in payment, GSWA Customer Service staff contact the customer by mail and telephone to provide a reminder to the customer, encouraging them to make payment to ensure that their account is restored to good standing. If the customer fails to pay and becomes 90 days or more behind in payment, a work order is placed to repossess the cart and terminate service. GSWA operations staff collects these carts. Seven hundred sixty-four (764) carts were repossessed during this reporting period, and 207 of these carts, or 27 percent, were returned to customers after they had paid their balance due and a \$50 reinstatement fee.

Personnel

On June 30, 2014, GSWA had 30 full-time Government of Guam employees and 24 workers employed by the Receiver through our contract with Pacific Human Resources, Inc. (PHRS). In addition, there were two employees under contract directly with the Receiver for a total of 57 full-time equivalent employees.

GSWA Board of Directors

During the reporting period, three official meetings of the GSWA Board of Directors were held. Below are highlights from these meetings.

April 10, 2014: The Receiver provided an overview of collection and disposal options for green waste. The Receiver invited John Limtiaco, who owns and operates a composting facility on Guam, and Professor Mohammad Golabi, an expert in the composting field, to the Board's meeting to discuss current activities related to green waste and the Rhinoceros Beetle blight. The Receiver also provided an overview of GSWA's fleet maintenance contracts with private companies.

May 15, 2014: An ad hoc committee of the Board tasked with reviewing the process of transitioning temporary GSWA employees into full-time government workers reported on the committee's meeting with the Receiver and GSWA personnel. The discussion focused on the three classifications of employees: full-time government employees, temporary employees from a private human resources company, and employees contracted directly by the Receiver.

June 17, 2014: The Receiver discussed with Board members the status of the Request for Proposals for the Board's legal representation.

The minutes and agenda for each meeting are posted on the GSWA website (www.guamsolidwasteauthority.com/bod.html), and the audio of each meeting is also available online through the website of the Office of the Public Auditor (www.guamopa.org/index.php?pg=board-and-commission-meetings).

Island-wide Curbside Recycling Program

As of June 30, 2014, GSWA had provided recycling carts to all customers serviced by the larger garbage trucks, approximately 90 percent of GSWA's curbside trash customers. Residential customers who live on roads where the large garbage trucks cannot travel because of road conditions, low hanging wires and

branches or inability to turn the vehicle around, receive trash collection with what GSWA refers to as Baby Packer trucks, which are pickups with small containers on their beds. The customers on the Baby Packer trash routes were not provided recycling carts because the Baby Packer trucks cannot efficiently serve these customers for recycling. However, GSWA is concluding a bid for two 10-cubic-yard compactor trash trucks that are expected to replace the current Baby Packer trucks. Once placed into operation, GSWA will be able to provide curbside recycling service to many of the remaining 10 percent of GSWA's customers.

Figure 8 shows the recycling tonnage collected in the Island-wide Curbside Recycling Program thus far in 2014. From January through June 2014, 881.07 tons were collected at the curb. Approximately half of this tonnage, 445.18 tons, was collected at the curb during this three-month reporting period. GSWA collection crews take the recyclable material to Guahan Waste Services, the contractor that processes and sells the material. Revenue for the recyclable material from January through June 2014 totaled \$7,385.24, of which \$3,545.92 was attributed to this reporting period.

Figure 8. Recycling Tonnage January 2014 through June 2014

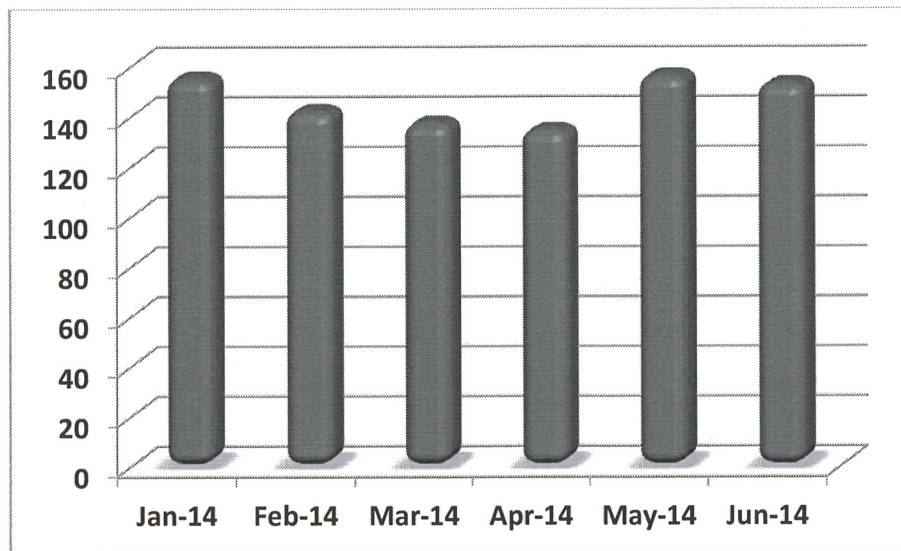


Figure 9 shows the percentage breakdown by material of recyclables collected during this reporting period.