



FAX

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From: **Doris Flores Brooks, CPA, CGFM**
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Agency: **GPA** Pages 6 (including cover page)

CC: Kevin J. Fowler, Esq., Attorney for Date: March 1, 2016
Morrigo

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Re: **OPA-PA-13-015 Decision RE Appellant's Motion to Enforce OPA Decision RE:
Purchase of Bucket Trucks From Morrigo**

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Llewelyn Terlaje – lterlaje@guamopa.org

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OFFICE OF PUBLIC ACCOUNTABILITY
 Doris Flores Brooks, CPA, CGFM
 Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF,
 MORRICO EQUIPMENT, LLC.

Appellant

APPEAL NO: OPA-PA-13-015

DECISION RE APPELLANT'S MOTION
 TO ENFORCE OPA DECISION RE:
 PURCHASE OF BUCKET TRUCKS
 FROM MORRICO

I. INTRODUCTION

This is the Decision of the Public Auditor for Appellant MORRICO EQUIPMENT, LLC's, (Hereafter Referred to as "MORRICO") Motion to Enforce OPA Decision Re Purchase of Bucket Trucks from MORRICO (Hereafter Referred to as "Motion") which was filed on January 4, 2016 regarding the Guam Power Authority's (Hereafter Referred to as "GPA") alleged bad faith in issuing GPA-IFB-011-16 (2016 Bucket Trucks) (Hereafter referred to as "IFB") which solicited for three 65' Bucket Trucks and three 55' Bucket Trucks. The Public Auditor holds that this matter is not properly before the Public Auditor because MORRICO's Motion to Enforce the Decision is untimely. Accordingly, MORRICO's Motion is hereby DENIED.

II. FINDINGS OF FACT

The Public Auditor in reaching this Decision has considered and incorporates herein the procurement record and all documents submitted by the parties, and all arguments made during the February 1, 2016 hearing for MORRICO's Motion. Based on the aforementioned record in this matter, the Public Auditor makes the following findings of fact:

1. The Public Auditor issued her original Decision in this matter on January 24, 2014 and the Public Auditor ruled, in relevant part, that:

1 a. MORRICO's August 20, 2013 Protest was timely.

2 b. GPA violated the terms of GPA-IFB-064-11 (55' Bucket Trucks), and 5 G.C.A.
3 §5211(g) and 2 G.A.R., Div. 4, Chap. 3, §3109(n)(1) by re-awarding the contract for said
4 solicitation to MID PAC FAR EAST, whose bid could not be the second lowest bid because it
5 was rejected by GPA as being non-conforming pursuant to the specifications of said solicitation.

6 c. That, pursuant to 5 G.C.A. §5212(d), GPA must re-award the
7 aforementioned solicitation's contract to MORRICO because it was the next lowest bidder
8 whose bid met the aforementioned solicitation's requirements and criteria.¹

9 2. In relevant part, the Decision awarded MORRICO the remainder of the contract
10 for GPA-IFB-064-11 (55' Bucket Trucks) which were its remaining Option Years. These
11 Options Years allowed GPA to order up to two 55' Bucket Trucks from MORRICO in FY2014
12 and to order up to an additional two 55' Bucket Trucks from MORRICO in FY2015. However,
13 the aforementioned solicitation and its subsequent contract specifically and expressly gave GPA
14 the right to exercise these Option Years.² Additionally, during the December 16, 2014 Hearing
15 on the original appeal in this matter, GPA's Supply Management Administrator testified that
16 GPA did not intend to purchase any bucket trucks from the successful bidder during any of these
17 options years.³

18 3. GPA did not initially comply with the Decision and on March 7, 2014, MORRICO
19 filed its first Motion to Enforce OPA Decision Re Re-Award of the Contract to MORRICO and
20 Payment of Bid Preparation Costs.⁴

21 4. On March 26, 2014, the OPA issued its Order granting MORRICO's Motion and
22 the OPA ordered GPA, in relevant part, to re-award the contract to MORRICO within 14 days
23 after the Decision was issued. Further, the OPA found that MORRICO's right to receive any
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27 ¹ Pages 10-11, Decision filed on January 24, 2014.

² Page 133, TAB 18, Procurement Record filed on November 8, 2013.

³ Testimony of Jaime Pangelinan, GPA Supply Management Administrator, December
28 16, 2014.

⁴ Appellant's Motion to Enforce OPA Decision Re Re-Award of Contract and Bid
Preparation Costs filed on March 7, 2014.

1 orders for bucket trucks is subject to whether GPA exercises the contract's remaining option
2 years.⁵

3 5. On April 7, 2014, GPA finally complied with the Public Auditor's original Decision
4 by re-awarding the remaining contract for GPA-IFB-064-11 (55' Bucket Trucks) to MORRICO.⁶

5 6. On September 30, 2015, the contract for GPA-IFB-064-11 (55' Bucket Trucks)
6 expired without GPA exercising its options to purchase bucket trucks in FY2014 and FY2015.⁷

7 7. On December 17, 2015, GPA issued GPA-IFB-011-16 (2016 Bucket Trucks).⁸ The
8 IFB solicited for three 65' bucket trucks and three 55' bucket trucks.⁹

9 8. On January 4, 2016, MORRICO filed the present motion.

