OFFICE OF THE PUBLIC AUDITOR

July 31, 2008

X

Appellant – Far East Equipment Company
John A. Limtiaco
Vice President
Far East Equipment Company LLC
PO Box 10838
Tamuning, Guam 96931

Procuring Agency – General Services Agency
Claudia C. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

Purchasing Agency – Port Authority of Guam
Carlos H. Salas
Acting General Manager
Port Authority of Guam
1026 Cabras Highway
Suite 201
Piti, Guam 96925

Attorney for the Purchasing Agency – Port Authority of Guam
Ignacio C. Aguigui, Esq.
Lujan Aguigui & Perez LLP
Suite 300, DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Attorney for Interested Party – Morricco Equipment
Kevin J. Fowler, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913

Charles Mendiola
for FAR EAST Equip.
8/1/08

Ms. Acfalle and Messers Salas, Limitiaco, Aguigui, and Fowler

Transmitted herewith is a copy of the Decision and Findings of Fact on appeal OPA-PA-07-010 in the appeal of Far East Equipment Company LLC relative to the procurement of

OFFICE OF THE PUBLIC AUDITOR

July 31, 2008

Appellant – Far East Equipment Company
John A. Limtiaco
Vice President
Far East Equipment Company LLC
PO Box 10838
Tamuning, Guam 96931

Procuring Agency – General Services Agency
Claudia C. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

Purchasing Agency – Port Authority of Guam
Carlos H. Salas
Acting General Manager
Port Authority of Guam
1026 Cabras Highway
Suite 201
Piti, Guam 96925

Attorney for the Purchasing Agency – Port Authority of Guam
Ignacio C. Aguigui, Esq.
Lujan Aguigui & Perez LLP
Suite 300, DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Attorney for Interested Party – Morricco Equipment
Kevin J. Fowler, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913

RECEIVED
AUG 01 2008
11:40 AM
DOOLEY ROBERTS & FOWLER LLP

Ms. Acfalle and Messers Salas, Limitiaco, Aguigui, and Fowler

Transmitted herewith is a copy of the Decision and Findings of Fact on appeal OPA-PA-07-010 in the appeal of Far East Equipment Company LLC relative to the procurement of

OFFICE OF THE PUBLIC AUDITOR

July 31, 2008

Appellant – Far East Equipment Company
John A. Limtiaco
Vice President
Far East Equipment Company LLC
PO Box 10838
Tamuning, Guam 96931

Procuring Agency – General Services Agency
Claudia C. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

Purchasing Agency – Port Authority of Guam
Carlos H. Salas
Acting General Manager
Port Authority of Guam
1026 Cabras Highway
Suite 201
Piti, Guam 96925

Attorney for the Purchasing Agency – Port Authority of Guam
Ignacio C. Aguigui, Esq.
Lujan Aguigui & Perez LLP
Suite 300, DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

RECEIVED
AUG 01 2008
LUJAN AGUIGUI & PEREZ LLP
By: 10:00

Attorney for Interested Party – Morricco Equipment
Kevin J. Fowler, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913

Ms. Acfalle and Messers Salas, Limitiaco, Aguigui, and Fowler

Transmitted herewith is a copy of the Decision and Findings of Fact on appeal OPA-PA-07-010 in the appeal of Far East Equipment Company LLC relative to the procurement of

8/1/08 10:07
Port Authority of Guam
General Manager's Office
RECEIVED

OFFICE OF THE PUBLIC AUDITOR

July 31, 2008

Appellant – Far East Equipment Company
John A. Limtiaco
Vice President
Far East Equipment Company LLC
PO Box 10838
Tamuning, Guam 96931

Procuring Agency – General Services Agency
Claudia C. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

X **Purchasing Agency – Port Authority of Guam**
Carlos H. Salas
Acting General Manager
Port Authority of Guam
1026 Cabras Highway
Suite 201
Piti, Guam 96925

Attorney for the Purchasing Agency – Port Authority of Guam
Ignacio C. Aguigui, Esq.
Lujan Aguigui & Perez LLP
Suite 300, DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Attorney for Interested Party – Morricco Equipment
Kevin J. Fowler, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913

Ms. Acfalle and Messers Salas, Limitiaco, Aguigui, and Fowler

Transmitted herewith is a copy of the Decision and Findings of Fact on appeal OPA-PA-07-010 in the appeal of Far East Equipment Company LLC relative to the procurement of

OFFICE OF THE PUBLIC AUDITOR

July 31, 2008

Appellant – Far East Equipment Company
John A. Limtiaco
Vice President
Far East Equipment Company LLC
PO Box 10838
Tamuning, Guam 96931

