



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

IN THE APPEAL OF

MORRICO EQUIPMENT, LLC,

Appellant.

Docket No. OPA-PA-15-014

Docket No. OPA-PA-15-017

Docket No. OPA-PA-16-001

DECISION

This is the Decision of the Public Auditor for consolidated appeals OPA-PA-15-014, OPA-PA-15-017, and OPA-PA-16-001 regarding MORRICO EQUIPMENT, LLC's ("Morrico") Appeals of the GUAM SOLID WASTE AUTHORITY's ("GSWA") Denials of Procurement Protests dated November 22 and December 10, 2015, concerning Invitation for Bid No. GSWA004-15 ("the 1st IFB"), a procurement solicitation for rear loader refuse packer bodies, and Morrico's Appeal of GSWA's Denials of Procurement Protests dated December 23, 2015, concerning Invitation for Bid No. GSWA002-16 ("the 2nd IFB"), another procurement solicitation for rear loader refuse packer bodies. This matter came before the Public Auditor Doris Flores Brooks, CPA, CGFM, and Hearing Officer Delia Lujan Wolff for a Hearing on March 22, 2016. Present at the Hearing were Kevin J. Fowler, counsel for Morrico, and Vanessa L. Williams, counsel for GSWA.

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I. FINDINGS OF FACT

In reaching this Decision, the Public Auditor has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments¹ made during the March 22, 2016, Hearing on Morrico’s Appeals. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. On August 18, 2015, GSWA issued the 1st IFB which solicits bids for rear loader refuse packer bodies. (Notice of Procurement Appeal (OPA-PA-15-014) Ex. A.) The IFB specifies a required delivery date of 90 days. (Id.) It further states that it is “issued subject to all the provisions of the Guam Procurement Act (5 GCA, Chapter 5) and the Guam Procurement Regulations” (Id.)

2. On August 24, 2015, GSWA issued Addendum No. 1 to the IFB, which amended the IFB to include on IFB packages bid for three unites of rear loader refuse packer body, changed the written questions submissions deadline, and changed the Written Responses to Questions deadline. (Procurement Record (OPA-PA-15-014), Tab 10.)

3. On August 28, 2015, GSWA issued Addendum No. 2 to the IFB, which changed the deadline for written responses to questions and changed the bid due date. (Procurement Record (OPA-PA-15-014), Tab 15.)

4. On September 1, 2015, Morrico filed a Procurement Protest with GSWA, wherein Morrico protested the release of the 1st IFB as an unlawful attempt to circumvent the OPA’s

¹ At the Hearing, Morrico stated that it had no evidence to present. Further, only Morrico presented argument on the consolidated appeals. GSWA objected to the jurisdiction of the Public Auditor in hearing these appeals and declined to present any argument.

1 previous decision upholding Morrico's protest of prior IFB GSWA001-15, the IFB specification
2 that the packer body be 3.6 cubic yards, the 90 day delivery time specification, the specification
3 requiring that tailgate latches be hydraulically operated working in conjunction with the tailgate
4 lift cylinders, and the specification that manual or auxiliary automated latch systems are not
5 acceptable. (Procurement Record (OPA-PA-15-014), Tab 19.)
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7 5. On September 2, 2015, GSWA issued a Notice to All Prospective Bidders: A Stay of
8 Procurement, informing all prospective bidders that a "Stay of Procurement" is in effect and that
9 "no proceeding or action could take place until protest is resolved." (Procurement Record (OPA-
10 PA-15-014), Tab 20.)

11 6. On September 4, 2015, GSWA issued its response to Morrico's protest, wherein
12 GSWA rejected Morrico's protest. (Procurement Record (OPA-PA-15-014), Tab 22.)

