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

8 IN THE MATTER OF)
9 MORRICO EQUIPMENT, LLC,)
10)
11 Appellant,)
12)
13 and)
14)
15 GUAM SOLID WASTE AUTHORITY)
16 UNDER THE MANAGEMENT OF)
17 FEDERAL RECEIVER GERSHMAN,)
18 BRICKNER AND BRATTON, INC.,)
19 Purchasing Agency.)

Docket OPA PA-14-010

**REPLY IN SUPPORT OF
MOTION TO DISMISS**

REPLY

Pursuant to the Scheduling Order in the above referenced matter, GSWA hereby submits its Reply to Morrigo's Opposition to GSWA's Motion to Dismiss.

I. GSWA'S MOTION WAS PROMPTLY AND TIMELY FILED.

Morrigo's attempt to bring their improperly submitted protest and appeal within the OPA's jurisdiction requires a sloppy and unreasonable reading of Rule 12104(c)(9). GSWA's motion was timely, and in accordance with the rules because it was "promptly filed" contemporaneously with GSWA's first required response- the Agency Report and Agency Statement.

Title 2 G.A.R. § 12104(c)(9) requires that any "objection" to the Public Auditor hearing the Appeal be filed within seven (7) days after the Notice of the Appeal. Section 12104(c)(9) does not require any "motion" be filed within seven (7) days. The pertinent language provides:

1 Any objection or motion addressed to the jurisdiction of the Public
2 Auditor shall be promptly filed. Objection to the Public Auditor
3 hearing the Appeal shall be filed within seven (7) days after the
4 notice of Appeal is filed. The Public Auditor shall have the right at
5 any time and on her or his own motion to raise the issue of its
6 jurisdiction to proceed with an Appeal and shall do so by an
7 appropriate order.

8 2 G.A.R. § 12104(c)(9). GSWA filed a motion, not an objection. The motion was filed
9 concurrently with the Agency Report and Agency Statement– the first response and filing of an
10 agency in a procurement appeal. Rule 12104(c)(9) did not require the motion to be filed within
11 7 days, and such a requirement cannot be implied from its construction.

12 Rules of statutory construction provide guidance in interpreting Rule 12104(c)(9). “In
13 cases involving statutory construction, the plain language of a statute must be the starting point.”
14 *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23 citing *American Tobacco Co. v. Patterson*, 456 U.S.
15 63 (1982). Here, the first requirement is that both objections and motions regarding jurisdiction
16 be “promptly filed.” Imposing the seven (7) day deadline for “objections” on jurisdictional
17 “motions” is contrary to the plain reading of the Rule 12104(c)(9) and any reasonable
18 interpretation of it. The first sentence clearly references both objections and motions and requires
19 they both be “promptly” filed. The second sentence blatantly omits any references to motions,
20 and requires that an “objection” be filed within the specific time frame of seven days. It would
21 be redundant for the two sentences to be read as one requirement - that both objections and
22 motions be filed within seven days.

23 Further, “[a] statutory provision should be interpreted consistently and so as not to render
24 another statutory provision, particular one concerning the same subject, null and void.” *Id.* at ¶
25 6. Here, reading the second sentence of 12104(c)(9) to require that “motions” in addition to
26 “objections” be filed within seven days would render the first sentence of the rule superfluous,
27 null and void. If it was intended that the seven days would apply to both objections and motions,
28 it would have clearly stated so in the first sentence, and omitted the second sentence altogether.

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1 **II. THE PUBLIC AUDITOR HAS THE RIGHT TO ADDRESS ITS JURISDICTION**
2 **AT ANY TIME.**

3 Regardless of Morrigo's interpretation of Rule 12104(c)(9), the Supreme Court of Guam
4 has ruled that "jurisdiction issues may be raised at any time." *Pacific Rock Corp. v. Dept. of*
5 *Education*, 2001 Guam 21 ¶ 18. Indeed, Rule 12104(c)(9) states "[t]he Public Auditor shall have
6 the right at any time and on her or his own motion to raise the issue of its jurisdiction to proceed
7 with an Appeal and shall do so by an appropriate order." 2 G.A.R. § 12104(c)(9). (Emphasis
8 added.) It would not make sense for the law to repeatedly reinforce early, prompt, expeditious
9 dispute resolution of procurement protests, only for a rule to allow a protestor to drag out an
10 untimely protest on a technicality. That is why the same rule Morrigo erroneously relies on
11 specifically provides that the Public Auditor has the right "at any time" to address the issue of its
12 own jurisdiction. *Id.*

13 **III. IT IS CONTRARY TO PUBLIC POLICY TO EXERCISE JURISDICTION OVER**
14 **UNTIMELY PROTESTS.**

15 Section 12103 states that "[t]he Public Auditor's jurisdiction shall be utilized to promote
16 the integrity of the procurement process and the purposes of 5 GCA Chapter 5." *Id.* It is required
17 by 5 G.C.A. Chapter 5 to dismiss untimely protests, and sound public policy to support such
18 dismissal. It is clear that the intent of Guam's procurement law is to promote timely protests,
19 and the expeditious resolution thereof. Unlike other statutes of limitation, procurement protests
20 and appeal require short deadlines and prompt responses in order to expeditiously resolve
21 disputes. *See* 5 G.C.A. Sections 5425(a),(c), and (e). This policy against unnecessary delay of
22 territorial procurement is echoed in the mandate to the Public Auditor to "adopt rules of
23 procedure, which, to the fullest extent possible, will provide for the expeditious resolution of
24 controversies in accordance with the requirements of this Chapter." 5 G.C.A. § 5701. (Emphasis
25 added.) Thus, the exercise of jurisdiction over an untimely protest does not promote the integrity
26 nor purposes of 5 G.C.A. Chapter 5.

1 **IV. MORRICO'S PROTEST WAS UNTIMELY AND THE MATTER IS NOT**
2 **PROPERLY SUBMITTED TO THE OPA.**

3 Turning towards the actual merits of the Motion, Morrico's appeal must be dismissed
4 because it was not timely filed and not properly submitted before the OPA. Morrico does not
5 dispute that the actual notice at the pre-bid conference that the conventional cab was not
6 acceptable and did not meet the cab forward specification. Morrico instead argues that their
7 protest is timely because they could not know a specification would be removed until told so in
8 writing. However, this is the whole point of the "should have known" standard. It requires
9 reasonable and prompt action, and does not allow Morrico to plead ignorance based on
10 inapplicable language within the IFB – the "Explanation to Bidders" clause.

11 The "Explanation to Bidders" language does not render Morrico's actual notice
12 "meaningless." See Opposition of Morrico Equipment, LLC, to GSWA Motion to Dismiss, p.5.
13 The language clearly states that "Oral explanations or instructions given before the award of the
14 contract will not be binding." Ms. Ibanez' verbal and unambiguous "no" in response to whether
15 conventional cabs were acceptable was undoubtedly "actual notice" that a conventional cab would
16 not be acceptable. It was not an "explanation" nor "instruction" "regarding the meaning or
17 interpretation of the Solicitation, drawings, specifications[.]" *Id.* at p. 4. GSWA was not being
18 asked what cab forward *meant*, or how to *interpret* it. It was merely confirming that the
19 specification called for a cab forward, not a conventional cab, design.

20 Morrico fails to address all of GSWA's underlying and enumerated arguments as to *why*
21 Morrico's reliance is unreasonable. Therefore, it bears repeating. Morrico's reading of the
22 Reservations Clause to waive its actual notice is unreasonable because a plain reading of the
23 language illustrates it does not apply to Morrico's protest, and applying it would lead to illogical
24 results. First, the Reservations Clause only applies to discrepancies in made in actual bids, which
25 GSWA could waive post-bid and pre-award. There was no actual bid to waive any discrepancy.
26 IN any event, there was no *discrepancy*. A *discrepancy* would exist if the IFB called for a cab-
27 forward design and a conventional cab design. The IFB did not.

