

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: 12.23.15

TIME: 10:20 AM PM BY: JMS

FILE NO OPA-PA: 15-014

1 Vanessa L. Williams, Esq.
2 414 West Soledad Avenue
3 GCIC Bldg., Suite 500
4 Hagåtña, Guam 96910
5 Telephone: 477-1389
6 Email: vlw@vlwilliamsllaw.com

7 Attorney for Purchasing Agency
8 *Guam Solid Waste Authority*

**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

9 IN THE MATTER OF
10 MORRICO EQUIPMENT, LLC,

11 Appellant,

12 and

13 GUAM SOLID WASTE AUTHORITY

14 Purchasing Agency.

) Docket OPA PA-15-014

**MOTION TO DISMISS
FOR LACK OF JURISDICTION
AND FOR RECUSAL
& MEMORDANDUM OF POINTS
AND AUTHORITIES**

MOTION TO DISMISS OR RECUSE

17 Pursuant to 5 G.G.A. § 5703 and 2 GAR § 12104(c)(9), the Guam Solid Waste
18 Authority (“GSWA”) hereby moves to dismiss the appeal of Morrico Equipment, LLC
19 (“Morrico”) due to the Public Auditor’s lack of jurisdiction and recusal or disqualification from
20 hearing this matter. This motion is supported by the following Memorandum of Points and
21 Authorities, the record of the proceedings and papers on file, together with any and all
22 arguments to be adduced at the hearing of the within entitled motion.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

25 On July 12, 2015, the Public Auditor issued an open letter to the public regarding the
26 Guam Solid Waste Authority and the Federal Receiver. To date, this letter remains on the
27
28

1 Public Auditor's website. A true and correct copy of the Public Auditor "Letter to Publishers
2 and Broadcasters regarding the Guam Solid Waste Authority and the Federal Receiver" is
3 attached as **Exhibit A**.

4 On August 18, 2015, GSWA issued IFB GSWA004-15 (the "IFB"). The IFB included a
5 ninety (90) day delivery time specification. On August 27, 2015, Morrigo submitted Pre-Bid
6 Questions. One of these questions requested the ninety (90) day delivery time specification be
7 changed to permit a one-hundred eighty (180) day delivery time. On September 1, 2015,
8 Morrigo submitted its first protest ("Morrigo's First Protest") to the IFB protesting the ninety
9 (90) day delivery time specification. A true and correct copy of Morrigo's First Protest is
10 attached as **Exhibit B**. On September 4, 2015, GSWA denied Morrigo's First Protest. A true
11 and correct copy of the September 4, 2015 denial of Morrigo's First Protest is attached as
12 **Exhibit C**.

13 On September 4, 2015, Morrigo and Far East Equipment submitted bids in response to
14 the IFB. Neither bid was responsive. On September 24, 2015, GSWA notified Morrigo that its
15 bid was non-responsive. On September 28, 2015, Morrigo submitted its second protest
16 ("Morrigo's Second Protest") to the IFB protesting the ninety (90) day delivery time
17 specification. A true and correct copy of Morrigo's Second Protest is attached as **Exhibit D**.
18 On November 23, 2015, GSWA responded to Morrigo's protest notifying that it was moot as
19 the IFB was being cancelled. GSWA also noted in its response that Morrigo's Second Protest
20 was untimely. On November 25, 2015, GSWA issued a notice to all bidders that the IFB was
21 cancelled.

22 On December 7, 2015, Morrigo submitted its third protest to the IFB ("Morrigo's Third
23 Protest") protesting the cancellation of the IFB. On December 7, 2015, Morrigo also filed the
24 appeal herein. This Motion to Dismiss for Lack of Jurisdiction and Motion for Recusal follows.

25
26 **ARGUMENT**

27 The Public Auditor has no jurisdiction over matters not properly submitted to her. 5
28 G.C.A. § 5703; 2 G.A.R. § 12103. As the matter is not "properly submitted" before the OPA,

1 the OPA lacks jurisdiction to hear the appeal and the appeal must be dismissed. Further, the
2 Public Auditor should recuse herself pursuant to 2 G.A.R. § 12601.

3 **I. THE PUBLIC AUDITOR DOES NOT HAVE JURISDICTION OVER**
4 **MORRICO'S UNTIMELY PROTEST AND APPEAL.**

5 This matter is not properly before the Public Auditor. Untimely appeals and appeals on
6 untimely protests cannot be "properly submitted" before the OPA. *See TRC Environment*
7 *Corporation v. Office of the Public Auditor*, Superior Court of Guam Case No. SP160-07,
8 Decision and Order p.5, Nov. 24, 2008 (matters not submitted in strict compliance with 5
9 G.C.A. § 5425 are not "properly submitted" to the OPA). A true and correct copy of the *TRC*
10 *Environment Corporation* Decision is attached as **Exhibit E**.

11 The Guam Procurement Law contains provisions allowing for protests and explaining
12 when protests are timely. The statutory language is as follows:

13
14 Any actual or prospective bidder, offeror, or contractor who may
15 be aggrieved in connection with the method of source selection,
16 solicitation or award of a contract, may protest to the Chief
17 Procurement Officer, the Director of Public Works or the head of a
18 purchasing agency. The protest shall be submitted in writing within
19 fourteen (14) days after such aggrieved person ***knows or should***
20 ***know*** of the facts giving rise thereto.

21 5 G.C.A. § 5425(a) (Emphasis added.)

22 The facts giving rise to Morrigo's protest arise from the inclusion of the ninety (90) day
23 delivery time specification in the IFB as stated in Morrigo's First Protest. Obviously, at the
24 very latest, Morrigo knew of the ninety (90) day delivery time specification when it first
25 protested the specification on September 1, 2015. GSWA issued the decision on Morrigo's
26 First Protest on September 4, 2015. Pursuant to 5 G.C.A. § 5425(e), Morrigo had 15 days
27 thereafter, or until September 19, 2015, to appeal GSWA's decision on the ninety (90) day
28 delivery time specification. *See TRC Environment Corporation v. Office of the Public Auditor*,
Superior Court of Guam Case No. SP160-07, Decision and Order p.5, Nov. 24, 2008.
Morrigo's Appeal was not submitted until December 7, 2015, almost three months after

1 GSWA's decision on the ninety (90) day delivery time specification. Therefore, this matter is
2 not "properly submitted" to the OPA and must be dismissed.

3 Morrico attempts to assert the OPA's jurisdiction by purportedly appealing GSWA's
4 November 22, 2015 decision on Morrico's Second Protest. The facts giving rise to Morrico's
5 Second Protest are the same facts that gave rise to Morrico's First Protest – the ninety (90) day
6 delivery time specification. Morrico cannot toll its appeal time to the OPA by repeatedly
7 protesting the same issue before the agency. *TRC Environment Corporation* is instructive on
8 this issue. There, Emissions Technologies, Inc. (ETI) submitted a first protest to GPA on
9 January 30, 2007. GPA denied that protest on March 28, 2007. ETI then submitted a second
10 protest to GPA on April 6, 2007. **Exhibit E**, *TRC Environment Corporation v. Office of the*
11 *Public Auditor*, Superior Court of Guam Case No. SP160-07, Decision and Order p.1, Nov. 24,
12 2008. The second protest was denied on April 13, 2007 as it was interpreted as an appeal which
13 fell under the jurisdiction of the OPA rather than GPA. *Id.* ETI then filed a formal appeal with
14 the OPA on April 20, 2007 and submitted an Amended Notice of Appeal on May 1, 2007. *Id.*
15 The Public Auditor found jurisdiction over the matter. *Id.* TRC Environmental Corporation
16 (TRC) petitioned the Superior Court of Guam challenging the OPA's exercise of jurisdiction,
17 based on the untimeliness of ETI's appeal before the OPA. *Id.* at 2. The Court found that ETI's
18 appeal to the OPA was untimely. The Court reasoned that ETI's second protest did not toll the
19 time to appeal as it was merely protesting the same issues in its First Protest and its Second
20 Protest was not a request for reconsideration. *Id.* at pp. 6-7. Further, even if the OPA equitably
21 tolled the time to appeal, the appeal still would have been untimely as more than 15 days
22 elapsed between the decision on ETI's first protest and its second protest, and after ETI's
23 second protest and appeal.

24 The facts here are indistinguishable. Morrico obviously missed the time to appeal its
25 First Protest. Morrico is attempting to appeal the decision on the same facts giving rise to its
26 First Protest. Morrico attempted to toll the time to appeal the decision on the First Protest by
27 submitting in Second Protest. The Second Protest was deemed untimely as it protested the same
28 facts giving rise to the First Protest and was not a request for reconsideration. Further, even if

1 the OPA equitably tolled the time to appeal, the appeal would still be untimely as more than 15
2 days elapsed between the decision on Morrigo's First Protest and the filing of its Second protest
3 (September 4 – September 28), and the decision on Morrigo's Second Protest and its appeal
4 (November 23-December 7). As the appeal is untimely, it is not "properly submitted" to the
5 OPA and must be dismissed.

6 For the foregoing reasons, the OPA should find that Morrigo knew or should have
7 known of the facts giving rise to the protest more than 14 days before December 7, 2015; that
8 GSWA was required to deny Morrigo's Second Protest pursuant to 5 G.C.A. § 5425(a); that
9 the appeal was not "properly submitted" to the OPA ; and that the OPA lacks jurisdiction to
10 hear the appeal under 5 G.C.A. § 5703 and 2 G.A.R. § 12103.

11
12 **II. THE PUBLIC AUDITOR SHOULD RECUSE HERSELF FROM THIS APPEAL.**

13 GSWA respectfully requests that the Public Auditor, Doris Flores Brooks, recuse herself
14 from this appeal due to her apparent bias for Morrigo Equipment, LLC and against the
15 management and receivership of the Guam Solid Waste Authority. Guam Procurement Law
16 provides:

17 The Public Auditor may recuse herself or himself at any time and
18 notify all parties, or any party may raise the issue of
19 disqualification and state the relevant facts prior to the hearing.
20 The Public Auditor shall make a determination and notify all
21 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.

22 2 G.A.R. § 12601.

23 The Public Auditor's role involves investigating, auditing, and ultimately deciding a
24 procurement appeal. (Decision and Order Re: Purchasing Agency's Motion for the Public
25 Auditor to Recuse Herself, *In the Appeal of Teleguam Holding LLC*, Appeal No. OPA-PA-10-
26 002. "). Objectivity and impartiality is critical to the adjudicatory process. *See e.g.* 5 G.C.A. §
27 9222 ("A hearing officer or agency member shall voluntarily disqualify himself and withdraw
28 from any case in which he cannot accord a fair and impartial hearing or consideration.").

