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FILE NO OPA-PA: 13-015

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11 **OFFICE OF THE PUBLIC AUDITOR**
12 **PROCUREMENT APPEALS**
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15 IN THE APPEAL OF) **DOCKET NO. OPA-PA-13-015**
16)
17 MORRICO EQUIPMENT, LLC,) **OPPOSITION TO APPELLANT'S SECOND**
18) **MOTION TO ENFORCE OPA DECISION**
19 Appellant.)
20 _____)
21)
22)

23 **COMES NOW**, the GUAM POWER AUTHORITY, by and through its counsel of
24
25 record, D. GRAHAM BOTHA, ESQ., and hereby files its opposition to Appellant's second motion
26 for enforcement of OPA decision regarding re-award of the contract to Morricco.

27 Morricco again requests the OPA enforce the re-award of the contract to Morricco. The
28 original OPA decision was filed on January 24, 2014, a copy of which is attached as Exhibit A. A
29 careful review and reading of the OPA decision on page 10 would reveal the following language
30 **"Should GPA require and have the funding** to procure additional bucket trucks in 2014 and
31 2015, it should exercise its options for those years under the IFB contract and procure them from
32 MORRICO." The Order also contained the language that "This is a Final Administrative Decision.
33 The parties are hereby informed of their right to appeal from a Decision by the Public Auditor to
34 the Superior Court of Guam, in accordance with Part D of Article 9, of 5 GCA, **within fourteen**
35 **(14) days** after receipt of a Final Administrative Decision. 5 GCA §5481(a). Morricco failed to file
36 an appeal to Superior Court within 14 days as required by 5 GCA §5481(a).

1 Instead, on March 7, 2014, Morrico filed its first motion to enforce the re-award of the
2 contract to Morrico. The OPA issued a decision on March 26, 2014, a copy of which is attached
3 as Exhibit B, which clearly stated that “the IFB clearly states that GPA reserves the right to
4 exercise the **remaining option years, 2014 and 2015**, of the contract. This means that GPA must
5 re-award the contract to Morrico and send the required notices to the rest of the IFB’s bidders.
6 However, **Morrigo’s right to receive any orders for bucket trucks is subject to whether GPA**
7 **exercises the contract’s remaining option years.”** The second OPA Order of March 26, 2014,
8 also contained the language that “This is a Final Administrative Decision. The parties are hereby
9 informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of
10 Guam, in accordance with Part D of Article 9, of 5 GCA, **within fourteen (14) days** after receipt
11 of a Final Administrative Decision. 5 GCA §5481(a). Morrico again failed to file an appeal to
12 Superior Court within 14 days as required by 5 GCA §5481(a).

13 Morrico again brings an almost identical motion to enforce the OPA decision regarding the
14 re-award of the contract to Morrico. Its motion was filed on January 4, 2016, when it clear that
15 option years 2014 and 2015 of the contract have expired. Morrico contends apparently that GPA
16 should illegally make an order to Morrico after the contract has expired, and the Decision states
17 clearly that “**Morrigo’s rights to receive any orders for bucket trucks is subject to whether**
18 **GPA exercises the contract’s remaining option years.”**

19 Interestingly enough, Morrico filed a protest in GPA-011-16, 2016 Bucket Trucks, on
20 December 31, 2015, a copy of which is attached as Exhibit C. In its protest letter, Morrico argues
21 that it needs 360 days to deliver bucket trucks. GPA substantially changed the specifications in
22 GPA-011-16 for bucket trucks, so that vendors could deliver within 120 days, a task which was
23 previously done by Mid Pac Far East in 2014.

24 GPA has fully complied with the OPA decision in this case, and the contract expired without

1 exercising any option years at the **end of FY15 on September 30, 2015**. Morrico proposes that
2 GPA should illegally extend an expired contract, and should provide this alternative to the CCU
3 and PUC. This is not an alternative contemplated by the PUC contract review protocol,
4 particularly as set forth in paragraph 7 of the protocol. The other documents referenced by
5 Morrico's counsel are not a part of the PUC contract protocol (6 pages), a copy of which is
6 attached as Exhibit D.

7 GPA requests that OPA deny the motion submitted by appellant Morrico, as GPA has fully
8 complied with the OPA decision regarding award of option years FY2014 and FY2014. In
9 addition, both the January 24, 2014 Decision and the March 26, 2014 Order provided that they
10 were Final Administrative Decisions pursuant to 5 GCA §5481(a). Morrico failed to file an appeal
11 to Superior Court within 14 days as required by 5 GCA §5481(a) for either Decision or Order, and
12 there is no basis for another appeal almost two years later.

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RESPECTFULLY SUBMITTED this 22nd day of January, 2016.


D. GRAHAM BOTHA, ESQ.
GPA Legal Counsel



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
MORRICO EQUIPMENT, LLC

Appellant

) **APPEAL NO: OPA-PA-13-015**

) **DECISION**

I. INTRODUCTION

This is the Decision of the Public Auditor for appeal number OPA-PA-13-015 which was filed by MORRICO EQUIPMENT, LLC, (Hereafter Referred to as "MORRICO") on October 30, 2013 regarding the Guam Power Authority's (Hereafter Referred to as "GPA") October 15, 2013 denial of MORRICO's August 20, 2013 Protest concerning GPA-IFB-064-11 (55' Bucket Trucks) (Hereafter referred to as "IFB"). The Public Auditor holds that: (1) MORRICO's August 20, 2013 Protest was timely; (2) GPA violated the terms of the IFB, and 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1) by re-awarding the IFB Contract to MID PAC FAR EAST, whose bid could not be the second lowest bid because it was rejected by GPA as being non-conforming to the IFB specifications. Accordingly, MORRICO's appeal is hereby SUSTAINED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the December 16, 2013 hearing for Appellant's Appeal. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

