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Attorneys for Appellant  
Morrigo Equipment, LLC

**THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Procurement Appeal of	)	Docket No. OPA-PA-13-015
	)	
MORRICO EQUIPMENT, LLC,	)	<b>APPELLANT'S CLOSING</b>
	)	<b>ARGUMENT AND</b>
Appellant.	)	<b>REMEDIES BRIEF</b>
_____	)	

Morrigo Equipment, LLC ("Morrigo"), hereby submits its closing argument and remedies brief.

**I. Morrigo Submitted a Timely Protest.**

Although Guam Power Authority ("GPA") argued that Morrigo did not timely file a protest, it has no evidence in support of that assertion other than that the subject bucket trucks were delivered in July or August, 2013, and that Morrigo did not file a protest until August 20, 2013. However, Morrigo illustrated that it learned of the purchase through a GPA press release on or about August 8, 2013, and it filed a protest within fourteen (14) days thereafter. Morrigo also established at the hearing that it is well aware of the fourteen day (14) protest window.

In addition, GPA did not issue a notice of its February, 2013, award of a contract to Mid-Pac to any of the other bidders. This violates 2 GAR § 3109(q) which requires that "[i]n procurement (sic) over \$25,000, each unsuccessful bidder shall be notified of the award. Notice of award shall be made available to the public." Again, GPA cannot use its failure to follow the procurement

regulations requiring notice of award to all vendors to now argue that Morrigo should have known earlier of the Mid-Pac award. Accordingly, the evidence shows that Morrigo timely protested the award to Mid-Pac.

## **II. GPA Tried to Hide its Rejection of Mid-Pac's Bid.**

It is also clear that GPA tried to hide the fact that it had rejected Mid-Pac's July, 2011, bid as non-responsive to the specifications. In its November 8, 2013, Procurement Record, GPA did not include the documents by which it rejected the Mid-Pac bid as non-responsive. After being told to supply the entire record, GPA filed another Procurement Record on November 25, 2013, which contained the documents by which GPA had rejected Mid-Pac's bid as non-responsive to the specifications. *See*, November 25, 2013, GPA Procurement Record, Tab 10, p. 92 of 303; *Id.*, p. 108 of 303; *Id.*, Tab 11, p. 137 of 303. This is bad faith.

## **III. GPA Contracted for Option Years.**

Though GPA did not list this as an issue on appeal, it now appears to take the position that it never intended to contract for option years. GPA's Jimmy Pangelinan testified that he came in to salvage this procurement because it was very important that GPA add bucket trucks to their fleet. He testified that GPA only had 9 trucks and that they were supposed to have 26. He therefore worked with Mid-Pac, illegally, to allow it to submit an entirely new "revised proposal." Of course, this was also necessary given that GPA had rejected Mid-Pac's July, 2011, bid as non-responsive to the specifications of the IFB. But GPA then only had 11 trucks and was still short over a dozen. This is why GPA's sudden position that it did not intend to contract for option years rings hollow.

Again, GPA has never stated as an issue in this appeal that it did not contract for option years. *See*, December 13, 2013, Appellee's List of Issues. At the scheduling conference in this matter GPA was asked to advise as to the state of the procurement. Its counsel advised that GPA had procured two trucks and that they were in service. Morrigo then advised that the contract include option years, and GPA did not state otherwise.

When the Public Auditor first asked Jamie Pangelinan whether GPA would go out to bid if it wanted to acquire additional bucket trucks, she responded that if the first trucks were delivered by the vendor, that GPA would have made a further purchase from Far East Equipment under the option. After further questioning, however, Ms. Pangelinan then quickly changed her tune and stated that GPA only intended to acquire trucks for the base year and would bid out any trucks desired in later years. Then, after even further questioning, she testified that GPA's intent was to award the base year and the option years. The Public Auditor also noted that Mid-Pac put a 5% shipping cost caveat in its proposal that raised an implication that GPA was going to award option years. Ms. Pangelinan could not provide any reasonable explanation of why GPA included option years if it never intended to contract for option years. On follow up questions by Morrigo, Ms. Pangelinan acknowledged that GPA's purchase of bucket trucks in 2003 or 2004 included a base year plus option years.

