



Jerrick Hernandez <jhernandez@guamopa.com>

Signed Declaration Re: Court Action, Hearing Request and Agency Report, Agency Statement, And Supplemental Record Document

Kiana M. Santos <kmsantos@portofguam.com>

Thu, Aug 29, 2024 at 3:16 PM

To: jhernandez <jhernandez@guamopa.com>

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Hafa Adai Jerrick,
Please accept for filing the attached signed Declaration Re: Court Action, Hearing Request, Agency Report, Agency Statement, and Supplemental Record Document.
Service has been provided here as requested by Appellant's attorneys.

Docket No. OPA-PA-24-002

If you have any questions, please feel free to contact me.

Thanks,

--

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5 attachments



Signed Agency Statement OPA-PA-24-002.pdf

378K



Signed Supplemental Record Document OPA-PA-24-002.pdf

66K



signed Agency Report OPA-PA-24-002.pdf

51K



Signed Declaration Re Court Action Docket No OPA-PA-24-002.pdf

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signed Hearing request OPA-PA-24-002.pdf

23K

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7 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
8 **PROCUREMENT APPEAL**

9 **IN THE APPEAL OF:**) **DOCKET NO. OPA-PA-24-002**
10)
11 **MORRICO EQUIPMENT, LLC,**)
12) **Appellant,**)
13) **and**) **AGENCY STATEMENT**
14 **PORT AUTHORITY OF GUAM,**)
15) **Purchasing Agency.**)
16)

17 The Port Authority of Guam (“PAG”), hereby submits its Agency Statement, pursuant to
18 2 GAR Div. 4 § 12105(g), in response to the appeal from Morrico Equipment, LLC (“Morrico”
19 or “Appellant”) of IFB-PAG-013-24, re: Re-bid Procurement of 180’ Telescopic Boom Lift.
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22 **I. RELEVANT BACKGROUND**

23 On January 26, 2024, PAG issued IFB-PAG-004-24, re: Procurement of 180’ Telescopic
24 Boom Lift. (“IFB #1”). This procurement was funded with federal funds from the U.S. Maritime
25 Administration (MARAD) FY2022 American Marine Highway (AMH) Grant No.:
26 693JF72340007. On February 16, 2024, the PAG opened the bids submitted for IFB #1. Only
27 one bidder, Morrico, submitted a bid for IFB #1. Morrico’s bid of \$659,193.27 for IFB #1
28

1 exceeded the available funding.

2 Pursuant to 2 GAR, Div. 4 § 3102(c)(1)(C), when only one bid is received, but the bid
3 price submitted is not fair and reasonable, there are options to continue the procurement as a sole
4 source procurement under 2 GAR, Div. 4 § 3112, or as an emergency procurement under 2 GAR,
5 Div. 4 § 3113. On February 20, 2024, Buyer Supervisor Mark Cabrera called Morrico's
6 representative, Patrick Chargualaf, via telephone, to determine whether these options were
7 amenable to Morrico. Morrico rejected this request and instead, on March 5, 2024, Morrico
8 submitted a letter of protest regarding this process (Letter of Protest #1") to Mark Cabrera. The
9 next day, March 6, 2024, Morrico submitted an "Amended Procurement Protest" ("Letter of
10 Protest #2) on the same basis. Morrico withdrew Letter of Protest #1 on March 15, 2024. The
11 PAG was then required to reject Morrico's bid because it exceeded the funds available for the
12 procurement, and issued a Notice of Rejection of Bid to Morrico on March 19, 2024. Thereupon,
13 the PAG was also required to cancel IFB #1, as there were no other bids, and the PAG issued a
14 Notice of Cancellation the same day.