Exhibit A

- 1 1. On or about June 14, 2011, GPA issued the IFB.¹
- 2 2. The IFB required, in relevant part, the following:
- 3 a. That the bidders submit bids for two (2) bucket trucks, which complied with
- 4 the IFB specifications, that would be delivered in two-hundred-forty (240) calendar days.²
- 5 b. That the bidder submit bids for an additional two (2) bucket trucks, for each
- 6 of three (3) Option Years, 2013, 2014, and 2015, and that GPA reserves the right to exercise
- 7 subsequent option years.³ However, GPA's Supply Management Administrator testified that
- 8 GPA did not intend to purchase any bucket trucks from the successful bidder during any of these
- 9 options years.⁴
- 10 c. That award shall be made to the lowest responsible and responsive bidder,
- 11 whose bid is determined to be the most advantageous to the government, taking into
- 12 consideration the evaluation factors set forth in the IFB.⁵
- 13 d. That the bucket truck's aerial platform have a polyethylene liner with a 69KV
- 14 AC rating.⁶
- 15 3. On July 12, 2011, GPA received the following bids in response to the IFB:
- 16 a. MORRICO bid the amount of \$237,486 for each truck, and the amounts of
- 17 \$244,528 for each truck for Option Year 2013, \$251,833 for each truck for Option Year 2014,
- 18 and \$259,413 for each truck for Option Year 2015.⁷
- 19 b. TRIPLE J. ENTERPRISES bid the amount of \$279,809 for each truck, and
- 20 the amounts of \$299,777 for each truck, for Option Year 2013, \$311,090 for each truck for
- 21 Option Year 2014, and \$319,574 for each truck for Option Year 2015.⁸
- 22 c. PACIFIC WASTE SYSTEMS bid the amount of \$262,885 for each truck,
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25 ¹ Page 132, IFB, TAB 18, Procurement Record filed on November 8, 2013.

26 ² Page 133, Id.

27 ³ Id.

28 ⁴ Testimony of Jaime Pangelinan, GPA Supply Management Administrator, December 16, 2014.

⁵ Paragraph 23, Award, Cancellation, & Rejection, General Terms and Conditions, page 151, Id.

⁶ Paragraph C.7.2, IFB Specifications, page 135, Id.

⁷ Page 1, Abstract of Bids, TAB 10, Id.

⁸ Id.

1 and the amounts of \$282,601.37 for each truck for Option Year 2013, \$303,796.43 for each truck
2 for Option Year 2014, and \$326,581.21 for each truck for Option Year 2015.⁹

3 d. MID PAC FAR EAST bid the amount of \$235,750 for each truck, and the
4 amounts of \$247,540 for each truck for Option Year 2013, \$259,995 for each truck for Option
5 Year 2014, and \$273,000 for each truck for Option Year 2015.¹⁰

6 e. FAR EAST EQUIPMENT COMPANY bid the amount of \$228,125 for each
7 truck, and the amounts of \$244,095 for each truck for Option Year 2013, \$261,180 for each truck
8 for Option Year 2014, and \$279,463 for each truck for Option Year 2015.¹¹

9 4. On October 5, 2011, GPA notified MORRICO that its bid had been rejected due to
10 high price and GPA advised MORRICO that the bid is recommended for award to FAR EAST
11 EQUIPMENT LLC, for two (2) bucket trucks for the total amount of \$456,250.¹²

12 5. On October 5, 2011, GPA notified MID PAC FAR EAST that its bid was rejected
13 because it did not conform with the IFB's specifications because the trucks that MID PAC FAR
14 EAST bid did not meet the minimum di-electric rating for the platform polyethylene liner, and
15 because of the bid's high price.¹³

16 6. GPA awarded the IFB contract to FAR EAST EQUIPMENT LLC, which required
17 FAR EAST EQUIPMENT LLC, to supply GPA with two (2) bucket trucks at a cost of \$228,125
18 each for a total cost of \$456,250 with delivery required by June 15, 2012.¹⁴

19 7. However, FAR EAST EQUIPMENT LLC, subsequently defaulted on its obligation
20 to deliver the two (2) bucket trucks by June 15, 2012 and GPA terminated its contract with FAR
21 EAST EQUIPMENT LLC, on January 16, 2013 after no bucket trucks were delivered to GPA.¹⁵

22 8. Sometime after GPA terminated its contract with FAR EAST EQUIPMENT LLC,
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25 ⁹ Id.

26 ¹⁰ Id., at page 2.

27 ¹¹ Id.

28 ¹² GPA Bid Status dated October 5, 2011, Exhibit A, Notice of Appeal filed on
October 30, 2013.

¹³ GPA Bid Status dated October 5, 2011, MORRICO's Exhibit 2, December 16,
2013 Hearing.

¹⁴ Consolidated Commission on Utilities (CCU) Resolution No. 2011-41 Amended,
page 16, TAB 5, Id.

¹⁵ Id., at page 17.

1 Jimmy Pangelinan, GPA's Fleet Support Services Manager, talked to GPA's Procurement
2 Personnel to "salvage" the IFB. Pangelinan, with the assistance of GPA's Procurement
3 Personnel, formed a bid evaluation committee, whose members included Pangelinan, Enrique V.
4 Quidachay, GPA's Power Systems Superintendent, and Jose M. Ichihara, GPA's Heavy
5 Mechanic Leader, and this committee met with a representative from MID PAC FAR EAST
6 sometime between January 16, 2013 and February 11, 2013. This representative confirmed that
7 MID PAC FAR EAST would provide two (2) bucket trucks to GPA at its bid price of \$235,750
8 each for the total amount of \$471,500.¹⁶

9 9. However, MID PAC FAR EAST had to make various deviations from its original bid
10 submittal, such as requiring GPA to pay additional shipping charges, and by changing its bucket
11 truck manufacturer from International to Altec, changing the color of the trucks from John Deere
12 Yellow to white, changing the trucks' tool box compartments from fiberglass to steel, changing
13 the truck's horsepower (HP) from 250 HP to 245 HP, changing the trucks' battery capacity from
14 1875 to 1850, and by changing the trucks' outriggers from A-Frames to X-Frames.¹⁷

15 10. Despite these deviations, on February 11, 2013, GPA's bid evaluation committee
16 recommended that these deviations were acceptable and the committee recommended re-
17 awarding the IFB contract to MID PAC FAR EAST. This recommendation was approved by
18 Melinda R. Camacho, P.E., GPA's Assistant General Manager of Operations, and by Joaquin C.
19 Flores, P.E., GPA's General Manager.¹⁸

20 11. On February 12, 2013, the CCU, which serves as GPA's governing board, found the
21 procurement of the two (2) bucket trucks from MID PAC FAR EAST to be reasonable and
22 prudent, and the CCU authorized GPA's management to purchase two (2) bucket trucks from
23 MID PAC FAR EAST for the amount of \$471,500.¹⁹

24 12. On February 13, 2013, GPA awarded the IFB contract to MID PAC FAR EAST by
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27 ¹⁶ Id., and GPA Memorandum dated February 11, 2013, page 19, TAB 5, and
28 Testimony of Jimmy Pangelinan, GPA Fleet Services Manager, December 16, 2013.

