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In the Appeal of Morrigo Equipment, LLC; OPA-PA-24-001

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Dear Mr. Hernandez:

Please see the attached document submitted for filing:

1. Appellant's Hearing Brief.

Should you have any questions or concerns, please feel free to contact our office. Thank you.

Regards,
Mariah Saldana

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7.26.24 Appellant's Hearing Brief.pdf

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

MORRICO EQUIPMENT, LLC,

Appellant.

DOCKET NO. OPA-PA-24-001

APPELLANT'S HEARING BRIEF

I. INTRODUCTION AND ISSUES ON APPEAL.

Morrigo Equipment, LLC ("Morrigo" or "Appellant") submits this Trial Brief in conformance with the Order of the Office of Public Accountability ("OPA") issued on June 13, 2024. This Trial Brief will assist the OPA in addressing the following list of issues to be resolved in this appeal:

A. Was Morrigo Equipment, LLC materially responsive to the requirements of Guam Solid Waste Authority ("GSWA") Bid 004-24, Compact Wheel Loader with Attachments?

B. Did GSWA improperly disqualify Morrico Equipment, LLC from bid consideration?

C. Did GSWA create an impermissible procurement restriction by holding bidders to brand specifications of the John Deere Model 244P?

II. SERVICES UNDER GSWA GSWA-004-24

On November 3, 2023, the GSWA issued GSWA-004-24, a procurement solicitation seeking a Compact Wheel Loader with Attachments (the “IFB”). The IFB carried a single description of what GSWA was seeking: a “compact wheel loader with attachments.” Notice of Appeal, **Exhibit A** ¶ p.32 (IFB Description). GSWA also advised offerors that it had formulated additional information on the wheel loader in reliance upon the specifications of a “John Deere model 244P,” but that “Such preference is intended to be descriptive, but not restrictive and for the sole purpose of indicating to prospective bidders a description of the article or services that will be satisfactory. Bids on comparable items will be considered provided the bidder clearly states in his bid the exact articles he is offering and how it differs from the original specification.” *See*, Notice of Appeal **Exhibit D** (GSWA Bid Answer, November 14, 2024); Notice of Appeal **Exhibit A** ¶ 18 (IFB General Terms and Conditions). In response to questions from bidders, GSWA explained that its specifications reliant upon John Deere terminology was provided “for ensuring that the compact wheel loader can effectively navigate varied terrains, accommodate different load sizes, and maintain stability during operation. Procurement Record, 83. The agency never included a 5 G.C.A. §5268(b) written justification specifying “a product having features which are peculiar to the products of one manufacturer.” As such, adherence to the exact specifications provided to the agency by John Deere was not required of bidders.

III. RELEVANT PROCEDURAL AND FACTUAL HISTORY

On December 5, 2023, Morrico submitted its bid for a compact wheel loader with attachments, with a price \$47,000 less expensive than the John Deere 244 P offered by Far East Equipment. Compare Notice of Procurement Appeal **Exhibit A** with Notice of Procurement Appeal **Exhibit F** (Far East Bid Submission). On December 13, 2023, Morrico received word that the agency had rejected its bid due to “non-conformance with the specifications.” Notice of Procurement Appeal **Exhibit B** (Bid Status form). Since it became apparent that the agency had improperly restricted the bid to a *de facto* sole source procurement by wherein only the specification of the “John Deere model 244P” could comply, Morrico filed a procurement protest with the GSWA on December 27, 2023. Notice of Procurement Appeal **Exhibit C**. GSWA denied the protest on April 5, 2024, and this appeal followed. Notice of Procurement Appeal **Exhibit E**. GSWA’s motion seeking to dismiss Morrico’s appeal was denied on or about July 9, 2024.

IV. BASIS FOR PROTEST AND APPEAL

1. GSWA’s disqualification of Morrico was based upon an improper reliance upon John Deere brand specifications and language.

5 GCA § 5265 provides that: “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.” In addition, 5 GCA § 5268(a) provides that: “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.” An agency should avoid specifications peculiar to one manufacturer and, instead, should develop

specifications that “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.” 5 GCA § 5268(b) and (c). More, when an agency like GSWA opts to utilize a brand name specification, its use is limited to instances where the purchasing officer formally determines in writing that only the specified brand can adequately fulfill the needs of the territory. The government is also obligated to actively pursue multiple competitive sources for brand name items. Failing to do so necessitates resorting to the sole source method for source selection, as stipulated in § 4103(b)(2)(c)(ii).

Morrigo’s bid on the solicitation offered the government a wheel loader in the same class and with the same — and in some instances superior — performance capabilities as the John Deere model 244P, though with several *de minimis* deviations from the John Deere descriptions. These deviations from the brand specific specifications were explained to the agency as allowed under ¶18 of the general terms and conditions of the bid. When GSWA rejected its bid on the basis that Morrigo did not match the exact John Deere specifications, it became apparent that GSWA had mounted a *de facto* sole source procurement, but without adhering to the formalities required of such a procurement. This violated the law, and mandates that the procurement be corrected so as to bring about maximum competition to protect the taxpayers and ratepayers of Guam.

