



Jerrick Hernandez <jhernandez@guamopa.com>

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

Sosanbra Salas <ssalas@rwtguam.com>

Fri, May 31, 2024 at 4:02 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joseph C. Razzano" <jrazzano@rwtguam.com>, "Joshua D. Walsh" <jdwalsh@rwtguam.com>, "Tabitha H. Madarang" <tmadarang@rwtguam.com>

Dear Mr. Hernandez,

Please see attached *Comments on Agency Report* by Morrico Equipment, LLC for filing with the OPA.

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

--

Regards,

Sosanbra Santos S. Reyes**RAZZANO WALSH & TORRES, P.C.**

139 Murray Blvd. Ste. 100

Hagatna, Guam 96910

(T): 671-989-3009

(T): 671-988-3941

(F): 671-989-8750

**Comments on Agency Report.pdf**

384K

RAZZANO WALSH & TORRES, P.C.

JOSEPH C. RAZZANO

JOSHUA D. WALSH

PAN AMERICAN BUILDING

Suite 100, 139 Murray Blvd.

Hagåtña, Guam 96910

Telephone: (671) 989-3009

Facsimile: (671) 989-8750

Electronic Service: eservice@rwtguam.com

Counsel for Appellant

Morrigo Equipment, LLC

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

PART I.

In the Appeal of

MORRICO EQUIPMENT, LLC,

Appellant.

DOCKET NO. OPA-PA-24-001

COMMENTS ON AGENCY REPORT

I. INTRODUCTION

Pursuant to 2 GAR §§ 12104(c)(4) and 12108(a), Appellant Morrigo Equipment, LLC (“Morrigo” or “Appellant”) submits its Comments on the Agency Report submitted by the Guam Solid Waste Authority (“GSWA”) to the Office of Public Accountability (“OPA”) on May 6, 2024. As those comments were never served on the Appellant or its counsel, the OPA has allowed the Appellant until May 31, 2024, to provide its Comments on the Agency Report.¹ These comments are

¹ The Agency Report appears to have been drafted by the General Manager of GSWA, and not the Office of the Attorney General despite that office entering an

submitted to address the positions taken by GSWA in its Agency Report and Statement regarding Invitation for Bid No. GSWA-004-24: Compact Wheel Loader with Attachments. (the “IFB”).

II. COMMENTS TO AGENCY STATEMENT

A. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.²

On November 3, 2023, the GSWA issued GSWA-004-24, a procurement solicitation seeking a Compact Wheel Loader with Attachments (the “IFB”). The IFB carried a single description of what GSWA was seeking: a “compact wheel loader with attachments.” Notice of Procurement Appeal **Exhibit A** ¶ p.32 (IFB Description). GSWA also advised offerors that it had formulated additional information on the wheel loader in reliance upon the specifications of a “John Deere model 244P,” but that “Such preference is intended to be descriptive, but not restrictive and for the sole purpose of indicating to prospective bidders a description of the article or services that will be satisfactory. Bids on comparable items will be considered provided the bidder clearly states in his bid the exact articles he is offering and how it differs from the original specification.” See, Notice of

appearance in this matter on April 30, 2024, presumably as counsel for the Agency. The Appellant’s counsel was also contacted on May 6, 2024, by “Camacho & Taitano LLP, counsel for GSWA.” To the extent that neither the OAG nor Camacho & Taitano LLP represent the Agency, these comments are submitted without prejudice to the Appellant’s ability to seek extrication from these proceedings of extraneous parties or counsel, or to seek clarity from GSWA regarding its representation.

² Much of this history is contained in Morrico’s Notice of Appeal but is recounted here for ease of reference for the reader.

Procurement Appeal **Exhibit D** (GSWA Bid Answer, November 14, 2024); Notice of Procurement Appeal **Exhibit A** ¶ 18 (IFB General Terms and Conditions).