¹⁷ Letter dated January 31, 2013 from Mark S. Cruz, MID PAC FAR EAST Sales
Manager, to Joaquin Flores, GPA General Manager, page 21, TAB 8, Id.

¹⁸ GPA Memorandum dated February 11, 2013, page 19, TAB 6, Id.

¹⁹ CCU Resolution No. 2011-41 Amended, page 16, TAB 5, Id.

1 the issuance of Purchase Order No. 19011 for the amount of \$471,500 for two (2) bucket trucks
2 priced at \$235,750 each.²⁰

3 13. MID PAC FAR EAST subsequently delivered the bucket trucks to GPA, received its
4 payment, and the bucket trucks are currently operating in GPA's vehicle fleet.²¹

5 14. On or about August 7, 2013, GPA published a press release concerning its new
6 bucket trucks which stated that they cost \$236,000 each, that they were manufactured by
7 International/Altec and that MID PAC FAR EAST provided extensive training to GPA on the
8 operation and maintenance of the trucks.²²

9 15. On or about August 8, 2013, MORRICO's President, Allan Morrison, read the GPA
10 Press Release regarding the bucket trucks GPA procured from MID PAC FAR EAST and filed a
11 protest with GPA concerning this procurement, twelve (12) days later, on August 20, 2013.²³

12 16. MORRICO's protest alleged: (1) That MID PAC FAR EAST's bid did not
13 comply with and was unresponsive to the IFB; (2) That the bucket trucks MID PAC FAR EAST
14 provided GPA were not the same trucks that MID PAC FAR EAST offered in its bid; and (3)
15 The bucket trucks supplied by MID PAC FAR EAST did not comply with the IFB's color
16 specifications.²⁴

17 17. On October 15, 2013, GPA denied MORRICO's protest. Although GPA agreed with
18 MORRICO that originally, MID PAC FAR EAST's bid was a different manufacturer than the
19 manufacturer of the bucket trucks it delivered, GPA stated that when the original low bidder
20 FAR EAST EQUIPMENT LLC defaulted on delivery, GPA contacted the next lowest
21 responsive bidder, MID PAC FAR EAST and inquired whether they would still honor the
22 original bid price they submitted, and that MID PAC FAR EAST agreed to do so but requested

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24 ²⁰ GPA Purchase Order No. 19011 dated January 24, 2013 and signed by Joaquin
25 Flores, GPA General Manager on February 13, 2013, page 8, TAB 3, Id.

26 ²¹ Testimony of Jimmy Pangelinan, December 16, 2013

27 ²² GPA Press Release dated August 7, 2013, *New Bucket Trucks Added to Utility*
28 *Fleet*, Pacific Daily News Website, Exhibits B and C, Notice of Procurement
Appeal filed on October 30, 2013

²³ Testimony of Allan Morrison, MORRICO's President, December 16, 2013, and
MORRICO's Protest Dated August 20, 2013, Exhibit D, Notice of Procurement
Appeal filed on October 30, 2013

²⁴ Id.

1 deviations which GPA determined that the revised submission still met the requirements of the
2 original bid submission. GPA found that MORRICO's allegations that the bucket trucks did not
3 meet the IFB's specifications had no factual basis and GPA denied MORRICO's protest on this
4 ground. GPA also found that MORRICO'S protest was untimely because MID PAC FAR EAST
5 delivered the bucket trucks prior to MORRICO's protest.²⁵

6 18. On October 30, 2013, fifteen (15) days after GPA issued its Protest Decision,
7 MORRICO filed this appeal.

9 III. ANALYSIS

10 Pursuant to 5 G.C.A. §5703, the Public Auditor shall review GPA's October 15, 2013,
11 Decision denying MORRICO's August 20, 2013 Protest *de novo*. As a threshold matter, the
12 Public Auditor must first determine if GPA's denial of MORRICO's protest on the grounds that
13 it was untimely was correct.
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16 A. MORRICO's Protest was Timely.

17 GPA's initial finding that MORRICO's protest was untimely has no merit. As stated
18 above, GPA found that MORRICO's protest was untimely because MID PAC FAR EAST
19 delivered the bucket trucks prior to MORRICO's protest. However, whether an item or service
20 has been received by the purchasing agency is not the legal standard to determine whether a
21 protest is timely. Protests shall be filed with the purchasing agency fourteen (14) days after the
22 protestor knows or should have known of the facts giving rise thereto. 5 G.C.A. §5425(a) and 2
23 G.A.R. Div. 4, Chap. 9, §9101(c)(1). Applying this standard to this matter, the Public Auditor
24 finds that MORRICO could not have known about GPA's Award of the IFB to MID PAC FAR
25 EAST any earlier than August 7, 2013, which is the date GPA issued the press release regarding
26 its receipt of the bucket trucks from MID PAC FAR EAST because GPA failed to issue any
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28 ²⁵ GPA's Protest Decision dated October 15, 2013, page 1, TAB 1, Procurement Record filed on November 8, 2013

1 notices whatsoever to MORRICO or any of the other bidders of the termination of its contract
2 with FAR EAST EQUIPMENT LLC, its formation of an evaluation committee to review MID
3 PAC FAR EAST's bid, and its subsequent re-awarding of the IFB contract to MID PAC FAR
4 EAST.²⁶ As a result of GPA's failure to issue these notices to the other bidders, the Public
5 Auditor finds that Allan Morrison, MORRICO's President, had no way of knowing about GPA's
6 re-award of the IFB contract to MID PAC FAR EAST, until he read GPA's Press Release in the
7 Pacific Daily News on August 8, 2013. Thus, the Public Auditor finds MORRICO's protest was
8 timely because it was filed just twelve (12) days later on August 20, 2013, which is well within
9 the fourteen (14) day protest deadline established by 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4,
10 Chap. 9, §9101(c)(1). The Public Auditor will now review the merits of MORRICO's August
11 20, 2013 Protest.