13 7. On September 8, 2015, GSWA issued Addendum No. 3, which, among other things,
14 stated that GSWA will not accept a delivery date deadline of 180 days due to a fleet truck which
15 is currently inoperable and in need of a new packer unit. (Procurement Record (OPA-PA-15-
16 014), Tab 24.)
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18 8. On September 14, 2015, Morrico submitted its bid on the 1st IFB, which provided for a
19 delivery time of within 180 days and a total price of \$269,280.00. (Notice of Procurement
20 Appeal (OPA-PA-15-014) Ex. B.)
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22 9. The only other bidder was Far East Equipment Company, LLC ("Far East"), whose bid
23 provided for a 90 day delivery time and total price of \$294,000.00. (Procurement Record (OPA-
24 PA-15-014), Tab 6.)
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1 10. On September 24, 2015, GSWA issued a Bid Status stating that Far East’s bid was
2 rejected due to failure to furnish the descriptive literature by the time specified in the solicitation.
3 (Procurement Record (OPA-PA-15-014), Tab 32.) On the same date, GSWA issued another Bid
4 Status stating that Morrigo’s bid was rejected due to not meeting the delivery requirement as
5 stated in the IFB. () Both Bid Statuses stated in the Remarks section that the procurement was to
6 be rebid. (Procurement Record (OPA-PA-15-014), Tab 31.)
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8 11. On September 28, 2015, Morrigo filed with GSWA a Procurement Protest, in which
9 Morrigo protested GSWA’s rejection of Morrigo’s bid for failure to meet the 90-day delivery
10 specification. (Procurement Record (OPA-PA-15-014), Tab 33.) Morrigo argues that its bid
11 could not have been rejected for this reason, without otherwise complying with 5 GCA § 5010.
12 (Id.) According to Morrigo, GSWA could only refuse to award a contract to Morrigo because of
13 its delivery time if the price of some other bidder who met the 90-day delivery time does not
14 exceed 105% of the lower price bidder’s (Morrigo). (Id.) Morrigo contends that, since Far East’s
15 bid was non-responsive, its faster delivery time could not even be considered in any analysis of
16 the bids submitted for the IFB. (Id.) Even if Far East’s bid were responsive, GSWA could not
17 award a contract to it because its price was well above 105% of Morrigo’s price. (Id.)
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19 12. In a letter dated November 22, 2015, GSWA stated that, although Morrigo’s protest is
20 untimely, it is also moot as GSWA is cancelling the IFB. (Procurement Record (OPA-PA-15-
21 014), Tab 34; Notice of Procurement Appeal Ex. G.)
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23 13. In a letter dated November 24, 2015, GSWA advised Morrigo that GSWA has
24 determined to cancel the 1st IFB because, “in the best judgment of the Receiver continuing with
25 the procurement would unreasonably delay the progress in meeting the mandates of the Consent
26 Decree by endangering GSWA’s immediate capacity to provide services to its customers thus
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1 endangering the revenue of GSWA. This revenue is essential to meeting the mandates of the
2 Consent Decree.” (Procurement Record (OPA-PA-15-014), Tab 36.)

3 14. On December 4, 2015, GSWA issued GSWA002-16, another Invitation for Bid for
4 rear loader refuse packer bodies (“the 2nd IFB”). (Notice of Procurement Appeal (OPA-PA-16-
5 001) Ex. A.) The 2nd IFB explicitly provides that “the Receiver is invoking its authority to depart
6 from Guam Law for this procurement as it relates to protests by bidders or prospective bidders
7 and any other provision of Guam Law or regulation that would, in the best judgment of the
8 Receiver unreasonably delay meeting the mandates of the Consent Decree.” (Notice of
9 Procurement Appeal (OPA-PA-16-001) Ex. A.) Additionally, the IFB cites numerous sections of
10 Guam’s procurement law and regulations, (id. Ex. A at Sealed Bid Solicitation Instructions §§ 1,
11 7, 11 (citing 2 G.A.R. 4 § 2109(f)(1) and Guam Procurement Regulations Section 3109(k) and
12 (l)(2)), General Terms and Conditions Sealed Bid Solicitation and Award §§ 6, 9, 15, 25, 31, 32,
13 and 34 (citing Section 5651 of the Guam Procurement Act, 5 GCA § 5212, Section 3109(O)(2)
14 of Guam Procurement Regulations, Chapter 11 (Ethics in Public Contracting) of the Guam
15 Procurement Act and Chapter 11 of the Procurement Regulations, Section 6101(10) of the Guam
16 Procurement Regulations, Section 6101(8) of the Guam Procurement Regulations), Affidavit
17 Disclosing Ownership and Commissions (citing 5 GCA § 5233), Affidavit Re Non-Collusion
18 (citing 2 GAR 4 § 3126(b)), Affidavit Re No Gratuities or Kickbacks (citing 2 GAR 4 §
19 11107(e)), Affidavit Re Ethical Standards (citing 5 GCA Ch. 5, Art. 11, 2 G.A.R. 4 § 11103(b)),
20 Affidavit Re Contingent Fees (citing 2 G.A.R. 4 § 11108(f), (h)), Declaration Re Compliance
21 with U.S. D.O.L. Wage Determination (citing 5 GCA §§ 5801, 5802).) The 2nd IFB also provides
22 for a 90 day delivery time specification that was extended to 120 days.
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1 15. On December 7, 2015, Morrico filed a procurement appeal with the OPA on the 1st
2 IFB, wherein it appeals GSWA's rejection of its bid. (Notice of Procurement Appeal (OPA-PA-
3 15-014).) This is OPA-PA-15-014.

