



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**PAG Motion To Dismiss OPA-PA-24-002**

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**Kiana M. Santos** <kmsantos@portofguam.com>

Mon, Sep 23, 2024 at 3:48 PM

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Hafa Adai Jerrick,

Please accept for filing the attached Motion to Dismiss from the PAG in OPA-PA-24-002.

Thank you,

--

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 **MOTION TO DISMISS OPA-PA-24-002.pdf**  
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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 )  
13 **Appellant,** )  
14 )  
15 **and** ) **MOTION TO DISMISS**  
16 )  
17 **PORT AUTHORITY OF GUAM,** )  
18 )  
19 **Purchasing Agency.** )  
20 )

17 The Port Authority of Guam (“PAG”), hereby moves for an order dismissing the appeal  
18 filed by Morrico Equipment, LLC (“Morrico” or “Appellant”) in IFB-PAG-013-24, re: Re-bid  
19 Procurement of 180’ Telescopic Boom Lift.

21 **I. RELEVANT BACKGROUND**

22 On January 26, 2024, PAG issued IFB-PAG-004-24, re: Procurement of 180’ Telescopic  
23 Boom Lift. (“IFB #1”). *PR IFB1, 1a and 2a.* This procurement was funded with federal funds  
24 from the U.S. Maritime Administration (MARAD) FY2022 American Marine Highway (AMH)  
25 Grant No.: 693JF72340007. *Ids.* On February 16, 2024, the PAG opened the bids submitted for  
26 IFB #1. *PR IFB1, 5a and 5b.* Only one bidder, Morrico, submitted a bid for IFB #1. *Ids.* Morrico’s  
27 bid of \$659,193.27 for IFB #1 exceeded the available funding. *PR IFB1, 6a, 7c, and 7d.*  
28

1 Pursuant to 2 GAR, Div. 4 § 3102(c)(1)(C), when only one bid is received, but the bid  
2 price submitted is not fair and reasonable, there are options to negotiate the procurement as a sole  
3 source procurement under 2 GAR, Div. 4 § 3112, or as an emergency procurement under 2 GAR,  
4 Div. 4 § 3113. On February 20, 2024, Buyer Supervisor Mark Cabrera called Morrigo's  
5 representative, Patrick Chargualaf, via telephone, to determine whether these options were  
6 amenable to Morrigo. *PR IFB1, 7a*. Morrigo rejected this request and instead, on March 5, 2024,  
7 Morrigo submitted a letter of protest regarding this process (Letter of Protest #1") to Mark  
8 Cabrera. *Id.* The next day, March 6, 2024, Morrigo submitted an "Amended Procurement  
9 Protest" ("Letter of Protest #2) on the same basis. *PR IFB1, 7d*. Morrigo subsequently withdrew  
10 its Letters of Protest ##1 and 2 on March 15, 2024. *Supp. PR, Withdrawal of Procurement Protest*  
11 *Without Prejudice*. The PAG was then required by law to reject Morrigo's bid because Morrigo's  
12 price was too high and exceeded the funds available for the procurement, and the PAG issued a  
13 Notice of Rejection of Bid citing this reason to Morrigo on March 20, 2024. *PR IFB1, 6a; and*  
14 *2<sup>nd</sup> Supp. PR, 8c*. Thereupon, the PAG was also automatically required to cancel IFB #1, because  
15 there were no qualifying, responsive bids, and the PAG issued a Notice of Cancellation the same  
16 day. *PR IFB1, 7c, and 7d; 2<sup>nd</sup> Supp. PR, 8e*.

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20 On April 23, 2024, the PAG issued a re-bid of IFB #1, as IFB-PAG-013-24 ("IFB #2"),  
21 with the same federal funds and funding source. *PR IFB2, 1a, 1b, and 2a*. This time, IFB #2  
22 included a notice that the PAG would also accept the published pricing listed in the Federal  
23 General Services Agency Multiple Award Schedule ("MAS") contract, plus shipping, as a priced  
24 bid submission for the 180' Telescopic Boom Lift described in IFB #2. *PR IFB2, 2a*. Federal  
25 Contracts Corporation ("FCC") carried a qualifying telescopic boom lift publicly advertised  
26 under GSA Contract #GS-03F-113DA at the published price of \$403,411.28, not including  
27  
28