12
13 **B. GPA's Re-Award of the IFB Contract to MID PAC FAR EAST violates Guam's**
14 **Procurement Laws and Regulations.**

15 GPA's denial of MORRICO's protest on the grounds that it re-awarded the IFB contract
16 to the next lowest bidder which was MID PAC FAR EAST has no merit. Generally, in the event
17 that a successful bidder fails to complete delivery of supplies or services as required in the
18 contract between such vendor and the Government of Guam, the Government of Guam may
19 proceed to procure such supplies or services from the next lowest bidder who is able to deliver
20 such supplies or services. 5 G.C.A. §5212(d). Here, as stated above, FAR EAST EQUIPMENT
21 LLC defaulted on the IFB contract resulting in GPA terminating it. GPA then turned to the
22 second lowest bidder to re-award the IFB contract and this is where GPA erred. Here, as stated
23 above, the IFB expressly states that award shall be made to the lowest responsible and responsive
24 bidder, whose bid is determined to be the most advantageous to the government, taking into
25 consideration the evaluation factors set forth in the IFB. This IFB provision complies with
26 Guam Procurement Law and Regulations which mandate that an IFB contract must be awarded

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28 ²⁶ Testimony of Allan Morrison, MORRICO'S President, Testimony of Jaime Pangelinan, GPA Supply Management Administrator, and Testimony of Jimmy Pangelinan, GPA's Fleet Services Manager, December 16, 2013

1 with reasonable promptness by written notice to the lowest responsible bidder whose bid meets
2 the requirements and criteria set forth in the invitation for bids. 5 G.C.A. §5211(g) and 2
3 G.A.R., Div. 4, Chap. 3, §3109(n)(1). Here, although MID PAC FAR EAST submitted the
4 second lowest bid, the Public Auditor finds that its bid was nonresponsive. As stated above, the
5 IFB specifications required the bidders to bid bucket trucks with aerial platform having a
6 polyethylene liner with a 69KVAC rating. Further, as stated above, GPA specifically found that
7 the bucket trucks bid by MID PAC FAR EAST did not meet this specification and it rejected
8 MID PAC FAR EAST's bid for this reason. MID PAC FAR EAST could have filed a protest on
9 this rejection but did not, and its rejection on this ground is final. Thus, the Public Auditor finds
10 that the next lowest bidder whose bid met the requirements and criteria set forth in the IFB was
11 MORRICO, and GPA violated the terms of the IFB, and 5 G.C.A. §5211(g) and 2 G.A.R., Div.
12 4, Chap. 3, §3109(n)(1) by re-awarding the IFB Contract to MID PAC FAR EAST, whose bid
13 could not be the second lowest bid because it was rejected by GPA as being non-conforming to
14 the IFB specifications. Further, the Public Auditor finds, pursuant to 5 G.C.A. §5212(d), that the
15 re-award of the IFB contract must be made to MORRICO as it is the next lowest bidder whose
16 bid meets the requirements and criteria set forth in the IFB. As the Public Auditor has found that
17 GPA could not re-award the IFB contract to MID PAC FAR EAST, MORRICO's remaining
18 arguments concerning the late, post-bid modifications GPA allowed MID PAC FAR EAST to
19 make, are moot and will not be reviewed.

20
21 **C. The Re-Award of the IFB Contract to MID PAC FAR EAST Must Be Terminated**

22 MORRICO argues that the re-award of the IFB Contract to MID PAC FAR EAST must
23 be terminated.²⁷ The Public Auditor Agrees. If after an award it is determined that an award of a
24 contract is in violation of law, if the person awarded the contract has not acted fraudulently or in
25 bad faith, the contract may be terminated and the person awarded the contract shall be
26 compensated for the actual expenses reasonably incurred under the contract, plus a profit, prior
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²⁷ Page 8, MORRICO's Arguments and Remedies Brief, filed on December 18, 2013.

1 to termination. 5 G.C.A. §5452(a)(1)(ii) and 2 G.A.R., Div. 4, Chap. 9, §9106(a)(ii). As stated
2 above, GPA violated the terms of the IFB, and 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4, Chap. 3,
3 §3109(n)(1) by re-awarding the IFB Contract to MID PAC FAR EAST. Further, the Public
4 Auditor finds that although GPA personnel may have been negligent in selecting the next lowest
5 bidder after FAR EAST EQUIPMENT LLC defaulted on the IFB Contract, there is no evidence
6 of bad faith on the part of MID PAC FAR EAST, who appears to have merely responded to
7 GPA's erroneous selection of the next lowest bidder. Accordingly, pursuant to 5 G.C.A.
8 §5452(a)(1)(ii) and 2 G.A.R., Div. 4, Chap. 9, §9106(a)(ii), GPA's re-award of the IFB Contract
9 to MID PAC FAR EAST is hereby terminated, and GPA shall compensate MID PAC FAR
10 EAST for its actual expenses reasonably incurred under the contract, plus a profit, prior to this
11 termination. The Public Auditor further finds, based on the testimony of GPA's Fleet Services
12 Manager and GPA's Supply Management Administrator, that MID PAC FAR EAST has
13 possibly received its full compensation for the bucket trucks that it delivered to GPA under the
14 IFB contract, and if this is so, no further compensation is due and owing to MID PAC FAR
15 EAST under the IFB contract.²⁸

16 GPA argues that MORRICO is not entitled to any remedies because MID PAC FAR
17 EAST has delivered the bucket trucks, GPA paid for them, and because GPA has no intention of
18 procuring any additional bucket trucks under the IFB contract.²⁹ However, the Public Auditor
19 finds this argument to be disingenuous. First, the record does not support this argument. As
20 stated above, the IFB solicited for two (2) bucket trucks that would be delivered in two-hundred-
21 forty (240) calendar days after the award of the IFB contract, and it solicited for an additional
22 two (2) bucket trucks, for each of three (3) Option Years 2013, 2014, and 2015. Hence, the IFB
23 contract is a multi-year contract and not limited to the initial delivery of two (2) bucket trucks.
24 Additionally, the CCU specifically found that GPA, prior to receiving the two (2) bucket trucks

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26 ²⁸ Testimony of Jimmy Pangelinan, GPA's Fleet Services Manager, and Testimony
27 of Jaime Pangelinan, GPA's Supply Management Administrator, December 16,
2013.

