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PROCUREMENT APPEALS

DEC 12 2007
TIME: 4:10 PM
BY: Anne Camacho
FILE No. GPA-PA 07-010

7 **BEFORE THE PUBLIC AUDITOR OF GUAM**
8 **PROCUREMENT APPEAL**

9 IN THE APPEAL OF

10 FAR EAST EQUIPMENT COMPANY,
11 LLC,

12 Appellant.

OPA-PA-07-010

CERTIFICATE OF SERVICE

13
14 I certify that I caused a copy of the Agency Report (with exhibits) filed with the Office of
15 the Public Auditor at Suite 401, DNA Building, 238 Archbishop Flores Street, Hagåtña, Guam,
16 December 12, 2007, to be served on the following by facsimile:

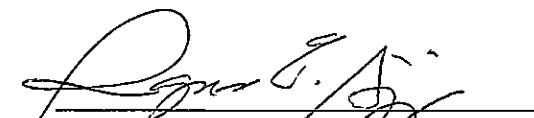
17 **DOOLEY ROBERTS & FOWLER**
18 Suite 201, Orlean Pacific Plaza
865 S. Marine Corps Drive
19 Tamuning, Guam 96913
20 Facsimile: 646-1223

GENERAL SERVICES AGENCY
Department of Administration
148 Route 1, Marine Corps Drive
Piti, Guam 96915
Facsimile: 472-4217

21 **OFFICE OF THE ATTORNEY GENERAL**
22 Pedro's Plaza, 287 West O'Brien Drive
Hagåtña, Guam 96910
23 Facsimile: 472-2493

FAR EAST EQUIPMENT COMPANY LLC
P.O. Box 10838
Tamuning, Guam 96931
Facsimile: 473-4370

24 Executed December 12, 2007, in Hagåtña, Guam.

25
26 
27 **IGNACIO C. AGUIGUI, ESQ.**
28

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07-010

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9
10 **BEFORE THE PUBLIC AUDITOR OF GUAM**
11 **PROCUREMENT APPEAL**
12

13 IN THE APPEAL OF

OPA-PA-07-010

14 FAR EAST EQUIPMENT COMPANY,
15 LLC,

**AGENCY REPORT OF THE JOSE D. LEON
GUERRERO COMMERCIAL PORT (PORT
AUTHORITY OF GUAM)**

16 Appellant.

17 The Jose D. Leon Guerrero Commercial Port (Port Authority of Guam) (the "Port")
18 respectfully submits its Agency Report pursuant to 2 GAR Div. 4, §§ 12104(c)(3) and 12105.

19 The documents required by § 12105(a)-(f) were submitted as part of the Procurement
20 Report filed by the Port on November 27, 2007,¹ and are identified as follows:

21 (a) A copy of the Protest: *Previously submitted to the Office of the Public*
22 *Auditor ("OPA") on November 27, 2007, by the Port under Tab a.*

23 (b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or
24 offer that is being considered for award or whose bid or offer is being protested, if any had been
25 submitted prior to the protest: *Previously submitted to the OPA on November 27, 2007, by the*
26 *Port under Tabs b-1 and b-2*

27 ¹ A copy of the Procurement Record was provided to the Appellant

1 (c) A copy of the solicitation, including the specifications or portions thereof
2 relevant to the protest. *Previously submitted to the OPA on November 27, 2007, by the Port*
3 *under Tab c.*

4 (d) A copy of abstract of bids or offers or relevant or portions thereof relevant to
5 the protest. *Previously submitted to the OPA on November 27, 2007, by the Port under Tab d.*

6 (e) Any other documents which are relevant to the protest; including the contract, if
7 one has been awarded, pertinent amendments, and plans and drawings: *Previously submitted to*
8 *the OPA on November 27, 2007, by the Port under Tab e.*

9 (f) The decision from which the Appeal is taken, if different than the decision
10 submitted by the Appellant: *Previously submitted to the OPA on November 27, 2007, by the*
11 *Port under Tab f.*