1 shipping. *PR IFB2, 6b.* FCC timely submitted a quote for this price, plus its cost of shipping, via  
2 e-mail to the PAG. *PR IFB2, 3a.* Morrico timely submitted a bid in hard copy. *PR IFB2, 3b.*  
3 Both of these submissions were opened publicly and their prices were announced to everyone  
4 present at the bid opening on May 8, 2024. *PR IFB2, 4a and 4b.* FCC's price was announced at  
5 \$517,205.41, and Morrico's price was announced at \$652,137.06. *Ids.* Patrick Chargualaf,  
6 representing Morrico, was present at the bid opening and announcement, including  
7 announcement of all included forms and terms. *Ids.* A Bid Abstract showing the PAG's  
8 acceptance of FCC's bid forms and bid price for evaluation, without bid bond, business license,  
9 and the Special Reminders form, was prepared during this same bid opening, while Mr.  
10 Chargualaf was present. *Ids.* Mr. Chargualaf witnessed and was aware on May 8, 2024, that FCC  
11 had submitted the lowest price quote, which was accepted for evaluation at that time, without all  
12 of the documents it now protests. *Ids.* The bids were evaluated, and on May 20, 2024, Notice of  
13 Award announcing FCC as the awarded contractor was issued to Morrico and to FCC. *PR IFB2,*  
14 *5a and 5b; and 3<sup>rd</sup> Supp PR, 4c.*

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17  
18 On June 3, 2024, Appellant filed the first protest document at issue in this appeal ("Letter  
19 of Protest #3"). *PR IFB2, 7a.* This Letter of Protest #3 was filed 26 days after the bids were  
20 opened to the public, and 14 days after Morrico received its Notice of Award. On June 20, 2024,  
21 Appellant filed a document that it labeled as a "Supplemental Bid Protest" ("Letter of Protest  
22 #4"), but has also characterized as a "second Bid Protest" in its Notice of Appeal. *PR IFB2, 7c.*  
23 Letter of Protest #4 was filed 43 days after the bids were opened to the public, and 31 days after  
24 Appellant received its Notice of Award. On July 31, 2024, the PAG issued a Decision addressing  
25 both Letters of Protest #3 and #4. *PR IFB2, 7f.* The following is PAG's Motion to Dismiss  
26 Morrico's Appeal.  
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1 **II. DISCUSSION**

2 The PAG moves the Office of Public Accountability to dismiss this appeal and all of Morrigo’s  
3 claims for the purposes available under the Guam Rules of Civil Procedure Rule 12(b)(1) and  
4 (6), including lack of subject matter jurisdiction, failure to state a claim, and/or failure to request  
5 appropriate relief.  
6

7  
8 **A. Jurisdiction/Timeliness**

9 The case law in Guam is clear: “the timeframes set forth in the Procurement Code are  
10 jurisdictional in nature—i.e., the failure to abide by these timeframes will deprive the Superior  
11 Court of jurisdiction.” *DFS Guam, L.P. v. The A.B. Won Pat International Airport Authority,*  
12 *Guam*, 2020 Guam 20 ¶ 77 (citing *Teleguam Holdings II*, 2018 Guam 5 ¶¶ 20-21; *see also Rivera*  
13 *v. Guerrero*, 4 N.M.I. 79 (1993)). “How a protest is framed by the aggrieved bidder—including  
14 whether they frame the protest as a challenge to the solicitation, the evaluation, or the award—  
15 does not dictate when the time period to file a protest begins to run.” *Id.* ¶ 86 (footnote omitted).  
16  
17

18 The complaints contained in Morrigo’s Protest were untimely filed. “Protests filed after  
19 the 14 day period shall not be considered.” 2 GAR § 9109(b)(1). Morrigo complains that FCC’s  
20 bid did not include: 1) a bid bond and forms; 2) business licensing; 3) a Special Reminder form;  
21 and 4) warranty/sales items. All of the bids were opened publicly on May 8, 2024, including  
22 FCC’s priced submission, containing its pricing, forms, and all alleged defects to which Morrigo  
23 objects. All of these portions of FCC’s bid submission have been available to Morrigo and the  
24 public since May 8, 2024. Guam’s Procurement Rules clearly state that:  
25

26 Bids and modifications shall be opened publicly in the presence of one or more  
27 witnesses, at the time, date, and place designated in the Invitation for Bids. The  
28 name of each bidder, the bid price, and such other information as is deemed

1 appropriate by the Procurement Officer, shall be read aloud or otherwise made  
2 available..... The opened bids shall be available for public inspection ....

3 2 GAR, Div. 4 § 3109(l)(2).