The idea that GPA did not intend to contract for option years is belied by the fact that the solicitation expressly included option years and by the fact that Jimmy Pangelinan testified that they needed up to 26 bucket trucks. The fact that GPA clearly needed new bucket trucks and let an invitation for the delivery of two (2) bucket trucks in the first year and for the delivery of additional

trucks over the course of three option years proves quite convincingly that GPA intended to and did contract for option year performance.

Further, on February 12, 2013, the Consolidated Commission on Utilities issued Resolution No. 2011-41 authorizing the purchase of bucket trucks pursuant to the solicitation at issue herein, Invitation for Bid, GPA-064-11. The CCU expressly noted that "WHEREAS, the Authority issued bid GPA-064-11 for the procurement of two 55-Foot Bucket Trucks with the option to purchase additional bucket trucks for three optional years and received 5 bids". *See*, November 8, 2013, GPA Procurement Record, Tab 5, p. 16 of 156. The CCU referenced the existence of the same option years in its 2011 Resolution authorizing the bucket truck purchase. *See*, November 25, 2013, GPA Procurement Record, Tab 4, p. 116 of 303.

Mid-Pac also quite obviously believed it had contracted for option years. In its January 31, 2013, Letter of Deviation to GPA, Mid-Pac stated that "if the Shipping Costs increase by more than 5% per year, GPA/GWA will be responsible to pay the additional charges for the Ocean Freight on each unit. This will be confirmed by disclosure of the rated Bill of Lading for the first two units." *See*, November 8, 2013, GPA Procurement Record, Tab 8, p. 21 of 156. None of this language would matter if there was not more than one year at issue or if Mid-Pac was only delivering two units.

And in an August 8, 2012, Memorandum to GPA's General Manager, Jimmy Pangelinan stated that "I am seeking your favor not to exercise the option of purchasing the remaining bucket trucks by Far East Equipment, LLC the authority is currently waiting for their first delivery of

bucket trucks that was due on June 16, 2012 ... ." *See*, November 25, 2013, GPA Procurement Record, Tab 4, p. 43 of 303.

GPA fully intended to contract for a base year acquisition of bucket trucks and the purchase of more trucks under the option years. Otherwise, the request for prices as some academic exercise is expressly forbidden by the Guam procurement code and that act alone would constitute a horrible abuse of discretion and bad faith.

**IV. Jamie Pangelinan was Involved in the Mid-Pac Procurement.**

Jamie Pangelinan tried to testify that although she was in charge of procurement, she was on leave when the Mid-Pac Purchase Order was executed and that is why she did not send a notice to other vendors of the Mid-Pac award, as required by the procurement regulations. However, she was involved in the procurement, her statements otherwise notwithstanding. Initially, she sent a January 16, 2013, email to Far East Equipment in which she advised that GPA would re-bid the procurement and imposing liquidated damages against Far East Equipment. *See*, November 25, 2013, Procurement Record, Tab 3, p. 12 of 303.

However, she also testified that she was not in the office at the time the Mid-Pac Purchase Order was signed and, therefore, that is why she did not send a notice of the Mid-Pac award to other vendors. However, that Purchase Order was signed on February 13, 2013, by Joaquin Flores. *See*, November 8, 2013, GPA Procurement Record, Tab 3. On that same date, Ms. Pangelinan signed a cancellation of the Far East Equipment Purchase Order. *See*, November 25, 2013, GPA Procurement Record, Tab 2, p. 7 of 303. So, she was in the office at the time that the Far East

Equipment award was terminated and at the time that the Mid-Pac Purchase Order was signed. Her testimony to the contrary was untruthful.

Ms. Pangelinan was also untruthful when she testified that Jimmy Pangelinan did not suggest a re-bid of the solicitation. In fact, Mr. Pangelinan sent her an email on November 9, 2012, in which he recommended a re-bid. *See*, November 25, 2013, GPA Procurement Record, Tab 4, p. 33 of 303. Ms. Pangelinan also stated that GPA would re-bid the procurement. *See*, November 25, 2013, GPA Procurement Record, Tab 3, p. 12 of 303 (“The Authority anticipates in moving forward with a re-bid for this procurement.”). Ms. Pangelinan also wrote to GPA’s counsel on November 9, 2012, asking “What is your determination with Far East’s proposal. Graham with a delivery of 240 calendar days, I say take the 100% amount and let’s rebid ... forget about Mid Pac Far East ... .” *See*, November 25, 2013, GPA Procurement Record, Tab 4, p. 33 of 303.