11 III. ANALYSIS

12 As a threshold matter, the Public Auditor must first determine if this matter is properly
13 before the Public Auditor.

14 A. MORRICO's Motion is Untimely.

15 MORRICO's Motion is not properly before the Public Auditor because it is untimely.
16 The Public Auditor shall have the power to review and determine *De Novo* any matter properly
17 submitted to her. 5 G.C.A. §5703. Generally, post-decision motions to enforce an order or
18 decision of the OPA are properly submitted to the Public Auditor because the Public Auditor's
19 jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes
20 of Guam's Procurement law. 5 G.C.A. §5703. Additionally, the OPA may seek to hold a party
21 in contempt for failing to obey a decision or order of the OPA by certifying such facts before the
22 Superior Court of Guam and by compelling the disobedient party to show cause why they should
23 not be punished for their contempt before the Court. 2 G.A.R., Div. 4, Chap. 12, §12108(d) and
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25 ⁵ Lines 7-11, Page 2, Order Re Appellant's Motion to Enforce OPA Decision
26 filed on March 26, 2014.

27 ⁶ Letter from Joaquin C. Flores, P.E., to Torgun Smith dated April 7, 2014,
28 Exhibit A, MORRICO's Motion filed on January 4, 2016.

⁷ Line 24, Page 2 - Line 1, Page 3, Opposition to Appellant's Second Motion to
Enforce OPA Decision filed on January 22, 2016.

⁸ Page 2, IFB, Exhibit F, Appellant's Motion filed on January 4, 2016.

⁹ Pages 3 and 7, Id.

1 5 G.C.A. §9238. Hence, motions such as MORRICO's motion at issue here are usually properly
2 before the Public Auditor because the enforcement of the OPA's decisions and orders in
3 procurement appeals is necessary to promote the integrity of the procurement process and the
4 purposes of Guam's Procurement law. Here, however, MORRICO's motion is not properly
5 before the Public Auditor because it is untimely. The portion of the contract that was re-awarded
6 to MORRICO was part of a multi-year contract. Generally, multi-year contracts must state the
7 term of the contract and conditions for renewal or extension. 5 G.C.A. §5237(a). Here, as set
8 forth above, the term of the contract for GPA-IFB-064-11 (55' Bucket Trucks) expired when the
9 last option in the contract terminated at the end of FY2015, which occurred on September 30,
10 2015. MORRICO filed its motion on January 4, 2016 which is more than three months after the
11 contract and all its options expired on September 30, 2015. The Public Auditor finds that the
12 expiration of the contract for GPA-IFB-064-11 (55' Bucket Trucks) makes MORRICO's motion
13 moot because GPA can no longer exercise any of the options in the new expired contract.

14 Further, even if MORRICO had filed its motion prior to the contract's termination, it is
15 unlikely that it would have prevailed. At the heart of MORRICO's Motion is its main argument
16 that, given the lack of good faith GPA has shown which led to the original appeal in this matter,
17 it is no stretch to believe that GPA simply did not want to purchase bucket trucks from
18 MORRICO and timed its purchase of the bucket trucks to avoid that requirement.¹⁰ Albeit GPA
19 was required to negotiate, perform, and administer the contract for GPA-IFB-064-11 (55' Bucket
20 Trucks) in good faith. 5 G.C.A. §5003 and 2 G.A.R., Div. 4, Chap. 1, §1105. Guam
21 Procurement regulations do not support this argument because the type of contract clause at issue
22 here, as shown above, concerns an option to purchase. The exercise of a contract option for
23 renewal, extension, or purchase is always at the purchasing agency's discretion only and is not
24 subject to agreement or acceptance by the contractor. 2 G.A.R., Div. 4, Chap. 3, §3119(k)(1).
25 Also, before exercising any option for renewal, extension, or purchase, the Procurement Officer
26 should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent
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¹⁰ Page 3, MORRICO's Motion filed on January 4, 2016.

1 competitive and cost factors and would be more advantageous to the Government of Guam than
2 renewal or extension of the existing contract. 2 G.A.R., Div. 4, Chap. 3, §3119(k)(2). Hence,
3 GPA not only had the sole discretion to exercise its options to purchase bucket trucks from
4 MORRICO in FY2014 and FY2015, but GPA would have had to consider whether a new
5 solicitation for bucket trucks was more practical and advantageous before exercising its options
6 to purchase.

8 IV. CONCLUSION

9 Based on the foregoing the Public Auditor hereby determines the following:

- 10 1. MORRICO's Motion is not properly before the Public Auditor because it is untimely.
- 11 2. MORRICO's MOTION is hereby DENIED.

12 This is a Final Administrative Decision. The Parties are hereby informed of their right to
13 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
14 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
15 Decision. 5 G.C.A. §5481(a).

16 A copy of this Decision shall be provided to the parties and their respective attorneys, in
17 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
18 www.opaguam.org.

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20 **DATED** this 1st day of March, 2016.

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DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR

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