



Jerrick Hernandez <jhernandez@guamopa.com>

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

Sosanbra Salas <ssalas@rwtguam.com>

Wed, Jun 26, 2024 at 3:14 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 *Opposition to Motion to Dismiss or in the Alternative to Lift Stay* 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

**6.26.24 Opposition to Motion to Dismiss or in the Alternative to Lift Stay.pdf**

435K

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**

In the Appeal of

MORRICO EQUIPMENT, LLC,

Appellant.

DOCKET NO. OPA-PA-24-001

**OPPOSITION TO MOTION TO
DISMISS OR IN THE ALTERNATIVE
TO LIFT STAY**

I. INTRODUCTION

On April 22, 2024, Morrigo Equipment, LLC (“Morrigo”) appealed the decision of the Guam Solid Waste Authority (“GSWA”) denying Morrigo’s agency level protest of Invitation for Bid GSWA-004-24, a procurement solicitation seeking a Compact Wheel Loader with Attachments (the “IFB”). On June 17, 2024, GSWA filed a Motion to Dismiss, claiming that Morrigo’s appeal to the agency was untimely, and therefore somehow the OPA lacks jurisdiction to review the merits of Morrigo’s

appeal. GSWA also claims that since the agency has unilaterally determined Morrico's protest to be untimely, GSWA has a legal right to ignore the automatic stay of procurement mandated by 5 G.C.A. §5429 (g). This Opposition is submitted to address the failings of that argument.

II. Relevant Bid History

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 the Guam Solid Waste Authority ("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 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, Morrigo 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, Morrigo 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, claiming that Morrigo’s protest was untimely, but also claiming that the IFB was not impermissibly restrictive to a single brand that that Morrigo’s bid was materially non-responsive. Notice of Procurement Appeal **Exhibit E**. This appeal followed.

III. MORRICO WAS TIMELY IN ITS BID PROTST

While Morrigo finds fault with GSWA’s use of John Deere specifications to formulate the IFB, Morrigo’s protest was triggered not by the appearance of those brand specifications, but rather GSWA’s use of those specifications in an unduly restrictive manner to disqualify Morrigo’s bid from consideration. Morrigo first learned of that disqualification on December 13, 2023, when Morrigo 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 at that moment of disqualification that the agency had improperly restricted the bid to a *de facto* sole source procurement wherein only the specification of the “John Deere model 244P” could comply even though Morrigo’s

machine met or exceeded the ground navigation specification of the IFB, Morrico filed a procurement protest with the GSWA fourteen days later on December 27, 2023. Notice of Procurement Appeal Exhibit C. Morrico's protest was timely.

GSWA attempts to use the guidance from the Supreme Court of Guam in *DFS Guam L.P. v. The A.B. Won Pat International Airport Authority*, 2020 Guam 20, to claim that Morrico should have protested within fourteen days of the John Deere specifications first appearing in the IFB. While *DFS Guam L.P.* indeed focuses the timeliness analysis "...not in terms of what is being protested but in terms of knowledge of the facts giving rise to a protest", the Supreme Court of Guam, in language ignored by the agency here, also explained that "[t]here may be situations in which the announcement of an award reveals new facts forming the basis of a protest or where the award is a key fact itself that forms the basis of a protest." *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, ¶ 95 (Guam Dec. 7, 2020). That is what has occurred here. GSWA ignores the fact that Morrico could not have had knowledge giving rise to its protest until Morrico's disqualification from the bid process.