28 ²⁹ Lines 7 through 11 and 15, page 2, GPA's Remedies Brief, filed on December
18, 2013.

1 provided by MID PAC FAR EAST, had a fleet of twenty-four bucket trucks, and that fourteen
2 (14) of these bucket trucks are more than ten (10) years old, and that eight (8) of these trucks are
3 constantly out of service for various maintenance and repair issues.³⁰ Hence, the Public Auditor
4 finds that it is still likely that GPA may need additional bucket trucks in the remaining 2014 and
5 2015 Option Years of the IFB contract. Second, and most troubling, is the testimony of GPA's
6 Supply Management Administrator who, as set forth above, stated that GPA never intended to
7 purchase any bucket trucks from the successful bidder during any of these options years. The
8 Public Auditor does not find this statement credible. GPA is reminded that one of underlying
9 policies of Guam's Procurement Law and Regulations is to ensure the fair and equitable
10 treatment of all persons who deal with the Government of Guam's procurement system. 5
11 G.C.A. §5001(b)(4) and 2 G.A.R., Div. 4, Chap. 1, §1102(3). Additionally, in negotiating,
12 performing, or administering its contracts, GPA must act in good faith. 5 G.C.A. §5003 and 2
13 G.A.R., Div. 4, Chap. 1, §1105. GPA would be violating the aforementioned policy and the
14 requirement to act in good faith if it intentionally forced the bidders to unnecessarily divulge
15 their prices for the bucket trucks they were bidding for the three (3) Option Years that the bid
16 after the bid was awarded. Thus, the Public Auditor finds that the appropriate remedy is to
17 require to GPA to award the remaining option years of the IFB contract to MORRICO, pursuant
18 to 5 G.C.A. §5212(d), because MORRICO was the next lowest responsive bidder after GPA
19 terminated the IFB contract with FAR EAST EQUIPMENT LLC. Should GPA require and have
20 the funding to procure additional bucket trucks in 2014 and 2015, it should exercise its options
21 for those years under the IFB contract and procure them from MORRICO.

22 23 **IV. CONCLUSION**

24 Based on the foregoing the Public Auditor hereby determines the following:

- 25 1. MORRICO's August 20, 2013 Protest was timely.
- 26
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³⁰ CCU Resolution No. 2011-41 Amended, page 16, TAB 5, Procurement Record
filed on November 8, 2013

1 2. GPA violated the terms of the IFB, and 5 G.C.A. §5211(g) and 2 G.A.R., Div. 4,
2 Chap. 3, §3109(n)(1) by re-awarding the IFB contract to MID PAC FAR EAST, whose bid could
3 not be the second lowest bid because it was rejected by GPA as being non-conforming to the IFB
4 specifications.

5 3. MORRICO's Appeal is hereby SUSTAINED.

6 4. No later than thirty (30) days after this Decision is issued, pursuant to 5 G.C.A.
7 §5212(d), GPA must re-award of the IFB contract to MORRICO because it is the next lowest
8 bidder whose bid meets the requirements and criteria set forth in the IFB.

9 5. Pursuant to 5 G.C.A. §5452(a)(1)(ii) and 2 G.A.R., Div. 4, Chap. 9, §9106(a)(ii),
10 GPA's re-award of the IFB contract to MID PAC FAR EAST is hereby terminated, GPA shall
11 compensate MID PAC FAR EAST for its actual expenses reasonably incurred under the
12 contract, plus a profit, prior to this termination.

13 6. The Public Auditor finds that MORRICO is entitled to its reasonable costs incurred in
14 connection with the IFB's solicitation and MORRICO's protest, excluding attorney's fees,
15 pursuant to 5 G.C.A. §5425(h), because there was a reasonable likelihood that MORRICO may
16 have been awarded the contract because it had the second lowest bid but for GPA's violations of
17 Guam Procurement Law and Regulations as set forth herein. GPA may object to MORRICO's
18 cost demand by filing the appropriate motion with the Public Auditor no later than fifteen (15)
19 days after MORRICO submits such cost demand to GPA.

20 This is a Final Administrative Decision. The Parties are hereby informed of their right to
21 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
22 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
23 Decision. 5 G.C.A. §5481(a).

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A copy of this Decision shall be provided to the parties and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website www.guamopa.org.

DATED this 24th day of January, 2014.



DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
MORRICO EQUIPMENT, LLC.

Appellant

APPEAL NO: OPA-PA-13-015

ORDER RE APPELLANT'S MOTION TO ENFORCE OPA DECISION

To: **Purchasing Agency:**
Guam Power Authority (GPA)
C/O D. Graham Botha, Esq.
1911 Army Drive, Ste. 227
Harmon, Guam, 96913
Telephone: (671) 648-3203/3002

Appellant:
Morrico Equipment, LLC.
C/O Kevin J. Fowler, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orleans Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam, 96913
Telephone: (671) 646-1222

THIS MATTER came before the Office of Public Accountability (OPA) pursuant to Appellant's February 14, 2014 claim for Bid Preparation Costs in the Amount of \$1,215, Appellant's March 7, 2014 Motion to Enforce OPA Decision Re: Re-Award of Contract to Morrico and Payment of Bid Preparation Costs, and the Purchasing Agency's March 14, 2014 Opposition to Motion to Enforce OPA Decision: RE Re-Award of Contract and Bid Costs. After reviewing these pleadings the Public Auditor FINDS and ORDERS the following:

