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**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
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FILE NO OPA-PA: 13-015

Attorneys for Appellant  
Morrigo Equipment, LLC

**THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Procurement Appeal of )  
 )  
MORRICO EQUIPMENT, LLC, )  
 )  
Appellant. )  
\_\_\_\_\_ )

Docket No. OPA-PA-13-015  
**COMMENTS ON AGENCY  
REPORT**

Morrigo Equipment, LLC (“Morrigo”) submits its comments on the Guam Power Authority (“GPA”) Agency Report regarding Invitation for Bid No. GPA-064-11 (“IFB”). GPA filed its Procurement Record herein on November 8, 2013. It filed another Procurement Record on November 25, 2013. It still does not appear that GPA has filed its “entire” Procurement Record on the subject IFB.

**I. Morrigo Timely Filed its Protest.**

GPA argues that the Morrigo protest was not timely filed within 14 days of when Morrigo knew or should have known of the basis for the protest. However, GPA does not offer any explanation as to how Morrigo should have known sooner of the basis for the protest. GPA simply states that it awarded a contract to Mid-Pac Far East (“Mid-Pac”), in February, 2013, that the contract required delivery by July 2, 2013, and that the Morrigo protest was not filed until August 20, 2013. In its Notice of Appeal Morrigo attached the GPA’s August 8, 2013, press release as the basis for its knowledge and it timely filed a protest within 14 days thereafter.

While GPA feigns disbelief at when Morrigo discovered the award to Mid-Pac, what GPA omits from its explanation is that it is in control of providing this knowledge to Morrigo and to all other bidders on the subject IFB. A Notice of Intent to award was signed by GPA and Mid-Pac on February 13 and 14, 2013. *See*, November 8, 2013, Procurement Record, Tab 4. 2 GAR § 3109(q) 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.” There is nothing in the Procurement Record showing that the GPA complied with this requirement. And GPA certainly does know of the requirement as it admits it sent to all other bidders the initial Notice of Award to Far East Equipment Company. *See*, GPA Statement Answering Allegations of Appeal, p. 1 (“The Notice of Intent of Possible Award to Far East Equipment Company was sent to all bidders”).

Had GPA complied with its regulatory responsibilities, Morrigo would have known of the award to Mid-Pac in February, 2013. GPA cannot take advantage of its own failure to send a notice of the award to the other vendors by now claiming that Morrigo should have been aware of something it kept secret. GPA’s actions in this regard severely undermine the statutory requirement in 5 GCA § 5003 that “all parties involved in the negotiation, performance, or administration of territorial contracts ... act in good faith.”

## **II. GPA Rejected Mid-Pac’s 2011 Bid Submission as Non-Responsive.**

At the Pre-Hearing Conference held in this matter on November 20, 2013, GPA represented that it only supplied those portions of the Procurement Record it believed were relevant to the issues on appeal before the OPA. However, the Public Auditor ordered GPA to submit the entire

Procurement Record. On November 25, 2013, GPA served Morrigo with additional portions of the Procurement Record. Curiously absent from the Procurement Record which GPA first filed with the OPA on November 8, 2013, were documents illustrating that the GPA had rejected Mid-Pac's 2011 bid submission as non-responsive. *See e.g., Exhibit A* attached hereto. GPA knew that its rejection of Mid-Pac's 2011 bid submission was highly relevant to the Morrigo appeal, but tried to get by without producing it, at least until the OPA ordered otherwise.

This sleight of hand by GPA is certainly not an act of good faith. GPA was clearly trying to hide from the OPA the fact that it had rejected Mid-Pac's 2011 bid submission as non-responsive. This also clarifies why GPA had Mid-Pac submit a "revised proposal" on January 31, 2013, and in which it allowed Mid-Pac to offer the product of a manufacturer different from that which it offered in its original 2011 bid submission.