4 FCC's bid was publicly opened, its price quote was announced, and the full contents of  
5 its bid, including all documents submitted and not submitted, were made known and were  
6 available to Morrico on May 8, 2024. *PR IFB2, 4a and 4b.* The Bid Abstract showing the PAG's  
7 acceptance of FCC's bid forms and bid price for evaluation, without bid bond, business licensing,  
8 and the Special Reminders form, was announced and prepared during this same bid opening, with  
9 Morrico's representative present. *Ids.*

11 May 8, 2024, is the date that Morrico was officially on notice that FCC's bid was  
12 allegedly defective and missing the items of which Morrico complains in its Letters of Protest  
13 ##3 and 4. Morrico had a representative present during the bid opening, Mark Chargualaf. *PR*  
14 *IFB2, 4a and 4b.* The primary terms of FCC's bid and all forms included, including the defects  
15 about which Morrico now complains, were announced aloud to Morrico at this bid opening. *Ids.*  
16 Morrico was informed of the alleged defects in FCC's bid on this date. *Ids.* The documents and  
17 terms of FCC's bid have not changed, and did not change upon the issuance of a Notice of Award.  
18 All of Morrico's claims are based on allegations that FCC's submission is not acceptable based  
19 on items and documents that are alleged to be faulty or lacking in FCC's bid submission. All of  
20 the items in FCC's bid upon which Morrico bases its Letters of Protest ##3 and 4 were public  
21 and actually known to Morrico as of May 8, 2024. Yet, Morrico did not complain of these facts  
22 until after the Notice of Award was issued on May 20, 2024, announcing FCC as the "lowest,  
23 responsible, and responsive bid offer" with whom a finalized contract would be entered. *PR IFB2,*  
24 *5a, 5b, 7a, and 7c.*

1           Morrico knew about the defects, and after the bid prices were all publicly read aloud to  
2 all present, Morrico was also then fully aware that FCC had submitted the lowest price for the  
3 IFB on May 8, 2024. FCC's price was \$517,205.41, and Morrico's price was \$652,137.06.  
4 Morrico's price is almost \$135,000.00 higher than FCC's price, and represents a 26% price  
5 increase over FCC's quote.  
6

7           Once Mark Chargualaf witnessed that FCC had submitted a much lower price quote that  
8 was accepted for evaluations, Morrico had actual notice that if FCC's lowest price bid was not  
9 rejected during evaluations, FCC would win the award. The IFB clearly stated FCC's pricing  
10 would be accepted and awarded in response to this solicitation:  
11

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

19 *PR IFB2, 2a*, General Terms and Conditions, p. 25, ¶48.

20           Morrico knew that FCC had submitted the lowest price for the IFB on May 8, 2024, and  
21 that the IFB stated that the "contract will be awarded to that vendor." *Id.* Morrico also knew that  
22 FCC did not submit bid bond, business license documents, or the Special Reminders form that  
23 day. *PR IFB2, 4a, Bid Abstract, and 4b.* All of Morrico's concerns about FCC's bid forms and  
24 any lack of documents were apparent and recorded, and could have been raised and resolved at  
25 this stage of the procurement. *Id.* Yet, Morrico made no request that FCC be disqualified and  
26 raised no complaints about FCC's bid contents or missing documents at that time. The alleged  
27 defects in FCC's bid forms were announced out loud to all present, and Morrico could have, and  
28 should have, further inspected FCC's entire bid when it was opened on May 8, 2024. But Morrico  
did not take any action at all, except to sit and wait.

1 The Supreme Court of Guam has specifically addressed this situation. *DFS v. GIAA*, 2020  
2 Guam 20, ¶ 148 (citing *Teleguam Holdings, LLC v. Guam*, 2015 Guam 13 ¶ 35 [hereinafter  
3 “*Teleguam Holdings I*”] and *Guam Imaging Consultants, Inc. v. Guam Mem’l Hosp. Auth.*, 2004  
4 Guam 15 ¶ 24).

5  
6 A party becomes “aggrieved” when they should be aware of a violation of the law or the  
7 terms of the solicitation document. *Id.* at ¶ 84 ((*Cf. MSG Grp., Inc. v. Dep’t of Pub. Welfare*, 902  
8 A.2d 613, 617 (Pa. Commw. Ct. 2006)). The time period to file a protest does not begin to run  
9 only “when a bidder learns that it was not awarded a contract.” *Id.* at ¶ 85 (quoting *In re Acme*  
10 *Am. Refrigeration, Inc. v. N.Y.C. Dep’t of Educ.*, 933 N.Y.S.2d 509, 513 (Sup. Ct. 2011)). The  
11 time begins to run when the protestor first knew or should have known of facts disqualifying  
12 another bidder’s bid from consideration. *Id.* at ¶¶ 84-101. Disqualification of a bid is a remedy  
13 that a protestor “could obtain prior to the issuance of an award,” such that a protest on this basis  
14 can be “made at any time during the evaluation process” and must be made prior to award. *Id.* at  
15 ¶ 96.  
16

