

Kevin J. Fowler
DOOLEY ROBERTS & FOWLER LLP
865 South Marine Corps Drive, Suite 201
Tamuning, Guam 96913
Telephone No. (671) 646-1222
Facsimile No. (671) 646-1223
E-mail: fowler@guamlawoffice.com

Attorneys for Appellant
Morrigo Equipment, LLC

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THE OFFICE OF PUBLIC ACCOUNTABILITY

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

**OPPOSITION MEMORANDUM TO
GSA MOTION TO DISMISS OR
TO RECUSE**

Docket No. OPA-PA-15-014
Docket No. OPA-PA-15-017
Docket No. OPA-PA-16-001

The GSWA has filed a January 19, 2016, Motion to Dismiss for Lack of Jurisdiction and for Recusal. As explained herein, the GSWA motion should be denied.

I. Background.

On or about August 18, 2015, the GSWA let GSWA 004-15, an Invitation for Bid for rear loader refuse packer bodies (the "Prior IFB"). On September 1, 2015, Morrigo protested the 90 day delivery time specification in the Prior IFB. The GSWA denied that protest on September 4, 2015.

On September 14, 2015, Morrigo submitted its bid on the Prior IFB and the GSWA conducted a bid opening on that same date. The only other bidder on the Prior IFB was Far East Equipment Company ("Far East"). The GSWA rejected the Far East bid because it failed to submit the descriptive literature required by the IFB. On September 24, 2015, Morrigo received a

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document titled "Bid Status", that informed Morrigo that its bid was rejected for failing to meet the 90 day delivery time specification in the IFB and that the IFB would be re-bid.

On September 28, 2015, Morrigo filed a protest with respect to the GSWA's rejection of its bid on the Prior IFB. Morrigo based its protest on the fact that the GSWA could not reject Morrigo's bid for failure to meet a ninety (90) day delivery specification, without otherwise complying with the provisions of 5 GCA § 5010. In a letter dated November 22, 2015, but received by Morrigo's counsel on November 23, 2015, the GSWA denied Morrigo's protest over the rejection of its bid because it believed the protest was untimely. GSWA believed Morrigo should have appealed the GSWA's denial of Morrigo's September 1, 2015, protest. The GSWA also advised that the protest was moot because it was going to cancel the Prior IFB. Morrigo appealed the denial of its protest to the OPA on December 7, 2015.

In a letter dated November 24, 2015, but received by Morrigo on November 25, 2015, the GSWA purported to cancel the Prior IFB. The ostensible reason for the cancellation was that "in the best judgment of the Receiver continuing with the procurement would unreasonably delay the progress in meeting the mandates of the Consent Decree by endangering GSWA's immediate capacity to provide services to its customers thus endangering the revenue of GSWA. This revenue is essential to meeting the mandates of the Consent Decree." In a letter dated December 7, 2015, and served on the GSWA on December 9, 2015, Morrigo protested the GSWA's cancellation of the Prior IFB because it was issued while a stay of procurement was in effect under 5 GCA § 5425(g) as a result of Morrigo's prior protest over the rejection of its bid and its appeal of the GSWA's denial of that protest to the OPA. In a letter dated December 10, 2015, and served on Morrigo's

counsel on December 11, 2015, the GSWA denied Morrigo's protest over the cancellation of the Prior IFB. Morrigo appealed that protest denial to the OPA on December 24, 2015.

On December 4, 2015, the GSWA let GSWA0002-16, another Invitation for Bid for rear loader refuse bodies (the "IFB"). On December 16, 2015, Morrigo filed its protest regarding the IFB because it was issued while a stay of procurement was still in effect due to the pendency of Morrigo's appeal to the OPA of the Prior IFB and because Morrigo's protest of GSWA's cancellation of the Prior IFB was still pending as well. On December 17, 2015, Morrigo filed another protest regarding the IFB based on the 90 day delivery time specification, which the GSWA had extended to 120 days by way of an IFB addendum. The 120 day delivery time is an unreasonable specification which restricts competition.

On December 23, 2015, GSWA served Morrigo's counsel with two letters denying both protests. In those letters, GSWA states that it is no longer following Guam procurement law. Rather, it claims that it is empowered to disregard Guam's procurement law based on the authority of the receiver in *United States of America v. Government of Guam*, District Court of Guam Civil Case No. 02-00022. GSWA further argued that "[t]he mandates of the Consent Decree simply cannot be met if GSWA is unable to reasonable and timely procure equipment necessary for its operations." Morrigo appealed the GSWA's denial of those protests to the OPA on January 4, 2016.

Morrigo learned on or about December 30, 2015, that the GSWA proceeded with a bid opening of the IFB on December 22, 2015. The GSWA conducted the bid opening one day before it served Morrigo with its December 23, 2015, letters denying Morrigo's protests regarding the IFB. The GSWA had previously respected the stay under 5 GCA section 5425(g). In its December 23rd

letters denying Morrigo's protests, it did not even advise that it had proceeded with a bid opening the day before.