In addition, Mid-Pac's January 31, 2013, letter to GPA states that it switched manufacturers so that it could meet the GPA's new 120 day delivery requirement. *See, November 8, 2013, Procurement Record, Tab 8.* However, it appears that Mid-Pac switched manufacturers because its distributorship agreement with Terex was terminated as of January 4, 2013. *See, Exhibits B and C* attached hereto.

### **III. The Mid-Pac Revised Proposal was Unlawful.**

GPA states that a bid evaluation committee was assembled to review the Mid-Pac revised proposal submitted on January 31, 2013, with respect to the 2011 IFB that had already gone through bid opening and evaluation on July 12, 2011.

The committee completed its evaluation of bid submittal for GPA-064-11. The Committee concludes that the minor deviations are acceptable. Therefore, the committee recommends re-awarding this bid to Mid Pac Far East.

*See*, November 8, 2013, Procurement Record, Tab 6. There is no statutory or regulatory support for deeming a revised proposal submitted a year and a half after bid opening acceptable at all, let alone with minor deviations.

The Guam procurement code severely restricts any changes in a vendor's bid after the bid opening date.

Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the Policy Office. *After bid opening, no changes in bid prices or other provisions of bids prejudicial to the interest of the Territory or fair competition shall be permitted.* Except as otherwise provided by regulation, *all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the ... head of a purchasing agency.*"

*See*, 5 GCA § 5211(f)(emphasis added). While 2 GAR § 3109(m)(4)(B) governs the correction of mistakes in bids for minor informalities discovered after opening but before award, the GPA had already made an award to Far East Equipment so this provision would not apply. Further, there was nothing minor or informal about allowing a vendor to submit a revised proposal a year and a half after bid opening and in which the vendor offers to sell the product of a manufacturer different from that it originally bid, and with a cheaper white color instead of the John Deere yellow specified in

the IFB. Nor did the GPA make any written determination authorizing any correction to Mid-Pac's original bid.

2 GAR § 3109(m)(5) similarly provides that “[m]istakes shall not be corrected after award of the contract except where the ... head of a Purchasing Agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected.” The GPA did not make any such written determination and there was no mistake here. Mid-Pac did not bid the product of one manufacturer back in 2011 at bid opening, when it intended all along to bid the product of a different manufacturer. It instead stated that “we have switched the Truck Manufacturer to INTERNATIONAL and the Body Manufacturer to ALTEC to meet your accelerated delivery time.” *See*, November 8, 2013, Procurement Record, Tab 8. Apparently, the GPA modified the 240 day delivery time under the IFB to 120 days upon contracting with Mid-Pac in February, 2013, to supply the bucket trucks. *See*, November 8, 2013, Procurement Record, Tab 4 and Tab 18, p. 132 of 156.

Because Mid-Pac did not make a mistake and because GPA did not purport to permit the correction of any mistake through application of relevant code or regulatory provisions, and supported by the written determination required by 5 GCA § 5211(f) and 2 GAR § 3109(m)(5), the award to Mid-Pac based on the submission of a revised proposal was improper. Of course, any award to Mid-Pac was also improper and unlawful given that the GPA had previously rejected the Mid-Pac 2011 bid submission as non-responsive.

**IV. The Mid-Pac Revised Proposal was not Responsive to the Invitation.**

Upon submission of its January 31, 2013, revised proposal, Mid-Pac emphasized that “[t]his proposal supersedes any prior verbal or written agreements regarding the Terms and Conditions of this equipment purchase.” *See*, November 8, 2013, Procurement Record, Tab 9, p. 22 of 156. Accordingly, the terms and conditions of the IFB no longer had any relevance to Mid-Pac’s submission of a revised proposal. And, although the IFB required that a bidder submit manufacturer brochures and descriptive literature, the Mid-Pac revised proposal contains none of this. *See*, November 8, 2013, Procurement Record, Tab 9. Nor did Mid-Pac submit any warranty information with its January 31, 2013, revised proposal, which was required by the terms of the IFB. *Id.*

Additionally, Mid-Pac’s January 31, 2013, revised proposal did not even use the correct bid specification pages as issued by the GPA. The revised proposal used pages 4, 5a and 8 while its 2011 original bid correctly used pages 4a, 5b and 8a. The modified bid specification pages issued by GPA to potential vendors are supposed to mean something. *See*, November 8, 2013, Procurement Record, Tabs 12-17.