1 Here, Ms. Brooks, as Public Auditor, is the administrative adjudicator of this appeal
2 responsible for providing a fair and impartial hearing or consideration to GSWA. However, in
3 her July 12, 2015 open letter issued to publishers and broadcasters regarding the Guam Solid
4 Waste Authority and the Federal Receiver, she raised the question of whether she can be fair
5 and impartial when it comes to the positions of the Guam Solid Waste Authority under the
6 management of the Federal Receiver, especially against Morrigo. *See Exhibit A.* In this
7 opinion letter the Public Auditor repeatedly expressed her “dismay” with the continued
8 management of GSWA under the Receiver, as well as her belief that the Receiver of GSWA has
9 made a “misrepresentation” to the District Court of Guam regarding Morrigo. The Public
10 Auditor further conveyed her belief that GSWA’s legal positions with respect to Morrigo are
11 frivolous due to the “free rein given to the Receiver.” The Public Auditor also expressed
12 concern regarding Morrigo’s legal costs, time, and resources. The Public Auditor also shared
13 her “heavy heart” about the continued management of GSWA under the Receiver. After
14 sympathizing with the Governor’s office on purported “bad blood...between the Receiver and
15 the Governor’s representatives,” the Public Auditor concluded that existing management under
16 the Receiver should end and be transitioned back to the “GSWA Board, chosen by the
17 Governor[.]” *Id.* at 3.

18 This opinion was not a part of the audit of the GSWA, nor was her open opinion letter to
19 the public in performance with any of the Public Auditor’s other statutory duties. *See* 1 G.C.A.
20 §§ 1908-1909. This open letter to the public also appears to be the first opinion of its kind in
21 the history of the Public Auditor. GSWA could find no other open letter or press release from
22 the Public Auditor outside of her statutory duties that opines on her confidence – or lack thereof
23 - in the management of any other public agency. Now, Morrigo and GSWA are again before
24 the OPA. The Public Auditor has already expressed strong opinions outside the scope of her
25 duties on disputes between GSWA and Morrigo. Therefore, any decision rendered by the
26 Public Auditor in this matter would be clouded by uncertainty over whether the Public Auditor
27 was truly fair and impartial. In the interests of justice, GSWA respectfully request the Public
28 Auditor recuse herself.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, the appeal should be summarily dismissed for the OPA's lack of jurisdiction to hear the appeal under 5 G.C.A. § 5703. The appeal should also be dismissed due to the disqualification or recusal of the Public Auditor in accordance with 2 G.A.R. § 12601.

Respectfully submitted this 23rd day of December, 2015.



VANESSA L. WILLIAMS, ESQ.
Attorney for Guam Solid Waste Authority

EXHIBIT

“A”



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

July 12, 2015

Letter to Publishers and Broadcasters re

Guam Solid Waste Authority and the Federal Receiver

The June 25, 2015 release of the FY 2014 financial audit of the Solid Waste Funds reflects three full years of operations at Layon Landfill by the Receiver. In less than three months, the books will close on FY 2015 and we will have four years of financial performance.

Thanks to the free rein that District Court Judge Frances Tydingco-Gatewood granted the Receiver, Guam has probably the most modern landfill of all of the Pacific Island countries. It's likely more up-to-date than many stateside landfills.

When OPA hosted the 13th Pacific Association of Supreme Audit Institutions (PASAI) Congress in September 2013 with attendance of over 60 delegates that included the Auditor Generals from 22 countries, such as New Zealand, Australia, New Caledonia, Papua New Guinea, to name a few, as well as the Acting Inspector General of the Department of the Interior, we toured the landfill operations at Harmon and Layon.

PASAI conducted a cooperative audit on solid waste in 2011 of which Guam and nine other island governments participated. I forewarned the Congress to take action and address their solid waste issues as not addressing them can come at a heavy price, which Guam is now experiencing.

I recently read in the paper with dismay and a heavy heart the Judge's decision to further delay the transition of management of the Layon landfill operations to the Guam Solid Waste Authority (GSWA).

It is my understanding that the GSWA Board has been requesting for the authority and funding to advertise and hire a general manager and other senior staff so that the Board can have its management team in place and be ready for the transition of managing Layon. However, according to one board member, the

Receiver has not even allowed the Board to advertise for the general manager position and other senior positions for its management team.

To be clear, the Board is NOT requesting to take over the closing of the Ordot Dump, a project that is still in progress. The Board wants to begin the transition of Layon.

I have also watched with dismay the disagreements between the Receiver and the Governor's office on future capital projects and how they would be funded. I can see now how some of that bad blood occurred between the Receiver and the Governor's representatives.

I say this because of my most recent experience with the Receiver and the 2014 financial audit of the Solid Waste Funds. Completion of the audit was repeatedly delayed because of the continued objections by the Receiver on certain aspects of the numbers, reconciliation of those numbers, the wordings of certain statements, and my comments over a particular consultant contract.

The Receiver reports on a cash basis to the Judge and the audit is on a modified accrual basis. There were other bones of contention pertaining to certain findings on procurement.

Let me just say that I refrained from responding in like kind to the less than professional comments by email and telephone to me and the Deloitte and Touche auditors. In the end, we agreed to disagree.

I also bring to the public's attention the Receiver's misrepresentation in his March 5, 2015 quarterly report to the District Court. At page 23 of the report, writing about OPA Procurement Appeal 14-010, Morrico Equipment, LLC v. Guam Solid Waste Authority, the Receiver said, "On February 20, 2015, the Office of Public Accountability upheld the protest on technical grounds citing lack of evidence in the record for the specification that was protested. While we disagree with the decision, we will revise the bid and reissue the procurement."

Despite the representation to the Judge that he would reissue the bid, the Receiver appealed the Public Auditor's decision to the Superior Court the very next day on March 6, 2015. The latest order from Judge Barcinas, issued June

30, sets trial for January 22, 2016 and motions to dismiss to be heard on August 21, 2015.

While any government entity can appeal the Public Auditor's procurement decision to the Superior Court, since 2006, when procurement appeals became the responsibility of my office, no other government entity has appealed a procurement decision; only vendors have appealed.

Because of the free rein given to the Receiver, the people of Guam are paying for the legal costs of the Receiver's appeal to the Superior Court. Money is coming from the Solid Waste Operations Fund, the solid waste rate payers of Guam, the taxpayers of Guam, as well as staff time and resources from the OPA and the Superior Court. In addition, there are Morrico's legal costs, time, and resources.

I write this open letter to say to the people of Guam, that after four years of the Receiver managing Layon, the Board should be given the opportunity and funding to get its management team in place and be allowed to manage and operate the Layon Landfill. FY 2016 should be the year GovGuam is allowed to prove to the Judge, and more importantly to the people of Guam, that Guamanians are fully capable of running Layon.

This transition can and should be under the watchful eye of the Court. The GSWA Board, chosen by the Governor and confirmed by the Legislature, should be handed the responsibility of managing and operating the Layon landfill.

Respectfully submitted,



Doris Flores Brooks, CPA, CGFM

Public Auditor

EXHIBIT

“B”

DOOLEY ROBERTS & FOWLER LLP
ATTORNEYS AT LAW

DAVID W. DOOLEY
TIM ROBERTS
KEVIN J. FOWLER
JON A. VISOSKY
SETH FORMAN

SUITE 201, ORLEAN PACIFIC PLAZA
865 SOUTH MARINE CORPS DRIVE
TAMUNING, GUAM 96913
TELEPHONE: (671) 646-1222
FACSIMILE: (671) 646-1223
www.GuamLawOffice.com

Of Counsel:
MELINDA C. SWAVELY

Writer's Direct Email:
Fowler@GuamLawOffice.com

September 1, 2015

PROCUREMENT PROTEST

VIA FACSIMILE TRANSMISSION
and HAND DELIVERY

David Manning
Chace Anderson
Gershman, Brickner & Bratton, Inc.
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 96911
Facsimile: (671) 649-3777

GSWA Guam Solid Waste Authority
Date Received



SEP 01 2015

By: _____

Linda J. Ibañez
1:55 pm

RE: GSWA004-15 – Rear Loader Refuse Packer Body

Dear Mr. Manning, Mr. Anderson and Gershman, Brickner & Bratton, Inc.:

This office represents Morrigo Equipment, LLC (“Morrigo”), 197 Ypao Road, Tamuning, Guam 96913, with respect to GSWA004-15, a procurement solicitation for rear loader refuse packer bodies.

Morrigo hereby files its protest with respect to the above-referenced procurement. We have addressed this latter to the three addressees above because in Superior Court of Guam Civil Case No. CV0185-15, the GSWA has alternatively claimed that each may be the head of the purchasing agency, GSWA. The reasons for this protest are as follows:

The Guam Solid Waste Authority (“GSWA”), previously let an IFB, GSWA001-15, for refuse collection trucks. Morrigo protested the specifications utilized by the GSWA for that procurement. After the GSWA denied Morrigo’s protest, Morrigo appealed the GSWA protest denial to the Office of Public Accountability (“OPA”). The OPA upheld Morrigo’s protest and ordered GSWA to correct the protested specifications which unnecessarily restricted

David Manning
Chace Anderson
Gershman, Brickner & Bratton, Inc.
Head of Purchasing Agency
GUAM SOLID WASTE AUTHORITY
September 1, 2015

competition. The GSWA appealed the OPA's ruling to the Superior Court of Guam in Civil Case No. CV0185-15, and that action is still pending in the Superior Court.

The GSWA has now released a new IFB, GSWA004-15 – Rear Loader Refuse Packer Body, by which it has unlawfully split up the prior protested IFB in order to get around the decision of the OPA that GSWA001-14 unnecessarily restricted competition. Instead of seeking procurement of an entire refuse collection vehicle, the GSWA now seeks to procure the rear packer body alone, without the vehicle itself. It is to be expected that the GSWA will later let an invitation for the refuse vehicle itself. By this method, the GSWA seeks to get around the adverse ruling of the OPA. Morrico protests the GSWA's subterfuge in trying to split up the procurement to avoid compliance with the OPA's decision on GSWA001-15. The GSWA's actions in seeking to circumvent the OPA's decision upholding Morrico's protest of the prior IFB, GSWA001-15, is unreasonable, arbitrary, capricious and an abuse of discretion.

Further, in GSWA004-15, the GSWA has required that the packer body be 3.6 cubic yards. In GSWA001-15, the GSWA's Addendum No. 1 changed the packer body from 3.6 to 3.5 ("3.5 cubic yards is also acceptable"). The GSWA's decision to revert to a 3.6 cubic yard packer body in the current IFB is meant to restrict competition and is arbitrary given that the GSWA allowed the bid of a 3.5 cubic yard packer body in the prior IFB, GSWA001-15. Leach has one of the largest hoppers available in the industry at 3.5 cubic yards. Rejecting a hopper over 0.1 cubic yards would be unreasonable, arbitrary, capricious and an abuse of discretion.