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

B. THE GSWA AGENCY REPORT CONFIRMS THAT THE AGENCY WAS TOTALLY RELIANT UPON JOHN DEER BRAND SPECIFICATIONS, AND UNDERTOOK NO EFFORT TO CONFIRM WHETHER OR NOT THE CASE MACHINE OFFERED BY APPELLANT MET THE EQUIVALENT TERRAIN NAVIGATION REQUIREMENTS OF THE IFB TAKEN FROM JOHN DEERE.

The Appellant offered GSWA a machine manufactured by Case Construction with a ground clearance of between 12.5 – 17.3 inches. Procurement Record (“PR”), 158. The Agency Report contains no attempt to explain why this meant that the Case machine did not comply with the terrain navigation requirements for the vehicle. The Agency admits, as it must given the procurement record, that that

“John Deere Model 244P” was used as the reference in developing its total specifications, including the specifications for terrain navigation. Agency Report, 2. The Agency then explains, without citation, that the “specifications are not unique to John Deere.” This is incorrect, as eventual trial testimony will show that only the John Deere Model 244P carries specifications meant to illustrate terrain navigation in the form of wheel movement listed in “Maximum Rise and Fall, Single Wheel” in inches, as opposed to degrees of oscillation for such rise and fall, and as opposed to the standard measurement of ground clearance typically used by other manufacturers to emphasize terrain navigation.³ None of this appears to have been taken into account by the GSWA procurement officer in tossing aside the Morrico tender.

Rather than admit that the Agency blindly copied specifications from the John Deer Model 244P that included the opaque John Deere specification for at least 14 inches of “max rise and fall single wheel”, the agency now insists that the specifications were curated to meet the terrain navigation requirements for Guam. Agency Report, 2. The Agency Report makes plain that the Agency was seeking specifications “necessary to navigate Guam’s Terrain.” That specification, as expert testimony will show, is one of ground clearance, and not a generalized power train notation as John Deere’s specifications delineate. To be sure, the Case 221 F

³ The John Deer 244P has a ground clearance of just 11 inches — significantly less than the machine offered by the Appellant Morrico. The John Deere emphasis on a “max rise and fall single wheel” specification seems offered to deemphasize this shortcoming. This conclusion is supported by the fact that the John Deer 344-P, a vehicle with 15.4 inches of ground clearance, does not include the amorphous additional specification of “max rise and fall single wheel.”

machine offered by the Appellant has a robust 17.3 Inches of Ground Clearance — more than enough to meet the Agency’s requirement of at least 14 inches of space to assist the machine to “navigate Guam’s Terrain.”⁴

C. THE GSWA AGENCY REPORT CONFIRMS THAT THE AGENCY FAILED TO MAKE THE NECESSARY WRITTEN FINDINGS FOR ITS TOTAL RELIANCE UPON JOHN DEERE BRAND SPECIFICATIONS.

While GSWA reconfirms in its report that it used the John Deere model 244p specifications, its Agency Report contains no written determination in conformance with Guam law that “those particular features are essential to its requirements and specifying the reason that similar products lacking those features would not meet minimum requirements for the item.” 5 G.C.A. §5268(b). Nothing in the Agency Report or procurement record explains why John Deere’s unique “Maximum Rise and Fall, Single Wheel” descriptor is essential. Morrico learned first on December 13, 2023, that the agency had rejected its bid due to “non-conformance with the specifications.” Notice of Procurement Appeal Exhibit B (Bid Status form). The specification relied upon for such a disqualification, the Agency has confirmed, is the John Deere unique specification of “Maximum Rise and Fall, Single Wheel.” If the agency were unwilling to analyze terrain navigation without the use of the John

⁴ Had Morrico been able to see into GSWA’s mind’s eye that the agency would be unable to reconcile a generic specification calculation for ground clearance with a John Deere specific requirement for the “max rise and fall single wheel”, Morrico would have protested sooner. It did not become apparent to Morrico until after its disqualification that GSWA had no real inclination to review the terrain navigation of the vehicles, and instead had locked itself into the John Deere specific reliance upon wheel movement.

