



Jerrick Hernandez <jhernandez@guamopa.com>

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

Tabitha H. Madarang <tmadarang@rwtguam.com>

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To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: jtoft@portofguam.com, kmsantos@portofguam.com, "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Joseph C. Razzano" <jrazzano@rwtguam.com>, Mariah Saldana <msaldana@rwtguam.com>

Dear Mr. Hernandez:

Please see the attached *Comments on Agency Report* for submission to the OPA in the above referenced case.

Should you have any questions, please contact our office. Thank you.

cc: Jessica Toft

Sincerely yours,

Tabitha H. Madarang**RAZZANO WALSH & TORRES, P.C.**

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

Tel. 671-989-3009

**OPA-PA-24-001 Comments on Agency Report.pdf**

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RAZZANO WALSH & TORRES, P.C.
JOSEPH C. RAZZANO
JOSHUA D. WALSH
PAN AMERICAN BUILDING
Suite 100, 139 Murray Blvd.
Hagåtña, Guam 96910
Telephone: (671) 989-3009
Facsimile: (671) 989-8750
Electronic Service: [eservice@rwtguam.com`](mailto:eservice@rwtguam.com)

Counsel for Appellant Morrigo Equipment, LLC

**PROCUREMENT APPEAL OF DENIAL OF PROCUREMENT PROTEST
IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

PART I.

In the Appeal of

MORRICO EQUIPMENT, LLC,

Appellant.

DOCKET NO. OPA-PA-24-001

COMMENTS ON AGENCY REPORT

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant Morrigo Equipment, LLC (“Morrigo” or “Appellant”) submits its Comments on the Agency Report submitted by the Port Authority of Guam (“PAG”) to the Office of Public Accountability (“OPA”) on August 29, 2024. These comments are submitted to address the positions taken by PAG in its Agency Report and Statement regarding Invitation for Bid No. PAG-013-24: Re-bid Procurement of 180’ Telescopic Boom Lift. (the “IFB”).

II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.¹

On January 26, 2024, the PAG issued IFB-PAG-004-24, seeking a 180' Telescopic Boom Lift. Morrico was the lowest priced responsive bidder for that tender, but when Morrico refused to unilaterally drop its quoted price, PAG cancelled the IFB. The Port then issued IFB-PAG-013-24 on April 23, 2024, seeking the exact same item. IFB attached to Morrico Notice of Appeal, **Exhibit A; Procurement Record (“PR”) Tab 2A; 2B.**²

On May 7, 2024, Morrico submitted its bid. On May 20, 2024, the Port informed Morrico that, despite being the only fully responsive bidder to the IFB, the Port instead intended to enter into a contract with Federal Contracts Corp (“FCC”). Notice of Award, Attached to Morrico Notice of Appeal, **Exhibit B; PR Tab 5B.** The Bid Abstract assembled by the Port’s procurement team confirms that FCC failed to provide the bid security necessary for a responsive bid, and also failed to have the necessary business and other licenses needed to make sales to the Port. **PR Tab 4A.** The Port’s notice on May 20, 2024, of the intended award to FCC meant that the Port not only selected a non-responsive offeror to perform the work of the IFB, but also selected a party that could not responsibly perform under the laws of Guam the way that Morrico can. Morrico submitted its Bid Protest to the PAG on June 3, 2024. Bid Protest 1, attached to the Morrico Notice of Appeal as **Exhibit C; PR Tab 7A.**

¹ Much of this history is contained in Morrico’s Notice of Appeal but is recounted here for ease of reference for the reader.

² PAG did not paginate or otherwise date stamp its procurement record.

Morrigo personnel were subsequently able to review procurement documents made available by PAG staff, and that review showed that not only did FCC both fail to provide the bid security necessary for a responsive bid and fail to have the licenses necessary to do the work, but their bid submission was also non-responsive and did not comport with the IFB's plain requirements for multiple other reasons:

(1) FCC failed to execute and provide the required Special Reminder to Prospective Bidders; (2) FCC failed execute and provide the Bid Bond form; (3) FCC was explicitly non-responsive in refusing to provide training as described and required on page 32 of the IFB; (4) FCC refused to offer and provide the warranty required by the IFB; (5) FCC refused to offer and provide technical assistance as sought on page 33 of the IFB; (6) FCC refused to offer and provide service as required on page 33 of the IFB; (7) FCC does not have a local authorized dealer as required on page 33 of the IFB; and (8) FCC refused to provide complete familiarization training as required on page 33 of the IFB.