1. The Appellant's Motion to Enforce the Re-Award of the Contract is hereby GRANTED. In the January 24, 2014 Decision, GPA was ordered, no later than thirty (30) days

Order Re Appellant's Motion to Enforce OPA Decision- 1

Suite 401, DNA Building
238 Archbishop Flores Street, Hagåtña, Guam 96910
Tel (671) 475-0390 • Fax (671) 472-7951
www.guamopa.org • Hotline: 47AUDIT (472-8348)

Exhibit B

1 after the Decision was issued, pursuant to 5 G.C.A. §5212(d), to re-award the IFB contract to
2 MORRICO because it is the next lowest bidder whose bid meets the requirements and criteria set
3 forth in the IFB. In its opposition, GPA claims it is not required to do so because it would
4 require funding for the option years of the contract prior to award. However, this is not true,
5 GPA can still re-award the remainder of the contract, inclusive of the option years, to
6 MORRICO, as the IFB clearly states that GPA reserves the right to exercise the remaining option
7 years, 2014 and 2015, of the contract. This means that GPA must re-award the contract to
8 MORRICO and send the required notices to the rest of the IFB's bidders. However,
9 MORRICO's right to receive any orders for bucket trucks is subject to whether GPA exercises
10 the contract's remaining option years. GPA must send the re-award of the IFB contract to
11 MORRICO no later than fourteen (14) days after the effective date of this order.

12 2. The Appellant's Motion to Enforce GPA's payment of the Appellant's Bid Costs is
13 MOOT. The Public Auditor finds that the Appellant claimed its bid preparation costs in the
14 amount of \$1,215 on February 14, 2014 and filed its motion to enforce payment of those costs on
15 March 7, 2014. GPA paid MORRICO's claimed Bid Preparation Costs on March 13, 2014.
16 Thus, the Public Auditor finds that GPA's payment of the Appellant's claimed bid preparation
17 costs is now moot.

18 3. The Appellant's request that the OPA Order GPA to disclose whether it has obtained
19 payment of liquidated damages from FAR EAST EQUIPMENT is hereby DENIED. Whether
20 GPA was to receive such payments from FAR EAST EQUIPMENT was not part of the OPA's
21 January 24, 2014 Decision in this matter and is outside the scope of the OPA's statutory powers
22 to enforce its January 24, 2014 Decision in this matter.

23 4. This is a Final Administrative Decision. The Parties are hereby informed of their
24 right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in

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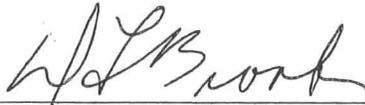
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accordance with Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative Decision. 5 G.C.A. §5481(a).

SO ORDERED this 26th day of March, 2014 by

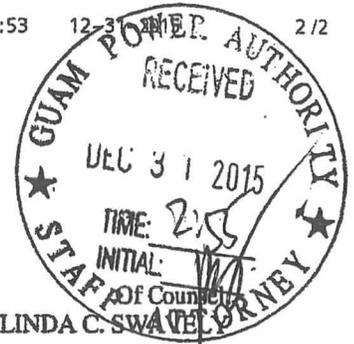


DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR

**DOOLEY ROBERTS & FOWLER LLP
ATTORNEYS AT LAW**

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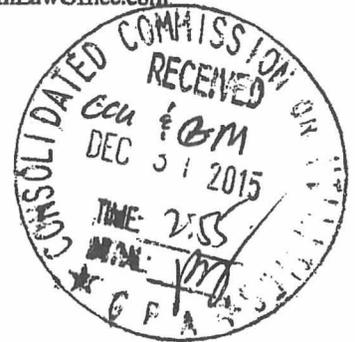
Writer's Direct Email:
Fowler@GuamLawOffice.com

December 31, 2015

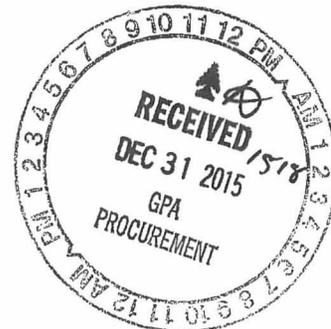
PROCUREMENT PROTEST

VIA HAND DELIVERY

Joseph T. Duenas
Chairman
**CONSOLIDATED COMMISSION
ON UTILITIES**
P.O. Box 2977
Hagatna, Guam 96932



John M. Benavente, P.E.
General Manager
GUAM POWER AUTHORITY
Procurement Management Materials Supply
GPA Central Office, 1st Floor
Gloria B. Nelson Public Service Building
688 Route 15
Mangilao, Guam 96913



Claudia S. Acfalle
Chief Procurement Officer
GENERAL SERVICES AGENCY
148 Route 1 Marine Drive
Piti, Guam 96925

RE: GPA-011-16 – 2016 Bucket Trucks

Dear Mr. Benavente:

This office represents Morrico Equipment, LLC (“Morrico”), 197 Ypao Road, Tamuning, Guam 96913, with respect to GPA-011-16, a procurement solicitation for bucket trucks (the “IFB”). Morrico hereby files its protest with respect to the above-referenced IFB for the following reasons.

Exhibit C

The GPA released the IFB on December 17, 2015, and, by way of a December 24, 2015, Amendment No. 1, extended the bid opening date to January 19, 2016, at 2:00 p.m. The IFB requires delivery of the bucket trucks within 120 days after the receipt of an order. This specification is unreasonable, prohibitive and designed to reduce competition. Normal industry time frames for the manufacture and delivery of these products to Guam is 360 days.

The development of product specifications is statutorily geared toward increasing competition among potential vendors. *See*, 5 GCA § 5265 (“All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory’s needs, and shall not be unduly restrictive.”); 5 GCA § 5010 (“All procurements of supplies and services shall, where possible, be made sufficiently in advance of need for delivery or performance to promote maximum competition and good management of resources. Publication of bids ... shall not be manipulated so as to place potential bidders at unnecessary competitive disadvantage.”); 4 GAR § 4106 (“All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the territory’s needs, and shall not be unduly restrictive.”) GPA’s specification of a 120 delivery time is intended to reduce competition and has been manipulated to put any bidder that cannot meet this extremely short delivery time specification, at a competitive disadvantage. In fact, the specification does not simply put bidders to a competitive disadvantage, it knocks them out of the competition altogether. GPA obviously did not plan for this procurement “sufficiently in advance of need for delivery ... to promote maximum competition and good management of resources.”