17  
18 Although Morrigo now complains that FCC’s bid should have been rejected during  
19 evaluations (i.e., prior to award) based on the alleged defects in the bid that allegedly violated  
20 the terms of the IFB, Morrigo knew about these defects on May 8, 2024, but waited to file its  
21 Protest (and its request for any records) until June 3, 2024, *after* FCC was announced as the  
22 winning vendor by written notice to all vendors who submitted a bid. *PR IFB2, 5a and 5b*. As of  
23 May 8, 2024, Morrigo knew that FCC’s bid contained the alleged defects and the lowest price,  
24 and that FCC would win the award if its bid was not rejected, yet it waited until after award to  
25 ask for rejection of this bid. This is exactly the type of protest situation that the Supreme Court  
26  
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1 of Guam has now prohibited. *Id.* at ¶ 99. In these circumstances, a protestor cannot wait until  
2 after award is announced to file its protest. *Id.*

3 The award was announced through a written Notice of Award issued to FCC as the  
4 winning vendor after the PAG “evaluated the bids received,” and a separate written Notice of  
5 Award sent to Morrico, informing Morrico of the contract award. *PR IFB2, 5a and 5b.* The  
6 Notices of Award sent to both Morrico and FCC clearly and unambiguously state that “the PAG  
7 Authority of Guam is hereby announcing its award to the following bidder: Federal Contracts  
8 Corp. ....” *Ids.* (emphasis added).  
9

10 The May 20, 2024 notices announcing the award of the contract were issued to FCC and  
11 Morrico *after evaluations were completed* and FCC was found to be the lowest responsible and  
12 responsive vendor, in order to make the award to FCC known to all bidders and the public. 2  
13 GAR, Div. 4 § 3109(q): “Publicizing Awards. Written notice of award shall be sent to the  
14 successful bidder. In procurement over \$25,000, each unsuccessful bidder shall be notified of the  
15 award. Notice of award shall be made available to the public.” *Id.* (emphases added); *see also* 5  
16 GCA § 5211(g) ((Competitive Sealed Bidding, Award) “Award. *The contract shall be awarded*  
17 *with reasonable promptness by written notice to the lowest responsible bidder....”) (emphases  
18 added). The bids were evaluated, and a winner was awarded, documented, and made known to  
19 everyone, including the successful vendor (FCC) and the unsuccessful vendor (Morrico), through  
20 these Notices of Award on May 20, 2024. Morrico waited until fourteen days after it received its  
21 notice to file its Protest. *Morrigo Protest* (June 3, 2024).  
22  
23  
24*

25 A bidder cannot wait until award is made to protest and complain that another bidder’s  
26 bid should have been rejected during evaluations. *DFS v. GIAA*, 2020 Guam 20 at ¶ 99. It is “not  
27 the award that was the relevant point of injury; rather, the injury occur[s] when [the agency]  
28

1 consider[s] a non-qualifying bid alongside the qualifying bids.” *Id.* at ¶ 96. If Morrico wanted  
2 the PAG to reject FCC’s bid and not to consider FCC’s bid for award based on defects in the bid  
3 and bid forms, Morrico was required to file its protest at that time. Morrico did not do so. Morrico  
4 waited to ask for rejection of FCC’s bid until after award was made---after evaluations of the  
5 bids had been completed and documented, and well after it knew of the alleged defects in the bid.  
6 Morrico’s claims regarding defects in FCC’s bid requiring rejection of the bid and  
7 disqualification of FCC from award during the evaluations of the bids are therefore, untimely,  
8 and should not be considered or addressed.  
9

10 The Protest was submitted well beyond the 14-day time period of when Morrico first  
11 knew or should have known of the facts giving rise to its complaints. 5 GCA § 5425(a) and 2  
12 GAR, Div. 4 § 9101(c)(1); *DFS v. GIAA*, 2020 Guam 20 at ¶¶ 95-96; *see also In the Appeal of*  
13 *ASC Trust Corporation*, OPA-PA-09-010 (finding that the fourteen-day clock begins when a  
14 party should first be aware of facts giving rise to the protest). Morrico is not entitled to any relief,  
15 and it is not entitled to have any of its complaints considered on the merits.  
16  
17

### 18 **B. Failure to Exhaust Administrative Remedies/Standing**

19 Morrico failed to exhaust its administrative remedies with respect to its claims. Failure to  
20 exhaust administrative remedies deprives a party of standing to pursue its claims. *DFS v. GIAA*,  
21 2020 Guam 20 at ¶¶ 50-1. Therefore, Morrico does not have standing to make these claims for  
22 this reason as well.  
23