II. GSWA Motions to Dismiss.

GSWA has filed a motion to dismiss based on its argument that Morrigo did not timely appeal the denial of its September 1, 2015, protest to the OPA. It also seeks dismissal based on an argument that the Public Auditor should recuse herself. Finally, it seeks dismissal based on a purported lack of jurisdiction of the Public Auditor over actions taken by GSWA under the control of David Manning as the Receiver Representative ("Receiver"), appointed by the District Court of Guam in Civil Case No. 02-0002.

A. Timeliness.

GSWA moves to dismiss these appeals because it contends that they are not properly submitted to the OPA. It incorporates its prior Motion to Dismiss for Lack of Jurisdiction and for Recusal filed with the OPA on December 23, 2015 ("Prior Motion"). In its Prior Motion, the GSWA argued that Morrigo did not appeal the GSWA's denial of Morrigo's September 1, 2015, protest on the Prior IFB. That protest was based on Morrigo's contention that a 90 day delivery date specification was unreasonable and reduced competition. The GSWA denied that protest on September 4, 2015, and the GSWA states that Morrigo was required to appeal that to the OPA by September 19, 2015. *See*, Prior Motion, p. 3 ("Morrigo had 15 days thereafter, or until September 19, 2015, to appeal GSWA's decision on the ninety (90) day delivery time specification.").

Morrigo did not appeal that protest denial to the OPA. Instead of appealing, Morrigo submitted its bid on the Prior IFB, which the GSWA publicly opened on September 14, 2015. Morrigo was the lowest bidder at the September 14, 2015, public opening. The bid from the only other bidder, Far East, was non-responsive. However, the GSWA rejected Morrigo's bid for failure to meet the 90 day delivery time specification. Morrigo protested the rejection of its bid on that basis because the rejection did not comport with the analysis of delivery time specifications required under 5 GCA § 5010. Morrigo protested the rejection of its bid, which the GSWA denied on November 22, 2015. Morrigo appealed that protest denial to the OPA on December 7, 2015.

The GSWA states that “[t]he facts giving rise to Morrigo’s Second Protest are the same facts that gave rise to Morrigo’s First Protest – the ninety (90) day delivery time specification.” Prior Motion, p. 4. But the facts are not the same. Morrigo’s protest over the rejection of its bid is based on the failure of the GSWA to analyze the submitted bids under 5 GCA § 5010, which it is required to do if it desires to obtain goods through a consideration of delivery time specification, and not just based on lowest price.

A delivery time specification is not per se unlawful. We know this because 5 GCA § 5010 expressly permits the use of a delivery date specification in making an award on an IFB. That section provides that “[e]xcept in emergency situations, lower price bids are generally preferable to shorten delivery or performance bids. Delivery time may be considered as a factor in making an award to a responsive bidder *only if* his average delivery time bid is at least ten percent (10%) shorter than the average delivery time bid of a lower price responsive bidder and if the price

offered by the bidder offering the faster delivery or performance does not exceed one hundred five percent (105%) of the lower price bidder.” 5 GCA § 5010 (emphasis added).

Until Morrigo’s bid was rejected in a situation where a higher priced bid with a shorter delivery time did not otherwise meet the requirements of 5 GCA § 5010, Morrigo was not an “aggrieved bidder” under 5 GCA § 5425(a). But at bid opening, Morrigo was the low bidder. And there was no other bidder whose price did not exceed 105% of Morrigo’s price, and who also bid a delivery time that was at least 10% shorter than Morrigo’s delivery time. Notwithstanding Morrigo’s winning bid, the GSWA rejected it. At that time, Morrigo became an “aggrieved bidder” under 5 GCA section 5425(a) and properly appealed that to the OPA.

Finally, Morrigo was also entitled to protest the 90 delivery specification in the IFB released on December 4, 2015. This was a new IFB and, by amendment, contained a new 120 day delivery specification. There is nothing in the procurement code that would prevent a bidder from protesting a specification that agency had previously rejected on some other prior IFB, at least in absence of controlling precedent on the propriety of that specification from the OPA or the courts.

B. Recusal.

The GSWA also moves the Public Auditor to recuse herself because of public statements made regarding the District Court of Guam’s handling of the GSWA receivership. The GSWA claims that the Public Auditor should recuse herself “due to her apparent bias for Morrigo ... and against the “management and receivership of the Guam Solid Waste Authority.” *See*, Prior Motion, p. 5.

The only apparent allegation of bias for Morrigo is with respect to the costs involved in Morrigo's defense of the GSWA's appeal to the Superior Court of Guam in another procurement in which the Public Auditor had upheld Morrigo's appeal. But the Public Auditor's job is to enforce compliance with Guam's procurement code and regulations, which expressly mandate that the system be run with an objective of the fair and equitable treatment of all parties and increased economy in procurement activities, among other things. *See*, 5 GCA § 5001(b). Expressing thoughts about the costs of procurement litigation are in line with those concerns of economy.