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18 On April 23, 2024 the PAG issued a re-bid of IFB #1, as IFB-PAG-013-24 ("IFB #2"),
19 with the same federal funds and funding source. This time, IFB #2 included a notice that the PAG
20 would also accept the published pricing listed in the Federal General Services Agency Multiple
21 Award Schedule ("MAS") contract, plus shipping, as a priced bid submission for the 180'
22 Telescopic Boom Lift described in IFB #2. Federal Contracts Corporation ("FCC") carried a
23 qualifying telescopic boom lift publicly advertised under GSA Contract #GS-03F-113DA at the
24 published price of \$403,411.28, not including shipping. FCC timely submitted a quote for this
25 price, plus its cost of shipping, via e-mail to the PAG. Morrico timely submitted a bid in hard
26 copy. Both of these submissions were opened publicly and their prices were announced to
27
28

1 everyone present at the bid opening on May 8, 2024. FCC's price was announced at \$517,205.41,
2 and Morrico's price was announced at \$652,137.06. Patrick Chargualaf, representing Morrico,
3 was present at the bid opening and announcement. On May 20, 2024, Notice of Award
4 announcing FCC as the awarded contractor was issued to Morrico and to FCC.
5

6 On June 3, 2024, Appellant filed the first protest document at issue in this appeal ("Letter
7 of Protest #3"). Letter of Protest #3 was filed 26 days after the bids were opened to the public,
8 and 14 days after Morrico received its Notice of Award. On June 20, 2024, Appellant filed a
9 document that it labeled as a "Supplemental Bid Protest" ("Letter of Protest #4"), but has also
10 characterized as a "second Bid Protest" in its Notice of Appeal. Letter of Protest #4 was filed 43
11 days after the bids were opened to the public, and 31 days after Morrico received its Notice of
12 Award. On July 31, 2024, the PAG issued a Decision addressing both Letters of Protest #3 and
13 #4. The following is PAG's Agency Statement in response to Appellant's appeal.
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15

16 II. RESPONSES TO MORRICO'S ALLEGATIONS

17
18 Appellant makes allegations that seem to begin in the "Relevant Procedural and Factual
19 History" section of the Notice of Appeal, August 14, 2022, Part IV(A)(1), Paragraphs 2-4, but
20 are interspersed with the factual statements in that section. This Agency Statement will attempt
21 to respond to all material allegations presented, following the allegation, beginning at this
22 paragraph and following sequentially with the appeal document, as much as possible; the factual
23 allegations are organized and numbered here in order of topic for the purposes of this statement.
24

25 1) **Morrico's Allegation(s) re: Bid Bond**---FCC is a non-responsive and/or non-responsible
26 bidder because it did not submit "the bid security necessary for a responsive bid" and it "failed
27 to execute and provide the Bid Bond form."
28

1 **PAG's Response---**All bid submissions were publicly opened and announced on May 8,
2 2024, containing all alleged defective terms to which Morrico objects. Morrico was present
3 on this date, when the vendors and their prices were announced. May 8, 2022 is the date that
4 Morrico was on notice that FCC's submission was the lowest price and included all allegedly
5 defective terms. These terms have not changed, and were not changed by the Notice of Award
6 issued on May 20, 2024. As such, the Letter of Protest was submitted beyond the 14-day time
7 period of when Morrico first knew or should have known of the facts giving rise to its
8 complaints. 5 GCA § 5425(a) and 2 GAR, Div. 4 § 9101(c)(1); *see also DFS v. GIAA*, 2020
9 Guam 20, ¶¶84-101; and *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010 (finding
10 that the fourteen-day clock begins when a party first becomes aware of facts giving rise to the
11 issues raised in the protest). Letters of Protest ##3 and 4 are both untimely, and Morrico's
12 failure to timely raise its protests deprives the OPA of jurisdiction. The PAG has substantially
13 and materially complied with applicable federal and local laws, and the terms and conditions
14 of its funding source. Appellant has failed to allege how it is materially affected or prejudiced
15 by its allegations. Further, Morrico's undue delay in waiting until after award to file Letters
16 of Protest ##3 and 4 has rendered its requests for relief moot, as the contract was awarded,
17 approved by the PAG's Board of Directors, and is being performed.

20 2) **Morrico's Allegation re: Licensure---**FCC is a non-responsive and/or non-responsible
21 bidder because it "fails to have the necessary business and other licenses needed to make sales
22 to the Port."

