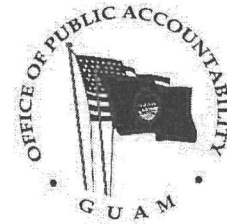


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To:	David L. Manning Head of Purchasing Agency Guam Solid Waste Authority Under the Management of Federal Receiver Gershman, Brickner, & Bratton, Inc. 542 North Marine Corps Drive Tamuning, Guam 96913	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
Phone: Fax:	(671) 646-4379 x 201 or 212 (671) 649-3777	Pages:	12 (including cover page)
CC:	Kevin J. Fowler (Attorneys for Morrico Equipment, LLC)	Date:	March 18, 2016
Phone: Fax:	(671) 646-1222 (671) 646-1223	Phone: Fax:	475-0390 x. 203 472-7951

Re: OPA-PA-15-014, 15-017, and 16-001 Decision and Order RE: Motions to Dismiss for Lack of Jurisdiction and For Recusal and Emergency Motion to Enforce Stay

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 Jerrick Hernandez
 Auditor
jhernandez@guamopa.org

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

1
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6 IN THE APPEAL OF
7
8 MORRICO EQUIPMENT, LLC,
9 Appellant.

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

**DECISION AND ORDER RE: MOTIONS
TO DISMISS FOR LACK OF
JURISDICTION AND FOR RECUSAL AND
EMERGENCY MOTION TO ENFORCE
STAY**

10
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12 Before the Office of Public Accountability (“OPA”) are three motions: (1) Motion to
13 Dismiss for Lack of Jurisdiction and for Recusal, filed by Guam Solid Waste Authority
14 (“GSWA”) on December 23, 2015, in OPA-PA-15-014 (“1st Motion to Dismiss”); (2) Motion to
15 Dismiss for Lack of Jurisdiction and for Recusal, filed by GSWA on January 19, 2016, in all
16 three consolidated appeals—OPA-PA-15-014, OPA-PA-15-017, and OPA-PA-16-001 (“2nd
17 Motion to Dismiss); and (3) Emergency Motion to Enforce Stay, filed by Appellant Morrico
18 Equipment, LLC (“Morrico”) on January 4, 2016, in OPA-PA-16-001. The Public Auditor finds
19 that no oral argument is necessary on the motions, and hereby makes the following decision and
20 order on the motions, addressing first the motions to dismiss for lack of jurisdiction and for
21 recusal.

22
23 **I. GSWA’s Motions to Dismiss for Lack of Jurisdiction and for Recusal.**

24
25 **A. Jurisdiction**

26 In the 1st Motion to Dismiss, GSWA requests dismissal of Morrico’s appeal in OPA-PA-
27 15-014 due to the OPA’s lack of jurisdiction under 5 G.C.A. § 5703. GSWA argues that Morrico
28

1 untimely filed its appeal in OPA-PA-15-014 on December 7, 2015, when Morrigo should have
2 filed its appeal by September 19, 2015, which is 15 days after GSWA denied Morrigo's first
3 protest on the 90-day delivery time specification in IFB GSWA004-15. GSWA further argues
4 that Morrigo's appeal of GSWA's November 22, 2015, decision denying Morrigo's second
5 protest cannot be timely since the second protest arises from the same facts as the first protest—
6 the 90-day delivery time specification. GSWA contends that Morrigo cannot toll the time to file
7 an appeal by repeatedly protesting the same issue. Morrigo's appeal is also untimely, according
8 to GSWA, because, even if the OPA equitably tolled the time to appeal, more than 15 days
9 elapsed between GSWA's decision denying the first protest and the filing of Morrigo's second
10 protest.
11

12 The 2nd Motion to Dismiss incorporates by reference GSWA's 1st Motion to Dismiss, and
13 GSWA further states, without elaboration, that the arguments in the 1st Motion to Dismiss support
14 dismissal of all three consolidated appeals. In addition, GSWA argues that the OPA lacks
15 jurisdiction over a decision issued pursuant to the authority of the Federal Receiver under District
16 Court of Guam in United States of Am. v. Gov't of Guam, Civil Case No. 02-0022. The OPA
17 also has no jurisdiction to interpret whether a federally appointed receiver's determination is in
18 compliance with a federal court order, according to GSWA.
19

