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PROCUREMENT APPEALS

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

9 IN THE MATTER OF)
10 MORRICO EQUIPMENT, LLC,)

11 Appellant,)

12 and)

13 GUAM SOLID WASTE AUTHORITY)
14 UNDER THE MANAGEMENT OF)
15 FEDERAL RECEIVER GERSHMAN,)
16 BRICKNER AND BRATTON, INC.,)

17 Purchasing Agency.)

Docket OPA PA-14-010

**AGENCY REPORT &
AGENCY STATEMENT**

AGENCY REPORT

18
19 The purchasing agency, the Guam Solid Waste Authority (“GSWA”), by and through its
20 attorney Vanessa L. Williams, Esq., hereby submits its Agency Report required under 2 GAR §
21 12105 as follows:

22 (a) Copy of Protest. The GSWA submitted a copy of the protest to the Office of
23 Public Accountability (“OPA”) on November 19, 2014, as part of the procurement record
24 required by 2 G.A.R. § 12104(c)(3). See Submission of Procurement Record, **Tab 12**, which is
25 incorporated herein by reference;

26 (b) Copy of the Bid or Offer submitted by the Appellant and a copy of the Bid that is
27 being considered for Award. No bid or offer has been submitted by the Appellant, Morrico
28 Equipment LLC;

1 (c) Copy of the Solicitation. The GSWA submitted a copy of the solicitation,
2 including the specification relevant to the protest, to the OPA on November 19, 2014, as part of
3 the procurement record required by 2 G.A.R. § 12104(c)(3). See Submission of Procurement
4 Record, **Tab 2**, which is incorporated herein by reference;

5 (d) Copy of the Abstract of Bids or Offers or Portions thereof Relevant to the
6 Protest. No abstracts of bids or offers relevant to the protest have been submitted to the GSWA;

7 (e) Any other Documents Relevant to the Protest. The GSWA submitted documents
8 relevant to the protest to the OPA on November 19, 2014, as part of the procurement record
9 required by 2 G.A.R. § 12104(c)(3). See Submission of Procurement Record, which is
10 incorporated herein by reference;

11 (f) Decision from which the Appeal is Taken. The GSWA submitted the decision
12 from which Morrico's Appeal is taken to the OPA on November 19, 2014, as part of the
13 procurement record required by 2 G.A.R. § 12104(c)(3). See Submission of Procurement
14 Record, **Tab 15**, which is incorporated herein by reference;

15 (g) Statement Answering the Allegation of the Appeal. A statement answering the
16 allegations of the Appeal and setting forth findings, actions, and recommendations in this
17 matter, together with additional evidence or information necessary to determine the validity of
18 Morrico's Appeal is attached;

19 (h) Determination of Award pursuant to 2 G.A.R. § 92101(e). No award has been
20 made in this matter;

21 (i) Statement Regarding Court Proceeding. A statement indicating whether the
22 matter is the subject of a court proceeding is being filed concurrently herewith, and is
23 incorporated herein by reference.

24 Respectfully submitted this 24th day of November, 2014.

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27 VANESSA L. WILLIAMS, ESQ.
28 *Attorney for Guam Solid Waste Authority under the
Federal Receivership of Gershman, Brickner & Bratton*

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AGENCY STATEMENT

The GSWA denies the allegations in Morrigo’s appeal. The appeal is not properly before the OPA, and must be denied as Morrigo’s protest was untimely. Should the appeal proceed to be heard on the merits, Morrigo’s protest must still be denied because they have failed to demonstrate that the GSWA’s cab forward specification was arbitrary, capricious or an abuse of discretion. By contrast, the GSWA has provided several reasonable bases for why the cab forward specification is a salient technical requirement for the desired performance characteristics of the refuse trucks. Based on the following, Morrigo’s appeal should be denied.

I. MORRICO’S PROTEST WAS UNTIMELY AND ITS APPEAL SHOULD BE DISMISSED.

Morrigo’s protest was denied because it was not timely filed within 14 days of the issuance of the IFB. Morrigo alleges that its protest was timely filed because it “could not know whether its specification discrepancy in offering g a conventional cab model would be accepted or rejected until the GSWA spoke on that matter.” (Notice of Procurement Appeal p. 2 ¶ 6, Nov. 6, 2014.) GSWA denies that Morrigo’s protest was timely. A Motion to Dismiss Morrigo’s Appeal is being filed concurrently herewith. The Motion to Dismiss outlines in detail the reasons for why Morrigo’s allegation of a timely protest fails. The GSWA hereby incorporates its Motion to Dismiss into this Statement, to address Morrigo’s allegations that its Protest was timely filed.

II. THE CAB FORWARD SPECIFICATION IS A SALIENT TECHNICAL REQUIREMENT FOR THE DESIRED PERFORMANCE CHARACTERISTICS.

Morrigo alleges that GSWA’s refusal “to amend the specifications to allow vendors to bid a conventional cab model was arbitrary, capricious and an abuse of discretion.” (Notice of Appeal, p.3 ¶ 5, Nov. 6, 2014). In applying the “arbitrary and capricious” standard to an agency procurement decision, the Superior Court of Guam has stated:

[A] procurement decision can be set aside if it lacked rational basis or if the agency’s decision-making involved a violation of regulation or procedure. However, *de minimus* errors in the procurement process do not justify relief.