4 16. On December 9, 2015, Morrico filed with GSWA a Procurement Protest dated
5 December 7, 2015, wherein Morrico protested GSWA's cancellation of the 1st IFB. (Notice of
6 Procurement Appeal (OPA-PA-15-017) Ex. I.)

7 17. In a letter dated December 10, 2015, GSWA denied Morrico's protest over the
8 cancellation of the 1st IFB. (Notice of Procurement Appeal (OPA-PA-15-017) Ex. J.)

9 18. On December 16, 2015, Morrico filed a Procurement Protest with GSWA, wherein
10 Morrico protested the issuance of the 2nd IFB while a stay of procurement was still in effect due
11 to the pendency of Morrico's appeal to the OPA on the 1st IFB and because Morrico's protest of
12 GSWA's cancellation of the 1st IFB was still pending. (Notice of Procurement Appeal (OPA-PA-
13 16-001) Ex. B.)

14 19. On December 17, 2015, Morrico filed another Procurement Protest with GSWA
15 regarding the 2nd IFB's 90-day delivery specification, which GSWA had extended to 120 days by
16 way of an IFB addendum. (Notice of Procurement Appeal (OPA-PA-16-001) Ex. C.)

17 20. In a letter dated December 23, 2015, GSWA denied Morrico's December 16 protest.
18 (Notice of Procurement Appeal (OPA-PA-16-001) Ex. E.)

19 21. In another letter dated December 23, 2015, GSWA denied Morrico's December 17
20 protest. (Notice of Procurement Appeal (OPA-PA-16-001) Ex. D.)

21 22. On December 24, 2015, Morrico filed a second procurement appeal on the 1st IFB,
22 wherein it appeals GSWA's cancellation of the 1st IFB. (Notice of Procurement Appeal (OPA-
23 PA-15-017).)

1 232. On January 4, 2016, Morrico filed a procurement appeal on the 2nd IFB, wherein it
2 appeals the issuance of the 2nd IFB while a stay of procurement was in effect and the 90-day
3 delivery time specification which was extended by addendum to 120 days. (Notice of
4 Procurement Appeal (OPA-PA-16-001).)

5 II. ANALYSIS

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7 The Public Auditor shall review and determine de novo any matter properly submitted to
8 her or him. 5 GCA § 5703; 2 GAR 4 § 12103.

9 A. OPA-PA-15-014.

10 In this first procurement appeal on the 1st IFB, Morrico appeals GSWA's denial of its
11 protest of the rejection of its bid for failure to comply with 5 GCA § 5010. Section 5010
12 provides:

13 **§ 5010. Policy in Favor of Planned Procurement.**

14 All procurements of supplies and services shall, where possible, be made
15 sufficiently in advance of need for delivery or performance to promote maximum
16 competition and good management of resources. Publication of bids and requests
17 for proposals shall not be manipulated so as to place potential bidders at
18 unnecessary competitive disadvantage. Except in emergency situations, lower
19 price bids are generally preferable to shorten delivery or performance bids.
20 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 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.

21 5 GCA § 5010.