20 On January 26, 2016, Morrigo filed an opposition to GSWA's motions. On the issue of
21 jurisdiction, Morrigo argues that its appeal is timely and properly submitted to the OPA. Morrigo
22 argues that its first protest to GSWA on GSWA004-15, lodged September 1, 2015, and denied by
23 GSWA on September 4, 2015, arose from different facts than its second protest to GSWA on the
24 same IFB, sent September 28, 2015, and denied by GSWA on November 22, 2015. The first
25 protest was based on Morrigo's contention that a 90-day delivery date specification was
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1 unreasonable and reduced competition, while the second protest, made after Morrico had
2 submitted a bid which was rejected by GSWA, was based on GSWA's rejection of Morrico's bid
3 and failure to analyze the submitted bids under 5 GCA § 5010. Morrico further contends that it
4 was entitled to protest the 90-day delivery specification in GSWA002-16, a new IFB which
5 contained, by amendment, a new 120-day delivery specification, and that nothing in the
6 procurement code prevents the protest.
7

8 Morrico further contends that the Public Auditor has jurisdiction over government of
9 Guam agencies conducting procurement, including GSWA, whether under receivership or not. In
10 support, Morrico cites Ninth Circuit decision, Med. Dev. Int'l v. Cal. Dep't of Corrections &
11 Rehab., 585 F. 3d 1211, 1220 (9th Cir. 2009), and 28 U.S.C. § 959. Morrico argues that the
12 Receiver cannot invoke the OPA's jurisdiction when it suits it and then eschew that jurisdiction
13 when it does not suit it.
14

15 The Public Auditor finds that it has jurisdiction over all three consolidated appeals.
16 Regarding OPA-PA-15-014, Morrico's appeal of GSWA's November 22, 2016, denial of
17 Morrico's second protest is timely. This appeal concerns the rejection of Morrico's bid for failing
18 to meet the 90-day delivery time in the IFB and the alleged failure of GSWA to determine if the
19 provisions of 5 GCA § 5010 were met. (See Notice of Procurement Appeal (OPA-PA-15-014) at
20 2, Ex. F at 2.) These are grounds not found in Morrico's first protest. (See GSWA's 1st Mot.
21 Dismiss Ex. B.) Thus, GSWA's contention that Morrico is attempting to appeal the decision on
22 the same facts giving rise to its first protest and is attempting to toll the time to appeal the
23 decision on the first protest by submitting its second protest lacks merit. As Morrico first learned
24 of the rejection of its bid on September 24, 2015, its September 28, 2015, written protest to
25 GSWA was timely under 5 GCA § 5425(a) (requiring that protest be submitted in writing within
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1 14 days after bidder knows or should know of the facts giving rise thereto). Morrigo's appeal is
2 also timely, as Morrigo first received notice of GSWA's denial of its protest on November 23,
3 2015, (Notice of Procurement Appeal (OPA-PA-15-014) at 2), and Morrigo filed its appeal with
4 the OPA on December 7, 2015. See 5 GCA § 5425(e) (stating that a decision on a protest may be
5 appealed to the Public Auditor within 15 days after receipt by the protestant of notice of the
6 decision).