1 Rather, the protesting bidder must prove that a significant error marred the
2 procurement in question. **If the court finds a reasonable basis for the**
3 **agency's action, the court should stay its hand even though, it might, as an**
4 **original proposition, have reached a different conclusion as to the proper**
5 **administration and application of the procurement regulations.**

6 *TRC Environmental Corporation v. Office of the Public Auditor*, Superior Court of Guam Case
7 No. SP160-07, Decision and Order, p. 3, Nov. 24, 2008. (Internal citations omitted.) (Emphasis
8 added.)

9 Thus, Morrigo bears the burden of proving GSWA's decision to seek cab forward trucks
10 was arbitrary and capricious. In order to meet their burden, Morrigo must prove the cab forward
11 specification "lacked rational basis." *Id.* Morrigo failed to meet its burden. Morrigo failed to
12 allege any facts to demonstrate that GSWA's retention of the cab forward specification was
13 arbitrary, capricious or an abuse of discretion. By contrast, GSWA provided several reasonable
14 bases for the cab forward specification, as clearly stated in GSWA's response to Morrigo's
15 untimely protest, including:

- 16 (a) Better maneuverability and better visibility to the drivers,
17 resulting in more Efficient use of the equipment and
18 enhanced safety for GSWA personnel and the public;
- 19 (b) Reduced repair time and costs due to ease of accessibility
20 to important engine components; and
- 21 (c) The GSWA drivers' overwhelming preference for the cab
22 forward design.

23 (Denial of Protest, Submission of Procurement Record, Tab 15, Nov. 19, 2014.) Accordingly,
24 the OPA should find there was "reasonable basis" for the cab forward specification. *See TRC*
25 *Environmental Corporation v. Office of the Public Auditor*, discussed *supra*. Further, the
26 foregoing reasoned bases also support that the cab forward specification is a salient technical
27 requirement for the desired performance characteristics of the refuse trucks. *See* 5 G.C.A. §
28 5268(a) and (c).

Morrigo's protest alleged "the cab forward design has several disadvantages to the
conventional cab design[.]" (Procurement Protest, Notice of Procurement Appeal, Exhibit D,

1 Nov. 6, 2014.) These alleged disadvantages included operator maneuverability and visibility,
2 ease and expense of maintenance, and comfort of the operators. *Id.* In turn, GSWA’s Denial of
3 Morrico’s protest addressed operator visibility, ease and expense of maintenance, and comfort
4 of the operators. (Denial of Protest, Submission of Procurement Record, Tab 15, Nov. 19,
5 2014.)

6
7 **A. Cab Forward Trucks Provide Better Maneuverability and Visibility.**

8 Morrico alleges that the cab forward specification is not necessary to carry out the
9 purposes for which the refuse trucks are being purchased. This argument assumes that the
10 trucks are being procured solely to pick up trash. However, it is essential and necessary that the
11 GSWA refuse trucks not only be able to pick up trash, but to do so *safely and efficiently*,
12 without injuring person or property. The cab forward specification is relevant to safety and
13 efficiency, as cab forward trucks have overall better maneuverability and visibility. Cab
14 forward models are shorter and have markedly greater operator visibility. This improved
15 maneuverability and visibility in turn provides enhanced safety for GSWA personnel and the
16 public.

17 Morrico also alleges that the cab forward specification is not necessary to comply with
18 the turning radius specification, because a conventional cab can meet the same turning radius
19 requirement also included as a specification. However, this argument fails to address the
20 independence of these two requirements as clearly stated at the Pre-Bid conference.
21 (Submission of Procurement Record, Pre-Bid Conference Audio Recording at 4:12-4:45, Tab 6,
22 Nov. 19, 2014.) Nevertheless, Morrico alleges that the “historical difference” between the cab
23 forward model and the conventional cab model is that “a cab forward model had a tighter
24 turning radius that allowed the refuse collection truck to operate on narrow streets.” (Notice of
25 Procurement Appeal p. 2 ¶ 2, Nov. 6, 2014.) However, this is not the only difference between
26 the cab forward and conventional cabs. More importantly, the “historical difference” in the
27 turning radius of conventional and cab forward models was not the justification for the cab
28 forward specification. The turning radius requirement and the cab forward requirement are

1 independent, salient technical requirements for the desired performance characteristics of the
2 refuse trucks.

3 Morrico further alleges that GSWA maintained the specification “relying primarily on
4 the turning radius requirement and a reference to Guam’s narrow streets and roads.” (Notice of
5 Procurement Appeal, p.3 ¶ 1, Nov. 6, 2014.) This is simply not accurate; GSWA never relied
6 on the turning radius requirement for the cab forward specification. The two specifications are
7 independently necessary. What GSWA did reference was the “better maneuverability and
8 better visibility” to the drivers. However, as previously explained the turning radius
9 specification is an independent, salient requirement *in addition to* the salient cab forward
10 specification as it relates to maneuverability and visibility.