23 **PAG's Response---**All bid submissions were publicly opened and announced on May 8,
24 2024, containing all alleged defective terms to which Morrico objects. Morrico was present
25 on this date, when the vendors and their prices were announced. May 8, 2022 is the date that
26 Morrico was on notice that FCC's submission was the lowest price and included all allegedly
27 defective terms. These terms have not changed, and were not changed by the Notice of Award
28

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3 complaints. 5 GCA § 5425(a) and 2 GAR, Div. 4 § 9101(c)(1); *see also DFS v. GIAA*, 2020
4 Guam 20, ¶¶84-101; and *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010 (finding
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7 failure to timely raise its protests deprives the OPA of jurisdiction. The PAG has substantially
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9 of its funding source. Appellant has failed to allege how it is materially affected or prejudiced
10 by its allegations. Further, Morrico's undue delay in waiting until after award to file Letters
11 of Protest ##3 and 4 has rendered its requests for relief moot, as the contract was awarded,
12 approved by the PAG's Board of Directors, and is being performed.

13
14
15 **3) Morrico's Allegation(s) re: Bid Items---FCC** is a non-responsive and/or non-responsible
16 bidder because its submitted bid form did not check the "Yes, offer as requested" check boxes
17 on the bid form for several bid items listed on pp. 32-33 of the IFB solicitation document.

18 **PAG's Response---**All bid submissions were publicly opened and announced on May 8,
19 2024, containing all alleged defective terms to which Morrico objects. Morrico was present
20 on this date, when the vendors and their prices were announced. May 8, 2022 is the date that
21 Morrico was on notice that FCC's submission was the lowest price and included all allegedly
22 defective terms. These terms have not changed, and were not changed by the Notice of Award
23 issued on May 20, 2024. As such, the Letter of Protest was submitted beyond the 14-day time
24 period of when Morrico first knew or should have known of the facts giving rise to its
25 complaints. 5 GCA § 5425(a) and 2 GAR, Div. 4 § 9101(c)(1); *see also DFS v. GIAA*, 2020
26 Guam 20, ¶¶84-101; and *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010 (finding
27 that the fourteen-day clock begins when a party first becomes aware of facts giving rise to the
28

1 issues raised in the protest). Letters of Protest ##3 and 4 are both untimely, and Morrigo's
2 failure to timely raise its protests deprives the OPA of jurisdiction. The PAG has substantially
3 and materially complied with applicable federal and local laws, and the terms and conditions
4 of its funding source. Appellant has failed to allege how it is materially affected or prejudiced
5 by its allegations. Further, Morrigo's undue delay in waiting until after award to file Letters
6 of Protest ##3 and 4 has rendered its requests for relief moot, as the contract was awarded,
7 approved by the PAG's Board of Directors, and is being performed.
8

9 **4) Morrigo's Allegation re: Special Reminder to Prospective Bidders Form---**FCC is a non-
10 responsive bidder because it failed to submit the Special Reminder to Prospective Bidders
11 form.
12

13 **PAG's Response---**All bid submissions were publicly opened and announced on May 8,
14 2024, containing all alleged defective terms to which Morrigo objects. Morrigo was present
15 on this date, when the vendors and their prices were announced. May 8, 2022 is the date that
16 Morrigo was on notice that FCC's submission was the lowest price and included all allegedly
17 defective terms. These terms have not changed, and were not changed by the Notice of Award
18 issued on May 20, 2024. As such, the Letter of Protest was submitted beyond the 14-day time
19 period of when Morrigo first knew or should have known of the facts giving rise to its
20 complaints. 5 GCA § 5425(a) and 2 GAR, Div. 4 § 9101(c)(1); *see also DFS v. GIAA*, 2020
21 Guam 20, ¶¶84-101; and *In the Appeal of ASC Trust Corporation*, OPA-PA-09-010 (finding
22 that the fourteen-day clock begins when a party first becomes aware of facts giving rise to the
23 issues raised in the protest). Letters of Protest ##3 and 4 are both untimely, and Morrigo's
24 failure to timely raise its protests deprives the OPA of jurisdiction. The PAG has substantially
25 and materially complied with applicable federal and local laws, and the terms and conditions
26 of its funding source. Appellant has failed to allege how it is materially affected or prejudiced
27 by its allegations. Further, Morrigo's undue delay in waiting until after award to file Letters
28