The specifications themselves are supposed to be developed in a manner that emphasizes desired physical, technical and performance characteristics and they should not include restrictions that do not serve those objectives. *See*, 5 GCA § 5268(a) (“Specifications shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall include only the essential physical characteristics and functions required to meet the Territory’s minimum needs.”); 5 GCA § 5268(c) (“Purchase descriptions shall describe the salient technical requirements or desired performance characteristics of supplies or services to be procured without including restrictions which do not significantly affect the technical requirements or performance characteristics.”); 2 GAR § 4103(b)(1)(c) (“a specification shall not include any solicitation or contract term or condition such as a requirement for ... time of delivery”). The GPA specification of a 120 day delivery time is a restriction that does not pertain to the physical, technical and performance characteristics of the product sought.

The Public Auditor has previously held that the General Services Agency could not restrict competition through the use of a shortened delivery time. As explained in her Decision in Appeal No. OPA-PA-13-001, “[t]he Public Auditor finds that the IFB’s specification for a two-hundred-forty (240) day delivery time is invalid because it violates 5 G.C.A. § 5268(a) and 2 G.A.R., Div. 4, Chap. 4, § 4109(a) and § 4103(b)(1)(c), and 5 G.C.A. § 5010.” For the same reasons, the GPA’s 120 day delivery time specification in this IFB is invalid and is unlawfully designed to restrict competition. Accordingly, Morrico requests that the GPA eliminate the delivery time specification or provide a reasonable specification of 360 days.

In addition, the GPA was under an obligation to fulfill any needs it had for 55' bucket trucks from Morrico as held by the Public Auditor in Appeal No: OPA-PA-13-015. The GPA clearly had a need to acquire 55' bucket trucks during 2015 and was required to purchase them from Morrico. Accordingly, the 55' bucket trucks sought by GPA in this IFB must be purchased from Morrico. GPA's petition to the Consolidated Commission on Utilities ("CCU") and to the Public Utilities Commission ("PUC"), with respect to this IFB, violated the Contract Review Protocol which required GPA to advise those entities of any alternatives to a requested procurement. GPA did not advise the CCU or the PUC that an alternative to this procurement was the order of the Public Auditor that GPA must purchase 55' bucket trucks from Morrico. Accordingly, Morrico requests that the GPA purchase the 55' bucket trucks from Morrico as ordered by the Public Auditor.

Please be advised that pursuant to the Guam Procurement Law you are not to proceed further with the procurement or award of a procurement contract prior to resolution of this bid protest. *See*, 5 G.C.A. § 5425.

I look forward to your resolution of this protest expeditiously.

Sincerely,

DOOLEY ROBERTS & FOWLER LLP



Kevin J. Fowler

BEFORE THE GUAM PUBLIC UTILITIES COMMISSION



CONTRACT REVIEW PROTOCOL FOR)
GUAM POWER AUTHORITY)

) ADMINISTRATIVE
) DOCKET

ORDER

Pursuant to its authority under 12 GCG Section 12004, the Guam Public Utilities Commission [PUC] establishes the following protocol to identify and review regulated contracts and obligations of Guam Power Authority [GPA]:

1. The following GPA contracts and obligations shall require prior PUC approval under 12 GCA 12004, which shall be obtained before the procurement process is begun:
 - a) All capital improvement projects (CIP) in excess of \$1,500,000 whether or not a project extends over a period of one year or several years; provided, however, that no regulatory review shall be required for blanket job orders and line extensions.
 - b) All capital items by account group, which in any year exceed \$1,500,000;
 - c) All professional service procurements in excess of \$1,500,000;
 - d) All externally funded loan obligations and other financial obligations such as lines of credit, bonds, etc. in the excess of \$1,500,000 and any use of said funds;
 - e) Any contract or obligation not specifically referenced above which exceeds \$1,500,000, not including individual contracts within an approved CIP or contract;
 - f) Any internally funded procurement in excess of a CIP expenditure ceiling, which PUC shall establish on or before November 15 of each fiscal year.
 - g) Any agreement to compromise or settle disputed charges for services by GPA, when the amount of the waived charges would exceed \$1,500,000.
2. For contract that involve the receipt by GPA of revenues or reimbursement of costs in excess \$1,500,000, the following procedure will apply:
 - a) GPA is permitted to evaluate the contract without PUC approval;
 - b) Prior to entering into the contract, GPA will provide the following to PUC:

- i) The Consolidated Commission on Utilities [CCU] resolution authorizing the contract.
 - ii) An affidavit from GPA management stating that the contract does not produce an increased revenue requirement with supporting documentation.
 - iii) A narrative description of the contract.
 - c) The contract will be deemed approved unless rejected by PUC within 30 days after an adequate filing [as determined by the ALJ] has been made by GPA pursuant to subparagraph (b).
3. Emergency procurements, which are made by GPA under 5 GCA section 5215, shall not require PUC approval; provided, however that GPA shall file its section 5215 declaration, the governor's written approval of same, and the procurement details, as set forth in paragraph 5(b) below, within 20 days of the declaration. Any emergency procurement funded by other than bond revenues shall be included in the CIP ceiling established under paragraph 1(f).
4. With regard to multi-year contracts:
- a) The term of a contract or obligation [*procurement*] will be the term stated therein, including all options for extension or renewal.
 - b) The test to determine whether a procurement exceeds the \$1,500,000 threshold for PUC review and approval [*the review threshold*] is the total estimated cost of the procurement, including cost incurred in any renewal options.
 - c) For a multi-year procurement with fixed terms and fixed annual costs, GPA must obtain PUC approval if the total costs over the entire procurement term exceed the review threshold. No additional PUC review shall be required after the initial review process, unless GPA desires to amend the pricing terms, in which event GPA shall comply with Protocol section 4 (d) before entering into such an amendment.
 - d) For multi-year procurements with fixed terms and variable annual costs, GPA shall seek PUC approval of the procurement if the aggregate cost estimate for the entire term of the procurement exceeds its review threshold. On each anniversary date during the term of the procurement, GPA will file a cost estimate for the

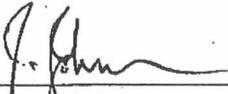
coming year of the procurement. GPA shall seek PUC approval in the event a procurement subject to this paragraph should exceed 120% of the aggregate cost initially approved by PUC.

