

On September 14, 2015, Morrigo submitted its bid on the Prior IFB and the GSWA conducted a bid opening on that same date. The only other bidder on the Prior IFB was Far East Equipment Company (“Far East”). The GSWA rejected the Far East bid because it failed to submit the descriptive literature required by the IFB. On September 24, 2015, Morrigo received a document titled “Bid Status”, that informed Morrigo that its bid was rejected for failing to meet the 90 day delivery time specification in the IFB and that the IFB would be re-bid.

On September 28, 2015, Morrigo filed a protest with respect to the GSWA’s rejection of its bid on the Prior IFB. Morrigo based its protest on the fact that the GSWA could not reject Morrigo’s bid for failure to meet a ninety (90) day delivery specification, without otherwise complying with the provisions of 5 GCA § 5010. In a letter dated November 22, 2015, but received by Morrigo’s counsel on November 23, 2015, the Receiver denied Morrigo’s protest over the rejection of its bid because it believed the protest was untimely. The Receiver believed that Morrigo should have appealed the Receiver’s denial of Morrigo’s September 1, 2015, protest. The Receiver also advised that the protest was moot because he was going to cancel the Prior IFB.

Morrigo appealed the denial of its protest to the OPA on December 7, 2015.

In a letter dated November 24, 2015, but received by Morrigo on November 25, 2015, the Receiver purported to cancel the Prior IFB. The ostensible reason for the cancellation was that “in the best judgment of the Receiver continuing with the procurement would unreasonably delay the progress in meeting the mandates of the Consent Decree by endangering GSWA’s immediate

capacity to provide services to its customers thus endangering the revenue of GSWA. This revenue is essential to meeting the mandates of the Consent Decree.”

In a letter dated December 7, 2015, and served on the GSWA on December 9, 2015, Morrigo protested the Receiver’s cancellation of the Prior IFB because it was issued while a stay of procurement was in effect under 5 GCA § 5425(g) as a result of Morrigo’s prior protest over the rejection of its bid and its appeal of the Receiver’s denial of that protest to the OPA. In a letter dated December 10, 2015, and served on Morrigo’s counsel on December 11, 2015, the Receiver denied Morrigo’s protest over the cancellation of the Prior IFB.

Morrigo appealed that protest denial to the OPA on December 24, 2015.

B. December 4, 2015, IFB.

On December 4, 2015, the GSWA let GSWA0002-16, another Invitation for Bid for rear loader refuse bodies (the “Second IFB”). On December 16, 2015, Morrigo filed a protest regarding the IFB because it was issued while a stay of procurement was still in effect due to the pendency of Morrigo’s appeal to the OPA of the Prior IFB and because Morrigo’s protest of the Receiver’s cancellation of the Prior IFB was still pending as well. On December 17, 2015, Morrigo filed another protest regarding the IFB based on the 90 day delivery time specification, which the GSWA had extended to 120 days by way of an IFB addendum. Morrigo argued that the 120 day delivery time was an unreasonable specification which restricts competition.

On December 23, 2015, The Receiver served Morrigo’s counsel with two letters denying both protests. In those letters, the Receiver stated that the automatic stay does not apply and that he was empowered to disregard Guam’s procurement law based on the authority of the receiver in

United States of America v. Government of Guam, District Court of Guam Civil Case No. 02-00022. The Receiver further stated that “[t]he mandates of the Consent Decree simply cannot be met if GSWA is unable to reasonably and timely procure equipment necessary for its operations.” Morrigo appealed the Receiver’s denial of those protests to the OPA on January 4, 2016.

Morrigo learned on or about December 30, 2015, that the GSWA proceeded with a bid opening of the Second IFB on December 22, 2015. The GSWA conducted the bid opening one day before the Receiver served Morrigo with his December 23, 2015, letters denying Morrigo’s protests regarding the Second IFB. The Receiver had previously respected the stay under 5 GCA section 5425(g). In his December 23, 2015, letters denying Morrigo’s protests, the Receiver did not even advise that the GSWA had proceeded with a bid opening the day before.