1 of Protest ##3 and 4 has rendered its requests for relief moot, as the contract was awarded,
2 approved by the PAG's Board of Directors, and is being performed.
3

4 III. TIMELINESS OF PROTEST

5
6 Morrico waited to file its Letters of Protest ##3 and 4 until after award. Letters of Protest
7 ##3 and 4 are untimely, and therefore, cannot be considered. Morrico's late filing deprives the
8 OPA of jurisdiction to determine its belated complaints, and the PAG intends to file a Motion to
9 Dismiss addressing this issue in full.
10

11 However, the PAG will summarize the timeliness issues for the purposes of this
12 statement. The IFB clearly contained a notice that the pricing of contractors listed on the Federal
13 Supply Schedules would be accepted and awarded in response to this solicitation:
14

15 48. FEDERAL GSA SCHEDULES: This IFB is federally funded under MARAD
16 FY2022 American Marine Highway (AMH) Grant No.: 693JF72340007; The
17 Port Authority of Guam is accepting Federal GSA pricing inclusive with shipping
18 cost to Guam. If the bid pricing existing on the Federal GSA website from a
19 qualified vendor for qualifying items on the date of the opening of the bids, plus
20 the confirmed price of shipping costs to Guam, confirmed after the opening of the
21 bids, is the lowest price, then the contract will be awarded to that vendor.

22 *IFB, General Terms and Conditions, p.25, ¶48.*

23 FCC's price submission was publicly opened, its price quote was announced, and the full
24 contents of its bid, including all documents submitted, were available to Morrico on May 8, 2024.
25 A Bid Abstract showing the PAG's acceptance of the forms and the priced submission for
26 evaluation was also provided the same day. In fact, Morrico had a representative present during
27 the bid opening, Patrick Chargualaf. All bid prices were publicly read aloud to all present.
28 Morrico was fully aware that FCC had submitted the lowest price for the IFB on May 8, 2024,
and that the IFB "contract will be awarded to that vendor." *Id.* At that time, Morrico had actual

1 notice that if FCC lowest price submission was accepted, and not rejected during evaluations,
2 FCC would win the award. Yet, it did not inspect FCC's price submission or take any action.
3 Morrico waited until the award to FCC was announced on May 20, 2024 to do anything. Now,
4 after the fact, based on technical issues in the forms of FCC's price submission, Morrico claims
5 that the PAG made "a mistake"; it should have rejected FCC's pricing, and FCC should have
6 been disqualified from consideration and award of the contract.
7

8 This is the exact practice that the Supreme Court of Guam has attempted to halt in its
9 ruling in *DFS Guam, L.P. v. The A.B. Won Pat International Airport Authority, Guam*, 2020
10 Guam 20 ¶¶77-101. Bidders can no longer adopt a "wait and see" approach, and wait until after
11 award is made to protest and complain that another bidder's bid should not have been considered
12 during evaluations. *Id.* at ¶ 99. If a bidder fails to take action when it could and should do so, it
13 forfeits its complaints. *Id.*
14

15 **IV. APPELLANT'S UNSUPPORTED REQUESTS FOR RELIEF:**

16 Appellant fails to show its entitlement to the specific relief set forth by rule or statute.
17 Morrico requests none of the available remedies set forth under Guam's Procurement Law or
18 Guam's Procurement Rules and Regulations. *See* 5 GCA §§ 5451, 5452; and 2 GAR, Div. 4 §§
19 9104, 9105, and 9106. Appellant makes two discernible requests for action by the OPA: 1)
20 "[t]hat the automatic stay of procurement arising under 5 G.C.A. §5425(g) be confirmed in
21 place;" and 2) "[t]hat Morrico, as the lowest priced responsive and responsible bidder under the
22 IFB, be named for award of the IFB." *Notice of Procurement Appeal*, p. 6, Section B(3) and (4).
23
24