2. Morrigo’s offered machine was responsive to the bid.

The Appellant offered GSWA a machine manufactured by Case Construction with a ground clearance of between 12.5 – 17.3 inches. Procurement Record (“PR”), 158. While the Agency has stated that this does not meet the John Deere specifications,

the Agency has not explained why this meant that the Case machine did not comply with the terrain navigation requirements for the vehicle. The Agency admits, as it must given the procurement record, that the “John Deere Model 244P” was used as the reference in developing its total specifications, including the specifications for terrain navigation. Agency report, 2. The Agency then explains, without citation, that the “specifications are not unique to John Deere.” This is incorrect, as trial testimony will show that only the John Deere Model 244P carries specifications meant to illustrate terrain navigation in the form of wheel movement listed in “Maximum Rise and Fall, Single Wheel” in inches, as opposed to degrees of oscillation for such rise and fall, and as opposed to the standard measurement of ground clearance typically used by other manufacturers to emphasize terrain navigation.¹ None of this appears to have been taken into account by the GSWA procurement officer in tossing aside the Morrico tender.

Rather than admit that the Agency blindly copied specifications from the John Deer Model 244P that included the opaque John Deere specification for at least 14 inches of “max rise and fall single wheel”, the agency explains that the specifications were curated to meet the terrain navigation requirements for Guam. Agency Report, 2. That specification is one of ground clearance, and not a generalized power train

¹ The John Deer 244P has a ground clearance of just 11 inches — significantly less than the machine offered by the Appellant Morrico. The John Deere emphasis on a “max rise and fall single wheel” specification seems offered to deemphasize this shortcoming. This conclusion is supported by the fact that the John Deer 344-P, a vehicle with 15.4 inches of ground clearance, does not include the amorphous additional specification of “max rise and fall single wheel.”

notation as John Deere’s specifications delineate. To be sure, the Case 221 F machine offered by the Appellant has a full 17.3 Inches of Ground Clearance — more than enough to meet the Agency’s requirement of at least 14 inches of space to assist the machine to “navigate Guam’s Terrain.”

3. Morrico’s protest was timely

While Morrico finds fault with GSWA’s use of John Deere specifications to formulate the IFB, Morrico’s protest was triggered not by the appearance of those brand specifications, but rather GSWA’s use of those specifications in an unduly restrictive manner to disqualify Morrico’s bid from consideration. Morrico first learned of that disqualification on December 13, 2023, when Morrico received word that the agency had rejected its bid due to “non-conformance with the specifications.” Notice of Procurement Appeal Exhibit B (Bid Status form). Since it became apparent at that moment of disqualification that the agency had improperly restricted the bid to a *de facto* sole source procurement wherein only the specification of the “John Deere model 244P” could comply even though Morrico’s machine met or exceeded the ground navigation specification of the IFB, Morrico filed a procurement protest with the GSWA fourteen days later on December 27, 2023. Notice of Procurement Appeal Exhibit C. Morrico’s protest was timely.

Morrigo’s disqualification from the process is the key fact that gave rise to this protest. It was only on December 13, 2023 — fourteen days before bringing its protest— that Morrico learned that GSWA would be using the John Deere brand specifications as a restrictive method to disqualify Morrico from the bid process. Any

earlier protest by Morrico would have not yet been ripe, since GSWA, like any Government agency receiving offers, “is presumed to act in good faith when executing their procurement functions.” *Aero Corp. v. United States*, 38 Fed.Cl. 408, 413 (1997); *Madison Servs., Inc. v. United States*, 92 Fed. Cl. 120, 129 (2010) (“A strong presumption of regularity and good faith conduct attaches to any rational agency decision”). Morrico could not have known until its disqualification that GSWA had no real inclination to review the terrain navigation of the vehicles, and instead had locked itself into the John Deere brand language of wheel movement.

V. CONCLUSION

Morrigo respectfully requests that the Office of Public Accountability issue an Order declaring the following:

- (1) That GSWA’s application of the John Deere 244P specifications in a restrictive manner to disqualify Morrico’s responsive bid offer violates the Guam Procurement Code and Regulations governing brand name specifications, and was arbitrary, capricious and an abuse of discretion;
- (2) That GSWA’s restrictive application of the John Deere 244P specifications without appropriate written findings was arbitrary, capricious and an abuse of discretion;
- (3) That GSWA’s denial of Morrico’s protests was unreasonable, arbitrary, capricious and an abuse of discretion;
- (4) That the automatic stay of procurement arising under 5 G.C.A. §5425(g)

be confirmed to have been in place;

- (5) That Morrigo, as the lowest priced responsive bidder, should be made the awardee of GSWA Bid 004-24, Compact Wheel Loader with Attachments
- (6) For such further relief that the OPA deems appropriate.

Respectfully submitted this 26th day of July 2024.

RAZZANO WALSH & TORRES, P.C.

By: 

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