The GSWA has also requested a delivery time of 90 days, which is prohibitive and designed to reduce competition. Normal industry time frames for the manufacture and delivery of the requested product is at least 150 days.

The IFB also includes a specification requiring that "[t]ailgate latches shall be hydraulically operated working in conjunction with the tailgate lift cylinders." Further, the GSWA has specified that "[m]anual or auxiliary automated latch systems are not acceptable." These are proprietary specifications that are not necessary to meet the GSWA's fundamental need to process refuse on Guam. Morrico's manufacturer, Leach, does not utilize the specified system of tailgate latch design and these tailgate latch specifications simply serve to eliminate the Leach product from the competition for this bid. The Leach tailgate latches are hydraulically operated, but not in conjunction with the tailgate lift cylinders. Leach uses an auxiliary set of small cylinders that locks and unlocks the tailgate. This design is very reliable and takes less than 4 seconds to lock or unlock. Functionally, the Leach tailgate system completes the same task as the tailgate assembly specified by the GSWA and, therefore, the tailgate specification in this IFB unnecessarily restricts competition.

The development of product specifications is statutorily geared toward increasing competition among potential vendors. *See*, 5 GCA § 5265 ("All specifications shall seek to

David Manning
Chace Anderson
Gershman, Brickner & Bratton, Inc.
Head of Purchasing Agency
GUAM SOLID WASTE AUTHORITY
September 1, 2015

promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive." Further, "[s]pecifications 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." See, 5 GCA § 5268(a). Similarly, "[p]urchase descriptions shall 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." See, 5 GCA § 5268(c). The GSWA specifications discussed above are restrictions that do not "significantly affect the technical requirements or performance characteristics" of the product to be acquired. The GSWA's specifications are unduly restrictive and are designed to reduce competition.

Please be advised that pursuant to the Guam Procurement Law you are not to proceed further with the procurement or award of a procurement contract prior to resolution of this bid protest. See, 5 G.C.A. § 5425. Furthermore, a receiver appointed by a federal court must comply with local law. See, 29 USCS § 959.

I look forward to your resolution of this protest expeditiously.

Sincerely,

DOOLEY ROBERTS & FOWLER LLP



Kevin J. Fowler

EXHIBIT

“C”



SOLID WASTE
MANAGEMENT
CONSULTANTS
RECEIVER

TRANSMITTAL

September 4, 2015

MEMORANDUM

TO: Kevin J. Fowler
Attorney at Law
865 South Marine Corps Drive
Suite 201
Tamuning, Guam 96913

FROM: Guam Solid Waste Authority

SUBJECT: Response to Protest Letter

Transmitted herewith is the Response to Protest Letter dated Sept. 4, 2015. If you have any questions, please contact the Solid Waste Authority Administrator at 646-3239.

ACKNOWLEDGEMENT RECEIPT

Name: Valerie Ampare

Signature: [Handwritten Signature]

Date: 09/04/2015



SOLID WASTE
MANAGEMENT
CONSULTANTS
R E C E I V E R

September 4, 2015

Mr. Kevin J. Fowler
Attorney at Law
865 South Marine Corps Drive
Suite 201
Tamuning, Guam 96913

Dear Mr. Fowler:

This letter is in response to your protest letter dated September 1, 2015 on behalf of your client Morrigo Equipment, LLC ("Morrigo"). After considerations of the grounds for the protest set forth in your letter, GSWA hereby denies Morrigo's protest. The reasons for the denial are set forth in the order submitted in Morrigo's protest as follows:

1. IFB GSWA004-15 is Not Related to IFB GSWA001-15

GSWA has an independent need for the packer body solicited in IFB GSWA004-15, separate and apart from the needs solicited in IFB GSWA001-15. GSWA requires the packer body for trucks presently existing in GSWA's fleet. GSWA has every intention to resume IFB GSWA001-15 once a final determination is made in Superior Court of Guam Civil Case No. CV0185-15.

The subject matter of CV0185-15. began with your protest in October 2014. Since the time of that protest, GSWA closed, at the request of the Governor of Guam, the Dededo Residential Transfer Station as of the end of June 2015. Closing this facility has allowed GSWA to reexamine the allocation of GSWA's current roll off fleet of vehicles. GSWA has determined that at a minimum GSWA can convert one, possibly two, of these vehicles to a residential packer truck. Further, GSWA also has an additional three existing vehicles in its fleet that are experiencing problems with their packer units. These packers are of a sufficient age and use that they should be replaced rather than rebuilt. On August 20, 2015, GSWA's fleet maintenance contractor notified GSWA that one of these packer units had to either be rebuilt or replaced. Therefore, GSWA also determined it was necessary to replace these packer units through this current procurement.

2. Cubic Yard capacity of Packer Body

This issue is moot. IFB GSWA004-15 Addendum No. 3 provides that a hopper capacity of 3.5 cubic yards is acceptable.

3. Delivery Time

GSWA has determined that it is necessary for the delivery time to be within 90 days. The packer bodies are immediately needed to make use of existing refuse collection vehicles in GSWA's fleet. One of the existing vehicles is already inoperable and in need of new packer unit, and as stated above, replacement packer bodies are urgently needed. GSWA anticipates these to be inoperable soon, and the agency cannot afford to have half of its fleet inoperable for three additional months.

4. Tailgate Latches

This issue is moot. IFB GSWA004-15 Addendum No. 3 provides that tailgate latches that work independently of the tailgate cylinders are acceptable.

For the reasons set out above, GSWA rejects your protest. It is our hope that representatives of all of the manufacturers of these vehicles, including your client, will aggressively bid to provide these packer bodies to GSWA.

Thank you.

Sincerely,



David L. Manning
Receiver Representative

c.c. Vanessa L. Williams, Esq.

EXHIBIT

“D”

DOOLEY ROBERTS & FOWLER LLP
ATTORNEYS AT LAW

DAVID W. DOOLEY
TIM ROBERTS
KEVIN J. FOWLER
JON A. VISOSKY
SETH FORMAN

SUITE 201, ORLEAN PACIFIC PLAZA
865 SOUTH MARINE CORPS DRIVE
TAMUNING, GUAM 96913
TELEPHONE: (671) 646-1222
FACSIMILE: (671) 646-1223
www.GuamLawOffice.com

Of Counsel:
MELINDA C. SWAVELY

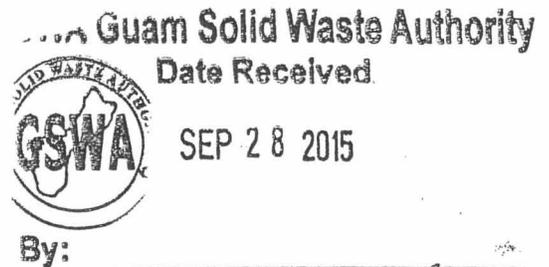
Writer's Direct Email:
Fowler@GuamLawOffice.com

September 28, 2015

PROCUREMENT PROTEST

VIA FACSIMILE TRANSMISSION
and HAND DELIVERY

David Manning
Chace Anderson
Gershman, Brickner & Bratton, Inc.
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 96911
Facsimile: (671) 649-3777



RE: GSWA004-15 – Rear Loader Refuse Packer Body

Dear Mr. Manning, Mr. Anderson and Gershman, Brickner & Bratton, Inc.:

This office represents Morrigo Equipment, LLC (“Morrigo”), 197 Ypao Road, Tamuning, Guam 96913, with respect to GSWA004-15, a procurement solicitation for rear loader refuse packer bodies (the “IFB”).

Morrigo hereby files its protest with respect to the above-referenced procurement. We have addressed this letter to the three addressees above because in Superior Court of Guam Civil Case No. CV0185-15, the GSWA has alternatively claimed that each may be the head of the purchasing agency, GSWA. The reasons for this protest are as follows:

The GSWA released the IFB on August 18, 2015, to procure rear loader refuse packer bodies and held a bid opening on September 14, 2015. Two bidders submitted bids on the IFB, Morrigo and Far East Equipment Company, LLC (“Far East”). On September 24, 2015, the GSWA issued a Bid Status to Morrigo advising that its bid was rejected because of “[n]ot meeting the delivery requirement as stated in the IFB.” The Bid Status further advised Morrigo

that the IFB would be rebid. While Morrico does not have any Bid Status form issued to Far East, it must be assumed its bid was rejected for failure to meet the mandatory requirement of the IFB that each bidder submit descriptive literature. I am attaching the Abstract of Bids for Far East's submission which shows that it failed to submit the required descriptive literature.

The IFB requested a delivery date of ninety days. While it is not per se unlawful to state a preferred delivery time in an IFB, it is unlawful to reject a bid for failing to meet that delivery time if the provisions of 5 GCA § 5010 are not otherwise met. I am attaching a copy of that statutory provision. As you will note, section 5010 provides that "[a]ll procurements of supplies and services shall, where possible, be made sufficiently in advance of need for delivery or performance to promote maximum competition and good management of resources." Quite obviously, the GSWA did not properly plan, "sufficiently in advance of need for delivery," the acquisition of the rear loader refuse packer bodies. This is rather ironic given that GBB was put in charge of Guam's solid waste system in order to ensure that the GSWA would timely meet the requirements of the solid waste consent decree entered into between Guam and the federal government. Section 5010 further provides that "[p]ublication of bids ... shall not be manipulated so as to place potential bidders at unnecessary competitive disadvantage." The GSWA has run afoul of this provision since only one bidder could meet the ninety day delivery time frame.

5 GCA § 5010 also provides that "[e]xcept in emergency situations, lower price bids are generally preferable to shorten delivery or performance bids. 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 bid 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." While we may take issue with whether the GSWA properly planned for this IFB as noted above, we must assume that under the receiver's guidance it has not neglected the GSWA's equipment needs to such an extent that it has given rise to an emergency situation. Therefore, the GSWA could only refuse to award a contract to Morrico because of its delivery time if the price of some other bidder who met the ninety day delivery time, "does not exceed one hundred five percent (105%) of the lower price bidder" which, here, was Morrico. Since Far East's bid was non-responsive, its faster delivery time could not even be considered in any analysis of the bids submitted for this IFB. Even if it had submitted a responsive bid, the GSWA could not award a contract to it because its price was well in excess of 105% of Morrico's price.

The development of product specifications is statutorily geared toward increasing price competition among potential vendors. See, 5 GCA § 5265 ("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."). Similarly, "[p]urchase descriptions shall 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." See, 5 GCA § 5268(c). The GSWA specification of a ninety day delivery time does not "significantly affect the technical requirements or performance characteristics" of the product to be acquired.