11 **B. Cab Forward Trucks Provide Easier and Less Expensive Maintenance.**

12
13 Morrico alleges that the conventional cab is less expensive to purchase and maintain
14 than a cab forward truck. (Notice of Procurement Appeal, Nov. 6, 2014.) Morrico further
15 alleges that the cab forward design “makes engine access more inefficient and dangerous.”
16 (Notice of Procurement Appeal, Procurement Protest, Exhibit D, Nov. 6, 2014.) The GSWA
17 denies this allegation. The GSWA has significant experience with both conventional and cab
18 forwards designs. From an operational perspective, due to the increased maneuverability of the
19 cab forward trucks, operators are able to reduce the route times by up to two hours, thereby
20 decreasing the wear and tear of the trucks. Further, the cab forward design’s ease of
21 accessibility to most of the important engine components is an advantage of the cab forward
22 design over the conventional cab design. This ease of accessibility helps reduce repair time and
23 costs, thereby promoting overall economy of the maintenance of the necessary trucks. *See* 5
24 G.C.A. § 5265 (“All specifications shall seek to promote overall economy for the purposes
25 intended and encourage competition in satisfying the Territory’s needs, and shall not be unduly
26 restrictive.”).

1 **C. Cab Forward Trucks are Overwhelmingly Preferred by GSWA's Truck**
2 **Operators.**

3 Morrigo alleges that the “cab forward design reduces operator comfort,” is “hotter,” and
4 “is also safer to enter and exit.” (Procurement Protest, Notice of Procurement Appeal, Exhibit
5 D, Nov. 6, 2014.) Morrigo denies this allegation. The GSWA values the input of its front-line
6 worker when making purchasing decision, and based on the input of the operators who actually
7 use the equipment, “their overwhelming preference if for the cab forward design.” (Denial of
8 Protest, Submission of Procurement Record, Tab 15, Nov. 19, 2014.) This preference is
9 logically attributable to the shorter route times and greater visibility of the cab forward trucks.
10 Therefore, Morrigo’s allegations that the cab forward design militates against operator
11 preference is without merit.

12 For the foregoing, reasons, it is clear that Morrigo failed to meet its burden to show that
13 the cab forward specification was arbitrary, capricious, or an abuse of discretion. Further, the
14 GSWA has provided several reasoned bases for the specification demonstrating that it is a
15 salient, technical requirement necessary for the desired performance characteristics of the refuse
16 trucks. Therefore, the finding of reasonable bases refutes Morrigo’s allegations and their appeal
17 should be denied.

18 **III. THE CAB FORWARD SPECIFICATION DOES NOT UNDULY RESTRICT**
19 **COMPEITION.**

20 Morrigo alleges that the cab forward requirement unduly restricts competition. However,
21 Morrigo fails to demonstrate how any competition is restricted, except Morrigo’s. The cab
22 forward specification is not proprietary to any particular manufacturer. GSWA even went
23 further to list for Morrigo the numerous manufacturers that offer a cab forward design. These
24 include FUSO, Hyundai and Freightliner, Mack, Peterbilt, Crane Carrier, Osh Kosh, and Volvo.
25 Morrigo does not dispute that the cab forward design is offered by these numerous other
26 manufacturers. Indeed, Morrigo even admits that Morrigo does represents one of those
27 manufacturers of the cab forward design – Freightliner – it just does not offer this particular
28

1 design in this market. (Notice of Procurement Appeal, Nov. 6, 2014.) Morrigo merely
2 represents that Morrigo does not represent or have access to those particular cab forward
3 models. Morrigo's admission of its singular inability to compete with the numerous other
4 manufacturers capable of providing the necessary specification is insufficient to prove the
5 specification unduly restricts competition. As the GSWA has demonstrated that the cab forward
6 specification promotes overall economy and encourages competition without being unduly
7 restrictive, Morrigo's appeal should be denied.

8 **IV. CONCLUSION**

9 Morrigo's protest was untimely, and therefore its appeal is not "properly submitted" to
10 the OPA and should be denied on GSWA's Motion to Dismiss. Should the OPA proceed to
11 consider Morrigo's protest on the merits, Morrigo has failed to meet its burden to show that the
12 GSWA's decision was "arbitrary, capricious or an abuse of discretion." Based on the foregoing,
13 the GSWA had several reasoned bases to demonstrate that the cab forward specification is a
14 salient technical requirement for the desired performance characteristics of the refuse trucks and
15 necessary to carrying out the purposes for which the refuse trucks are being sought. Therefore,
16 the OPA should deny Morrigo's appeal.

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18 Respectfully submitted this 21st day of November, 2014.

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24 *Federal Receivership of Gershman, Brickner & Bratton*
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