24 “Complainants should seek resolution of their complaints initially with the Procurement  
25 Officer or the office that issued the solicitation.” 2 GAR, Div. 4 § 9101(b). “It is the territory’s  
26 policy, consistent with [the Guam Procurement Act], to try to resolve all controversies by mutual  
27 agreement without litigation. In appropriate circumstances, informal discussions between the  
28

1 parties can aid in the resolution of differences by mutual agreement and are encouraged.” 2 GAR,  
2 Div. 4 § 9103(1). Morrico never attempted to seek informal resolution of its complaints with  
3 PAG prior to submitting any of its Letters of Protest. Morrico has never discussed or requested  
4 any remedy or resolution of its complaints with PAG by mutual agreement, either before or after  
5 award.

6 Morrico could have, and should have, raised any concerns about FCC’s bid and bid  
7 contents once it knew of the defects and that FCC had submitted a lower bid price, and was the  
8 apparent lowest bidder, on May 8, 2024. But more importantly, pursuant to the law, Morrico  
9 could have, and should have, informally contacted the PAG, through an email, or a phone call,  
10 or in person, to raise these concerns during the time of bid evaluations, and before award. These  
11 issues could have been informally resolved before a contract was awarded, with no legal  
12 consequences to Morrico. If Morrico truly believed that FCC’s bid should have been rejected for  
13 the alleged informalities in its bid forms, Morrico could have raised these issues well in advance,  
14 without halting the evaluation and awarding process. Yet, Morrico did not do so, and fails to  
15 offer any reason that it did not do so. Instead, it waited until after award was made, then filed a  
16 protest and attempted to obstruct the procurement with its formal protest. *PR IFB2, 7a.*

17  
18 Morrico should not now be allowed to pursue alleged procurement violations that could  
19 have been handled at the informal agency administrative level. Therefore, these claims should be  
20 dismissed. *DFS v. GIAA, 2020 Guam 20 at ¶¶ 50-1; see also Carlson v. Perez, 2007 Guam 6 ¶*  
21 *69; and Limtiaco v. Guam Fire Dep’t, 2007 Guam 10 ¶ 27.*

### 22 23 24 **C. Failure to State a Claim for Redress/Standing**

25 In order to have standing, a plaintiff must adequately establish: (1) an injury in fact (i.e., a  
26 “concrete and particularized” invasion of a “legally protected interest”); (2) causation (i.e., a  
27 “fairly ... trace[able]” connection between the alleged injury in fact and the alleged conduct of  
28 the defendant); and (3) redressability (i.e., it is “likely” and not “merely ‘speculative’” that the

1 plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit). *Lujan v. Defenders*  
2 *of Wildlife*, 504 U.S. 555, 560–561 (1992).

3 Failure to ask for the appropriate remedy provided by law, failure to specifically set forth  
4 the causes of action, or any failure to strictly follow the mandates of the laws or rules conferring  
5 jurisdiction upon an adjudicative body deprives the adjudicative body of jurisdiction to hear the  
6 matter, and mandates dismissal of the action. *California v. Texas*, 141 S.Ct. 2104, 2115-2116,  
7 210 L.Ed.2d 230 (June 17, 2021) (Plaintiffs were deprived of standing by failing to request the  
8 appropriate relief available under the law, and by requesting the wrong type of relief); *M.S. v.*  
9 *Brown*, 902 F.3d 1076, 1082, 1083-1090 (9<sup>th</sup> Cir. 2018) (Even where a plaintiff requests relief  
10 that could redress a claimed injury, there is no redressability, as required for standing, if the  
11 requested relief is beyond the scope of available relief); and *see e.g., Iwachiw v. New York State*  
12 *Bd. of Elections*, 186 Misc.2d 577, 719 N.Y.S.2d 800 (N.Y.Sup., 2000)(dismissal appropriate  
13 where petition failed to state a cause of action based on vague, conclusory allegations, and failed  
14 to request the specific relief provided by statute).

15  
16 The underlying Letters of Protest ##3 and 4 filed by Morrico failed to both: 1) request  
17 appropriate available post-award remedies; and 2) allege any injury that is redressable. The  
18 appeal filed by Morrico still fails to request the relief available under law, and still fails to allege  
19 any injury caused by the PAG's award of a contract to FCC.