The Office of the Public Auditor has issued a Decision holding unlawful the attempt by the Guam General Services Agency to restrict price competition through use of a shortened delivery time. I am attaching the Decision in Appeal No. OPA-PA-13-001, in which “[t]he Public Auditor finds that the IFB’s specification for a two-hundred-forty (240) day delivery time is invalid because it violates 5 G.C.A. § 5268(a) and 2 G.A.R., Div. 4, Chap. 4, § 4109(a) and § 4103(b)(1)(c), and 5 G.C.A. § 5010.” For the same reasons, the GSWA’s ninety day delivery time in this IFB is invalid and cannot be a basis for the rejection of Morrico’s bid. The GSWA must therefore award a contract to Morrico on this IFB as it was the winning bidder.

Please be advised that pursuant to the Guam Procurement Law you are not to proceed further with the procurement prior to resolution of this bid protest. *See*, 5 G.C.A. § 5425. Furthermore, a receiver appointed by a federal court must comply with local law. *See*, 29 USCS § 959.

I look forward to your resolution of this protest expeditiously.

Sincerely,

DOOLEY ROBERTS & FOWLER LLP



Kevin J. Fowler

Number of Solicitation
 Number of Bids Received



ABSTRACT OF BIDS

Invitation Number
 GSWA004-15
 Opening Date
 9/14/15
 Time
 10.00AM

| Description of Supplies or Services | OFFEROR(S) | Acceptance Time | Delivery Acceptance | Delivery Specified IN IFB (Days) | A | B | C | D | E | F | Item No. | Qty. | Unit |
|--|------------|-----------------|---------------------|----------------------------------|----------------------------|---|---|---|---|---|----------|------|------|
| | | | | | REAR PACKER BODY (3 UNITS) | | | | | ✓ | ✓ | ✓ | ✓ |
| FRONT EQUIPMENT | | | | | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ | | | |
| LETTER OF CREDIT \$ 45,000.00 | | | | | | | | | | | | | |
| NO DISCOUNT ^{Literature} # Aug. 2015 | | | | | | | | | | | | | |
| PAC MAC PLAZZS | | | | | | | | | | | | | |
| \$ 95,000.00 | | | | | | | | | | | | | |
| 294,000.00 | | | | | | | | | | | | | |
| 90 DAYS DELIVERY | | | | | | | | | | | | | |

I hereby certify that all bids are received in response to this Invitation were opened under my personal supervision and that the same as of all bidders have been entered hereon

JSK 9/14/15
 (Signature)

TABULATED BY: _____ DATE: _____

LEGEND(S)

- (A) Affidavit Disclosing Ownership and Commissions
- (B) Affidavit Re Non-Collusion
- (C) Affidavit Re No Gratuities or Kickbacks
- (D) Affidavit Re Ethical Standards
- (E) Affidavit Re Contingent Fees
- (F) Declaration Re Compliance with U.S. D.O.L. Wage Determination

Guam Code Annotated Currentness

Title 5. Government Operations

Division 1. Laws Applicable to Executive Branch

Chapter 5. Guam Procurement Law

Article 1. General Provisions

Subarticle a Purposes, Construction and Application (Refs & Annos)

5 G.C.A. § 5010

§ 5010. Policy in Favor of Planned Procurement.

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

Credits

SOURCE: Added by P.L. 18-044:30.

5 G.C.A. § 5010, GU ST T. 5, § 5010

End of Document

2015 Edition Revisions No. 0101 to 0105 of U.S. Government Works

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

| | | | |
|------------|--|---------------|--|
| To: | Morrigo Equipment, LLC C/O Kevin J. Fowler Dooley Roberts & Fowler LLP Phone: 646-1222 Fax: 646-1223 | From: | Doris Flores Brooks Guam Public Auditor Office of Public Accountability |
| | John M. Weisenberger Assistant Attorney General Office of the Attorney General for General Services Agency Phone: 475-3324 Fax: 472-2493 | Pages: | 15 (including cover page) |
| | Claudia Acfalle Chief Procurement Officer General Services Agency Phone: 475-1707 Fax: 475-1727; 472-4217 | Date: | April 19, 2013 |
| | | Phone: | 475-0390 x. 215 |
| | | Fax: | 472-7951 |

Re: OPA-PA-13-001 Decision: Morrigo Equipment, LLC vs. General Services Agency

- Urgent
 For Review
 Please Comment
 Please Reply
 Please Recycle

Comments:

See attached for reference. Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
 Clariza Roque, Auditor
 croque@guamopa.org

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CQPM
Public Auditor

PROCUREMENT APPEALS

1
2
3
4
5
6 IN THE APPEAL OF,

) APPEAL NO: OPA-PA-13-001

7 MORRICO EQUIPMENT, L.L.C.

) DECISION

8 Appellant
9

10
11 I. INTRODUCTION

12 This is the Decision of the Public Auditor for appeal number OPA-PA-13-001 which was
13 filed by MORRICO EQUIPMENT, L.L.C. (Hereafter Referred to as "MORRICO") on January
14 31, 2013 regarding the GENERAL SERVICES AGENCY, GOVERNMENT OF GUAM'S
15 (Hereafter Referred to as "GSA") January 30, 2013 denial of MORRICO's January 23, 2013
16 protest concerning Multi-Step Bid No. GSA-005-13 (New and Current Year, Custom Cab-
17 Forward Pumpers, New and Current Year, Urban/Wildland Interface Pumpers, and 5-Year
18 Extended Service/Maintenance Agreements) (Hereafter referred to as "IFB"). The Public
19 Auditor holds that GSA: (1) Violated 2 G.A.R., Div. 4, Chap. 4, §4103(b)(1)(c) by including
20 two (2) costly and unnecessary inspection trips for two (2) GFD employees in the IFB
21 specifications; and (2) Violated 5 G.C.A. §5268(a) and 2 G.A.R., Div. 4, Chap. 4, §4109(a) and
22 §4103(b)(1)(c), and 5 G.C.A. §5010 by including a two-hundred-forty (240) day delivery time in
23 the IFB specifications that unduly restricted competition; and (3) Violated 5 G.C.A. §5201(g)
24 and 2 G.A.R., Div. 4, §3109(n)(2) and 2 G.A.R., Div. 4, Chap. 3, §3115(e)(3)(A) by finding
25 MORRICO and MID PAC's Unpriced Technical Offers unresponsive and rejecting them.
26 Accordingly, MORRICO's appeal is hereby SUSTAINED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties pursuant to GSA's March 13, 2013 Hearing Waiver and pursuant to MORRICO's March 14, 2013 Hearing Waiver. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. On or about November 16, 2012, GSA issued the IFB on behalf of the Guam Fire Department (GFD).
2. The IFB stated, in relevant part, that:
 - a. The IFB was an indefinite quantity bid pursuant to 2 G.A.R., Div. 4, Chap. 3, §3119(i)(2).¹
 - b. Delivery was two-hundred-forty (240) days upon receipt of the purchase order and that schedule time and quantity will be coordinated between the successful bidder and GFD on an as needed basis.²
 - c. Bidders who are awarded a contract under this solicitation guarantee that goods will be delivered or required services performed within the time specified and that failure to perform the contract in a satisfactory manner may be cause for suspension or debarment from doing business with the Government of Guam. In addition, the Government will hold the vendor liable and will enforce the Government's rights to liquidated damages.³
 - d. Bidders shall comply with all specifications and other requirements of the IFB.⁴
 - e. All supplies, materials, equipment, or services delivered under the IFB shall be subject to inspection and/or tests conducted by the Government at destination. If in any case the supplies, materials, equipment, or services are found to be defective in material, workmanship,

¹ Special Provisions, page 4, IFB, TAB 4, Procurement Record filed on February 11, 2013.

² Id.

³ Performance Guarantee, Paragraph 12, General Terms and Conditions, page 22, Id.

⁴ Compliance with Specifications and other Solicitation Requirements, Paragraph 6, Id.

1 performance, or otherwise do not conform with the specifications, the Government shall have the
2 right to reject the items or require that they be corrected and the number of days required for
3 correction will be determined by the Government.⁵

4 f. The contractor shall include in the bid/quote price, two (2) factory inspection
5 trips for two (2) representatives of GFD for the purpose of the pre-construction conferences for
6 the fire apparatus and final inspection before delivery of the unit(s). The conference will be held
7 after the contract has been signed so that all specifications, details, drawings, questions and
8 engineering work can be reviewed and approved by the department. This conference will be in
9 accordance with the build schedule of the manufacturer and will not in any way hold up the
10 construction of the unit. The conference will be held prior to the commencement of any work
11 being done on the chassis or the body. The respective persons will be in attendance at the
12 conference to authorize decision to be made on behalf of GFD. Trips shall be of such minimum
13 duration to allow for business at hand to be completed. This will also include all commercial
14 transportation, meals, and lodging that will be borne by the bidder. The pre-construction
15 conference shall be scheduled within thirty (30) calendar days after the award of contract.⁶

16 g. Bidders who are awarded contracts under the IFB guarantee that the goods will
17 be delivered to their destination or required services rendered within the time specified.⁷

18 h. It is understood and mutually agreed by and between the contractor and the
19 Government that the time for delivery to final destination or the timely performance of certain
20 services is an essential condition of this contract. If the contractor refuses or fails to perform any
21 of the provisions of this contract within the time specified in the Purchase Order (from the date
22 the Purchase Order is acknowledged by the contractor), then the contractor is in default.⁸

23 i. Award shall be made to the lowest responsible and responsive bidder, whose
24 bid is determined to be the most advantageous to the Government, taking into consideration the
25

26
27 ⁵ Inspection, General Terms and Conditions, Paragraph 27, page 23, Id.

28 ⁶ Factory Inspection Trips, Specifications, page 91, Id. Note: page 32 Factory
Inspection Trips notes "bidder" instead of "contractor".

⁷ Justification of Delay, General Terms and Conditions, Paragraph 39, page 24, Id.

⁸ Time for Completion, General Terms and Conditions, Paragraph 38, Id.

1 evaluation factors set forth in the IFB, and no other factors or criteria shall be used in the
2 evaluation.⁹

3 j. The contractor will deliver the completed apparatus within 240 calendar days
4 upon receipt of purchase order, with all equipment specified, to the current headquarters of the
5 Guam Fire Department on Guam. The contractor must submit a firm delivery time (number of
6 calendar days from date of order to date of delivery) of said apparatus with the Unpriced
7 Technical Offer. Quoting number of days after receipt of all components is unacceptable. A
8 deduction of per day will be made for each day over and above the stated delivery date. The
9 penalty shall apply if the unit is delivered and rejected, until the unit is returned meeting
10 specifications.¹⁰ The contractor shall be liable for damages for delay in the amount of one-fourth
11 of one percent (1%) of outstanding order per calendar day from date set for cure until either the
12 territory reasonably obtains similar supplies or services or the contractor provides the supplies or
13 services.¹¹

14 k. The manufacturing company or bidding contractor shall post and maintain a
15 website where GFD will be able to view digital images of their apparatus as it is being
16 manufactured. The digital images shall be posted once a week starting when the body begins
17 production or when the cab/chassis arrives and shall continue until the final completion of the
18 apparatus.¹²

19 l. A contract (Purchase Order) will be awarded, as soon as practical, after the
20 review and evaluation of Phase I of the Unpriced Technical Offers. The Unpriced Technical
21 Offers received shall be evaluated by the following criteria and order of importance:

- 22 (1) Contractor's overall conformance to specifications;
- 23 (2) Contractor's logistical and service support;
- 24 (3) Warranty provisions;
- 25 (4) Manufacturing and delivery schedule; and

26
27 ⁹ Award, Cancellation, & Rejection, General Terms and Conditions, Paragraph 22, page
23, Id.