Further, the Mid-Pac revised proposal states “comply” in spaces for which it originally referred to its Letter of Deviation (“LOD”). The January 31, 2013, Mid-Pac revised proposal does not refer to the LOD with respect to the option years on page 3, while its original bid listed LOD next to the option years on page 3. The Mid-Pac revised proposal indicates comply at page 4, space A.15.4; page 5a, space C.7.2; page 7, space E.2; and, page 8, spaces G.6 and G.12. The

original Mid-Pac bid referred to its LOD at those spaces. And, the Mid-Pac revised proposal refers to its LOD in spaces where it originally stated comply. In the Mid-Pac revised proposal it refers to LOD on page 3, spaces A.12 and A.14; and, page 4, spaces A.15.8, B.2 and B.3. In its original bid Mid-Pac stated comply at those spaces. *See*, November 8, 2013, Procurement Record, Tabs 9 and 11. Among the various Mid-Pac deviations in its 2013 revised proposal was the failure to supply a 250 hp engine, which cannot be considered a minor deviation.

Most importantly, the IFB required that potential vendors submit a bid in 2011 prior to the bid opening on July 12, 2011. A “revised proposal” submitted in 2013 is not sanctioned by any part of the IFB or Guam procurement law, particularly a revised proposal in which the product of one manufacturer is substituted for the product of a different manufacturer.

Finally, 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.

#### **V. Procurement Record.**

It is also clear that the GPA Procurement Record remains incomplete. It certainly does not contain “a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement.”

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Comments on Agency Report*

as required by 5 GCA § 5249(b). Mid-Pac's January 31, 2013, revised proposal comes out of nowhere. The Procurement Record does not show how Mid-Pac knew that it could submit a revised proposal. All the record shows is a GPA Purchase Order dated January 24, 2013, and a Mid-Pac revised proposal dated January 31, 2013. The two parties were obviously in communication but, again, there is no communications evident in the Procurement Record, let alone a log of all communications as required by the procurement code and regulations.

### CONCLUSION

The GPA Agency Report does nothing but illustrate that the GPA illegally awarded a procurement contract to Mid-Pac through a procedure that is nowhere authorized by the Guam procurement code or regulations.

Dated this 27<sup>th</sup> day of November, 2013.

DOOLEY ROBERTS & FOWLER LLP

By:

  
\_\_\_\_\_  
**KEVIN J. FOWLER**  
Attorneys for Appellant  
Morrico Equipment, LLC





# GUAM POWER AUTHORITY

ATURIDÁT ILEKTRESEDÁT GUAHAN  
P.O. BOX 2977 HAGÁTÑA, GUAM U.S.A. 96932-2977

## BID STATUS

October 05, 2011

Craig Wade  
President/CFO  
Mid Pac Far East, LLC  
P.O. Box 20969  
Barrigada, Guam 96921

BID INVITATION: GPA-064-11

OPENED: July 12, 2011

DESCRIPTION: 55' Bucket Trucks

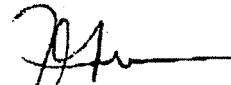
The following is the result of the above-mentioned bid. Refer to items checked below.

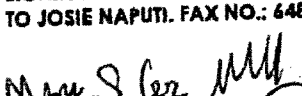
- Cancelled (in its entirety), or partially canceled due to:**
  - ( ) Insufficient funds;
  - ( ) Change of specifications;
  - ( ) Best interest of the Government
- Rejected due to:**
  - ( ) Late submission of bid;
  - ( ) No bid security or insufficient bid security amount submitted: as required by Section 11 of the General Terms and Conditions;
  - ( ) Not meeting the delivery requirements as stated in the IFB;
  - (X) Non-conformance with the specifications: did not meet the minimum dielectric rating for the platform polyethylene liner.
  - ( ) Inability to provide future maintenance and services to the equipment;
  - (X) High price; Line Item No.: 1.0, 2/Each @ \$235,750.00 Each
  - ( ) Others:

Bid is recommended for award to: Far East Equipment, LLC, Line Item Nos.: 1.0: 2/Each, in the total amount of \$456,250.00.

