

Vanessa L. Williams, Esq.
 Bank Pacific Bldg, Suite 102
 166 West Marine Corp Drive
 Dededo, Guam 96929
 Phone: 671-637-9627
 Facsimile: 671-637-9660
 Email: vw@guamlawyer.biz

Attorney for Purchasing Agency
Guam Solid Waste Authority

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 PROCUREMENT APPEALS

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

<p>IN THE MATTER OF MORRICO EQUIPMENT, LLC,</p> <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">and</p> <p>GUAM SOLID WASTE AUTHORITY UNDER THE MANAGEMENT OF FEDERAL RECEIVER GERSHMAN, BRICKNER AND BRATTON, INC.,</p> <p style="text-align: right;">Purchasing Agency.</p>))))))))))))	<p>Docket OPA PA-14-010</p> <p style="text-align: center;">REBUTTAL TO APPELLANT'S COMMENTS</p>
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REBUTTAL TO APPELLANT'S COMMENTS

Pursuant to 2 G.A.R. §§ 12104(c)(4) and 12102(g), GSWA hereby submits its Rebuttal to the Comments on Agency Report filed by appellant Morrico Equipment, LLC ("Morrico"). Morrico's Appeal must be dismissed because the matter is not "properly submitted" to the OPA. The protest was untimely and properly dismissed. In any event, Morrico's challenges to the "cab forward" specification should be denied. There is no merit to their challenges, and GSWA has complied with all procurement laws and regulations to achieve maximum practicable competition for the needs of the Territory.

I. THE MATTER IS NOT "PROPERLY SUBMITTED" TO THE OPA.

Morrigo quickly dismisses *TRC Environmental Corporation* for the proposition that the OPA owes no deference to GSWA's determination. GSWA acknowledges that the OPA's review is *de novo*. However, the emphasis drawn from *TRC Environmental Corporation* is that

1 although the OPA has the power to review and determine *de novo* any matter properly
2 submitted to her, a matter that is “untimely” is not “properly submitted” and any filing is
3 “contrary to law” falling below the § 5704 standard. *TRC Environmental Corp. v. Office of the*
4 *Public Auditor*, Superior Court of Guam Special Proceedings Case No. SP 160-07, p. 6 (Nov.
5 24, 2008). A protest is “untimely” and not “properly submitted” to the OPA if the protest was
6 not filed with the purchasing agency within fourteen (14) days after the protestor knows or
7 should have known of the facts giving rise there to. 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4,
8 Chap. 9, §9101(c)(1).

9 Applying this standard to this matter, Morrico should have known GSWA was including
10 the cab forward specification as a separate and independent requirement for the procurement at
11 the mandatory pre-bid conference on September 23, 2014. GSWA clearly and unequivocally
12 stated it would not accept bids for conventional cabs. (Procurement Record, Tab 6, Nov. 29,
13 2014.) In order for Morrico’s protest to have been timely, it must have been submitted no later
14 than October 7, 2014, or 14 days after September 23, 2014. Morrico did not submit its protest
15 until October 9, 2014, making it untimely, and all subsequent arguments against the cab forward
16 specification moot as the OPA lacks jurisdiction over this matter. *See TRC Environmental*
17 *Corporation supra*.

18 **II. MORRICO’S COMMENTS TO THE AGENCY REPORT AND** 19 **PROCUREMENT RECORD ARE ERRONEOUS AND MISLEADING.**

20 Morrico’s assertions that (a) there is “no justification in the procurement record” for the
21 cab forward specification and, (b) that GSWA’s justification for the cab forward specification is
22 only in “hindsight,” are erroneous, misleading, and fail to take into consideration the expertise
23 in drafting by the draftsman clearly indicated in the procurement record. (*See Appellant’s*
24 *Comments p.2, Dec. 4, 2014.*)

25 **A. Morrico’s Erroneous Arguments**

26 First, Morrico argues that the justifications detailed in the Agency Report for the cab
27 forward specification were not supported by the Procurement Record. This is simply untrue.
28 The Category 1 Body specifications which include the “low cab forward” design also required