Procuring Agency – General Services Agency
Claudia C. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

Purchasing Agency – Port Authority of Guam
Carlos H. Salas
Acting General Manager
Port Authority of Guam
1026 Cabras Highway
Suite 201
Piti, Guam 96925

Attorney for the Purchasing Agency – Port Authority of Guam
Ignacio C. Aguigui, Esq.
Lujan Aguigui & Perez LLP
Suite 300, DNA Building
238 Archbishop Flores Street
Hagatna, Guam 96910

Attorney for Interested Party – Morricco Equipment
Kevin J. Fowler, Esq.
Dooley Roberts & Fowler LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913

GENERAL SERVICES AGENC
148 Route 1
Marine Drive
Piti, Guam 96915
JUL 3 1 200
AUG 0 1 200

Ms. Acfalle and Messers Salas, Limitiaco, Aguigui, and Fowler

Transmitted herewith is a copy of the Decision and Findings of Fact on appeal OPA-PA-07-010 in the appeal of Far East Equipment Company LLC relative to the procurement of

GSA/PAG 07-006 Item 1.4 for a 40,000 pound fork truck for the Port Authority of Guam.

A complete copy of the Decision and Findings of Fact will be posted on our website within the next day and available for public view at ww.guamopa.org.

Senseramente,

Lourdes R. Perez
Acting Administrator

OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF FAR EAST EQUIPMENT COMPANY LLC, APPELLANT.	**Appeal No. OPA-PA-07-010** **DECISION**

I. INTRODUCTION

This is a Decision by the Public Auditor on a procurement appeal filed on November 20, 2007, by Far East Equipment Company LLC, (Hereafter "Far East") regarding the General Services Agency's (Hereafter "GSA") November 7, 2007, denial of protest, concerning GSA's rejection of Far East's GSA/PAG 07-006 bid solicitation for fork trucks also known as "forklifts." GSA was the administering procurement agency for the GSA/PAG 07-006 bid. A formal Hearing was held on May 13, 2008, on this matter. Present at the formal Hearing and making arguments on behalf of their clients were Ignacio C. Aguigui, Esq., Lujan, Aguigui & Perez, LLP, representing PAG and GSA; John A. Limticao, Vice President, representing Far East; and Kevin J. Fowler, Esq., Dooley, Roberts and Fowler, LLP, representing Morrico Equipment LLC, (Hereafter "Morrico"). A Motion to Dismiss was filed by PAG on May 13, 2008, and verbally opposed by Far East.

Suite 401, DNA Building
238 Archbishop Flores Street, Hagåtña, Guam 96910
Tel (671) 475-0390 · Fax (671) 472-7951
www.guamopa.org · Hotline: 47AUDIT (472-8348)

II. FINDINGS OF FACT

In reaching this Decision, the Public Auditor has considered and incorporates by reference herein the findings of the Hearing Officer, Robert G.P.Cruz, Esq. In addition, this Decision is based on the Procurement Record, all documents submitted by the parties in this appeal, and all testimonies and arguments presented at the May 13, 2008, Hearing on this matter.

1. At issue is whether the bid of the Appellant Far East was non-responsive to Bid No. GSA/PAG 07-006 for purchase of multiple Fork Trucks of varying sizes. On August 24, 2007, Far East submitted its bid for Item 1.4 which was specified as a 40,000 pound forklift at 24 inches center of gravity. It did not bid for the Item 1.1, 1.2, or 1.3 forklifts of other sizes. In its Statement of Appeal, Far East argues that it is the lowest responsible bidder for Item 1.4, and that GSA should not award the contract for this item to Morrico, which won the bid for 1.4 and all other sizes of fork trucks.

2. Far East argues that its bid proposal met the requirements of the request for bids with respect to forklift length and size of engine. On October 8, 2007, Far East was given a Bid Status notification advising that its primary bid for Item 1.4 was rejected because it did not meet the minimum horsepower (hp) requirement of 230 hp and a minimum fork length requirement of 96 inches. Far East's bid was understood by GSA to be for a Kalmar DCE 180-6 forklift with a 220 hp "Cummins" model engine and a Dana TE 1300 transmission with a fork length of 47 inches. See Far East's Exhibit B and GSA Procurement Record. In the descriptive literature submitted by Far East, the only "Cummins" engine available for the Kalmar DCE 180-6 model with a Dana TE 1300 transmission had a rated hp of 185 not 220 as Far East indicated in its bid. See GSA Procurement Record and PAG's Motion to Dismiss. The descriptive literature is the technical

technical brochure required to be submitted by the bidder to support their bid offers. See GSA/PAG 07-006 General Terms and Conditions. In the alternative, Far East also proposed a 44,000 pound, Kalmar DCE 200-12 forklift. In the descriptive literature submitted, the engine type available for the Kalmar DCE 200-12 model is a Cummins engine with a rated 215 hp. Both Far East's primary and optional proposals did not meet the required specifications of the bid.