28 ¹⁰ Delivery Terms, Specifications, page 32, Id. Note: page 91 Delivery Terms notes a
deadline of within 240 calendar days from the date of notice of award.

¹¹ Liquidated Damages, General Terms and Conditions, Paragraph 40, page 25, Id.

¹² Internet In-Process Site, Specifications, page 33, and Specifications, page 92, Id.

1 (5) Contractor's demonstrated capabilities and qualifications¹³

2 Based on the evaluation criteria, the contractor is eligible for a maximum of 100 points.¹⁴

3 m. In Phase I, bidders could score a maximum of twenty (20) points for the
4 Manufacturing and Delivery Schedule criteria. It includes a maximum of ten (10) points for the
5 manufacture and delivery timelines, a maximum of five (5) points for the acceptability of
6 transportation, shipping and delivery procedures, and a maximum of five (5) points for the
7 accessibility to manufacturing and transportation progress information.¹⁵

8 n. In Phase I, the bidders with a total of 80 – 100 points would be deemed
9 acceptable, the bidders with a total 60-79 points would be deemed potentially acceptable, and the
10 bidders with a total of 59 points and below would be deemed unacceptable.¹⁶

11 o. In Phase I, each of the bidders shall be evaluated on the five (5) evaluation
12 criteria previously stated and the bidder's sealed bid costs submitted with their Unpriced
13 Technical Offers would only be opened and considered after their Technical Offer had been
14 evaluated and determined by GFD to be acceptable in the first phase pursuant to 2 G.A.R. Div. 4,
15 Chap., 3, §3109(t).¹⁷

16 p. The bidders were required to submit their technical offers no later than
17 December 3, 2012 at 10:00 a.m.¹⁸

18 3. On or about November 30, 2012, GSA issued Amendment No. 1 for the IFB changing
19 the bid opening date from December 3, 2012 at 10:00 a.m. to December 14, 2012 at 10:00 a.m.¹⁹

20 4. On or about December 5, 2012, GSA answered MORRICO's written questions
21 concerning the IFB. MORRICO asked if the IFB's two-hundred-forty (240) day delivery date
22 was a delivery date to Guam and if so, requested that it be extended to 360 days. GSA stated
23

24
25 ¹³ Award of Contract, Specifications, page 31, and Specifications, page 90, IFB.

26 ¹⁴ Phase I, Technical Bid Evaluation Criteria, page 116, Id.

27 ¹⁵ Id.

28 ¹⁶ Id.

¹⁷ Id.

¹⁸ Multi-Step Sealed Bid, page 3, Id. NOTE: The IFB uses the Term "Technical Bid," however, pursuant to 2 G.A.R., Div. 4, Chap. 3, §3109(r)(1), the correct term is "Unpriced Technical Offer," and that is the term the OPA will use throughout this Decision.

¹⁹ Amendment No. 1, dated November 30, 2012, Tab 6, Id.

1 that, based on other vendors, these trucks can be delivered within the two-hundred-forty (240)
2 day time period for delivery specified by the IFB, and denied the request for extension.²⁰

3 5. On or about December 14, 2012, GSA received Unpriced Technical Offers from FAR
4 EAST EQUIPMENT (Hereafter Referred to as "FAR EAST"), MID PAC FAR EAST (Hereafter
5 Referred to as "MID PAC"), and MORRICO.²¹

6 6. On or about January 23, 2013, GSA issued a notice to FAR EAST advising it that
7 their Unpriced Technical Offer was deemed acceptable and invited FAR EAST to participate in
8 Phase II of the Multi-Step Bid on January 24, 2013.²²

9 7. That same day, GSA issued notices to MORRICO and MID PAC advising them that
10 their Unpriced Technical Offers were rejected due to non-conformance with the IFB's two-
11 hundred-forty (240) day delivery requirement.²³

12 8. MORRICO received the aforementioned notice on January 23, 2013.²⁴

13 9. On January 23, 2013, the same day it received the aforementioned notice that its
14 Unpriced Technical Offer was rejected, MORRICO filed a protest with GSA alleging that GSA
15 failed to correctly follow the Technical Analysis procedure of the Multi-Step Bid Process by
16 rejecting MORRICO's Unpriced Technical Offer instead of awarding less points for a delivery
17 period longer than two-hundred-forty (240) days as set forth in the IFB.²⁵

18 10. On January 30, 2013, GSA denied MORRICO's January 23, 2013 protest, stating
19 that MORRICO's Unpriced Technical Offer was rejected solely because it did not conform to the
20 IFB's two-hundred-forty (240) day delivery requirement, that GSA could not waive this non-
21 conformity as a minor informality, and that GSA's evaluation committee did not score
22 MORRICO's Unpriced Technical Offer after it was rejected.²⁶

23
24
25 ²⁰ GSA Response to Questions Submitted by MORRICO, November 23, 2012, Tab 7, Id.

²¹ Abstract of Bids - Multi-Step-Bid, Tab 5, Id.

²² Letter dated January 23, 2013 from Claudia S. Acfalle, GSA Chief Procurement
26 Officer, to FAR EAST, Tab 8, Id.

²³ Letters dated January 23, 2013 from Claudia S. Acfalle, GSA Chief Procurement
27 Officer, to MORRICO and MID PAC, respectively, Id.

²⁴ Acknowledgement Copy, Letter dated January 23, 2013 from Claudia S. Acfalle, GSA
28 Chief Procurement Officer, to MORRICO, Id.

²⁵ MORRICO'S Protest dated January 23, 2013, Tab 1, Id.

²⁶ GSA's January 30, 2013 Decision denying MORRICO'S January 23, 2013 Protest, Tab 2,
Id.

1 11. On January 31, 2013, only one (1) day after GSA issued its decision denying
2 MORRICO's January 23, 2013 Protest, MORRICO filed this appeal.

3 4 III. ANALYSIS

5 Pursuant to 5 G.C.A. §5703, the Public Auditor shall review GSA's January 30, 2013
6 Decision denying MORRICO's January 23, 2013 protest *de novo*. As a preliminary matter, the
7 Public Auditor must review the IFB's specifications which include the two-hundred-forty (240)
8 delivery requirement.

9 10 A. The IFB's Specifications Include Invalid Contract Terms and Restrict Competition.

11 The IFB contains unreasonable inspection and delivery specifications. Generally,
12 specifications shall not include requirements which unnecessarily restrict competition and shall
13 include only the essential physical characteristics and functions required to meet the Government
14 of Guam's minimum needs. 5 G.C.A. §5268(a) and 2 G.A.R., Div. 4, Chap. 4, §4109(a).
15 Further, to the extent feasible, a specification must not include any solicitation or contract term
16 or condition, such as a requirement for time and place of bid opening, time of delivery, payment,
17 liquidated damages, or qualification of bidders. 2 G.A.R., Div. 4, Chap. 4, §4103(b)(1)(c).
18 Here, as stated above, the IFB's specifications included, in relevant part, the requirement for two
19 (2) factory inspection trips for two (2) GFD employees with the contractor awarded the IFB
20 paying for their airfare, commercial transportation, meals, and lodging expenses. The Public
21 Auditor finds that these trips do not concern the essential physical characteristics and functions
22 required to meet the Government of Guam's minimum needs. Generally, inspection
23 requirements are usually contract terms. However, the IFB should not be amended to include the
24 IFB's inspection requirements as contract terms because the IFB's aforementioned inspection
25 trips are unreasonably extravagant, unnecessary, and difficult to justify as valid contract terms.
26 As stated above, the IFB also required the contractor awarded the bid to post and maintain a
27 website where GFD can view digital images of the fire trucks being manufactured and these
28 images would be posted weekly from the start to the finish of their assembly. Additionally, as
stated above, GFD retained the right to reject the fire trucks if they were defective and the right

1 to require the contractor awarded the IFB to repair any defective workmanship. Thus, the Public
2 Auditor finds that the IFBs two (2) trips for two (2) GFD employees are invalid specifications
3 and an unnecessary extra cost.

4 The two-hundred-forty (240) day delivery specification is equally invalid. As stated
5 above, specifications must not unduly restrict competition and must not contain delivery times.
6 5 G.C.A. §5268(a), 2 G.A.R., Div. 4, Chap. 4, §4109(a) and §4103(b)(1)(c). This specification
7 does both. As stated above, only one (1) out of the three (3) bidders who submitted Unpriced
8 Technical Offers could comply with the IFB's two-hundred-forty (240) day delivery
9 specification. Based on these results, the Public Auditor finds that the delivery specification is
10 unrealistic and unduly restricts competition. Although delivery times are usually contract terms,
11 the IFB should be amended to exclude the two-hundred-forty (240) day delivery time as a
12 contract term. GSA and GFD should have considered the reasonable time it would take to
13 custom build the fire trucks to the IFB's technical specifications when they issued the IFB. All
14 procurement of supplies and services shall, where possible, be made sufficiently in advance of
15 need for delivery or performance to promote maximum competition and good management of
16 resources and the publication of bids and requests for proposals shall not be manipulated so as to
17 place potential bidders at unnecessary competitive disadvantage. 5 G.C.A. §5010. Hence, the
18 two-hundred-forty (240) day delivery time could be the result of issuing the IFB too late to
19 receive the fire trucks when needed, or it could be a deliberate attempt to manipulate the
20 solicitation to award the contract to a preferred bidder. The Public Auditor finds that the IFB's
21 specification for a two-hundred-forty (240) day delivery time is invalid because it violates
22 5 G.C.A. §5268(a) and 2 G.A.R., Div. 4, Chap. 4, §4109(a) and §4103(b)(1)(c), and 5 G.C.A.
23 §5010. The Public Auditor will now review whether GSA correctly followed the Multi-Step
24 Sealed Bidding Process during the IFB solicitation.