1 “Front windshield with curved corners having a minimum of 2033 square inches *for maximum*
2 *visibility*” and “Rear Corner windows in B-Pillars Post for *Maximum Visibility and Safety.*” (See
3 Procurement Record, Tab 2, Nov. 19, 2014.) (Emphasis added.) Further, when Morrico
4 inquired at the Pre-Bid Conference whether the cab forward design was a safety or turning
5 radius issue, GSWA said “both.” (Procurement Record, Pre-Bid Conference Audio Recording,
6 Tab 6, Nov. 19, 2014.) Thus the Procurement Record clearly indicates the visibility and safety
7 justifications for a cab forward design.

8 Second, Morrico argues that GSWA failed to include “mandatory specification
9 development information that must be included in an IFB procurement record.” (Appellant’s
10 Comments p.3, Dec. 4, 2014.) The argument cannot be sustained. Section 5249(d) requires the
11 inclusion of technical literature in the Procurement Record only *if* such technical literature was
12 used in the development of specifications. Based on their erroneous application 5 G.C.A. §
13 5249(d), Morrico also argues that the GSWA’s justification that the cab forward trucks navigate
14 routes faster than the conventional cabs is outside the procurement record because there is no
15 technical literature establishing such a fact. Again, this logic fails because it erroneously
16 assumes that GSWA’s justification for the cab forward specification was based on such
17 “technical literature.”

18 GSWA’s justifications for the cab forward design was based on the practical experience
19 and applied use by GSWA of both cab forward and conventional cab refuse trucks. GSWA has
20 significant experience with both cab forward and conventional cab designs. From an
21 operational perspective, due to the increased visibility of the cab forward trucks, operators are
22 more safely and efficiently able to maneuver the trucks. Such reliance on the purchasing
23 agency’s expertise is appropriate. Indeed, it is even required of the Chief Procurement Officer
24 and Director of Public Works when drafting specifications for a using agency. See 4 G.A.R §
25 4105 and 5 G.C.A. § 5264. Therefore, Morrico’s reliance on 5 G.C.A. § 5249(d) is misplaced.

26 Finally, Morrico relies on *L.P. Ganacias, Inc. dba RadioCom v. GIAA and Guam Cell*
27 *Communications*, to comprehensively support its argument that the procurement record is devoid
28 of justification for the cab forward trucks. *L.P. Ganacias* is inapplicable. There, the Court was

1 scouring the record for justification as to why a specific *brand* of pager could conceivably be
2 the only pager to meet the needs of the agency. Here, Morrico is not protesting the use of a
3 specific *brand*. Likewise, *In the Appeal of Guam Publications, Inc.* OPA-PA-08-007 is
4 inapposite. There the specifications regarding the size of an advertisement were unduly
5 restrictive because they specified specific dimensions instead of merely specifying a “full page
6 ad” size. *Id.* at p. 13. Morrico is challenging the restrictiveness of a type of truck designed to
7 pick up trash for residents of Guam. This cannot be compared to a dispute over a one-inch
8 discrepancy in size of an advertisement. *See id.*

9
10 **III. MORRICO’S PROTEST BASED ON ALLEGATIONS OF ARBITRARINESS,
11 CAPRICIOUSNESS, AND ABUSE WERE PROPERLY DENIED.**

12 Morrico implicated the standard of arbitrariness, capriciousness, and abuse of discretion.
13 Morrico’s Appeal to the OPA alleges that GSWA’s refusal “to amend the specifications to
14 allow vendors to bid a conventional cab model was arbitrary, capricious and an abuse of
15 discretion.” (Notice of Appeal, p.3 ¶ 5, Nov. 6, 2014). *TRC Environmental Corporation*
16 merely defines the standard of arbitrariness, capriciousness, or an abuse of discretion in the
17 context of procurement. Thus, even if the matter was “properly submitted” to the OPA,
18 subjecting it to *de novo* review, Morrico’s allegations based on arbitrariness, capriciousness,
19 and abuse of discretion cannot be sustained. Morrico should not be allowed to deviate from the
20 standard and issues it raised for itself, just because their allegations fail in hindsight.