22 Here, there were only two bidders on the 1st IFB—Morrico and Far East. Morrico was the
23 lower price bidder while Far East met the delivery time specification. As Far East's bid was
24 rejected for failure to provide the required descriptive literature, its bid was non-responsive.
25 Thus, delivery time could not have been considered as a factor in making an award on this IFB,
26 including rejecting Morrico's bid. Even if Far East's bid were responsive, delivery time could not
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1 have been a factor in making an award since Far East's price exceeded 105% of Morrico's bid.²
2 Further, GSWA has presented no argument or evidence that an emergency situation existed to
3 overcome the general preference for lower price bids to shorten delivery or performance bids.
4 Accordingly, the Public Auditor agrees with Morrico that GSWA could not have rejected
5 Morrico's lower price bid based on the failure to meet the delivery time specification.
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7 **B. OPA-PA-15-017.**

8 In the second procurement appeal on the 1st IFB, Morrico appeals GSWA's denial of its
9 protest of the cancellation of the 1st IFB during a stay of procurement. Morrico argues that
10 GSWA's cancellation of the 1st IFB violates 5 G.C.A. § 5425(g), which states:

11 (g) In the event of a timely protest under Subsection (a) of this Section or
12 under Subsection (a) of § 5480 of this Chapter, the Territory shall not proceed
13 further with the solicitation or with the award of the contracts prior to final
14 resolution of such protest, and any such further action is void, unless:

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

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

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

5 GCA § 5425(g). As the Public Auditor has previously determined that Morrico's September
28, 2015, written protest to GSWA was timely under 5 GCA § 5425(a), GSWA was prohibited

25 ² As Morrico's bid was \$269,280.00, 105% of Morrico's bid equals \$282,744.00. Far
26 East's bid of \$294,000.00 clearly exceeds 105% of Morrico's bid.

1 from proceeding further with the solicitation or with the award of contracts prior to final
2 resolution of Morrico's protest. In TeleGuam Holdings, LLC v. Territory of Guam, the Guam
3 Supreme Court interpreted section 5425(g) as providing an automatic stay which "remains in
4 effect during the fourteen-day period following OPA's decision and commencement of a civil suit
5 within the Superior Court and continues until final resolution of the action by the Superior
6 Court." 2015 Guam 13 ¶ 31. Thus, a stay of procurement was still in effect after GSWA rejected
7 Morrico's protest and at the time GSWA cancelled the 1st IFB.

9 Even if a stay of procurement were not in effect, Morrico argues that GSWA's
10 cancellation of the 1st IFB was improper under 2 GAR 4 § 3115(d)(2)(A)(i)-(vi), which governs
11 the cancellation of a procurement solicitation after the opening of bids but prior to award. §
12 3115(d)(2)(A) provides:

14 (A) After opening, but prior to award, all bids or proposals may be rejected
15 in whole or in part when the Chief Procurement Officer, the Director of Public
16 Works, or the head of a Purchasing Agency determines in writing that such action
17 is in the territory's best interest for reasons including but not limited to:

18 (i) the supplies, services, or construction being procured are no
19 longer required;

20 (ii) ambiguous or otherwise inadequate specifications were part of
21 the solicitation;

22 (iii) the solicitation did not provide for consideration of all factors
23 or significance to the territory;

24 (iv) prices exceed available funds and it would not be appropriate to
25 adjust quantities to come within available funds;

26 (v) all otherwise acceptable bids or proposals are at clearly
27 unreasonable prices; or

28 (vi) there is reason to believe that the bids or proposals may not
have been independently arrived at in open competition, may have been
collusive, and may have been submitted in bad faith.

2 GAR 4 § 3115(d)(2)(A). In this case, GSWA cancelled the 1st IFB after opening but prior to
award and therefore subsection (d)(2)(A) applies. However, GSWA failed to comply with this
provision as cancellation was done without any written determination by the head of GSWA that

1 such action is in the territory's best interest for reasons including, but not limited, to those reasons
2 stated in subsection (d)(2)(A)(i) through (vi). For these reasons, GSWA's cancellation of the 1st
3 IFB violated Guam's procurement law.

4 **C. OPA-PA-16-001.**

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6 In this procurement appeal, Morrico appeals GSWA's denial of its protests on the 2nd IFB,
7 regarding the issuance of the IFB while a stay of procurement remained in effect due to the
8 pendency of Morrico's appeal to the OPA of the prior IFB and because Morrico's protest of
9 GSWA's cancellation of the prior IFB was also pending and regarding the 90-day delivery time
10 specification which GSWA extended to 120 days by addendum.