II. Analysis.

The Public Auditor is asked to render decisions on whether Morrigo should have been awarded a contract under the Prior IFB, whether the Receiver could cancel that Prior IFB and whether Morrigo was entitled to protest the Second IFB and appeal the denial of that protest to the Public Auditor.

A. Timeliness.

The Receiver argues that Morrigo has not preserved any of its protest or appeal rights because it did not appeal from the denial of its September 1, 2015, protest that the 90 day delivery specification in the Prior IFB (GSWA 004-15 released on August 18, 2015), was commercially unreasonable and restrictive of competition. But, Morrigo did not protest on the basis that an agency could not specify a delivery date, only that a 90 day delivery date was unreasonable.

Agencies can specify desired delivery dates, or request that bidders provide a delivery date in their bid submissions. And, delivery dates should be included as a contractual term in order to ensure that agencies can obtain timely delivery of supplies and services. We know that agencies can include delivery dates in procurement contracts because the procurement code allows for the assessment of liquidated damages for late deliveries, and because 5 GCA § 5010 expressly allows consideration of delivery dates in making an award.

Morrigo did not appeal the denial of its September 1, 2015, protest to the OPA. Instead of appealing, Morrigo submitted its bid on the Prior IFB, which the GSWA publicly opened on September 14, 2015. Morrigo was the lowest bidder at the September 14, 2015, public bid opening. The bid from the only other bidder, Far East, was non-responsive. However, the GSWA rejected Morrigo's bid on September 24, 2015, for failure to meet the 90 day delivery time specification. On September 28, 2015, Morrigo protested the rejection of its bid on that basis because the rejection did not comport with the analysis of delivery time specifications required under 5 GCA § 5010. The Receiver denied that protest on November 22, 2015. Morrigo timely appealed that protest denial to the OPA on December 7, 2015.

The Receiver has taken the position that “[t]he facts giving rise to Morrigo’s Second Protest are the same facts that gave rise to Morrigo’s First Protest – the ninety (90) day delivery time specification.” December 23, 2015, Motion to Dismiss for Lack of Jurisdiction and for Recusal, p. 4. But the facts are not the same. Morrigo’s protest over the rejection of its bid is based on the failure of the GSWA to analyze the submitted bids under 5 GCA § 5010, which it is

required to do if it desires to obtain goods through consideration of a delivery time specification, and not just based on lowest price.

A delivery time specification is not per se unlawful. We know this because 5 GCA § 5010 expressly permits the use of a delivery date specification in making an award on an IFB. That section provides that “[e]xcept in emergency situations, lower price bids are generally preferable to shorten delivery or performance bids. Delivery time may be considered as a factor in making an award to a responsive bidder *only if* his average delivery time bid is at least ten percent (10%) shorter than the average delivery time bid of a lower price responsive bidder and if the price offered by the bidder offering the faster delivery or performance does not exceed one hundred five percent (105%) of the lower price bidder.” 5 GCA § 5010 (emphasis added).

Until Morrigo’s bid was rejected in a situation where a higher priced bid with a shorter delivery time did not otherwise meet the requirements of 5 GCA § 5010, Morrigo was not an “aggrieved bidder” under 5 GCA § 5425(a). But at the September 14, 2015, bid opening, Morrigo was the low bidder. And there was no other bidder whose price did not exceed 105% of Morrigo’s price and whose delivery time that was at least 10% shorter than Morrigo’s delivery time. Notwithstanding Morrigo’s winning bid, the GSWA rejected it. At that time, Morrigo became an “aggrieved bidder” under 5 GCA § 5425(a), properly protested that issue, and properly appealed the Receiver’s protest denial to the Public Auditor. As a matter of procurement policy, we should not encourage appeals to the Public Auditor regarding a delivery date specification before we even know whether it matters under a section 5010 analysis.

Because Morrico's bid on the Prior IFB should have been accepted, the Receiver's purported cancellation of the Prior IFB was void. *See*, 5 GCA § 5425(g).