20  
21 1) Failure to Request Available Post-award Relief

22 Morrico specifically requests only pre-award relief. "If prior to award it is determined  
23 that a solicitation or proposed award of a contract is in violation of law, then the solicitation or  
24 proposed award shall be: (a) cancelled; or (b) revised to comply with the law." 5 GCA § 5451.  
25 Although not very clearly stated, in Letters of Protest ##3 and 4, Morrico requested that the PAG  
26 go back and reject FCC's bid and award a contract to Morrico, and requested that the PAG be  
27 prevented from "proceed[ing] further with the solicitation or with the award of the contract ...."  
28

1 5 GCA § 5425(g). Even in this appeal, Morrico only makes two discernible requests for action  
2 by the OPA: 1) “[t]hat the automatic stay of procurement arising under 5 G.C.A. §5425(g) be  
3 confirmed in place;” and 2) “[t]hat Morrico, as the lowest priced responsive and responsible  
4 bidder under the IFB, be named for award of the IFB.” *Notice of Procurement Appeal*, p. 6,  
5 Section B (3) and (4). These are all pre-award remedies. *See* pre- and post-award protest remedies  
6 at 5 GCA §§ 5451, 5452; and 2 GAR, Div. 4 §§ 9104, 9105, and 9106. These remedies are only  
7 available prior to award, and cannot be requested retroactively.  
8

9  
10 Although it knew of the alleged defects in the bid prior to award, and these pre-award  
11 remedies could have been applied, if timely requested, Morrico waited until after award of the  
12 contract to request these remedies. Morrico never requested revision or cancellation of IFB #2,  
13 even though it had notice that the IFB clearly stated that award would be granted to MAS  
14 contractors, if they offered the lowest price. Morrico also did not request revision or cancellation  
15 of the expected award, prior to awarding, even though it had notice that FCC did, in fact, offer  
16 the lowest price on May 8, 2024, and would therefore receive the award pursuant to the terms of  
17 the IFB. Appellant asks for relief but fails to provide any information or law that would entitle it  
18 to the pre-award relief it seeks, local or federal. Appellant fails to support the pre-award relief it  
19 seeks now---after the contract has already been awarded to FCC, executed by the parties, and is  
20 being performed. *PR IFB2, 6a and 6b; 3<sup>rd</sup> Supp. to PR, 6c and 6d.*  
21

22  
23 Even if this appeal were to be sustained, there is no request for any of the available remedies  
24 that can be granted on the basis of alleged pre-award defects in the bid, and therefore, this appeal  
25 should be dismissed. The appropriate remedies that would be available to Morrico now (if it  
26 could show standing, jurisdiction, and injury, which it cannot) are limited to post-award  
27 remedies. After award, Guam’s Procurement Law clearly sets forth the available remedies: if the  
28

1 awarded contractor has not acted fraudulently or in bad faith, executed contracts may either be:  
2 1) "ratified and affirmed"; or 2) "terminated and the person awarded the contract shall be  
3 compensated for the actual expenses reasonably incurred under the contract, plus a reasonable  
4 profit, prior to the termination ...." 5 GCA § 5452(a)(1); and 2 GAR, Div. 4 § 9106(a). Even if  
5 the awarded contractor has acted fraudulently, or in bad faith, the contract may still be ratified,  
6 if it is in the best interests of the government of Guam. 5 GCA § 5452(a)(2); and 2 GAR, Div. 4  
7 § 9106(b).  
8

9         Where there is no fraud or bad faith, Guam's Procurement Law and Guam's Procurement  
10 Regulations require contracts to be ratified and affirmed if it is in the best interests of the  
11 government. 5 GCA § 5452(a), (1) and (2); 2 GAR, Div. 4 § 9106(a), (b), and (c). FCC has not  
12 acted fraudulently or in bad faith; nor has the PAG. Morrico does not make a single assertion of  
13 bad faith or fraud by FCC or the PAG. Morrico complains about defects in FCC's bid forms, and  
14 technical deficiencies. Morrico only asserts that that the PAG allegedly made "mistakes" by  
15 awarding to FCC.  
16

17         There is no legitimate dispute: at the end of the day, FCC, as a pre-vetted, responsive and  
18 responsible federal MAS contractor, offers the 180' Telescopic Boom Lift for the lowest price  
19 available to the government of Guam, at a fraction of the price offered by Morrico. Morrico was  
20 allowed to, and did, compete on the basis of merit and price, not once, but twice, for this contract.  
21 This competition was open, and Morrico was given specific notice that it would be competing  
22 against federal MAS contractors. There is no fraud or bad faith in this purchase. It is undeniably  
23 in the best interests of the PAG and the people of Guam to make this purchase from FCC. For  
24 these reasons, the contract must be ratified and affirmed, and this appeal should be denied and  
25 dismissed in its entirety.  
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1           2) Failure to Allege Redressable Injury