21 Morrico protested the cab-forward specification alleging “the cab forward design has
22 several disadvantages to the conventional cab design[.]” (Procurement Protest, Notice of
23 Procurement Appeal, Exhibit D, Nov. 6, 2014.) These alleged disadvantages included operator
24 maneuverability and visibility, ease and expense of maintenance, and comfort of the operators.
25 *Id.* GSWA denied the protest because in addition to being untimely, Morrico’s arguments were
26 without merit. Morrico is using red herrings to beat a dead horse. The cab forward
27 specification was justified based on the expertise and experience of GSWA in operating both
28 cab forward and conventional cab refuse trucks.

1 Morrico’s fixation on the turning radius requirement in relation to the cab forward
2 design specification is a red herring. The greater maneuverability and visibility justifications
3 for a cab forward truck versus a conventional cab do not stem from the turning radius or
4 windshield size. They are advantages of the *design* of cab forward trucks. The whole *design* of
5 a cab forward truck is such that the cab is “forward” or “over” the engine and the driver is
6 sitting right at the front of the truck; hence, the description as “cab forward” or “cab over.” It is
7 this aspect *by design* that gives it greater maneuverability or visibility, resulting in shorter route
8 times, more efficient use of the equipment, and enhanced safety for GSWA personnel and the
9 public. By contrast, the design of a conventional cab is such that the driver sits several feet away
10 from the front of the truck and the windshield. Morrico’s insistence that the cab forward axle is
11 more expensive is also a red herring. Even if presumed true, the increased cost of one aspect of
12 the trucks does **not** override a concern for public safety.

13 Morrico first raised the issue of driver comfortability as an advantage of conventional
14 cab trucks over cab forward trucks in its shotgun attempt to illustrate why the cab forward
15 specification is unreasonable. Now Morrico argues this is irrelevant. Morrico is speaking out
16 both sides of its mouth. Although Morrico may subjectively disagree with the GSWA drivers’
17 preference, as Morrico has conceded, any subjective indicia is irrelevant in determining whether
18 the inclusion of the cab forward specification is contrary to procurement law and regulations.
19 However, the GSWA’s preference is logically attributable to the ease of maneuverability and
20 visibility *by design* of the cab forward trucks, as known through the experience and expertise of
21 the purchasing agency. The cab forward specification was and is justified as a salient technical
22 requirement for the desired performance characteristics of the refuse trucks, and complies with
23 Guam procurement law and regulations.

24 **IV. THE CAB FORWARD SPECIFICATION DOES NOT UNDULY RESTRICT**
25 **COMPETITION.**

26 Again, Morrico fails to demonstrate how any competition is restricted, except Morrico’s.
27 More importantly, Morrico has failed to demonstrate how such restriction is undue or excessive.
28 There is ample justification that the cab forward specification is a salient, technical design

1 requirement necessary for the needs of the Territory. Further, as Morrigo concedes, only one
2 out of three of the potential bidders present at the mandatory pre-bid conference cannot meet the
3 cab forward specification – Morrigo. One out of three definitely does not mathematically
4 “absolutely restrict competition.” (See *Appellant’s Comments*, p. 8, Dec. 4, 2014.)

5
6 **CONCLUSION**

7 Morrigo’s Appeal must be dismissed because the matter is not “properly submitted” to
8 the OPA. The protest was untimely and properly dismissed. In any event, Morrigo’s challenges
9 to the “cab forward” specification should be denied. There is no merit to their challenges, and
10 GSWA has complied with all procurement laws and regulations to achieve maximum
11 practicable competition for the needs of the Territory.

12 Respectfully submitted this 15th day of December, 2014.

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