25
26 **B. GSA did not Properly Follow the Multi-Step Sealed Bidding Process.**

27 GSA did not correctly follow the Multi-Step Sealed Bidding Procedure. As stated above,
28 the IFB was a Multi-Step Bid. Multi-Step Sealed Bidding is a two (2) phase process consisting
of a technical first phase in which bidders submit an Unpriced Technical Offer to be evaluated by

1 the purchasing agency, and a second phase in which those bidders whose technical offers were
2 determined to be acceptable in the first phase have their priced bids considered. 2 G.A.R., Div.
3 4, Chap. 3, §3109(r)(1). One of the main benefits of this process is the solicitation of Unpriced
4 Technical Offers and the discussions between the bidders and the purchasing agency to
5 determine the acceptability of the Unpriced Technical Offers. 2 G.A.R., Div. 4, Chap. 3,
6 §3109(r)(1). The Multi-Step Bid process is used when the purchasing agency finds it desirable
7 to conduct these discussions to facilitate understanding of the Unpriced Technical Offers and the
8 purchase description requirements, and, where appropriate, to obtain supplemental information,
9 permit amendment of the Unpriced Technical Offers, or amend the purchase descriptions.
10 2 G.A.R., Div. 4, Chap. 3, §3109(r)(2)(b). Hence, this procedure has two (2) advantages over
11 regular Competitive Sealed Bidding. First, the communication between the purchasing agency
12 and the bidder should result in enhanced, mutual understanding of the purchasing agency's
13 requirements and the bidder's offer. The second advantage is the procedure's flexibility because
14 it allows the bidders to amend their Unpriced Technical Offers to fully meet the purchasing
15 agency's needs and it allows the purchasing agency to amend the IFB after these discussions to
16 ensure the bidders can meet the purchasing agency's requirements. The Multi-Step Sealed
17 Bidding Process, if followed correctly, ensures the purchasing agency gets these benefits. Phase
18 I of the procedure requires that the Unpriced Technical Offers submitted by the bidders be
19 evaluated solely in accordance with the criteria set forth in the invitation for bids, and be
20 categorized as acceptable, potentially acceptable, that is reasonably susceptible of being made
21 acceptable, and unacceptable. 2 G.A.R., Div. 4, Chap. 3, §3109(t)(4). The procurement officer
22 may conduct discussions with any bidder who submits an acceptable or potentially acceptable
23 Unpriced Technical Offer, and once discussions are begun, any bidder who has not been notified
24 that its offer was found unacceptable may submit supplemental information amending its
25 Unpriced Technical Offer at any time until the closing date established by the procurement
26 officer and such submissions may be made at the request of the procurement officer or upon the
27 bidder's own initiative. 2 G.A.R., Div. 4, Chap. 3, §3109(t)(5). The procurement officer may
28 initiate Phase II of the procedure, if in the procurement officer's opinion, there are sufficient
acceptable Unpriced Technical Offers to assure effective price competition in the second phase

1 without technical discussion and if the procurement officer finds that such is not the case, the
2 procurement officer shall issue an amendment to the IFB or engage in technical discussions. 2
3 G.A.R., Div. 4, Chap. 3, §3109(t)(4). Thus, the Multi-Step Sealed Bidding Process gives the
4 purchasing agency two (2) opportunities to conduct these valuable discussions with bidders
5 during Phase I. The first opportunity, which is at the discretion of the purchasing agency, occurs
6 after the bidders submit their Unpriced Technical Offers. The second opportunity is mandatory
7 and occurs if there are insufficient acceptable Unpriced Technical Offers to assure effective price
8 competition in Phase II and the purchasing agency does not amend the bid. The later scenario is
9 exactly what occurred here.

10 As stated above, GSA only received three (3) Unpriced Technical Offers. GSA did not
11 conduct the voluntary technical discussions with the bidders. Further, GSA only found the
12 Unpriced Technical Offer, from FAR EAST, acceptable. Also, GSA did not amend the IFB after
13 it received the Unpriced Technical Offers. Thus, the provisions of 2 G.A.R., Div. 4, Chap. 3,
14 §3109(t)(4) applied and GSA was mandated to conduct technical discussions. However, instead
15 of conducting these discussions, or amending the bid, GSA chose to reject the Unpriced
16 Technical Offers from MORRICO and MID PAC and proceed to Phase II of the Multi-Step
17 Sealed Bidding Process with only one (1) Unpriced Technical Offer. The Public Auditor finds
18 that GSA violated 2 G.A.R., Div. 4, Chap. 3, §3109(t)(4) by doing so.

19 GSA argues that it followed the Multi-Step Sealed Bidding Process because it only
20 received one (1) responsive Unpriced Technical Offer.²⁷ As stated above, the purchasing agency
21 must evaluate Unpriced Technical Offers using only the criteria set forth in the invitation for
22 bids. 2 G.A.R., Div. 4, Chap. 3, §3109(t)(4). GSA rejected MORRICO and MID PAC's
23 Unpriced Technical Offers solely because they did not comply with the IFB's two-hundred-forty
24 (240) day delivery requirement and GSA believes this makes them unresponsive.²⁸ The IFB's
25 plain language does not support this argument. After reviewing the entire IFB and IFB
26 Amendment No. 1, the Public Auditor finds that it does not contain any language stating that the
27 failure of a bidder to submit an Unpriced Technical Offer strictly complying with the two-

28
²⁷ Page 2, GSA's Agency Report filed on February 14, 2013.

²⁸ Id.

1 hundred-forty (240) day delivery requirement would result in an automatic rejection of the
2 Unpriced Technical Offer. Further, Guam Procurement Law and Regulations do not support
3 GSA's argument that it could find an Unpriced Technical Offer to be unresponsive. A
4 responsive bidder is generally defined as a bidder who submits a **bid** which conforms in all
5 material respects to the IFB (Bold Emphasis Added). 5 G.C.A. §5201(g) and 2 G.A.R., Div. 4,
6 §3109(n)(2). The term "bid", for the purposes of determining responsiveness, only applies to the
7 bid submitted in the second phase of the Multi-Step Sealed Bidding Process. 2 G.A.R., Div. 4,
8 Chap. 3, §3115(e)(3)(A). Further, a bid submitted in the second phase of the Multi-Step Sealed
9 Bidding Process can be rejected if it is non-responsive, that is, it does not conform in all material
10 respects to the invitation for bids. 2 G.A.R., Div. 4, Chap. 3, §3115(e)(3)(A)(ii). Thus, the
11 Public Auditor finds no merit in GSA's argument that it received only one (1) responsive
12 Unpriced Technical Offer and no merit in GSA's argument that it properly rejected MORRICO
13 and MID PAC's Unpriced Technical Offers.

14
15 **C. GSA must Amend the IFB to comply with Guam Procurement Law & Regulations.**

16 The Public Auditor finds that GSA must revise its solicitation to comply with Guam
17 Procurement Law and Regulations. If prior to award it is determined that a solicitation or
18 proposed award of a contract is in violation of law, then the solicitation or proposed award shall
19 be cancelled or revised to comply with the law. 5 G.C.A. §5451. As stated above, GSA violated
20 2 G.A.R., Div. 4, Chap. 4, §4103(b)(1)(c) by including two (2) unnecessary inspection trips for
21 two (2) GFD employees in the IFB specifications. GSA also violated 5 G.C.A. §5268(a) and 2
22 G.A.R., Div. 4, Chap. 4, §4109(a) and §4103(b)(1)(c), and 5 G.C.A. §5010 by including a two-
23 hundred-forty (240) day delivery time in the IFB specifications. GSA violated 2 G.A.R., Div. 4,
24 Chap. 3, §3109(t)(4) by proceeding to Phase II of the Multi-Step Sealed Bidding Process with
25 only one (1) Unpriced Technical Offer. Finally, GSA violated 5 G.C.A. §5201(g) and 2 G.A.R.,
26 Div. 4, §3109(n)(2) and 2 G.A.R., Div. 4, Chap. 3, §3115(e)(3)(A) by finding MORRICO and
27 MID PAC's Unpriced Technical Offers unresponsive and rejecting them. As these violations of
28 law occurred prior to award, GSA shall amend the IFB's specifications by deleting all

1 requirements which unnecessarily restrict competition, especially the two-hundred-forty-day
2 delivery requirement, and by deleting all solicitation or contract terms or conditions, such as a
3 requirement for time and place of bid opening, time of delivery or payment, liquidated damages,
4 or qualification of bidders, including the requirement for two (2) inspection trips paid for by the
5 contractor for two (2) GFD employees, and GSA shall ensure that only the essential physical
6 characteristics and functions required to meet the Government of Guam's minimum needs are
7 contained in the specifications. After the aforementioned amendment is issued, GSA shall
8 permit the bidders who submitted Unpriced Technical Offers to submit new Unpriced Technical
9 Offers or amend those they submitted in accordance 2 G.A.R., Div. 4, Chap. 3, §3109(t)(2).

11 IV. CONCLUSION

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

- 13 1. GSA violated 2 G.A.R., Div. 4, Chap. 4, §4103(b)(1)(c) by including two (2)
14 unnecessary inspection trips for two (2) GFD employees in the IFB specifications.
- 15 2. GSA also violated 5 G.C.A. §5268(a) and 2 G.A.R., Div. 4, Chap. 4, §4109(a) and
16 §4103(b)(1)(c), and 5 G.C.A. §5010 by including a two-hundred-forty (240) day delivery time in
17 the IFB specifications that unduly restricted competition.
- 18 3. GSA violated 5 G.C.A. §5201(g) and 2 G.A.R., Div. 4, §3109(n)(2) and 2 G.A.R.,
19 Div. 4, Chap. 3, §3115(e)(3)(A) by finding MORRICO and MID PAC's Unpriced Technical
20 Offers unresponsive and rejecting them.
- 21 4. MORRICO's Appeal is hereby SUSTAINED.
- 22 5. GSA's January 23, 2013 notice to FAR EAST that GSA would proceed to Phase II,
23 and GSA's notices to MORRICO and MID PAC advising them their Unpriced Technical Offers
24 were rejected due to non-conformance with the IFB's two-hundred-forty (240) day delivery
25 requirement are hereby deemed null and void *ab initio* and shall no longer have any force or
26 effect.
- 27 6. No later than thirty (30) days after this Decision is issued, GSA shall issue an
28 Amendment to the IFB, the IFB's specifications by deleting all requirements which

1 unnecessarily restrict competition, especially the two-hundred-forty-day delivery requirement,
 2 and by deleting all solicitation or contract terms or conditions, such as a requirement for time and
 3 place of bid opening, time of delivery or payment, liquidated damages, or qualification of
 4 bidders, including the requirement for two (2) inspection trips paid for by the contractor for two
 5 (2) GFD employees, and GSA shall ensure that only the essential physical characteristics and
 6 functions required to meet the Government of Guam's minimum needs are contained in the
 7 specifications. After the aforementioned amendment is issued, GSA shall give the bidders who
 8 submitted Unpriced Technical Offers a minimum of thirty (30) days to submit new Unpriced
 9 Technical Offers or amend those they submitted in accordance 2 G.A.R., Div. 4, Chap. 3,
 10 §3109(t)(2). Thence GSA shall proceed with the solicitation in accordance with Guam's
 11 Procurement Law and Regulations.

12 7. The Public Auditor finds that MORRICO is not entitled to its reasonable costs
 13 incurred in connection with the solicitation and MORRICO's protest, excluding attorney's fees,
 14 pursuant to 5 G.C.A. §5425(h), because it has not been determined whether MORRICO should
 15 have been awarded the contract or whether there was a reasonable likelihood that MORRICO
 16 may have been awarded the contract because three (3) bidders submitted Unpriced Technical
 17 Offers and GSA did not score MORRICO's Unpriced Technical Offer to determine whether it
 18 was acceptable, potentially acceptable, or unacceptable in accordance with 2 G.A.R., Div. 4,
 19 Chap. 3, §3109(t)(4).

20 This is a Final Administrative Decision. The Parties are hereby informed of their right to
 21 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
 22 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
 23 Decision. 5 G.C.A. §5481(a).

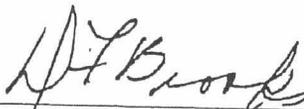
24 A copy of this Decision shall be provided to the parties and their respective attorneys, in

25 ///

27 ///

1 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
2 www.guamopa.org.

3
4 **DATED** this 19th day of April, 2013.
5

6
7
8 

9
10

DORIS FLORES BROOKS, CPA, CGFM
11 PUBLIC AUDITOR
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT

“E”

Territorial Law Library

IN THE SUPERIOR COURT OF GUAM

FILED
SUPERIOR COURT
OF GUAM
NOV 24 PM 1:17
CLERK OF COURT

| | | |
|---|----------------------------------|--------------------------------|
| 1 | | |
| 2 | | |
| 3 | TRC ENVIRONMENTAL CORPORATION,) | SPECIAL PROCEEDINGS CASE NO. |
| 4 | |) SP160-07 |
| 5 |) Petitioner,) | |
| 6 |) vs.) | |
| 7 | OFFICE OF THE PUBLIC AUDITOR,) | DECISION AND ORDER ON PETITION |
| 8 | |) FOR WRIT OF MANDATE |
| 9 |) Respondent.) | |

10 This matter came before the Honorable Alberto C. Lamorena III on February 1, 2008, on
11 TRC Environmental Corporation’s Petition for Writ of Mandate. Appearing on behalf of
12 Petitioner TRC Environmental Corporation (hereinafter “TRC”) and Guam Power Authority
13 (hereinafter “GPA”) were Attorneys James M. Maher and Anthony R. Camacho, respectively.
14 Appearing on behalf of Respondent Office of the Public Auditor (hereinafter “OPA”) and
15 Emissions Technologies, Inc. (hereinafter “ETI”) were Attorneys Robert G. P. Cruz and Kevin J.
16 Fowler, respectively. After reading the briefs and upon hearing the arguments, the Court took
17 the matter under advisement. The Court now issues its Decision and Order.

FACTUAL HISTORY

18 Among others, ETI and TRC submitted proposals in response to GPA’s October 17, 2006
19 Request for Proposal (“RFP”) to operate and maintain emissions systems. On January 22, 2007,
20 GPA informed ETI that TRC had the best offer. ETI protested this via a January 30, 2007 letter,
21 citing ETI’s history of experience with GPA in performing the precise work called for by the
22 RFP. The resulting January 31st, 2007 GPA stay of procurement ended when GPA sent its
23 March 28, 2007 fax to all interested parties, informing them of its March 26, 2007 denial of
24 ETI’s protest in which it also informed ETI that it had a right to seek administrative or judicial
25 review. ETI responded to GPA with an April 6, 2007 “Letter of Protest” in which it asked for
26 administrative review, alleged bias toward ETI, and requested confirmation that TRC was
27 licensed to practice business on Guam. On April 10, 2007, GPA stayed proceedings again, but
28 lifted the stay on April 13, 2007 in a faxed denial letter to ETI in which it explained how it

1 interpreted the April 6, 2007 letter as an appeal, which fell under the jurisdiction of the OPA
2 rather than GPA. ETI then filed a formal appeal with OPA on April 20, 2007 based on TRC's
3 alleged lack of business license, and submitted an Amended Notice of Appeal on May 1, 2007.
4 GPA's May 4, 2007 Agency Report stated that the RFP did not require offerors to obtain a
5 business license prior to submitting a proposal. A July 6, 2007 hearing was held before the
6 Public Auditor Hearing Officer Therese M. Terlaje, at which point TRC's application for a
7 Guam Business License was pending with the Department of Revenue and Taxation. Public
8 Auditor Doris Flores Brooks, in her August 1, 2007 Decision, found jurisdiction over the matter
9 and ordered that TRC be eliminated from consideration for procurement based upon its lack of a
10 Guam business license.

11 TRC then filed the instant Petition for Writ of Mandate on August 22, 2007. On August
12 23, 2007, the court signed an Alternative Writ, ordering OPA to show cause as to why it should
13 not vacate its decision and reinstate TRC into the consideration process. OPA complied with this
14 order by submitting its Show of Cause for Noncompliance on October 10, 2007. GPA Joined in
15 TRC's Petition for Writ of Mandate on October 11, 2007. On October 25, 2007, ETI filed both
16 an Answer and a Response to the Petition. TRC Supplemented the Certification of Record, and
17 Replied to the OPA's Show of Cause and to ETI's Opposition on December 11, 2007. The
18 Court now addresses the Petition for Writ of Mandate.

19 20 DISCUSSION

21 The issues before this Court are Petitioner's standing to file a writ of mandate, ETI's
22 timeliness in filing an appeal before the Office of the Public Auditor, and the exact point at
23 which a bidder is 'considered' by GPA for an award. Petitioner TRC has brought the instant
24 Petition for Writ of Mandate in an attempt to challenge the OPA's recent exercise of its
25 jurisdiction and thus reinstate itself into the GPA consideration process. Respondent asks that
26 the Court deny the proposed writ. Both parties ask for costs. While an administrative agency
27 has discretion in how it proceeds, this discretion is not unfettered. *Skelly v. State Personnel Bd.*,
28 15 Cal. App. 3d 194 (1975). A writ may issue by any court to any inferior tribunal to compel the

1 performance of an act which the law specifically enjoins as a duty resulting from an office, trust,
2 or station, or to compel the admission of a party to the use and enjoyment of a right to which he
3 is entitled and from which he is unlawfully precluded by such inferior tribunal. 7 G.C.A. §
4 31202. A writ may issue when, “there is not a plain, speedy, adequate remedy in the course of
5 law.” 7 G.C.A. § 31203. Mandamus lies to compel an agency to comply with its rules.
6 *Stationary Eng’rs Local 39 v. County of Sacramento*, 59 Cal. App. 4th 1177 (Cal. App. 3 Dist.
7 1977); *California Correctional Peace Officers Ass’n v. State Personnel Bd.*, 899 P.2d 79 (Cal.
8 1995); *Hardin Oldsmobile v. New Motor Vehicle Bd.*, 60 Cal. Rptr. 2d 583 (Cal. App. 3 Dist.
9 1997).

11 I. Standing

12
13 Standing for filing a writ of mandate requires that the petitioner be a beneficially
14 interested party. 7 G.C.A. § 34203; *City of Garden Grove v. Superior Court*, 157 Cal.App.4th
15 355, 366 (Cal.App. 4 Dist. 2007). This does not mean that petitioner must be a party to the
16 litigation, but it does mean that petitioner must obtain some benefit from the issuance of the writ,
17 or suffer some detriment from its denial; he must have a special interest to be served or a
18 particular right to be protected over and above the interest held in common with the public at
19 large. *Cruz v. Guam Election Commission*, 2001 Guam 26, ¶ 24; *Monterey Club v. Superior*
20 *Court*, 119 P.2d 349 (D. Cal. 1941); *Emid v. County of Santa Barbara*, 107 Cal.Rptr.2d 6, 10
21 (Cal. Ct. App. 2001). The interest that the petitioner seeks to advance must also be within the
22 zone of interests to be protected or regulated by the legal duty asserted. *Waste Management v.*
23 *County of Alameda*, 94 Cal.Rptr.2d 740, 747 (Cal.App.3 Dist. 2000). Economic injuries alone
24 are often recognized as sufficient to provide for judicial review. *Sierra Club v. Morton*, 92 S.Ct.
25 1361, 1365 (1972).

26 TRC asserts its standing to file the instant writ by calling notice to the irreparable harm
27 the OPA’s decision has caused by precluding TRC’s proposal from consideration. TRC reasons
28 that ordering OPA to vacate its Findings and Recommendations and reinstating TRC for

1 consideration would restore a professional benefit and reputation not shared by the public at
2 large. So far, Petitioner's logic has no defect.

3 ETI states that, although under 5 G.C.A. § 5707, a person "may appeal from a *decision*
4 by the Public Auditor to the Superior Court of Guam," TRC only appealed from the OPA
5 Hearing Officer's *Findings and Recommendations*, rather than from the actual Aug. 1, 2007
6 OPA *Decision*, and thus there is nothing to review. ETI adds that TRC has no standing to appeal
7 because TRC did not intervene when the matter was before the OPA, nor did TRC appear before
8 the OPA in this matter. ETI's basis for this argument is in *Katenkamp v. Dep't of Finance*, 9
9 Cal.App.2d 343 (Cal. Ct. App. 1935), which states that one must be a party in order to appeal,
10 and 5 G.C.A. §§ 9240 and 9104, which respectively state that "judicial review may be had of any
11 agency decision by any party affected adversely by it", and "a party includes the agency, the
12 respondent, and any person other than an officer or an employee of the agency in his official
13 capacity who has been allowed to appear in the proceeding".

14 TRC counter-argues that both of these arguments by ETI lack merit because they are
15 founded on the premise that TRC *appealed*- which is entirely different from what TRC is
16 actually doing, which is filing for a writ of mandate- a separate civil action falling under separate
17 procedural rules, including G.R.C.P. 15. TRC adds that since the Hearing Officer's Findings
18 mirror and are incorporated into the Decision, there would be no surprise by granting a petition
19 to amend this blunder in word choice.