25 The only cognizant argument supporting relief that can be discerned from the statements
26 in Letters of Protest ##3 and 4 and this appeal is that Appellant is claiming that FCC's bid should
27 have been rejected, and FCC should have been disqualified from consideration for award, back
28

1 when the bids were evaluated. However, this does not constitute a clear statement of support for
2 the relief the Appellant wants now---after the contract has already been awarded to FCC, and
3 after the contract is being performed.
4

5 Award of the contract was made in May of 2024. Appellant protested in June of 2024.
6 Morrico fails to properly support or request the post-award remedies that are available to it;
7 instead requesting only the pre-award remedies of preventing the government from “proceed[ing]
8 further with the solicitation or with the award of the contract,” 5 GCA § 5425(g), and rejecting
9 FCC’s bid and awarding to Morrico. *See* pre- and post-award protest remedies at 5 GCA §§ 5451,
10 5452; and 2 GAR, Div. 4 §§ 9104, 9105, and 9106. Morrico waited until after award of the
11 contract to request these remedies. These remedies are only available prior to award, and cannot
12 be requested retroactively.
13

14 Morrico has not timely and correctly invoked the appropriate pre-award redress for its
15 allegations. 2 GAR, Div. 4 § 9105 and 5 GCA § 5451. “If prior to award it is determined that a
16 solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed
17 award shall be: (a) cancelled; or (b) revised to comply with the law.” 5 GCA § 5451 (emphasis
18 added). Morrico never requested revision or cancellation of IFB #2, even though it had notice
19 that the IFB clearly stated that award would be granted to MAS contractors, if they offered the
20 lowest price. Morrico did not request revision or cancellation of the expected award, prior to
21 awarding, even though it had notice that FCC did, in fact, offer the lowest price on May 8, 2024,
22 and would therefore, receive the award pursuant to the terms of the IFB.
23
24

25 Appellant asks for relief but fails to provide any information or law that would entitle it
26 to the pre-award relief it seeks, local or federal. After award, Guam’s Procurement Law clearly
27 sets forth the available remedies, and requires contracts to be ratified and affirmed if it is in the
28

1 best interests of the government, where there is no bad faith or fraud. 2 GAR, Div. 4 § 9106(a),
2 (b), and (c). For these reasons, this appeal should be denied and dismissed in its entirety.
3

4
5 **V. APPELLANT IS NOT AGGRIEVED AND NOT ENTITLED TO RELIEF**

6 IFB #2 only imposes the requirements of law, i.e., Guam's Procurement Law, Guam's
7 Procurement Rules and Regulations, Title 2 CFR, Part 200, and other applicable federal
8 regulations. Therefore, its terms are not unreasonable, arbitrary, or capricious. Appellant fails to
9 provide any legal authority to support its positions or evidence of any violation of law materially
10 affecting its ability to participate in the procurement process. Morrico is not aggrieved pursuant
11 to 5 GCA § 5425(a) or 2 GAR, Div. 4 § 9101(a)(1)(a).
12

13 In order to pursue a protest, Morrico must have standing. When standing is at issue, "the
14 relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury
15 to himself that is likely to be redressed by a favorable decision." *Simon v. E. Kentucky Welfare*
16 *Rights Org.*, 426 U.S. 26, 38 (1976). Under 5 GCA § 5245(a): "[a]ny actual or prospective bidder,
17 offeror, or contractor who may be aggrieved in connection with the method of source selection,
18 solicitation or award of a contract, may protest to ... the head of the purchasing agency." Morrico
19 must show that it is "aggrieved" by the alleged violations of law. 5 GCA § 5425(a).
20

21 None of the complaints raised operate to penalize Morrico or prevent Morrico from
22 participating in this federally funded Invitation for Bids solicitation. Morrico had actual notice
23 of all defects alleged. Morrico has suffered no injury, and is not aggrieved by the alleged
24 violations. This appeal should be denied in its entirety and dismissed.
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V. CONCLUSION

In conclusion and for the aforementioned reasons, PAG respectfully requests that this appeal be denied in its entirety and dismissed with prejudice.

Submitted this 29th day of August, 2024.

PORT AUTHORITY OF GUAM

By: 

JESSICA TOFT