2           This appeal cannot be sustained because Morrico fails to plead sufficient facts and law to  
3 support its claims and survive a GRCP 12(b)(6) motion to dismiss. In order to pursue a protest,  
4 Morrico must have standing. When standing is at issue, "the relevant inquiry is whether,  
5 assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to  
6 be redressed by a favorable decision." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26,  
7 38 (1976). This entails two burdens of proof: a) injury; and b) an entitlement to appropriate  
8 available relief for that injury. *Id.*

9           In order to be entitled to any relief, Morrico must show: 1) that "a solicitation or award of  
10 a contract is in violation of law," 5 GCA § 5450; and 2) that it is "aggrieved" by the alleged  
11 violation(s) of law. 5 GCA § 5425(a).

12           However, Morrico has not set forth any facts or law to show that the award of the contract  
13 to FCC is "in violation of law," as required by 5 GCA §§ 5450, 5451, and 5452. Morrico appears  
14 to claim that the PAG is violating the law, but without any specific citations to any specific laws.  
15 All of Morrico's claims/requests for relief on appeal rest on the conclusory argument that FCC's  
16 price submission should have been rejected, and Morrico should have been awarded the contract.  
17 However, none of these claims is sustainable because Morrico is not entitled to award of a  
18 contract under any law.

19           Without any precise reference, Morrico's appellate filings imply that Morrico does not  
20 agree that federal law applies and controls this federally funded procurement. Morrico's  
21 implication is completely unfounded in fact or law. The PAG asserts that it is required to follow  
22 federal law when spending its federal funds. 2 CFR § 200.339 and .340; *see also* 48 USC §  
23 1421(q) (The U.S. Constitution and overarching federal law always applies to Guam, as a  
24 jurisdiction of the United States). However, even if federal law is disregarded, Guam law  
25 mandates that the PAG must make this purchase from FCC.  
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1 The Organic Act of Guam specifically grants the entire government of Guam the authority  
2 and ability to make purchases through the General Services Agency of the United States. 48 USC  
3 § 1423(l) (“Purchases through GSA. The Territorial and local governments of Guam are  
4 authorized to make purchases through the General Services Administration.”).

5 Acknowledging this right to make purchases through federal GSA, as guaranteed by the  
6 Organic Act, the Legislature of Guam passed 5 GCA § 5122. This statute not only allows  
7 purchases from federal GSA, it mandates that certain purchases must be acquired from this  
8 agency of the United States, requiring: “[t]he General Services Agency shall procure supplies  
9 from the United States when the cost to the General Services Agency is less by ten percent (10%)  
10 than from other contractors.” *Id.* (emphasis added).

11 This statute obligates that Guam’s GSA, and by delegation or otherwise, executive branch  
12 agencies making purchases under Guam’s Procurement Law “shall” purchase supplies from the  
13 U.S. federal GSA when the federal GSA price is 10% less than other contractors. *Id.*, and 5 GCA  
14 §§ 5121(c) and 5125; *see also* 1 GCA 715(9) (“[s]hall is mandatory and *may* is permissive.”).

15 In this case, the price obtained through the federal GSA MAS contract with FCC is more  
16 than 20%<sup>1</sup> less than the price from the other bidder, Morrico. Guam’s own laws require the PAG  
17 to buy this 180’ Telescopic Boom Lift from FCC. No matter what law is applied, the outcome is  
18 the same: the PAG must make this purchase from FCC. Morrico is not entitled to an award of a  
19 contract for this purchase, and therefore, is not aggrieved by the award of a contract for this  
20 purchase to FCC. Accordingly, there is no “injury ... that is likely to be redressed by a favorable  
21 decision.” *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).  
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27 <sup>1</sup> Price Increase Formula:  $(\$652,137.06 - \$517,205.41) / \$517,205.41 \times 100 = 26\%$

28 Price Difference Formula:  $(\$652,137.06 - \$517,205.41) / (\$652,137.06 - \$517,205.41 / 2) \times 100 = 23\%$

Price Decrease Formula:  $(\$652,137.06 - \$517,205.41) / \$652,137.06 \times 100 = 21\%$



1           Morrigo demonstrates no injury, and makes untimely requests for remedies that are not  
2 available. This appeal, in its entirety, should be dismissed for Morrigo’s failure to plead  
3 sufficient facts and law to support Morrigo’s conclusory claims, failure to demonstrate injury,  
4 failure to request available and appropriate remedies, and lack of standing and jurisdiction.  
5

6  
7           **D. The PAG Made Extra Efforts to Allow Morrigo to Compete for a Contract**