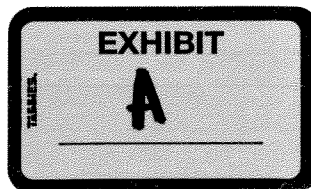
The Guam Power Authority greatly appreciates the interests and participation in our bids.

PLEASE ACKNOWLEDGE RECEIPT, BY  
SIGNING BELOW AND RETURN THIS FAX  
TO JOSIE NAPUTI. FAX NO.: 648-3165

  
JOAQUIN C. FLORES, P.E.  
General Manager

  
PRINT/SIGNATURE      DATE 10/5/11

APPRECIATE YOUR IMMEDIATE RESPONSE.  
THANK YOU  
JOSIE NAPUTI, BUYER  
GPA PROCUREMENT DIVISION  
TEL: (671) 648-3054/55





January 4, 2013

Mid Pac Far East  
825 Tiyan Parkway  
Barrigada, Guam 96921 USA

**Re: Termination of Distribution Agreement (“Agreement”)**

The Purpose of this letter is to act in accordance with the provisions of the (“Distribution agreement”) reached between **Terex-Telelect, Inc.**, (“Terex” or Terex Utilities, Inc.) and **Mid Pac Far East**, (“MPFE”) dated July 6, 2009 for distribution of Terex-Telelect aerial devices and digger derrick products in Guam (the “Distributorship”).

Per the Distribution agreement, Terex-Telelect is hereby terminating the Distributorship of MPFE effective immediately, due to MPFE sales inactivity.

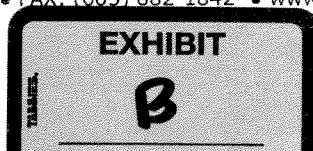
If you have any questions regarding this matter, please contact me directly.

Best Regards,

*Michael Tilden*

Michael Tilden

International Sales Manager  
Terex South Dakota, Inc.  
DBA – Terex Utilities, Inc.



## Kevin Fowler

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**From:** Mark Cruz [macruz@midpacfareast.com]  
**Sent:** Thursday, January 03, 2013 4:01 PM  
**To:** Tilden, Michael  
**Cc:** 'STEPHEN BONFIELD'  
**Subject:** RE: MPFE distributor termination

Dear Michael,

MPFE is in receipt of the Termination Letter.

Best Regards,

*Mark S. Cruz*

Sales Manager  
Mid Pac Far East, LLC  
Office: (671) 632-5160  
Mobile: (671) 486-2789  
Fax: (671) 632-5167

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**From:** Tilden, Michael [mailto:Michael.Tilden@terex.com]  
**Sent:** Friday, January 04, 2013 9:57 AM  
**To:** macruz@midpacfareast.com  
**Cc:** Tilden, Michael  
**Subject:** MPFE distributor termination

Sir,

Effective January 4, 2013 - MPFE is being terminated as a distributor for Terex Utilities, Inc.

However, as a chassis supplier to Guam customers.

If MPFE requests a quotation from Terex South Dakota, Inc., for an installed product on a MPFE supplied chassis, ( for Guam ). Terex South Dakota, Inc., will provide MPFE a quotation.

Please respond with an acknowledgement - receipt of termination letter.

Best Regards,

Michael Tilden  
International Sales Manager  
Terex South Dakota, Inc.  
T 503.924.1551  
F 503.684.1793  
M 775.722.3882  
E [michael.tilden@terex.com](mailto:michael.tilden@terex.com)