These additional non-conforming issues compelled Morrigo to submit a second Bid Protest on these issues on June 20, 2024. Bid Protest 2, attached to Morrigo Appeal as **Exhibit D**. PAG Denied the Bid Protests on July 31, 2024. Decision on protest, attached to the Morrigo Appeal as **Exhibit E; PR 7f**.

B. PAG'S AGENCY STATEMENT HIGHLIGHTS A PROCUREMENT DECISION THAT IS NOT SUPPORTED BY THE PROCUREMENT RECORD.

The agency statement claims that the original bid was cancelled since Morrigo's bid — the lowest priced responsive bid to the invitation — “exceeded the available funding.” Agency Statement, 1-2. This averment is coupled with no citation to the procurement record. The agency then incongruously claims that it cancelled the procurement in conformance with 2 GAR 3102 since the Morrigo bid

was “not fair and reasonable....” Agency Statement 2. This averment is coupled with no citation to the procurement record on how such a determination was made. In fact, the only reference to §3102 of the GAR in the procurement record appears in PAG’s protest denial.

C. THE AGENCY ADMITS THAT FCC DID NOT INCLUDE DOCUMENTS THAT THE IFB REQUIRED OF A RESPONSIVE BID.

PAG does not contest the fact that FCC was nonresponsive to the language of the IFB in failing to provide a bid bond. Instead, PAG ignores developed procurement law and claims that Morricco’s protest was untimely, as it came more than 14 days after Morricco first learned that FCC was participating in the bid process. Agency Statement, 4.³

PAG does not contest the fact that FCC does not have the necessary business and other license needed to make sales to the port or perform the contract at issue here. Instead PAG again ignores developed procurement law and claims that Morricco’s protest was untimely. Agency Statement, 5.

PAG does not contest the fact that FCC did not submit the Special Reminder to Bidders — a requirement that PAG itself set as necessary for a responsive bid. Instead PAG again ignores developed procurement law and claims that Morricco’s protest was untimely. Agency Statement, 5.

³ The agency also seems to claim that Morricco’s protest letters are post-award. Agency Statement, 4. It appears that PAG misapprehends the difference between a Notice of Award under Guam procurement law. PAG claims that its May 20, 2024 Notice of Award somehow constituted a *fait accompli* regarding contract formation with FCC, despite the fact that the Notice plainly explains that an award is “conditioned upon the successful execution and final approval of the contract by all parties required by Guam law” and that the May 20 “notice does not constitute the final formation of a contract.” Notice of Award, attached as Exhibit B to Morricco’s Notice of Appeal. Morricco submits these comments without prejudice to its continued investigation as to whether or not PAG has intentionally pushed forward with void contract actions taken in violation of the automatic stay or procurement that was triggered by Morricco’s bid protest submission.

D. MORRICO FILED A TIMELY BID PROTEST.

The Port's May 20, 2024, decision to select a non-responsive offeror constituted a mistake. GCA 5 §5425(a) requires that Protests must be made within 14 days of the issues leading to the protest being known by the Protester (Morrigo in this case). Morrigo learned more about the Port's error in selecting a non-responsive offeror on the same day it received the award notice — May 20, 2024. Morrigo raised its protest to PAG on June 3, 2024, and raised newly discovered issues on June 20, 2024.

Morrigo's appeal came within fifteen days after PAG issued its protest decision to Morrigo on July 31, 2024, and is within the fifteen-day protest appeal period set by 5 GCA § 5425(e). Therefore, both Morrigo's agency level protest and subsequent appeal to the OPA meet the timeliness standards required by applicable law and regulation.