12 The statement prepared by the Port as required by § 12105(g) is attached hereto as *Exhibit*
13 *1.*

14 The statement required by § 12105(i) is attached hereto as *Exhibit 2.*

15 Submitted this 12th day of December, 2007.

16 **LUJAN AGUIGUI & PEREZ LLP**

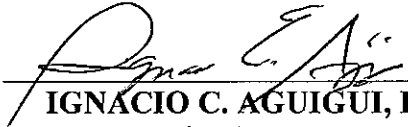
17
18 By: 
19 **IGNACIO C. AGUIGUI, ESQ.**
20 *Attorneys for the Jose D. Leon Guerrero*
21 *Commercial Port (Port Authority of Guam)*
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23
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EXHIBIT “1”

STATEMENT ANSWERING ALLEGATIONS OF APPEAL

(As required by 2 G.A.R. §12106(g))

I. RELEVANT BACKGROUND

A. GSA/PAG SOLICITS BIDS FOR INVITATION FOR BID NO. GSA/PAG 07-006

Pursuant to Invitation for Bid No. GSA/PAG 07-006 (the "IFB"), the Jose D. Leon Guerrero Commercial Port (Port Authority of Guam) ("PAG"), through the General Services Agency ("GSA") of the Government of Guam, solicited bids from vendors to purchase Fork Trucks in the following load-capacity specifications and quantities: (a) five (5) each 10,000-11,000 lbs.¹; (b) two (2) each 14,000-16,000 lbs.; (c) one (1) each 20,000 lbs.; and (d) one (1) each 40,000 lbs. The IFB identified other requirements as to each load-capacity category, such as engine specifications (e.g., horsepower requirements) and dimensions (e.g., length, width, thickness).

A pre-bid conference was held on July 17, 2007 at 10:00 a.m. at the GSA Conference Room in Piti. The bid was administratively handled and coordinated primarily by GSA.

B. BID OPENING

In response to the solicitation, GSA/PAG received bids from two companies, Far East Equipment Company LLC ("Far East") and Morrico Equipment LCC ("Morrico"). On August 24, 2007 the bids were publicly opened and subsequently evaluated. The bids received were as follows:

1. Far East Equipment Company LLC

a.	Five (5) each 10,000-11,000 lbs.:	No bid
b.	Two (2) each 14,000-16,000 lbs.:	No bid
c.	One (1) each 20,000 lbs.:	No bid
d.	One (1) each 40,000 lbs.:	\$227,830.80 each
	Option One (1), one (1) each 44,000 lbs.:	\$286,610.40 each

2. Morrico Equipment LLC

a.	Five (5) each 10,000-11,000 lbs.:	\$44,799.00 each
b.	Two (2) each 14,000-16,000 lbs.:	\$144,399.00 each
c.	One (1) each 20,000 lbs.:	\$147,799.00 each
d.	One (1) each 40,000 lbs.:	\$252,999.00 each

¹ The weight (lbs.) designation refers to the load capacity of the vehicles.

By memorandum dated October 5, 2007, PAG's bid evaluation committee found the bid from Far East to be non-compliant. As indicated above, Far East submitted a bid only for a 40,000 lbs. fork truck, and presented a 44,000 lbs. option for this category of equipment. Based on Port's review of the bid submittals, it was recommended that IFB GSA/PAG 07-007 be awarded to Morrico Equipment LLC. According to the Port, a copy of this memorandum was provided to GSA.

GSA issued a Bid Status notification on October 1, 2007.² The Bid Status notified Far East of its rejection of its bid because of non-conformance with specifications and high price. Furthermore, the Bid Status specifically indicated that the bid from Far East: "Did not meet minimum horsepower requirements. Minimum horsepower required per specifications 230hp — Far East 220hp." It also indicated that the bid "[d]id not meet fork dimensions. As per specification length of fork 96" Far East 47".

The Bid Status stated that the bid was recommended for award to Morrico in the total amount of \$920,391.00, which included the 40,000 fork truck price for \$252,999.00.