11 As noted earlier, 5 G.C.A. § 5425(g) provides that "the Territory shall not proceed further
12 with the solicitation or with the award of the contracts prior to final resolution of [a timely]
13 protest, and any such further action is void," unless certain conditions are met. The Public
14 Auditor interprets this provision to prohibit a reissuance, or "re-bid," of the solicitation prior to
15 final resolution of a timely protest. Since the conditions which would allow the Territory to
16 proceed further with the solicitation were not met here, the Public Auditor finds that GSWA's
17 reissuance of the solicitation in the form of the 2nd IFB violates the stay imposed by § 5425(g)
18 upon Morrico's timely protests on the 1st IFB.

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20 Although GSWA argues that it issued the 2nd IFB in accordance with powers granted to
21 the Receiver of GSWA in a federal case, it is undisputed that the 1st IFB is subject to Guam
22 procurement law, including the stay provisions of section 5425(g). Also, numerous provisions of
23 the local procurement code are cited throughout the 2nd IFB, showing that the 2nd IFB by its terms
24 is subject to Guam procurement law. Further, a receiver appointed by a federal court is required
25 to manage and operate the property in its possession as receiver according to the requirements of
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1 the valid laws of the State in which such property is situated, in the same manner that the owner
2 or possessor thereof would be bound to do if in possession thereof. 28 U.S.C. § 959(b). Thus,
3 the Receiver is required to manage and operate GSWA according to the requirements of Guam
4 law, including procurement law and regulations.

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6 Regarding Morrico's protest of the 90-day specification that was extended to 120 days, 5
7 GCA § 5268(a) provides: "Specifications shall not include requirements, such as but not limited
8 to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall
9 include only the essential physical characteristics and functions required to meet the Territory's
10 minimum needs." 5 GCA § 5268(c) provides: "Purchase descriptions shall describe the salient
11 technical requirements or desired performance characteristics of supplies or services to be
12 procured without including restrictions which do not significantly affect the technical
13 requirements or performance characteristics." 5 GCA § 5265 states: "All specifications shall
14 seek to promote overall economy for the purposes intended and encourage competition in
15 satisfying the Territory's needs, and shall not be unduly restrictive.

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17 Here, GSWA has failed to demonstrate that the delivery time specification of the 2nd IFB
18 is an essential characteristic and function necessary to meet Guam's minimum needs. No
19 evidence has been presented that the 90-day delivery time, extended to 120 days, is required to
20 meet Guam's minimum needs. Also, the procurement record includes no papers or materials used
21 by GSWA in the development of this specification, as required by 5 GCA § 5249(d), which
22 would show the basis for including this specification in the IFB. Accordingly, the Public Auditor
23 finds that the delivery date specification of the 2nd IFB unnecessarily restricts competition in
24 violation of 5 GCA § 5268(a).
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III. CONCLUSION

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

1. GSWA's rejection of Morrico's lower price bid based on the failure to meet the delivery time specification of the 1st IFB violates 5 GCA § 5010.

2. GSWA's cancellation of the 1st IFB violates 5 GCA § 5425(g), voiding any further action on the solicitation.

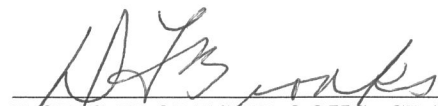
3. GSWA's reissuance of the solicitation in the form of the 2nd IFB violates 5 GCA § 5425(g), voiding any further action on the solicitation.

4. GSWA's delivery time specification in the 2nd IFB unnecessarily restricts competition in violation of 5 G.C.A. § 5268(a).

5. Accordingly, Morrico's procurement appeals are hereby GRANTED.

This is a Final Administrative Decision. The Parties are hereby informed of their right to judicial review in the Superior Court of Guam of a Decision of the Public Auditor under 5 G.C.A. Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law. In accordance with 5 G.C.A. § 5481(a), such action shall be initiated within fourteen (14) days after receipt of a Final Administrative Decision. 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 at www.opaguam.org.

SO ORDERED this 22nd day of April, 2016.


DORIS FLORES BROOKS, CPA, CGFM
Public Auditor of Guam