Deere term, then the procurement needed a 5 G.C.A. §5268(b) written justification from the agency head. The Agency Report contains no such determination.

D. THE GSWA AGENCY REPORT CONTAINS NO SUPPORT OR JUSTIFICATION FOR CLAIMING THAT THE APPELLANT'S CASE BRAND LOADER CANNOT COMPLY WITH A REVERSIBLE HYDRAULIC FAN SPECIFICATION.

The Agency obliquely claims that "Morrice's product did not meet the necessary specifications" for a reversible hydraulic fan. Agency Statement, 2. Morrice's admitted deviation from the John Deere specification was the offer of a more engineeringly sound "directly connected" fan as opposed to the belt driven fan specified. Morrice never declined to provide a reversible fan, and, in fact, its directly connected fan is indeed reversible. The Agency Report, however, makes it clear that the GSWA procurement officer gave no thought to analyzing specifications that deviated in even the slightest from the John Deere specifications, even if that deviation still provided the reversible fan the Agency Report confirms GSWA wanted. Since the Morrice specification did not exactly follow the John Deere specification, the Agency rejected the Morrice bid despite the fact that Morrice was offering the reversible fan the Agency Report claims is essential "to clean up illegal dump sites and green waste." Agency Report, 2.

The Appellant has offered a reversible fan as GSWA has sought. However, since the exact specification language of the reversible fan did not exactly mirror the John Deere 244P specification, the Agency rejected Morrice's bid. That rejection can only stand if the undue restriction was justified by a written procurement

record determination. That Agency Report confirms that no such record exists, and therefore, the rejection based upon that undue brand restriction must give way.

E. GSWA'S RECORD SUBMISSION VIOLATES THE LAW.

GSWA admits that it used the John Deere Model 244P to generate the specifications for this bid. Procurement Record, 77. Despite this, no records seem to exist illuminating how the agency came to rely upon the John Deere specifications in the first place beyond a general call for Market Research. This is essential, as Guam law is clear that this information must be captured, and its inclusion in the procurement record is a prerequisite to making an award. The Supreme Court of Guam has explained that:

“[e]ach procurement officer shall maintain a complete record of each procurement.” 5 GCA § 5249 (2005). The statute further identifies the specific records that must be kept. *Id.* § 5249(a)-(e). These records include “a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement,” *id.* § 5249(b), and “brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications,” *id.* § 5249(d). The statutes also require a complete record and dictate that “[n]o procurement award shall be made ...” without one. *Id.* § 5250.

Teleguam Holdings LLC v. Territory of Guam, 2018 Guam 5, ¶ 22 (Guam May 14, 2018)

Here, the Agency admits to using John Deere specifications, and the agency provides correspondence copies regarding the John Deere machines, but has no record on why, or even how, those John Deere specifications were selected by the agency and the specifications to hold bidders to. This

information is material to the procurement, and without it, the record is deficient.⁵

III. CONCLUSION

The Agency Report reveals that GSWA relied upon brand specifications from John Deere in an unduly restrictive manner that prevented an award to Morrico. The award was prevented despite the fact that Morrico offered a fully compliant machine with more terrain navigation ground clearance than the machine offered by John Deere. The Agency's procurement record materially fails to include any correspondence or records regarding why the agency chose to restrict its specifications to those friendly to John Deere. The result of the GSWA actions is a further expense of \$47,000 dollars hoisted upon the taxpayers of Guam. The OPA should correct this failed procurement, and direct that Morrico be named awardee of the IFB. Based on the foregoing, Morrico respectfully requests that its protest appeal be sustained.

Respectfully Submitted this 31st day of May 2024.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSEPH C. RAZZANO
JOSHUA D. WALSH
Attorneys for Appellant

⁵ Morrico reserves its rights, as the facts continue to develop through investigation and research, to address the failings of the procurement record through the submission of a new protest, motion practice before the OPA, or action through the courts of Guam if necessary.