This is significant because Morrico's disqualification from the process is the key fact that gave rise to this protest. It was only on December 13, 2023 — fourteen days before bringing its protest— that Morrico learned that GSWA would be using the John Deer brand specifications as a restrictive method to disqualify Morrico from the bid process. Any earlier protest by Morrico would have not yet been ripe, since GSWA, like any Government agency receiving offers, "is presumed to act in

good faith when executing their procurement functions.” *Aero Corp. v. United States*, 38 Fed.Cl. 408, 413 (1997); *Madison Servs., Inc. v. United States*, 92 Fed. Cl. 120, 129 (2010) (“A strong presumption of regularity and good faith conduct attaches to any rational agency decision”). Morricco could not have known until its disqualification that GSWA had no real inclination to review the terrain navigation of the vehicles, and instead had locked itself into the John Deere specific reliance upon wheel movement. *See, JMI-Edison v. OPA, GIAA, et al.*, Decision and Order Denying GIAA’s Motion to Dismiss, No. CV0095-22 (Guam Super. Ct. Sept. 22, 2022), 6. (Explaining that under Guam law “to be ‘aggrieved,’ a bidder must become aware of a violation of the procurement law.); *See also, In the Appeal of Guam Community Improvement Foundation, Inc. [vs DPW]*, OPA-PA-09-005, (“a losing bidder is an aggrieved bidder.”); *See also Tumon Corp. v. Guam Mem’l Hosp. Auth.*, No. CV1420-01, at 3 (Guam Super. Ct. Oct. 22, 2001). (“Offeror is an aggrieved offeror because it was not selected as the best qualified offeror.”)

IV. The OPA cannot provide the truncated relief GSWA wants in its Motion.

GSWA has moved to dismiss the Morricco appeal based upon a combination of law and assertions regarding the significance and meaning of certain facts in the record. The reliance upon such material “outside of the pleadings” converts the Motion to Dismiss into a Motion for Summary Judgment. *See, e.g., Ukau v. Wang*, 2016 Guam 26, ¶ 1. GSWA offers a *de facto* Motion for Summary Judgment, but

declines to provide a legal standard, statute, or procedural rule justifying such a maneuver. That is because no such maneuver properly existed before the OPA.

Summary Judgment on Guam is rooted in Guam R. Civ. Proc. 56. (“A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.” Guam R. Civ. Proc. 56. Summary Judgment.). The OPA has previously declared Summary Judgment under that rule inapplicable to proceedings before the OPA. In *In the Appeal of Core Tech International Corp*, OPA-PA-17-009, the Public Auditor explained that “Rule 56, Guam Rules of Civil Procedure are inapplicable to this administrative proceeding.” *In the Appeal of Core Tech International Corp*, OPA-PA-17-009, Decision and Order RE Purchasing Agency’s Motion to Dismiss¹. The OPA went on to reiterate that:

Procurement Appeals hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence or by technical or formal rules of procedure. 2 G.A.R., Div. 4, Chap. 12, § 12108(d). Hence, summary judgment as permitted by Rule 56, GRCP, in civil cases being heard before the Superior Court of Guam and the cases interpreting that rule are inapplicable to this matter because this proceeding is an informal procurement appeal that is not bound by such formal rules of civil procedure. *In the Appeal of Core Tech International Corp*, OPA-PA-17-009, Decision and Order RE Purchasing Agency’s Motion to Dismiss, 2.²

¹ The OPA captioned its decision as one on the Agency’s “Motion to Dismiss.” The agency had called its Motion a “Motion for Summary Judgment,” but the OPA had decided to construe the procedurally infirm summary judgment motion as one instead for dismissal. *See*, Motion for Summary Judgment, OPA-PA-17-009, November 3, 2017.

² Summary Judgment proceedings do exist in the context of administrative proceedings, but those are allowed and controlled by specific statutes in those jurisdictions, or by judicial

V. The Automatic Stay is in place, and GSWA seeks to violate the law by ignoring it.

GSWA's Motion indicates that the agency has decided to push forward with contract formation with a vendor despite a pre-award protest being submitted to it. Moreover, the agency declares that it has the ability to unilaterally decide whether the automatic stay is in place or not. This is not the case. There is no basis in Guam law that would allow an agency to unilaterally ignore a procurement stay since, in the mind of the agency, the procurement protest is meritless.