On October 17, 2007, Far East filed a protest with GSA. On November 7, 2007, GSA responded to the protest. In GSA's letter, the agency found Far East's protest to be without merit based on the following:

1. Minimum horsepower required per specifications was 230 hp for a 40,000 lb. fork truck. Far East submitted a specification for 220 hp and therefore the bid did not meet the minimum horsepower requirement.
2. Far East's bid price of \$286,610.40 for the 40,000 lbs. fork truck option (*i.e.*, a 44,000 lb. forklift) was too high

II. DISCUSSION

A. FAR EAST'S BID WAS APPROPRIATELY REJECTED AS NON-COMPLIANT, AND THE AWARD FOR THE 40,000 LBS. FORK TRUCK WAS PROPERLY GIVEN TO MORRICO

On Page 15 of 19 of the IFB General Terms and Conditions (Item # 23), the IFB advises potential bidders that award shall be made to the lowest responsible and responsive bidder, whose bid is determined to be advantageous to the Government. It also indicates that the GSA Chief Procurement Officer shall have the right to award, cancel or reject bids, in whole or in part for any one or more items, if he determines it is in the public interest.

GSA determined that Far East's bid was non-compliant with the specifications outlined in the IFB for the 40,000 lbs. fork truck. The IFB required a minimum

² The record indicates that the Bid Status was personally received by John Limtiaco, Vice President of Far East, on October 8, 2007.

horsepower specification for such equipment to be 230 horsepower. Far East's bid specified 220 horsepower. Far East itself admitted in its protest letter that its bid was non-compliant in this respect. Furthermore, Far East's bid price of \$286,610.40 was deemed to be too high for its 44,000 lbs. option. Therefore, the bid was rejected.

Morrigo's bid was deemed to be compliant with the bid specifications, and it was recommended that the award be made to the company in the amount of \$920,391.00, which was reflected in the Purchase Order eventually issued to Morrigo. The Purchase Order includes the award to Morrigo in the amount of \$252,999 for the 40,000 lbs. fork truck. Nothing in the record indicates that Morrigo was or would be non-compliant with the 230 minimum horsepower specification.

B. REMEDIES AFTER AWARD

Section 5452 of Title 5 GCA provides as follows:

- (a) If after an award, it is determined that a solicitation or award of a contract is in violation of law, then:
 - (1) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Territory; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.

PAG submits that there is no indication at this time that Morrigo acted in fraudulently or in bad faith. Therefore, assuming *arguendo*, that it is found that the solicitation or award of the contract at issue is in violation of law, it is respectfully requested that the contract nonetheless be ratified and affirmed as in the best interests of the Territory, as PAG is in need of the equipment sought and awarded under the IFB.

III. CONCLUSION

PAG respectfully requests that the appeal of Far East Equipment Company LLC be dismissed, and that the Public Auditor award all legal and equitable remedies that Port may be entitled to as a result thereof.

*** END OF AGENCY STATEMENT ***

EXHIBIT “2”

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9 **BEFORE THE PUBLIC AUDITOR OF GUAM**

10 **PROCUREMENT APPEAL**

11 **IN THE APPEAL OF**

OPA-PA-07-010

12 **FAR EAST EQUIPMENT COMPANY,**
13 **LLC,**

DECLARATION REGARDING COURT
ACTION

14 **Appellant.**

15 Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses
16 interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action
17 on any appeal where action concerning the protest or appeal has commenced in any court.

18 The undersigned party does hereby confirm that to the best of his or her knowledge, no
19 case or action concerning the subject of this Appeal has been commenced in court. All parties are
20 required to and the undersigned party agrees to notify the Office of the Public Auditor within 24
21 hours if court action commences regarding this Appeal or the underlying procurement action.

22 Submitted this 12th day of December, 2007.

23 **JOSE D. LEON GUERRERO**
24 **COMMERCIAL PORT**
25 **(PORT AUTHORITY OF GUAM)**

26 By: 

27 **JOAQUIN P. CRUZ**
28 **Acting General Manager**