3. After learning that Far East's bid for a forklift truck was not selected because GSA determined that Far East did not meet specifications under the bid, Far East claimed that if awarded the contract it could provide a fork length of 96 inches, and that the failure to meet the 230 hp minimum requirement was negligible. Far East has also argued that the 220 hp engine on the 40,000 pound forklift offered could produce 230 hp at a certain rpm range.

4. Far East further argued that the selected bidder, Morrico, also was not responsive because the engine on its offered forklift truck was exactly the same as Far East's. Morrico identified a Hyster H450 HD model forklift with a 230 hp Cummins diesel QSB 6.7 engine as its bid. No written evidence was presented at the Hearing by Far East to prove that their "Cummins" engine model and Morricco's Cummins diesel QSB 6.7 engine were the same. Further, PAG's attorney denied any deviation of the bid specifications by Morrico.

5. Far East requests that the Office of the Public Auditor rule that Far East is the lowest responsible bidder to Item 1.4 for a 40,000 pound fork truck. It bid $227,830 compared to Morrico's bid of $252,999 for Item 1.4. See Far East's Exhibit A.

6. On October 17, 2007, Far East filed a formal letter of protest advising GSA that its determination that the fork length did not meet the minimum requirement of 96 inches was an

error as it was stated in Far East's bid submittal that they would comply with the fork length requirement. Far East also noted in its protest letter that the difference of 10 hp from the specification does not reduce the forklift capacity of lifting 40,000 pounds that it was designed to meet and which was called for in the bid specifications. See Exhibit C Far East's Protest Letter and Exhibit D Forklift brochure.

III. ANALYSIS

1. This case presents the interesting situation where a bidder who admits that it did not meet the announced minimum standards claims that the winning bidder cannot provide an item of equipment that is more than the minimum standard, when the customer is willing to pay for it. Far East's position is based upon a high price argument. Acquiescence in error takes away the right of objecting to it. 20 GCA Section 15108, Remedies. Far East appears to argue that it does not have to play by the announced rules, and furthermore that the rules should be interpreted to prevent its opponent from winning, when the opponent has apparently followed those rules.

2. In our view, the procuring agency should have the right to determine the winner where competing vendors differ in product and specifications of equipment offered. However, where one of the bidders clearly does not meet the announced specification, it seems reasonable that the procuring agency can eliminate that bidder and select an alternate proposal even at substantially higher cost. 5 GCA Section 5211(g) requires that "the contract shall be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids and whose bid amount is sufficient to comply with Article 13 [Wage and Benefit Determination] of this Chapter, if applicable." (Article 13 not applicable in this instance). The other eight forklifts being purchased in this Request for Bids

were for much smaller sizes (five 11,000 pound and three 20,000 pound forklifts). The purchase of an over 40,000 pound rated forklift will provide the PAG with a capability of lifting very heavy items.

IV. CONCLUSION

Based on the above, as a matter of law, the Public Auditor determines that:

1. **The Appellant, Far East Equipment Company, LLC was non-responsive in its bid for the 40,000 pound fork truck to be purchased by PAG.** The Far East admits that while it missed the minimum specification, it missed the minimum specification by only 10 hp, a negligible amount. Nonetheless, they were below the required specification for engine horsepower. GSA was correct in finding the bid of Far East for a 40,000 pound fork truck nor the optional 44,000 pound fork truck to be non-responsive to its announced bid tender. Neither the Kalmar DCE 180-6 Far East nor the optional Kalmar DCE 200-12 forklifts offered met the minimum bid specifications and PAG is not required to purchase from Far East merely because it is cheaper than the alternative equipment offered by its competitor.

2. **Morrico, the winning bidder, met minimum bid specifications for the 40,000 pound fork truck, and is entitled to be awarded the procurement contract.** Its proposal met the minimum required specification. It will provide a lift capacity that PAG is willing to pay for, despite its higher cost.

3. **In conclusion, PAG's Motion to Dismiss is hereby granted, and PAG may proceed with the purchase of the 40,000 pound fork truck from Morrico.**

This is a final administrative Decision. Parties are hereby informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9 of 5 GCA Section 5481(a), within fourteen (14) days after receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the parties and their respective attorneys in accordance with 5 GCA Section 5702 and shall be made available for review on the OPA website www. guamopa.org.

DATED this 25th day of July 2008

DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR