



OFFICE OF PUBLIC ACCOUNTABILITY
 Doris Flores Brooks, CPA, CGFM
 Public Auditor
BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

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IN THE APPEAL OF

Docket No. OPA-PA-14-010

MORRICO EQUIPMENT, LLC,
 Appellant.

DECISION

I. INTRODUCTION

This is the Decision of the Public Auditor for Procurement Appeal number OPA-PA-14-010 regarding MORRICO EQUIPMENT, LLC’s (“Morrico”) Appeal of the GUAM SOLID WASTE AUTHORITY’s (“GSWA”) Denial of Procurement Protest dated October 22, 2014, concerning Invitation for Bid No. GSWA001-15 (“the IFB”), which seeks only cab forward models of refuse collection trucks, which are not offered by Morrico. This matter came before the Public Auditor and Hearing Officer Delia S.L. Wolff for a Formal Hearing on January 20, 2015. Present at the Hearing were Kevin J. Fowler, counsel for Morrico, Morrico representative Ross Morrison, Vanessa L. Williams, counsel for GSWA, and R. Chace Anderson, the Operations Manager of GSWA. The Public Auditor holds that GSWA’s cab forward specifications in the IFB for refuse collection trucks Categories I and II violate Guam procurement law. Accordingly, Morrico’s Appeal is hereby GRANTED.

II. FINDINGS OF FACT

In reaching this Decision, the Public Auditor has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the

1 January 20, 2015, Hearing on Morrigo's Appeal. Based on the aforementioned record in this
2 matter, the Public Auditor makes the following findings of fact:

3 1. On September 18, 2014, GSWA issued the IFB which solicits bids for two categories of
4 refuse collection trucks, both having a cab forward design. (Procurement Record, Tab 1 & Tab 2;
5 Specifications.)
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7 2. The IFB Instructions state in relevant part:

8 EXPLANATION TO BIDDERS: Any explanation desired by a bidder regarding
9 the meaning or interpretation of the Solicitation, drawings, specifications, etc., must
10 be submitted in writing and with sufficient time allowed for a written reply to reach
11 all bidders before the submission of their bids. Oral explanations or instructions
12 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.

13 (Procurement Record, Tab 2, Sealed Bid Solicitation Instructions ¶ 3.)

14 3. On September 19, 2014, Morrigo obtained a copy of the IFB. (Id., Tab 3.)

15 4. On September 23, 2014, GSWA held a mandatory pre-bid conference which was attended
16 by Morrigo through its representative, Ross Morrison. (Procurement Record, Tab 5.) At the pre-
17 bid conference, GSWA informed attendees that anything discussed at the pre-bid mandatory
18 conference would still have to be submitted in writing and that "you [attendees] would address it
19 in writing and if we [GSWA] feel there is an addendum we will send it out to you by email or fax.
20 Usually, we deliver also." (Id., Tab 6, at 1:51-2:05.) The cab forward specifications were also
21 addressed and GSWA verbally indicated that it would not consider any conventional cabs. (Id.,
22 Tab 6, at 3:55-4:15.) GSWA stated that it was a safety and turning radius issue, as being the reason
23 GSWA was seeking only a cab forward model. (Id., Tab 6, at 4:17-4:23.) Ross Morrison of
24 Morrigo then asked, "What if the manufacturer that offers a cab forward can meet or improve on
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1 the turning radius of a low cab forward truck?” GSWA responded, “You can submit it in and we’ll
2 look at it.” (Id., Tab 6, at 4:24-4:33.)

3 5. On September 25, 2014, Morrico submitted to GSWA Pre-Bid Questions for the IFB,
4 wherein it requested that the bid specification permit a conventional cab design. (Procurement
5 Record, Tab 7, Letter dated September 25, 2014, from Jennifer Cabuhat to Linda J. Ibanez.)
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7 6. On October 1, 2014, GSWA issued and provided to prospective bidders, including
8 Morrico, Addendum No. 1 to the IFB, which amended certain specifications but did not amend the
9 cab forward specifications to permit a conventional cab design or otherwise address the request by
10 Morrico in its Pre-Bid Questions to permit a conventional cab design. (Procurement Record, Tab
11 10, Addendum No. 1.)

12 7. On October 4, 2014, GSWA issued Addendum No. 2 to the IFB which postponed bid
13 opening from October 6, 2014, to October 15, 2014, due to the National Weather Service’s issuance
14 of a Typhoon Watch for Guam, Rota, Tinian, and Saipan. (Procurement Record, Tab 11.)
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16 8. On October 9, 2014, eight (8) days after receiving Addendum No. 1, Morrico filed with
17 GSWA a Procurement Protest, in which Morrico protested GSWA’s refusal to amend its
18 specifications for a cab forward design for each of the refuse collection trucks it seeks to acquire,
19 despite Morrico’s request for such amendment in its September 25, 2014, Pre-Bid Questions to
20 GSWA. (Procurement Record, Tab 12.)
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22 9. On October 10, 2014, GSWA issued a Stay of Procurement in light of Morrico’s protest.
23 (Procurement Record, Tab 14.)

24 10. GSWA denied Morrico’s protest via letter dated October 22, 2014, which was received
25 by Morrico on October 24, 2014. (Procurement Record, Tab 15.)
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1 11. On November 6, 2014, GSWA issued Addendum No. 3 which provided, among other
2 things, that the Stay of Procurement is resolved and that bid opening is scheduled for November
3 21, 2014, at 10:00 a.m. (Procurement Record, Tab 16, Addendum No. 3.)

4 12. On November 6, 2014, Morrico filed its procurement appeal with the OPA. (Notice of
5 Procurement Appeal.)
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7 III. ANALYSIS

8 A. Timeliness of Morrico's Appeal.

9 On November 24, 2014, GSWA filed a Motion to Dismiss Morrico's Appeal for lack of
10 jurisdiction due to Morrico's alleged failure to timely file its protest. GSWA argues that Morrico's
11 October 9, 2014, protest to GSWA was untimely, and that, therefore, Morrico's Appeal should be
12 dismissed for the OPA's lack of jurisdiction.
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14 The jurisdiction of the Public Auditor is set forth in Title 5 Guam Code Annotated (G.C.A.)
15 § 5703, which states in part: "The Public Auditor shall have the power to review and determine de
16 novo any matter properly submitted to her or him." 5 G.C.A. § 5703; see also 2 Guam
17 Administrative Rules (G.A.R.) § 12103(a). As Morrico's appeal is made from a decision on protest
18 of method, solicitation, or award, (Notice of Procurement Appeal at 1), 5 G.C.A. § 5425(a) sets
19 forth the relevant deadline for filing such protests:
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21 Any actual or prospective bidder, offeror, or contractor who may be aggrieved in
22 connection with the method of source selection, solicitation or award of a contract,
23 may protest to the Chief Procurement Officer, the Director of Public Works or the
24 head of a purchasing agency. The protest shall be submitted in writing within
fourteen (14) days after such aggrieved person knows or should know of the facts
giving rise thereto.

25 Upon timely receipt of such appeal, "[t]he Public Auditor shall determine whether a decision on
26 the protest of method of selection, solicitation or award of a contract ... is in accordance with the
27 statutes, regulations, and the terms and conditions of the solicitation." 2 G.A.R. § 12201(a).

1 Jurisdiction issues may be raised at any time. Pac. Rock Corp. v. Dep't of Educ., 2001
2 Guam 21 ¶ 8. The Public Auditor is authorized at any time to raise the issue of its jurisdiction to
3 proceed with an Appeal and shall do so by an appropriate order. 2 G.A.R. § 12104(c)(9). Thus,
4 before turning to the merits of Morrico's appeal, the Public Auditor first considers whether Morrico
5 timely filed its appeal.
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7 In GSWA's Motion to Dismiss, GSWA argues that Morrico's Appeal should be
8 dismissed for failure to file its protest with GSWA within 14 days of when Morrico knew or should
9 have known of the facts giving rise to the protest. Specifically, GSWA contends that Morrico
10 should have filed its protest within 14 days of the following events: (1) publication of the IFB,
11 which contained the cab forward specification, on September 18, 2014, which would require
12 Morrico, having constructive notice, to file its protest within 14 days thereafter, by October 2, 2014;
13 (2) Morrico's receipt of the IFB on September 19, 2014, which would require it to protest within
14 14 days thereafter, by October 3, 2014; or (3) Morrico's attendance at the pre-bid conference on
15 September 23, 2014, during which time GSWA stated it would not consider any conventional cabs,
16 which would require Morrico to protest within 14 days thereafter, by October 7, 2014.
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18 In opposition to the Motion to Dismiss, Morrico argues that the October 9, 2014, filing of
19 its protest to GSWA is timely. Morrico asserts that requiring vendors to file protests within 14 days
20 of publication of the IFB or of their receipt of the IFB would inundate agencies with protests,
21 thereby delaying procurements, and make poor policy. Morrico points out that 14 days from the
22 release of an IFB is insufficient time for a prospective vendor to run specifications through its
23 manufacturer, receive input on whether the specifications are restrictive or proprietary, submit
24 written questions to the procuring agency regarding concerns, and await a written response from
25 the agency. Furthermore, specifications are routinely amended through input from interested
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1 vendors after bid packages are reviewed by them. Morrico also argues that it should not have
2 known of the facts giving rise to its protest through its attendance at the pre-bid conference since
3 GSWA's instructions to bidders, contained in the IFB, state that oral explanations would not be
4 binding and that any questions regarding the specifications of the IFB had to be submitted in
5 writing. Given these instructions, Morrico argues, GSWA's oral explanation at the pre-bid
6 conference that GSWA would not consider conventional cabs is meaningless.
7

8 The Public Auditor does not agree with GSWA that the publication of the release of an IFB
9 gives vendors constructive notice which starts the 14-day clock in which to file a protest. GSWA
10 has provided no authority which would impose such constructive notice upon potential bidders.
11 The IFB, by its own instructions, requires that bidders submit in writing to GSWA "[a]ny
12 explanation desired by a bidder regarding the meaning or interpretation of the Solicitation,
13 drawings, specifications, etc.," and that "[o]ral explanations or instructions given before the award
14 of the contract will not be binding." For these same reasons, Morrico's receipt of the IFB also did
15 not trigger the running of the 14-day deadline to file a protest.
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17 The Public Auditor is not persuaded that the pre-bid conference provided Morrico with
18 notice of facts giving rise to its protest and that it should have filed its protest within 14 days. While
19 GSWA did orally notify attendees at the pre-bid conference that conventional cabs would not be
20 considered, the IFB instructions to bidders make clear that any pre-award oral explanations or
21 instructions will not be binding. Moreover, attendees at the pre-bid conference, which include
22 Morrico, were informed by GSWA that anything discussed at the conference would still have to be
23 submitted in writing. In fact, GSWA informed Morrico at the conference that it can submit its
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1 proposal¹ and GSWA would look at it. From these facts, the Public Auditor cannot conclude that
2 Morrico was required to file its protest within 14 days of the pre-bid conference.

3 As Morrico filed its protest with GSWA within 14 days of GSWA's issuance of Addendum
4 No. 1, which was made in response to vendors' pre-bid questions and which did not amend the
5 specifications to permit conventional cabs, the Public Auditor concludes that Morrico's protest to
6 GSWA was timely, and, therefore, the Public Auditor has jurisdiction to hear Morrico's Appeal.
7 Accordingly, the Public Auditor DENIES GSWA's Motion to Dismiss and proceeds to a
8 determination of the merits of Morrico's Appeal.
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10 **B. Standard of Review.**

11 Guam law empowers the Public Auditor to review and determine de novo any matter
12 properly submitted to her or him. 5 G.C.A. § 5703; 2 G.A.R. § 12103. While GSWA cites TRC
13 Environmental Corp. v. Office of the Public Auditor, SP160-07, Decision & Order at 3 (Superior
14 Court of Guam Nov. 24, 2008), as setting a standard for upholding an agency action if there is a
15 reasonable basis for such action, that case is inapposite since it concerns the standard for courts and
16 not the OPA. As authorized by statute, the Public Auditor determines this matter de novo.
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18 **C. Whether the Cab Forward Specifications Unnecessarily Restrict Competition.**

19 Morrico argues that the cab forward specifications restrict competition in violation of 5
20 G.C.A. §§ 5265 and 5268(a) and (c). 5 G.C.A. § 5268(a) provides: "Specifications shall not
21 include requirements, such as but not limited to restrictive dimensions, weights or materials, which
22 unnecessarily restrict competition, and shall include only the essential physical characteristics and
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26 ¹ While Morrico's representative, Ross Morrison, misstated "cab forward" in his question regarding the
27 acceptability of conventional cabs, the Public Auditor finds from the context in which the question was asked that
28 GSWA understood his question to relate to the acceptability of conventional cabs which can meet or improve on the
turning radius of low cab forward trucks.

1 functions required to meet the Territory’s minimum needs.” 5 G.C.A. § 5268(c) provides:
2 “Purchase descriptions shall describe the salient technical requirements or desired performance
3 characteristics of supplies or services to be procured without including restrictions which do not
4 significantly affect the technical requirements or performance characteristics.” 5 G.C.A. § 5265
5 states: “All specifications shall seek to promote overall economy for the purposes intended and
6 encourage competition in satisfying the Territory’s needs, and shall not be unduly restrictive.”
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8 The procurement function seeks to foster as much competition as possible by ensuring that
9 all who wish to compete for the opportunity to sell to the government can do so. The government
10 should take active steps to ensure that it receives as many bids/proposals as possible for each
11 solicitation. Generally, the more bids there are, then the lower the purchase cost is likely to be.²
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13 Cab forward specifications restrict competition to only those vendors that can offer cab
14 forward models, which does not include Morrico. In determining whether the cab forward
15 specifications unnecessarily restrict competition in violation of 5 G.C.A. § 5268(a), the issues are
16 whether such restriction is necessary to meet the Territory’s minimum needs, and whether the cab
17 forward specification is an essential physical characteristic and function required to meet the
18 Territory’s needs.

19 Here, the IFB seeks bids on two categories of refuse collection trucks—three 25 cubic yard
20 refuse collection trucks and two 10 cubic yards refuse collection trucks. It is undisputed by the
21 parties that the trucks are sought to meet the Territory’s needs in collecting refuse in Guam’s roads
22 and neighborhoods. However, GSWA adds that “it is essential and necessary that the GSWA refuse
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27 ² From “An Elected Official’s Guide to Procurement” by Patricia C. Watt published by the Government
28 Finance Officers Association.

1 trucks not only be able to pick up trash, but to do so *safely and efficiently*, without injuring person
2 or property.” (Agency Report & Statement at 5 (emphasis in original))

3 The parties do not dispute that both cab forward and conventional cab trucks are capable of
4 collecting trash in Guam. In fact, R. Chace Anderson, Operations Manager of GSWA, testified at
5 the Hearing that GSWA’s current fleet of refuse collection trucks includes both cab forward trucks
6 and trucks with conventional cabs. Assuming that Guam’s minimum needs are having its refuse
7 collected safely and efficiently, the issue is whether the cab forward specifications are essential
8 physical characteristics and functions necessary to meet these needs.

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10 At a minimum, the cab forward specifications would be essential physical characteristics
11 and functions necessary to meet Guam’s needs if they are safer and more efficient than conventional
12 cab trucks in collecting refuse in Guam. However, GSWA has failed to demonstrate that cab
13 forward models are safer or more efficient than conventional cab designs, including that offered by
14 Morrico, in picking up trash in Guam. While GSWA claims that cab forward trucks are safer
15 because they have greater visibility and maneuverability, (GSWA Hearing Brief at 2), the Public
16 Auditor agrees with Morrico that visibility and maneuverability are instead addressed in the IFB
17 specifications for windshield size and turning radius, respectively, (Appellant’s Hearing Brief at
18 2); Morrico is not protesting these specifications. Additionally, there was no evidence presented
19 that cab forward models cause fewer injuries to persons or property than conventional cabs.
20 Further, GSWA failed to show that cab forwards are more efficient in collecting trash in Guam than
21 conventional cabs.
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24 Notably, the procurement record includes no papers or materials used by GSWA in the
25 development of the IFB specifications. This is a requirement of 5 G.C.A. § 5249(d). Without this
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1 information, the Public Auditor cannot review GSWA's justification in requiring only the cab
2 forward specification in the IFB.

3 Accordingly, the Public Auditor is unable to determine whether or not the cab forward
4 specification is necessary and an essential physical characteristic and function to meet Guam's
5 minimum needs in safely and efficiently collecting refuse.
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7 As the Public Auditor finds that the cab forward specifications of the IFB unnecessarily
8 restrict competition in violation of 5 G.C.A. § 5268(a), Morrico's contention that such
9 specifications violate 5 G.C.A. §§ 5268(c) and 5265 need not be addressed.

10 IV. CONCLUSION

11 Based on the foregoing, the Public Auditor hereby determines the following:

12 1. Morrico timely filed its protest with GSWA in accordance with 5 G.C.A. § 5425(a) and
13 the OPA therefore has jurisdiction over this appeal.
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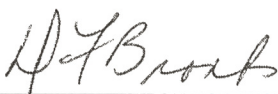
15 2. GSWA's cab forward specifications unnecessarily restrict competition in violation of 5
16 G.C.A. § 5268(a).

17 3. Accordingly, Morrico's procurement appeal is hereby GRANTED. GSWA shall
18 immediately amend the IFB to allow vendors to bid conventional cab models for refuse collection
19 trucks Categories I and II.
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21 This is a Final Administrative Decision. The Parties are hereby informed of their right to
22 judicial review in the Superior Court of Guam of a Decision of the Public Auditor under 5 G.C.A.
23 Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law. In
24 accordance with 5 G.C.A. § 5481(a), such action shall be initiated within fourteen (14) days after
25 receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties
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1 and their respective attorneys, in accordance with 5 G.C.A. § 5702, and shall be made available for
2 review on the OPA website at www.opaguam.org.

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4 SO ORDERED this 20th day of February, 2015.

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7 DORIS FLORES BROOKS, CPA, CGFM
8 Public Auditor of Guam

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