7
8 As for OPA-PA-15-017, GSWA provides no explanation as to how the arguments in its 1st
9 Motion to Dismiss support dismissal of this appeal. Morrigo also provides no argument as to why
10 this specific appeal is timely. Nevertheless, the Public Auditor finds that Morrigo timely
11 appealed. This second appeal arises from GSWA's denial of Morrigo's protest dated December
12 7, 2015, in which Morrigo protested the cancellation of GSWA004-15. (Notice of Procurement
13 Appeal (OPA-PA-15-017) at 3, Ex. I.) This is a ground not found in Morrigo's first protest dated
14 September 1, 2015, and therefore any failure to appeal the denial of this first protest does not bar
15 the appeal in OPA-PA-15-017. As Morrigo first learned of the cancellation of the IFB on
16 November 25, 2015, (Notice of Procurement Appeal (OPA-PA-15-017) Ex. I at 2), its December
17 7, 2015, written protest to GSWA, received by GSWA on December 9, 2015 (14 days after
18 learning of cancellation), was timely under 5 GCA § 5425(a). Morrigo's appeal is also timely
19 under 5 GCA § 5425(e), as Morrigo first received notice of GSWA's denial of its protest on
20 December 11, 2015, (Notice of Procurement Appeal (OPA-PA-15-017) at 3), and Morrigo filed
21 its appeal with the OPA 13 days later, on December 24, 2015.
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24 Regarding OPA-PA-16-001, this appeal is of GSWA's denial on December 23, 2015, of
25 Morrigo's procurement protests dated December 16 and 17, 2015. In the December 16 protest,
26 Morrigo protested GSWA002-16, a new IFB for rear loader refuse bodies, arguing that it was
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1 issued while a stay of procurement remained in effect due to the pendency of Morrigo's appeal to
2 the OPA of the prior IFB and because Morrigo's protest of GSWA's cancellation of the prior IFB
3 was also pending. (Notice of Procurement Appeal (OPA-PA-16-001) at 2, Ex. B.) In the
4 December 17 protest, Morrigo protested the new IFB's 90-day delivery time specification, which
5 GSWA had extended to 120 days by addendum. (Notice of Procurement Appeal (OPA-PA-16-
6 001), at 2, Ex. C.) These are all grounds not contained in Morrigo's first protest dated September
7 1, 2015, on GSWA004-15. The Public Auditor disagrees with GSWA that the protest of the 90-
8 day delivery time specification, which was extended to 120 days, is identical to GSWA's first
9 protest of the 90-day delivery time specification in GSWA004-15. First, the protests are on
10 different IFBs. GSWA has cited no authority restricting a bidder from protesting a specification
11 on a different IFB, where the bidder did not appeal a denial of the protest of the specification on
12 an earlier IFB. Morrigo could not have known what the delivery time specification of
13 GSWA002-16 would be until after GSWA issued the IFB. Second, the delivery time
14 specifications of the two IFBs are not identical. In this third appeal, Morrigo is appealing the 90-
15 day delivery time specification which was extended to 120 days. No similar extension of the 90-
16 day delivery time was made in GSWA004-15. As GSWA002-16 was issued on December 4,
17 2015, (Notice of Procurement Appeal (OPA-PA-16-001) at 2, Ex. A), which was the earliest
18 possible time that Morrigo could have had knowledge of the IFB's issuance, the December 16,
19 2015, written protest to GSWA, 12 days later, was timely under 5 GCA § 5425(a). Likewise, as
20 GSWA issued on December 16, 2015, Addendum No. 1 to the IFB, which extended the delivery
21 time from 90 days to 120 days, (Procurement Record (OPA-PA-16-001), Addendum No. 1),
22 Morrigo's December 17, 2015, written protest to GSWA, one day later, was timely under 5 GCA
23 § 5425(a). Morrigo's appeal is also timely under 5 GCA § 5425(e), as Morrigo first received
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1 notice of GSWA's denial of its protests on December 23, 2015, (Notice of Procurement Appeal
2 (OPA-PA-16-001) at 3), and Morrico filed its appeal with the OPA 12 days later, on January 4,
3 2016.

4 Addressing GSWA's argument that the consolidated appeals should be dismissed because
5 the Public Auditor lacks jurisdiction to interpret whether a federally appointed receiver's
6 determination is in compliance with a federal court order, the Public Auditor finds that these
7 appeals are properly submitted to the OPA and that it has jurisdiction over them, regardless of the
8 federal receivership. See 5 GCA § 5703; 2 G.A.R. 4 § 12103(a). Morrico's three appeals arise
9 from decisions on protests of method of source selection, solicitation, or award of a contract, and
10 are proper for appeal to the OPA. 5 GCA § 5425(e). Any argument that GSWA is excused from
11 complying with Guam procurement law does not deprive the Public Auditor of this statutorily
12 conferred jurisdiction. Federal law also requires that a receiver appointed by a federal court
13 manage and operate the property in its possession as receiver according to the requirements of the
14 valid laws of the State in which such property is situated, in the same manner that the owner or
15 possessor thereof would be bound to do if in possession thereof. 28 U.S.C. § 959(b). In other
16 words, the Receiver of GSWA is required to manage and operate GSWA according to the
17 requirements of Guam law, including procurement law and regulations. It is also worth noting
18 that GSWA004-15 expressly states that it is "issued subject to all the provisions of the Guam
19 Procurement Act (5 GCA, Chapter 5) and the Guam Procurement Regulations" (Notice of
20 Procurement Appeal (OPA-PA-15-014) Ex. A at General Terms and Conditions Sealed Bid
21 Solicitation and Award § 1.) Although GSWA002-16 explicitly states that "the Receiver is
22 invoking its authority to depart from Guam Law for this procurement as it relates to protests by
23 bidders or prospective bidders and any other provision of Guam Law or regulation that would, in
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1 the best judgment of the Receiver unreasonably delay meeting the mandates of the Consent
2 Decree,” (Notice of Procurement Appeal (OPA-PA-16-002) Ex. A at Invitation for Bid), this IFB
3 cites numerous sections of Guam’s procurement law and regulations, (id. Ex. A at Sealed Bid
4 Solicitation Instructions §§ 1, 7, 11 (citing 2 G.A.R. 4 § 2109(f)(1) and Guam Procurement
5 Regulations Section 3109(k) and (l)(2)), General Terms and Conditions Sealed Bid Solicitation
6 and Award §§ 6, 9, 15, 25, 31, 32, and 34 (citing Section 5651 of the Guam Procurement Act, 5
7 GCA § 5212, Section 3109(O)(2) of Guam Procurement Regulations, Chapter 11 (Ethics in
8 Public Contracting) of the Guam Procurement Act and Chapter 11 of the Procurement
9 Regulations, Section 6101(10) of the Guam Procurement Regulations, Section 6101(8) of the
10 Guam Procurement Regulations), Affidavit Disclosing Ownership and Commissions (citing 5
11 GCA § 5233), Affidavit Re Non-Collusion (citing 2 GAR 4 § 3126(b)), Affidavit Re No
12 Gratuities or Kickbacks (citing 2 GAR 4 § 11107(e)), Affidavit Re Ethical Standards (citing 5
13 GCA Ch. 5, Art. 11, 2 G.A.R. 4 § 11103(b)), Affidavit Re Contingent Fees (citing 2 G.A.R. 4 §
14 11108(f), (h)), Declaration Re Compliance with U.S. D.O.L. Wage Determination (citing 5 GCA
15 §§ 5801, 5802).)