E. MORRICO IS AN AGGRIEVED BIDDER.

PAG curiously describes Morrigo — the lowest priced bidder under the original bid of the IDFB that PAG cancelled and the lowest priced fully responsive bidder to the new IFB — as being somehow not aggrieved. PAG is wrong and has chosen to simply ignore the directive of the Guam Legislature that “Any actual or prospective actual bidder, offeror, or contractor who may be aggrieved in connection with the... award of a contract, may protest to the... head of a purchasing agency. See 5 GCA § 5425(a). To be sure, Morrigo is an actual bidder for the IFB. A party becomes “aggrieved” when they become aware of a violation of one of the procurement law's substantive provisions or the terms of the IFB. See *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 84. On

May 20, 2024, Morrico became aware that PAG had selected for award an offeror — FCC — that was non-responsive to the bid in several material ways. Pursuant to 5 GCA § 5425(a), Morrico made their protest to the head of PAG, the purchasing agency within fourteen (14) days after Morrico learned of the facts giving rise to the protest, *i.e.*, the selection of a non-responsive offeror by the agency. 5 GCA § 5425(a); *DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020 Guam 20, Amended Opinion ¶ 77 *citing Guam Imaging*, 2004 Guam 14 ¶ 25. Therefore, Morrico has brought proper and timely protests as a statutorily aggrieved bidder.

F. FEDERAL LAW CONTROLS THIS PROCUREMENT?

The Agency Statement also shows that PAG has also apparently abandoned its creative determination that “Federal Law Controls this Procurement”, despite being a Guam procurement that the PAG itself repeatedly assured bidders in the bid documents must comply with “Guam Law,” *Compare*, Protest Decision, July 31, 2024, *with* Agency Statement, August 29, 2024. Therefore, FCC’s failures to comply with the laws of Guam *vis a vis* a responsive bid submission on licensing, bid bond submission, and special notice compliance could only have been excused by PAG through some conscious decision expressed in the procurement record. There is no such record.

G. THE AGENCY REPORT ILLUMINATES PROCUREMENT RECORD HOLES THAT FAIL TO EXPLAIN HOW PAG CHOSE TO MAKE AN AWARD TO FCC.

Guam law mandates that “each procurement officer shall maintain a complete record of each procurement.” 5 G.C.A. § 5249. The law does not provide an exhaustive list of what a complete record contains, but instead provides a non-

exhaustive list of items that “the record shall include.” 5 G.C.A. § 5249. Under the law, PAG was required by Guam’s procurement laws to maintain a procurement record during the IFB process, and to make sure that the record includes everything essential to understanding how the award was made, and why certain agency actions — such as the claimed action of providing one bidder with an exception not afforded others — were made.

Guam law categorically and independently prevents an award when the material record of the procurement was not properly maintained. Under Guam law, “a complete procurement record is required by law for an award,” *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, ¶ 35 (Guam May 14, 2018), *citing* 5 G.C.A. § 5250. There is no factual support, or support in the Procurement record, for PAG’ s determination to grant FCC an exemption as to the responsiveness requirements of the IFB. Put another way, the Procurement Record contains no support or reasoning for holding one offeror to a stricter standard and another to a less strict compliance standard and then rewarding the latter with an award. The law does not allow this.

It is evident that the procurement record is incomplete, that PAG failed to maintain a complete procurement record as required by 5 G.C.A and that certification of the procurement record was improper. PAG claims that prior to Morrico’s protest the agency had decided to excuse FCC’s non-responsiveness. The Procurement Record does not reflect this decision. This information is material to the procurement, and without it, the record is deficient. ⁴

⁴ Morrico reserves its rights, as the facts continue to develop through investigation and research, to address the failings of the procurement record through the submission of a new protest, motion practice before the OPA, or action through the courts of Guam if necessary.

III. CONCLUSION

The Port's Agency Report and accompanying statement provide no support for the Port's newly claimed position that it intended to excuse offeror FCC from the responsiveness requirements laid down for bidders. Rather than engage with the non-responsiveness of FCC's bid submission, PAG now stands upon its contorted view of protest requirements and has buried its head in the proverbial sand while claiming that Morrico's protest was untimely.

Respectfully submitted this 9th day of September 2024

RAZZANO WALSH & TORRES, P.C.

By: 

JOSEPH C. RAZZANO

JOSHUA D. WALSH

Attorneys for Appellant