8           As a final note, the PAG gave Morrigo every opportunity to be awarded this contract. The  
9 PAG made sure to openly solicit from Morrigo, not once, but twice. Even after Morrigo submitted  
10 a bid that was too high in price for the PAG’s budget, the PAG gave this information to Morrigo  
11 and provided Morrigo with another opportunity to compete---with an additional advantage.  
12

13           If there is a core source of actual grievance in Morrigo’s complaints, it seems to be the  
14 allegation that FCC “was provided with a *de facto* unfair pricing advantage ...” *PR IFB2, 7a*, p.  
15 1, ¶ 2 (June 3, 2024). Morrigo seems to imply that the PAG provided FCC with some sort of  
16 unfair pricing advantage. This is absolutely incorrect. The PAG actually provided Morrigo with  
17 a *de facto* unfair pricing advantage. The PAG did everything in its power to allow Morrigo to  
18 compete for this contract, and Morrigo was able to compete with full knowledge of its  
19 competitor’s pricing, *prior to bidding*.  
20

21           Despite Morrigo’s claims, Morrigo was the party afforded the advantage in pricing for  
22 this IFB.

23           GSA schedule contracts require all schedule contractors to publish an ‘Authorized  
24 Federal Supply Schedule Pricelist’ (pricelist). The pricelist contains all supplies  
25 and services offered by a schedule contractor. In addition, each pricelist contains  
26 the pricing and the terms and conditions pertaining to each Special Item Number  
that is on schedule.

27 FAR § 8.402(b).  
28

1 As an MAS Schedule Contractor, FCC's established catalog pricing is publicly available  
2 at all times on <http://www.gsa.gov/schedules>. FAR § 8.401 and .402; 38.101(a); GSAR §  
3 552.238-88.

4  
5 Established Catalogue Price means the price included in a catalogue, price list,  
6 schedule or other form that: (a) is regularly maintained by a manufacturer or  
7 contractor; (b) is either published or otherwise available for inspection by  
8 customers; and (c) states prices at which sales are currently or were last made to  
a significant number of any category of buyers or buyers constituting the general  
buying public for the supplies or services involved.

9 2 GAR, Div. 4 § 1106(24), *Established catalogue pricing*.

10 FCC's established catalog pricing for the 180' telescopic boom lift is listed at:

11 [https://www.gsaadvantage.gov/advantage/ws/catalog/product\\_detail?gsin=11000079278024](https://www.gsaadvantage.gov/advantage/ws/catalog/product_detail?gsin=11000079278024).

12 This price is locked in by contract until June 12, 2026. *PR IFB2, 6b*. Morrico could view this  
13 open, published and public pricing at any time before Morrico submitted its bid. Morrico was  
14 able to preview its competitor's (FCC's) prices for the qualifying products, and could use this  
15 information to determine its own bid price in response to this solicitation. Conversely, FCC  
16 could not preview Morrico's pricing, because Morrico is not an awarded contractor with pre-set  
17 mandatory public catalog pricing. FAR § 8.401 and .402; GSAR § 552.238-88. Further, FCC is  
18 contractually obligated to offer the pricing already set forth in its MAS contract and cannot  
19 change its pricing. *Ids.* Morrico *can* change its pricing and underbid any published price by FCC,  
20 if it so chooses. Any advantage that FCC might arguably have in pricing is because the  
21 contractors on the Federal Supply Schedule offer a bulk discount. FAR §§ 8.402(c)(2), 38.101(e);  
22 GSAR §§ 538.270, .271, and .273. This is not caused by any acts of the PAG.  
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26 In contrast, Morrico was provided with a significant competitive advantage by this  
27 solicitation, because Morrico could see the set item price it needs to bid under to win, prior to  
28 submitting its bid. Morrico was helped, not hindered, in competing for this solicitation.

1 None of the complaints raised operate to penalize Morrigo or prevent Morrigo from  
2 participating in this federally funded solicitation. Morrigo had actual notice of all defects alleged.  
3 Morrigo has suffered no injury, and is not aggrieved by the alleged violations. This appeal should  
4 be denied in its entirety and dismissed.  
5

6 **III. CONCLUSION**

7 For the foregoing reasons, and with good cause shown, PAG moves the Public Auditor  
8 and the Office of Public Accountability to dismiss this appeal and all of Morrigo's claims for  
9 lack of subject matter jurisdiction, standing, failure to request appropriate relief, and failure to  
10 state a claim.  
11

12 Submitted this 23<sup>rd</sup> day of September, 2024.  
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14 PORT AUTHORITY OF GUAM

15 By:   
16

JESSICA TOFT  
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