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18 Based on the foregoing, the Public Auditor finds that she has jurisdiction over the three
19 consolidated appeals and, therefore, GSWA’s motions to dismiss for lack of jurisdiction are
20 hereby DENIED.

21
22 **B. Recusal Request**

23 In GSWA’s 1st Motion to Dismiss, it seeks the Public Auditor’s required recusal or
24 disqualification from hearing the appeal pursuant to 2 G.A.R. § 12601, due to an apparent bias for
25 Morrico and against the management and receivership of GSWA. For evidence of such apparent
26 bias, GSWA points solely to a July 12, 2015, Letter to Publishers and Broadcasters re Guam
27

1 Solid Waste Authority and the Federal Receiver, issued by the Public Auditor. GSWA argues
2 that, in the letter, the Public Auditor raised the question of whether she can be fair and impartial
3 when it comes to positions of GSWA under the management of the Federal Receiver, especially
4 against Morrico. GSWA further argues that, as the Public Auditor has expressed strong opinions
5 in the letter outside the scope of her duties on disputes between GSWA and Morrico, any decision
6 rendered by the Public Auditor on the appeal would be clouded by uncertainty over whether she
7 was truly fair and impartial. The 2nd Motion to Dismiss incorporates by reference GSWA's 1st
8 Motion to Dismiss and for Recusal, and states that the same points and authorities support recusal
9 for all three appeals.
10

11 Morrico opposes recusal, arguing that the Public Auditor's expressions of thought about
12 the costs of procurement litigation are in line with her duty to enforce compliance with Guam's
13 procurement code and regulations, which expressly mandate that the system be run with an
14 objective of the fair and equitable treatment of all parties and increased economy in procurement
15 activities. The Public Auditor is an elective position, making it necessary for the Public Auditor
16 to communicate with the public about agency auditing activities. The Public Auditor has
17 routinely been made available to media organizations on Guam with regard to findings made
18 within the auditor's work, and often these comments are critical, according to Morrico. Lastly,
19 Morrico argues that the Public Auditor's comments focused on the federal court's handling of the
20 receivership, and those comments included the Public Auditor's observation that Guam now has a
21 very modern waste system, "a pat on the back that the receiver would apparently wish to ignore,"
22 says Morrico. The Public Auditor is far from the only Guam official who has publicly
23 commented on the costs of the receivership, according to Morrico.
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1 In Sule v. Guam Bd. of Dental Examiners, the Guam Supreme Court held that the
2 standard for determining whether administrative adjudicators have a disqualifying bias is the
3 actual bias standard, which is higher than an appearance of impropriety standard. 2008 Guam 20
4 ¶ 19. The Supreme Court held that “in order to prove that an adjudicator is biased, there must be
5 a concrete showing that bias actually exists.” Id. ¶ 20. One party’s “unilateral perceptions of an
6 appearance of bias cannot be a ground for disqualification.” Id. (quoting Andrews v. Agric.
7 Labor Relations Bd., 623 P.2d 151, 157 (Cal. 1981)). Administrative adjudicators “are presumed
8 to be free from bias.” Id. (quoting Goldsmith v. De Buono, 665 N.Y.S.2d 727, 731 (N.Y. App.
9 Div. 1997)).