- e) Unless for good cause shown, any petition for PUC approval of a multi-year procurement must be made a minimum of sixty days prior to the commencement of the procurement process to provide PUC with reasonable time to conduct its review.
5. In the event GPA receives only one bid for a procurement, which is subject to this contract review protocol, GPA shall obtain prior CCU approval of the prudence of accepting the single bid. GPA shall file with PUC the documentation regarding this CCU prudence review within ten days of CCU action. PUC reserves the authority, after monitoring this prudence review process to reconsider the need for additional regulatory oversight over single bid procurements. In addition, in the event GPA determines to award a contract after receiving only a single bid, GPA shall provide PUC with the determination made by GPA pursuant to section 3102(c) (1) of Chapter 2, Division 4, Title 2 of the Guam Administrative Rules and Regulations, relating to single bid procurements.
 6. On or before September 15 of each year, GPA will use best efforts to file with PUC its construction budget for the coming fiscal year plus estimates for the subsequent two fiscal years. The filing shall contain a description of each CIP contained with the budget and estimates. Project descriptions should be sufficiently detailed to identify the specific location and type of equipment to be purchased, leased or installed. For capital items that are subject to review by account group, GPA shall file information equivalent to that submitted to its governing body for these items.
 7. With regard to any contract or obligation [*procurement*], which requires PUC approval under this Order, GPA shall initiate the regulatory review process through a petition, which shall be supported with the following:
 - a) A resolution from the Consolidated Commission on Utilities [CCU], which confirms that after careful review of the documentation described in subparagraph (b) below and upon finding that the proposed procurement is reasonable, prudent and necessary, CCU has authorized GPA to proceed with the procurement, subject to regulatory review and approval.
 - b) The documentation on which CCU based its approval under subparagraph (a) above, which shall include, at a minimum, a report from management or an independent third party, which contains the following:

- i. A description of the project, including timeframes, time constraints and deadlines, and a justification of its need.
 - ii. An analysis from a technical and cost benefit perspective, of all reasonable alternatives for the procurement.
 - iii. A detailed review of the selected alternative, which establishes the basis of selection and that it is economically cost effective over its life.
 - iv. Cost estimates and supported milestones for the selected alternative.
 - v. The projected source of funding for the project with appropriate justification and documentation.
 - vi. A supporting finding that the procurement is necessary within the context of other utility priorities.
8. If during any fiscal year, GPA desires to undertake a contract or obligation covered by paragraph 1, for which approval has not otherwise been received, it may file an application with the PUC for approval of such contract or obligation, which shall contain the information required in paragraph 6 above. GPA shall obtain PUC approval thereof before the procurement process is begun.
9. GPA shall, on or before December 1 of each year, file a report on the contracts and obligations approved by PUC for the prior fiscal year pursuant to this Protocol. This report shall show the amount approved by PUC and the actual expenditures incurred during the preceding fiscal year for each such contract and obligation and other changes from the prior filing in cost estimates, start dates and inservice or completion dates.
10. GPA shall not incur expenses for PUC approved contracts and obligations in excess of 20% over the amount authorized by the Commission without prior PUC approval. In the event that GPA estimates that it will exceed the PUC approved level of expenditures by more than 20%, it shall submit to PUC the revised estimate and full explanation of all additional cost.
11. GPA shall file with PUC monthly financial reports within five working days of presentation of monthly financial reports to its governing body.

12. Unless prior relief is granted for good cause shown, GPA shall make no filing under this protocol less than 60 days before the proposed beginning of the term of the renewed, extended or new contract.
13. To the extent GPA submits a filing to PUC under this order which PUC staff believes is incomplete or deficient, it shall notify GPA and the PUC within 15 calendar days thereof with specific indication of the alleged incompleteness or deficiency.
14. PUC staff will use best efforts to be prepared for hearing within 60 days of a complete GPA filing under the terms of this protocol. PUC's administrative law judge, is authorized, in his judgment, to shorten the above 60 day period, for good cause shown by GPA.
15. GPA shall include the following as a standard provision in every contract it enters: 'PUC Approval. GPA is required by law to obtain prior approval from the Guam Public Utilities Commission before entering into, extending or amending contracts, which could impact rates. This approval process is described in PUC's February 15, 2008 Order, which is available for inspection. GPA certifies that it has complied with this requirement, if applicable, before entering into this contract.
16. GPA shall assign an individual to be responsible for complying with the requirements of this protocol. PUC shall be informed of this assignment.
17. Within the context of a rate or management audit proceeding, PUC staff may review the prudence of all procurement or obligations whether or not subject to review herein.
18. PUC cautions GPA that unless for extraordinary cause shown, PUC will not ratify a contract or contract amendment, which has been entered into in violation of this protocol order. PUC shall refer any such violation to the Office of Public Auditor and to the Attorney General for appropriate action.
19. PUC's administrative law judge is authorized to interpret the meaning of any provision of this order, in furtherance of the contract review process.

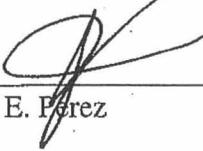
Dated this 15th day of February, 2008.



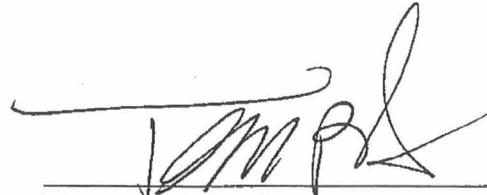
Jeffrey C. Johnson



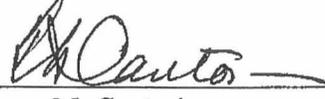
Joseph M. McDonald



Rowena E. Perez



Terrence M. Brooks



Filomena M. Cantoria