Despite this and after consultation with counsel, GPA obviously decided that it would be more prudent to illegally contract with Mid-Pac. GPA also allowed Mid-Pac to switch out manufacturers after rejecting Far East Equipment’s request to do the same thing. When Far East Equipment ran into trouble with their manufacturer, it suggested an option to GPA that it be allowed to substitute the Diamond Heavy Vehicle model it bid with a Ford Model. *See*, November 25, 2013, GPA Procurement Record, Tab 4, p. 39 of 303; *Id.*, p. 35 of 303. GPA rejected this offer to substitute manufacturers. *See*, November 25, 2013, GPA Procurement Record, Tab 4, p. 33 of 303. But then GPA allowed Mid-Pac to substitute manufacturers, once again acting in bad faith.

**V. GPA and Mid-Pac Acted in Bad Faith.**

Both GPA and Mid-Pac acted in bad faith. 2 GAR § 9104(3) provides that “[s]pecific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith.”

GPA rejected Mid-Pac's July, 2011, bid because it was non-responsive to the bid specifications. In addition, Mid-Pac's distributorship with the manufacturer of the product it bid was terminated. Accordingly, even though Mid-Pac's original bid was rejected as non-responsive and although its distributorship agreement was terminated, GPA nonetheless allowed Mid-Pac to submit an entirely new “revised proposal” on January 31, 2013, eighteen months after the bid opening. Both parties recklessly disregarded the procurement laws and regulations. There is in fact no procurement law or regulation which authorizes this exceedingly reckless conduct. Both GPA and Mid-Pac knew that it was illegal to submit a completely new “revised proposal” eighteen (18) months after bid opening.

And while Mid-Pac stated that its switched manufacturers to meet a new 120 delivery deadline, it is clear that Mid-Pac could not deliver the product it originally bid because its distributorship agreement with that manufacturer was terminated. *See*, Morrico Hearing Exhibits 7 and 8. Mid-Pac also deviated from the specifications in several ways, to include using white instead of John Deere yellow, a less expensive option. This is bad faith on behalf of both of these parties.

In any event, nothing in the Guam procurement code or the procurement regulations allows a bidder to submit an entirely new “revised proposal” eighteen months after bid opening and by which that bidder is allowed to switch out the manufacturers of the products which it bid. Although

GPA made a reference to 2 GAR § 3109(m)(4) as a basis for allowing Mid-Pac to submit a revised proposal, that regulation only deals with mistakes in bids for minor informalities discovered prior to bid opening. However, the bid opening had already been conducted, Mid-Pac did not make a mistake in its July, 2011, bid and switching product manufacturers is not some minor informality. That regulation does not apply. In fact, 5 GCA § 5211(f) forbids such changes after bid opening.

In addition, the January 31, 2013, Mid-Pac revised proposal was conditioned on a requirement not found in the IFB, that "if the Shipping Costs increase by more than 5% per year, GPA/GWA will be responsible to pay the additional charges for the Ocean Freight on each unit." *See*, Procurement Record, Tab 8. Allowance for such a contractual term is nowhere provided in the subject IFB and the Procurement Record does not show notice to other vendors that they could condition their bids in such a manner so as to offset increased shipping costs.

The GPA procurement committee for this solicitation also met in private with Mark Cruz of Mid-Pac to discuss the Mid-Pac revised proposal of January 31, 2013. All of them absolutely knew that private meetings to discuss the procurement are not allowed. To keep this all under wraps, GPA did not compile a log of its communications with Mid-Pac and did not provide notice to other bidders of the award to Mid-Pac. In proceeding in this fashion, GPA ensured that it could avoid the pesky problem posed by a stay of procurement which automatically attaches upon the filing of a protest.

Given the bad faith of the parties, the only viable remedy is to terminate the contract to Mid-Pac and order GPA to award the contract and its option years to Morrigo. Morrigo hereby reaffirms that its option year pricing will remain fixed over the next three years. Morrigo's option year prices



were less expensive than those offered by the other bidders by thousands of dollars, with the sole exception of Far East Equipment's first year option price. *See*, November 25, 2013, GPA Procurement Record, Tab 12, pp. 138-39 of 303. Accordingly, this result is in the best interests of the Territory.