The Receiver has also taken the position that Morrico could not protest the delivery date specification in the December 4, 2015, IFB for the same rear loader packers. However, this was a new IFB and, by amendment, contained a new 120 day delivery specification. Further, there is nothing in the procurement code that would prevent a bidder from protesting a specification that an agency had previously rejected on some other prior IFB. Morrico timely protested the Second IFB based on the existence of a stay arising from the Prior IFB and because, again, the delivery date specification was unreasonable. The Receiver violated the stay arising upon a timely protest by conducting a bid opening on December 22, 2015, and by not denying Morrico's protest until December 23, 2015. The receiver's award of any contract to Far East arising out of the Second IFB was and is void. *See*, 5 GCA § 5425(g).

B. Receiver Compliance with Guam Procurement Law.

The Receiver has taken it upon himself to adhere to or ignore Guam's procurement laws at his whim. While the Receiver has determined that he can act arbitrarily with respect to Guam's procurement laws, Morrico is nonetheless constrained to follow those same procurement laws.

For example, Morrico is required to exhaust its administrative remedies before an agency and the Public Auditor before it can file any action in court. *See, generally, DFS Guam L.P., v. A.B. Won Pat International Airport Auth., et al.*, Superior Court of Guam Civil Case No. CV0685-13 (July 19, 2013, Decision and Order, p. 1)(Although DFS appealed a protest denial to the Public Auditor, it did not obtain a final administrative decision there and, therefore, "the court hereby

dismisses Plaintiff's action based upon its lack of subject matter jurisdiction; Plaintiff having failed to exhaust its administrative remedies prior to commencing this action."); *DFS Guam L.P., v. The A.B. Won Pat International Airport Authority*, 2014 Guam 12 ("indeed the trial court did not have jurisdiction to address the merits").

Accordingly, while the Receiver has himself decided what procurement laws he will or will not follow, Morrigo was nonetheless required to follow those laws and to exhaust its administrative remedies before the Public Auditor, which it did in trying to get a ruling on application of the administrative stay under 5 GCA section 5425(g), once it learned that the Receiver had ignored the administrative stay by proceeding with a bid opening of the Second IFB on December 22, 2015. Assuming that the Public Auditor imposed a stay, further enforcement could be sought in court. If the Public Auditor denied the stay, Morrigo could seek review on appeal of that decision in court. But until both the agency and the Public Auditor ruled, Morrigo was forbidden from proceeding in court.

A significant example of the Receiver's whimsical approach to Guam procurement law is his statement in the December 4, 2015, Second IFB that he was departing from Guam procurement law with respect to protests and that he would "consider any protest that is filed within 20 days of receipt of this Invitation for Bid." But even when making up his own laws, like the foregoing protest protocol, the Receiver refused to follow them. Morrigo filed protests on December 16 and 17, 2015, within 20 days of the IFB's release on December 4, 2015. However, without responding to Morrigo's protests, the Receiver proceeded with a bid opening on December 22, 2015, presumably making an award to the sole bidder, Far East. A day later, on December 23, 2015, the

Receiver denied Morrigo's protests and, for the first time, advised that he was not going to observe a stay of procurement that otherwise arises upon a procurement protest by proclaiming that "The automatic stay simply does not apply."

In another example of whimsy, the Receiver delivered a January 6, 2016, cease and desist letter to the Public Auditor instructing her to "immediately desist in attempting to exercise jurisdiction in this matter." And while the Receiver on the one hand instructs the Public Auditor to cease and desist from attempting to exercise jurisdiction over him and bemoans Morrigo's protests/appeals as obstructing the procurement process, and bringing it to a standstill; he simultaneously invokes the Public Auditor's jurisdiction to dismiss Morrigo's pending appeals, to recuse herself, and to prolong the alleged standstill by continuing hearings. If the Receiver had simply accepted Morrigo's low bid back on September 14, 2015, it would be receiving delivery in early March, at a cheaper price and without the substantial expenses of engaging procurement counsel to litigate protests and Public Auditor appeals.