To be certain, the automatic stay has been in place since the moment Morrico submitted its protest. While the agency claims its protest to be untimely, the fact remains that Morrico brought a bid protest within fourteen (14) days after learning that the John Deere specifications had been used to disqualify its offer. The statute provides, in the event of a timely protest such as this, the government agency "shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void..." 5 GCA § 5425(g). This is the case, even if the Agency pretends the protest to be untimely. Here, it is undisputed that Morrico's protest came before GSWA's effort to "lift the stay and award the contract." Motion to Dismiss, 4. GSWA's post-protest activity

precedent that adopt rules of civil procedure when the administrative code is silent. *See, e.g.,* Ind. Code Ann. § 4-21.5-3-23 ("A party may, at any time after a matter is assigned to an administrative law judge, move for a summary judgment in the party's favor as to all or any part of the issues in a proceeding."); *Bd. of Ethics in Matter of Monsour*, 2017-1274 (La. 5/1/18), 249 So. 3d 808, 810 ("The Louisiana Code of Civil Procedure governs civil proceedings in administrative agency proceedings where agency laws are silent."). Here, Liheslaturan *Guåhan* has declined to provide for an administrative summary judgment proceeding, and the OPA has specifically declined to adopt Guam R. Civ. Proc. 56 that would provide a framework for summary adjudication in the administrative context.

in this regard constitutes a violation of law, renders any resulting contract void. *See, In the Appeal of G4S Security Systems (GUAM), Inc.*, OPA-PA-13-013, Decision and Order re Appellant's Motion to Declare Automatic Stay in Effect, November 12, 2013, p.2 (explaining that " Generally, in the event of a timely protest, the purchasing agency shall not proceed further with the solicitation or award of the contract prior to final resolution of such protest, and any such further action is void unless the head of the purchasing agency and the Attorney General of Guam, make written determinations that award of the contract without delay is necessary to protect substantial interests of the Government of Guam, and the protestant is given at least two (2) days prior notice.")

If the interests of the territory are met by a removal of the stay, Guam law provides a specific statutory mechanism for an agency to remove the stay. Rather than simply ignore the stay or ask the OPA to bless such a move, GSWA must follow the provisions of 5 G.C.A. § 5425 (g) regarding the lifting of the automatic stay. They have not done so. Guam law provides specific steps that must be undertaken in order to proceed with services under a protested contract:

(1) The Chief Procurement Officer or the Director of Public Works after consultation with and written concurrence of the head of the using or purchasing agency and the Attorney General or designated Deputy Attorney General, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of Guam; and (2) Absent a declaration of emergency by the Governor, the protestant has been given at least two (2) days' notice (exclusive of territorial holidays); and (3) If the protest is pending before the Public Auditor or the Court, the Public Auditor or Court has confirmed such determination, or if no such protest is pending, no protest to the Public Auditor of such determination is filed prior to expiration of the two (2) day period specified in Item (2) of Subsection (g) of this Section.

Here, rather than obtain concurrence from the Guam Attorney General, the Public Auditor, and the Superior Court — concurrence that would have been predicated on Notice to Morrico and a hearing on the matter — GSWA created a novel procedure to address an emergency of its own making and used Morrico's protest to justify pushing forward with an award and the procurement of services from more expensive vendors. There is no legal analogue to what GSWA did, since the procedure to address the need to press forward with services despite the automatic stay already exists and was circumvented by the agency.

VI. CONCLUSION

GSWA urges the OPA to dismiss Morrico's appeal based upon its position that Morrico was untimely in its original protest. Moreover, GSWA invites the OPA to adopt a position that vitiates the automatic stay. The OPA should reject GSWA's invitation and move this matter forward to an analysis of the merits of the Morrico appeal. The OPA should issue a decision declaring that Morrico's protest was timely filed, and that as a timely pre-award protest, the automatic stay has been in place since the submission of Morrico's protest, and any further activity by GSWA regarding IFB performance is void.

Respectfully Submitted this 26th day of June 2024.

RAZZANO WALSH & TORRES, P.C.

By: 

JOSHUA D. WALSH
JOSEPH C. RAZZANO

Counsel for Appellant Morrico Inc.