While the GSWA takes issue with the Public Auditor making public statements, this is an elective position and one in which it is necessary to communicate with the public about agency auditing activities. The job of the Public Auditor should not be conducted in secret. And when an agency is not in compliance with accounting principles or standards, or procurement mandates, the public must be so advised. The Public Auditor has routinely made herself available to media organizations on Guam with regard to findings made within the auditor's work. Often, these comments are critical, which any involved voter would want.

Finally, the Public Auditor's focus certainly seemed to be with the federal court's handling of the receivership; hence the free rein comments. However, the Public Auditor first noted that Guam now has a very modern waste system, a pat on the back that the receiver would apparently wish to ignore. The costs of the receivership are tremendous and the Public Auditor is far from the only Guam official the public has heard from on that issue. And it continues to this day with the Attorney General's filings in the receivership case that take issue with the

receiver's continued denigration of the abilities of the government of Guam to run the solid waste system.

There is no basis for the recusal of the Public Auditor.

C. Jurisdiction over the GSWA.

The Public Auditor has jurisdiction over all government of Guam agencies conducting procurements and the GSWA is no exception, whether run by a federal equity receiver or otherwise. Until some higher authority issues coercive process against the Public Auditor, her jurisdiction continues. And the Receiver is not a higher authority that can disregard Guam law on a whim or determine for himself who may assert jurisdiction over him.

As the Ninth Circuit Court of Appeals explained, “[a] receivership does not create a liability-free-zone for the business or organization that is the subject of the receivership. If MDI has a valid claim, something we have to assume at this point, it cannot be left out in the cold with nowhere to turn.” *MDI v. CDCR*, 585 F.3d 1211, 1220 (9th Cir. 2009)(Further explaining that federal receivers must comply with local law in running a receivership entity and that local courts have jurisdiction over the actions of a federal receiver arising out of a procurement contract and under 28 U.S.C. § 959(a) and (b)). Additionally, federal law governing receiverships expressly requires that a receiver operate the receivership property in conformance with local law, which would obviously include Guam's procurement law. *See*, 28 USC section 959(b)(“a ... receiver appointed in any cause pending in any court of the United States ... shall manage and operate the property in his possession as such ... receiver ... according to the

requirements of the valid laws of the State in which such property is situated, in the same manner that the owner of possessor thereof would be bound to do if in possession thereof.”).

The Receiver cannot invoke the jurisdiction of the OPA or the local courts when it suits him, and then eschew that jurisdiction when it does not suit him. The Receiver’s jurisdictional objection is simply based on the fact that this has all become inconvenient. When appointed, the Receiver took great issue with the DPW’s procurement of equipment necessary to run a solid waste operation. Now the receiver himself is unable to comply with the procurement system. However, the Receiver simply needs to comport with the mandate that all procurements of goods and services are to be planned sufficiently in advance of need to promote maximum competition. *See*, 5 GCA § 5010. The Receiver has not done this, apparently. This is why he is trying to shotgun a procurement of rear packer bodies on a shortened delivery time frame and conducting a bid opening in violation of the required stay of procurement. This has resulted in only one bidder submitting a bid and obtaining a contract award thereon. So much for competition and creating economy in the procurement of goods and services for Guam.

The Receiver claims he must now disregard Guam procurement law in order to meet the mandates of the Consent Decree. But the mandates of the Consent Decree have been largely met. The Ordot Dump is closed and Guam has a new environmentally compliant landfill. GSWA service to customers and collection of fees is outstanding. While the Receiver claims he must get more rear packer bodies in order to generate system revenue needed to comply with the Consent Decree, the government of Guam has to pay for final compliance with Consent Decree mandates regardless of GSWA collections.

Further, while the Receiver argues that it cannot comply with the mandates of the Consent Decree without violating Guam law, this is an argument made up after the fact and because compliance with Guam procurement law has become too tiresome. Accordingly, the Receiver has now determined that Guam's procurement system is dysfunctional. *See, United States v. Guam*, Civil Case No. 02-00022, January 15, 2016, Submission of Receiver's Response to Government of Guam's Response to the Receiver's October 21, 2015, Report, p. 8 ("Procurement problems – Guam's dysfunctional procurement system must be addressed to allow GSWA to purchase needed equipment, maintenance and other goods and services on a reasonable and predictable schedule."). The Receiver states, among other things, that the GSWA board cannot be expected to take over operation of the GSWA until these dysfunctional procurement problems are corrected. This apparently means Guam is stuck with the Receiver for years to come. Nonetheless, the Receiver has not demonstrated a lack of jurisdiction.

Based on the foregoing, Morrigo requests that the OPA deny the GSWA motions.

Dated this 26th day of January, 2016.

DOOLEY ROBERTS & FOWLER LLP

By:



KEVIN J. FOWLER
Attorneys for Appellant
Morrigo Equipment, LLC