Again, while the Receiver is entitled to his own opinions about whether the Public Auditor has jurisdiction, Morrigo is not. Morrigo is compelled to continue following the process outlined in Guam's procurement laws with respect to filing an initial protest with the GSWA, filing a procurement protest appeal to the Public Auditor and, if necessary, taking an appeal into the courts of Guam; all in order to exercise its rights and remedies under Guam's procurement system.

For example, Morrigo needed to enjoin the Receiver from proceeding with his December 4, 2015, IFB for the procurement of the rear loader packers. But to do this, Morrigo first needed to file

a protest with the GSWA. Morrigo assumed, to its obvious detriment, that the Receiver would respect the stay of procurement arising upon a protest; he had not said otherwise. But the Receiver, without telling anyone, did not do that. Instead, the Receiver conducted a bid opening on December 22, 2015, and then denied Morrigo's protests on December 23, 2015, adding for the first time that he was not going to adhere to any stay. Still, before proceeding in court to enforce an injunction, Morrigo had to follow Guam's procurement laws by appealing to the Public Auditor and exhausting its administrative remedies there.

The Receiver also argues that Morrigo waived its protest rights because it did not timely appeal to the Public Auditor, while simultaneously arguing that the Public Auditor has no jurisdiction. It would appear that the Receiver's position is that Morrigo cannot preserve its protest rights unless it appeals to the Public Auditor and, when Morrigo does appeal to the Public Auditor, it claims that the Public Auditor has no jurisdiction over Morrigo's appeal. As the Ninth Circuit stated in a similar receivership situation involving a procurement contract, "That Catch-22 gambit cannot succeed." *See, MDI v. CDCR*, 585 F.3d 1211, 1221 (9th Cir. 2009). It should be noted that the receivership giving rise to the *MDI v. CDCR* case did not grant a receiver wholesale exemption from local laws but, rather, permitted the receiver to "request a waiver of state law in the event such waiver becomes necessary and other alternatives are inadequate." *See, e.g., Plata v. Schwarzenegger*, 2007 WL 2318898, * 1 (N.D.Cal. 2007).

The *MDI v. CDCR* case is only the most recent of Ninth Circuit opinions requiring receivers to follow local law. For example, in *State of California v. Gillis*, 69 F.2d 746 (9th Cir. 1934), the court agreed with the appellant's argument that "a District Court of the United States is

without power or jurisdiction to order a Federal equity receiver to disregard valid State laws or to operate the business of a corporation contrary to and in violation of the laws of the State in which the business is carried on.” The court held that “We are of the opinion that the contention of appellant is correct and must be sustained.” *State of California v. Gillis*, 69 F.2d 746, 747-48. The court further explained, with respect to the state statute at issue there, that the “act not being in conflict with any provision of the Federal or state Constitution should be enforced.”

Similarly, here, the Guam procurement code does not contravene any federal law or Constitutional provision. The *Gillis* court concluded that “compliance by a receiver with the state statute is a condition precedent to his right to engage in the business referred to; and if the receiver cannot comply therewith, we think the estate should be liquidated and the receivership closed.” *Id.*, at 748. If compliance with the Guam procurement code would cause further violation of the federal environmental laws, which prohibit the discharge of pollutants into the waters of the United States, the result might be different. But given the fact that the Ordot Dump has been closed and that a new environmentally sound landfill has been opened, there is no basis upon which to argue that a rear loader is necessary to prevent further discharge of pollutants into the waters of the United States.

Based on the foregoing, Morrico requests that the Public Auditor find that the Receiver was required to consider any delivery date specification in the Prior IFB under the provisions of 5 GCA § 5010, order the Receiver to award Morrico a contract as a result of its low bid in the Prior IFB, find that the Receiver unlawfully cancelled the Prior IFB and that his action in that regard is void, find that the Receiver violated the automatic stay in proceeding with the Second IFB and, finally,

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OPA-PA-15-014, OPA-PA-15-017 and OPA-PA-16-001
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impose a stay on the Receiver's actions regarding the Second IFB and hold that any award of a contract is void.

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