5 GCA § 5212(d) specifically authorizes the award of a contract to the next lowest responsive bidder after a default in delivery by the successful bidder. "In the event that a successful bidder fails to complete delivery of supplies or services as required in the contract between such contractor and the government of Guam, the government of Guam may proceed to procure such supplies or services from the next lowest bidder who is able to deliver such supplies or services." An award can only be made to "the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids." *See*, 5 GCA § 5211(g); 5 GCA § 5201(g) ("Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids."). Since Mid-Pac's bid was rejected for being non-responsive to the specifications it was not the next lowest responsive bidder, Morrico was.

The violations committed by GPA and Mid-Pac cannot be ratified as they constitute an irreparable threat to the integrity of the procurement process. *See, In The Appeal of Pacific Data Systems, Inc.*, Appeal No: OPA-PA-10-005, January 12, 2011, Decision (waiver of statutory requirements that contracts be awarded to the lowest most responsible bidder are serious threats to the integrity of the procurement process and must not be condoned by contract ratification); *In the Appeal of Guam Publications, Inc.*, Appeal No: OPA-PA-08-007, September 5, 2008, Decision

(failure to evaluate bids with the express terms of the IFB, which was the root cause of the unlawful award, is a serious threat to the integrity of the procurement process and must not be condoned).

Accordingly, the OPA should declare the Mid-Pac contract null and void due to the bad faith of both parties. At a minimum, the OPA should order GPA to award the option years for the bucket trucks to Morrico, which is in the best interests of the Territory given that Morrico offered the lowest option year prices.

**VI. The Award Should Have Been Made to Morrico.**

GPA rejected Mid-Pac's July, 2011, bid for being non-responsive to the specifications and for high price. GPA only rejected Morrico's bid for high price, which was the third lowest after Mid-Pac. Morrico met all other requirements of the solicitation. *See*, November 25, 2013, GPA Procurement Record, Tab 10, p. 95 of 303; *Id.*, p. 107 of 303 (Regarding evaluation of Morrico bid, "Technical specification and delivery requirements met, however not awarded due to high price."); *Id.*, Tab 12, p. 137 of 303 ("The committee completed evaluating bid submittals for GPA-064-11, 55' Bucket Trucks, Mid Pac Far East did not meet the minimum di-electric rating for the platform polyethylene liner. *The committee concludes that the remaining bidders have met the bid specifications* set forth in the IFB GPA-064-11 and the committee recommends proceeding with the award to the lowest bidder.")(emphasis added).

It is not clear if GPA is now contending that the Morrico bid should have been rejected because it offered an X-frame as opposed to an A-Frame. However, it would certainly be bad faith for GPA to claim that it was acceptable for Mid-Pac to provide an X-Frame but that this same X-

Frame would somehow disqualify Morrico. While both Mid-Pac and Morrico offered an X-Frame as opposed to an A-Frame, Mr. Pangelinan testified that this would make absolutely no difference.

Should the OPA determine that Morrico should have been awarded the contract, it asks leave to submit a bill of costs for its bid preparation. *See, In the Appeal of Joeten Development, Inc.*, Appeal No: OPA-PA-11-012, September 27, 2011, Decision; *In the Appeal of Pacific Data Systems, Inc.*, Appeal No: OPA-PA-11-011, September 26, 2011, Decision.


### CONCLUSION

There is no provision of Guam procurement law that authorized GPA to award a contract to a bidder whose bid was rejected as non-responsive. There is also no authorization for allowing a rejected bidder to submit an entirely new "revised proposal" eighteen (18) months after bid opening and in which the bidder is allowed to switch out manufacturers of the products bid. Both GPA and Mid-Pac knowingly and recklessly acted in bad faith. The award of the base contract to Mid-Pac should be declared null and void and GPA should be ordered to award the contract and its option years to Morrico. In addition, because Morrico should have been awarded this contract but was not, it is entitled to its bid preparation costs.

Respectfully submitted this 18<sup>th</sup> day of December, 2013.

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By:

  
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