11 Further, 2 G.A.R. 4 § 12601 specifically addresses the disqualification of the Public
12 Auditor, stating:

14 The Public Auditor may recuse herself or himself at any time and notify all parties,
15 or any party may raise the issue of disqualification and state the relevant facts prior
16 to the hearing. The Public Auditor shall make a determination and notify all
17 parties. In the event of disqualification or recusal of the Public Auditor, a
procurement Appeal must be taken to the Superior Court of Guam in accordance
with 5 GCA § 5480.

18 2 G.A.R. 4 § 12601.

19 Here, GSWA has raised the issue of disqualification and stated all relevant facts in support
20 of its recusal request. In its 1st Motion to Dismiss, which is incorporated in its 2nd Motion to
21 Dismiss, GSWA merely alleges an “apparent bias” for Morrico and against the management and
22 receivership of GSWA. (1st Mot. Dismiss (OPA-PA-15-014) at 5.) The relevant facts cited by
23 GSWA to support this allegation are contained in an open letter from the Public Auditor dated
24 July 12, 2015, in which the Public Auditor made statements regarding GSWA and its
25 management. However, GSWA has failed to make a concrete showing, through this letter, that
26 bias by the Public Auditor actually exists. In fact, GSWA only alleges an “apparent bias” by the
27

1 Public Auditor. Instead, the Public Auditor affirms that she harbors no actual bias against GSWA
2 or for Morrico. The lack of actual bias against GSWA is evident, for example, in a recent final
3 decision in a procurement appeal, in which the Public Auditor granted GSWA's motion to
4 dismiss for lack of jurisdiction. See In the Appeal of Maeda Pac. Corp., OPA-PA-15-008,
5 Decision & Order at 3 (OPA Oct. 9, 2015). Although, in that appeal, GSWA had moved for the
6 Public Auditor's recusal based on the same grounds as in the instant appeals and the Public
7 Auditor had denied the recusal request as being moot, id., GSWA accepted the Public Auditor's
8 decision, in GSWA's favor, and chose not to appeal the denial of the request to recuse.
9

10 As GSWA merely alleges an apparent bias by the Public Auditor and has failed to make a
11 concrete showing of actual bias, and the Public Auditor has affirmed that there is no actual bias,
12 GSWA's motions for the Public Auditor's recusal or disqualification are hereby DENIED.
13

14 **II. Morrico's Emergency Motion to Enforce Stay**

15 In its motion, Morrico requests that the OPA enforce the stay of procurement arising
16 under 5 GCA § 5425(g), with respect to GSWA002-16. According to Morrico, a stay of the
17 procurement is required in light of Morrico's December 16 and 17 protests of the IFB. GSWA
18 has filed no opposition to the motion.

19 5 GCA § 5425(g) provides:

20
21 In the event of a timely protest under Subsection (a) of this Section or under
22 Subsection (a) of § 5480 of this Chapter, the Territory shall not proceed further
23 with the solicitation or with the award of the contract prior to final resolution of
24 such protest, and any such further action is void, unless:

25 (1) The Chief Procurement Officer or the Director of Public Works after
26 consultation with and written concurrence of the head of the using or purchasing
27 agency and the Attorney General or designated Deputy Attorney General, makes a
28 written determination that the award of the contract without delay is necessary to
protect substantial interests of the Territory; and

(2) Absent a declaration of emergency by the Governor, the protestant has
been given at least two (2) days notice (exclusive of territorial holidays); and

1 (3) If the protest is pending before the Public Auditor or the Court, the
2 Public Auditor or Court has confirmed such determination, or if no such protest is
3 pending, no protest to the Public Auditor of such determination is filed prior to
4 expiration of the two (2) day period specified in Item (2) of Subsection (g) of this
5 Section.

6 5 GCA § 5425(g).

7 Here, Morrico has submitted timely protests under subsection (a) of 5 GCA § 5425 for all
8 three consolidated appeals. Since provisions (1) through (3) of § 5425(g) do not apply, Guam law
9 requires that GSWA not proceed further with the solicitation or with the award of a contract for
10 GSWA002-16 before final resolution of Morrico's protests, and that any such further action by
11 GSWA is void.¹ Thus, Morrico's emergency motion to enforce stay of the procurement, with
12 respect to GSWA002-16, is hereby GRANTED.

13 In summary, GSWA's Motions to Dismiss for Lack of Jurisdiction and for Recusal are
14 DENIED and Morrico's Emergency Motion to Enforce Stay is GRANTED.

15 SO ORDERED this 18th day of March, 2016.

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18 DORIS FLORES BROOKS, CPA, CGFM
19 Public Auditor of Guam

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25 _____
26 ¹ At a hearing on February 22, 2016, GSWA stated that an award had been made on the
27 IFB, GSWA002-16.