20 There is little need to belabor the issue of standing because GPA, a party pursuant to
21 Sections 9240 and 9104, who did appear before the OPA on this matter, joined in the instant
22 petition for writ of mandate on October 11, 2007- thus curing any defect of standing because
23 GPA would be treated as if it had originally brought the petition. *Bridget A. v. Superior Court*,
24 148 Cal.App.4th 285 (Cal. App. 2 Dist. 2007); *MC Asset Recovery, LLC v. Castex Energy, Inc.*,
25 2008 WL 2940602 (N.D. Tex. 2008). Nevertheless, to find a lack of standing for the reason
26 proposed by ETI would prove inconsequential because such a noticeable lack of prejudice would
27 support the freely-given leave to amend suggested by *Foman v. Davis*, 371 U.S. 178 (1962).
28

1 Moreover, TRC clearly appeals OPA's decision to assume jurisdiction, regardless of whether
2 TRC states the actual word 'decision' in its Petition.

3 4 **II. Timeliness**

5
6 The jurisdiction of the Office of the Public Auditor is limited to "matter[s] properly
7 submitted to her." 5 G.C.A. § 5703; 2 G.A.R. §12103. Title 5 of the Guam Code Annotated,
8 Section 5425(e) states that an appeal of a protest denial must be filed with the Office of the
9 Public Auditor within fifteen (15) days after receipt of the denial. TRC argues that OPA went
10 beyond its jurisdiction because ETI's April 20, 2007 appeal from GPA's March 26, 2007 denial
11 of the first protest was untimely because in order to comply with § 5425(e), ETI would have had
12 to file the protest by April 11¹, 2007. ETI combats this timeliness argument in two ways: first by
13 supporting the OPA's interpretation of the April 6th letter as an appeal, and second by arguing
14 that a tolling occurred.

15 ETI received an April 12, 2007 letter from OPA acknowledging that OPA had received
16 the April 6, 2007 letter from ETI to GPA, and that OPA believed that the letter was intended as a
17 procurement appeal, but wanted confirmation of ETI's desires. The OPA further advised that
18 "ETI must submit to OPA a formal appeal in the format specified by the Rules of Procedure for
19 Procurement Appeals within fifteen (15) days...." ETI then wrote to OPA on April 19, 2007,
20 explaining the basis of the appeal, and formally filed its appeal on Apr. 20, 2007.

21 Despite the appearance of ETI's April 19, 2007 letter as a confirmation of ETI's April 6th
22 intent to appeal, the OPA could not have properly interpreted this April 6th letter as an appeal
23 because the OPA articulated exactly how to confirm ETI's desires: by "submit[ting] to OPA a
24 formal appeal in the format specified by the Rules of Procedure for Procurement Appeals within
25 fifteen (15) days." This April 19, 2007 letter falls short of such description. In its April 12, 2007
26 letter, the OPA did not state that it would accept the April 19, 2007 letter, or any similar

27
28 ¹ April 11, 2007: 15 days after Mar. 26, 2007 is actually Apr. 10, 2007. So ETI would have had to file the appeal by
the end of Apr. 10, 2007.

1 notification, in lieu of a proper and formal appeal, nor did OPA or ETI bring to light any
2 statutory or case law authority warranting such interpretation of a letter. In the absence of
3 contrary authority, 5 G.C.A. § 5425(e) is interpreted strictly.

4 ETI maintains that its letter to GPA on April 6, 2007, stating that “this will now serve as
5 ETI’s official request for an administrative review of this award,” was a request for
6 reconsideration, rather than a second protest. TRC argues that since the letter did not meet the
7 requirements of 2 G.A.R. § 9101(h)(1), and was labeled “Letter of Protest”, it was *not* a request
8 for reconsideration and thus no tolling occurred. Section 9101(h)(1) states that “[t]he request for
9 reconsideration shall contain a detailed statement of factual and legal grounds upon which
10 reversal or modification is deemed warranted.” Akin to the standing analysis above in which
11 TRC’s failure to use the word “Decision” was non-dispositive, ETI’s failure to use the word
12 “Reconsideration” is equally non-dispositive in light of its adequate outline of the basis for
13 modification. On April 10, 2007, GPA wrote to ETI stating that “the department has executed a
14 stay of procurement on the above subject Request for Proposal as a result of your company’s
15 letter dated April 06, 2007, until such time the concerns are resolved. We are currently
16 reviewing the Request for Proposals submitted and will formally advise the outcome.” ETI
17 argues that GPA’s making such a statement, and then claiming, one day after ETI had missed the
18 15-day appeal deadline, that it had no jurisdiction to consider the April 6, 2007 letter’s issues,
19 constituted sufficient trickery to warrant a tolling of the 15-day limitations period.

20 Limitations periods can be tolled on an equitable basis, especially if the government has
21 engaged in trickery. *Young v. United States*, 535 U.S. 43, 50 (U.S. 2002). This Court finds no
22 trickery, however, in GPA’s actions. GPA did advise of the outcome as it stated it would. The
23 stay which resulted from ETI’s April 6, 2007 request for reconsideration was lifted as evidenced
24 by GPA’s April 13, 2007 protest denial letter sent to all interested parties- putting ETI on notice
25 of its renewed duty to abide by 5 G.C.A. 5425(e). At that point, ETI did not need a reminder of
26 § 5425(e) still being in effect because ETI had received, a day earlier, a letter from OPA
27 containing similar cautionary language regarding the impending § 5425(e) deadline. Further,
28 this Court agrees with TRC that a tolling of the limitations period would be futile because the

1 nine (9) days before the stay (March 28 – April 6) would still be counted toward the fifteen (15),
2 and so when the nine (9) are combined with the six (6) remaining post-stay days (April 13 –
3 April 19), that would put the new filing deadline at April 19, 2007. Thus, even with a tolling,
4 ETI’s April 20, 2007 filing of appeal with the OPA was untimely.

5 Respondent OPA supports ETI by reminding the Court that the OPA has the power to
6 review and determine *de novo* any matter properly-submitted to her or him, and that absent a
7 finding of being arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law, any
8 decision of the Public Auditor regarding the interpretation of the procurement law or regulations
9 shall be entitled to great weight and the benefit of reasonable doubt. 2 G.A.R. § 12103. In this,
10 OPA fails to assist ETI because the operative term is “properly-submitted”, and by being
11 untimely, as explained above, ETI’s appeal was not ‘properly-submitted’. For the same reason,
12 ETI’s filing was ‘contrary to law’ and thus falls below the § 5704 standard.

13 14 **III. Illegality**

15
16 ETI contends that the Court may not grant the writ because mandamus cannot compel an
17 illegal act or an act contrary to public policy. *Cook v. Noble*, 181 Cal. 720 (Cal. 1919). In
18 support of this contention, ETI cites 5 G.C.A. § 5008 (Procurements must be made from
19 companies licensed to conduct business on Guam), and pages 24, 31, and 35 of the RFP
20 (“Business License and additional requirements must be submitted at the time of RFP Closing”;
21 “It is the policy of the Guam Power Authority to award proposals to offerors duly authorized and
22 licensed to conduct business on Guam”; “[GPA will] not consider for award any offer submitted
23 by an offeror who has not complied with the Guam Licensing Law”).

24 GPA counteracts by clarifying that there are three (3) steps to the procurement process: 1.
25 Proposal (at which point the bidder is *not* required to have a Guam Business License), 2. Price
26 Solicitation, Negotiation, and Agreement, and 3. Award of the Order. TRC adds that despite its
27 being the most qualified at the time of ETI’s protest, it had not been ‘considered’ because the
28 intermediate step of price solicitation, negotiation, and agreement had yet to be completed.

1 Under the aforementioned 'arbitrary and capricious' standard, a procurement decision
2 can be set aside if it lacked rational basis or if the agency's decision-making involved a violation
3 of regulation or procedure. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238
4 F.3d 1324, 1332 (Fed. Cir. 2001); *The Ravens Group, Inc. v. United States*, 79 Fed. Cl. 100, 112
5 (Fed. Cl. 2007). However, *de minimus* errors in the procurement process do not justify relief.
6 *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 1000 (Fed. Cir. 1996). Rather, the protesting
7 bidder must prove that a significant error marred the procurement in question. *L-3 Global*
8 *Communications Solutions, Inc. v. United States*, 2008 WL 3852149 (Fed. Cl. 2008). "If the
9 court finds a reasonable basis for the agency's action, the court should stay its hand even though
10 it might, as an original proposition, have reached a different conclusion as to the proper
11 administration and application of the procurement regulations." *Honeywell, Inc. v. United*
12 *States*, 870 F.2d 644, 648 (Fed. Cir. 1989).

13 Courts have been reluctant to micro manage the minutiae of a procurement to ferret out
14 technical deficiencies. *Pacific Helicopter Tours, Inc. v. United States*, 2007 WL 5171114 (Fed.
15 Cl. 2007). When an agency is making a procurement decision, particularly based on a 'best
16 value' approach, rather than a 'best price' approach, courts will typically not second-guess the
17 discretionary judgments made in balancing these factors. *Geo-Seis Helicoptersw, Inc. v. United*
18 *States*, 77 Fed. Cl. 633 (Fed. Cl. 2007); *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed.
19 Cir. 1996) ("The protestor's arguments deal with the minutiae of the procurement process in
20 such matters as technical ratings and the timing of various steps in the procurement, which
21 involve discretionary determinations of procurement officials that a court will not second
22 guess").

23 GPA's consideration of a bidder for the award would take place towards the end of Step
24 2, either after 'negotiation', or after 'agreement' of the price. The record reflects that GPA had
25 received TRC's best and final price offer of \$169,850.00 on April 18, 2007. However, receipt of
26 a price offer does not indicate that an agreement has been reached, nor that negotiations on such
27 offer have even begun. This Court finds convincing the evidence from the Transcript of the July
28 6, 2007 protest hearing regarding the procurement process and the lack of immediate need for a

1 bidder to be licensed. Putting Petitioner back in the situation where the intermediate step of
2 negotiation and price agreement can be accomplished does not violate the RFP and thus, is not
3 illegal or against public policy. GPA employed a multi-factor best value analysis, as was its
4 common practice, in favoring Petitioner TRC after TRC had gotten past Step 1 in the
5 procurement process. GPA provided a coherent and rational explanation of the procurement
6 process regarding the timing of steps in the procurement. In the face of such explanation, any
7 further inquiry into when exactly a bidder is 'considered' for the award qualifies as minutiae
8 which this Court opts not to second-guess.

9
10 **CONCLUSION**

11
12 Based on the above, the Court finds that the Office of the Public Auditor lacked
13 jurisdiction to render its Aug. 1, 2007 Decision. Therefore, TRC's Petition for Writ of Mandate
14 is hereby GRANTED.

15
16 **IT IS SO ORDERED** this 21st day of November, 2008.

17
18
19
20 **Alberto C. Lamorena III**
21 Presiding Judge
22 Superior Court of Guam

23
24
25
26
27
28
I hereby certify that the foregoing
is a true and correct copy of the
original as it is in the office of the
Clerk of the Superior Court of Guam.
Clerk of the Superior Court

NOV 24 2008

GOVERNMENT NEWS