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Attorneys for Appellant  
Morrigo Equipment, LLC

**THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Procurement Appeal of	)	<b>MORRICO BRIEF ON OPA</b>
	)	<b>ORDER</b>
MORRICO EQUIPMENT, LLC,	)	
	)	Docket No. OPA-PA-14-011
Appellant.	)	Docket No. OPA-PA-14-012
_____	)	

Morrigo Equipment, LLC (“Morrigo”), hereby files its brief on the issues identified by the Office of Public Accountability (“OPA”) at the January 28, 2015, formal hearing of this matter.

The OPA has requested the parties to brief two issues related to this appeal. First, the OPA has requested briefing on the timeliness and ripeness of Morrigo’s appeals herein, when Morrigo had notice of the appeal of Triple J Enterprises, Inc. (“Triple J”), in OPA-PA-14-009 (“IFB”), and when Morrigo had notice of the settlement agreement entered into between Triple J and the General Services Agency (“GSA”). Second, the OPA has requested briefing on the authority of the OPA to set aside settlement agreements resolving procurement protests or appeals, including those reached pursuant to 5 GCA § 5425, and those that are not signed by an interested party.

**I. Timeliness of Morrigo Appeals.**

The GSA conducted a bid opening for Invitation for Bid No. GSA065-14, a solicitation for school buses, on August 12, 2014. On September 9, 2014, the GSA advised Morrigo that its bid

was rejected for non-compliance with a specification requiring the use of rivets on all exterior body parts. The GSA further advised that it would re-bid the IFB.

On September 15, 2014, Morrigo delivered a letter to the GSA analyzing the exterior rivet specification and asking that the rivet specification be deleted from the re-bid of the IFB. Morrigo also delivered a letter dated October 16, 2014, explaining why the exterior rivet specification was improper. On October 14, 2014, Morrigo reviewed Triple J's bid submission at the GSA to determine why the Triple J bid was rejected.

On October 31, 2014, Morrigo became aware through an article in the Marianas Variety that Triple J had filed an appeal to the OPA with respect to the IFB. Morrigo was unaware at that time that Triple J had filed a protest and did not understand how Triple J could challenge the cancellation of the IFB which occurred on September 9, 2014. During the next week, Morrigo communicated with counsel about reviewing the documents regarding Triple J's protest and OPA appeal, and whether it was necessary for Morrigo to enter an appearance in the Triple J OPA appeal.

On November 7, 2014, Fred Nishihara, an Assistant Attorney General, contacted Torgun Smith of Morrigo at approximately 1:30 p.m. and advised that he was requested to communicate with Morrigo about a settlement being discussed with Triple J on the IFB. Mr. Smith and Mr. Nishihara spoke again about the proposed settlement at around 3:10 p.m. Morrigo will offer testimony at the hearing of this matter about the substance of these conversations. However, Morrigo did not then know that Triple J's counsel had written to Mr. Nishihara at around 12:30 p.m. on November 7, 2014, accepting a settlement offer made by Mr. Nishihara that morning. *See,*

Exhibit A. And, while the GSA has stated that Morrigo did not respond to the purported settlement offer<sup>1</sup>, this is false as Morrigo's testimony at the hearing of this matter will show.

Morrigo did not see any written settlement agreement until it was posted on the OPA's website on November 10, 2014, when Morrigo was arranging to file its November 10, 2014, entry of appearance in the Triple J OPA appeal. When Morrigo realized that the GSA and the Attorney General's Office had already entered into a settlement agreement with Triple J, Morrigo also filed a November 10, 2014, protest with the GSA regarding its intent to award a contract to Triple J for the school buses which were the subject of the IFB. Morrigo also filed a second protest with the GSA on November 21, 2014, expanding upon the grounds for its protest of any award of a contract to Triple J.

Morrigo's protests filed on November 10 and 18, 2014, were timely filed within fourteen (14) days of November 7, 2014, the earliest date on which Morrigo had any idea that the GSA and the Attorney General's Office were agreeing to award a school bus contract to Triple J through a settlement agreement. Morrigo's protests were also ripe. The procurement code allows protests to be filed on any aspect of a procurement and a protestor need not wait for an actual contract to be awarded to a competitor before filing a protest. In fact, if a protestor waits to file a protest until a contract is actually awarded to a competitor, it cannot avail of the automatic stay required by 5 GCA § 5425(g). *See, Guam Imaging Consultants, Inc., v. Guam Memorial Hospital Authority*, 2004 Guam 15, ¶ 34 ("The May 16, 2003 protest of the interim sole source contract mentioned in GMHA's May 14, 2003 memorandum must also have been filed prior to the contract being awarded in order for the automatic stay to be triggered.").

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<sup>1</sup> *See*, GSA December 1, 2014, letter to Kevin Fowler, denying Morrigo protest ("the government did contact your client, Morrigo on two separate occasions prior to the settlement asking if your client would agree the split offered in the agreement. No answer was received and the government and the other party moved forward with the agreement.").

Here, the GSA found that the Triple J bid was non-responsive at bid opening for failure to include mandatory drawings/seating plans. Title 2 GAR §3109(n)(3), governing product acceptability, provides in part that “[t]he Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require submission of bid samples, descriptive literature, technical data, or other material.” This section further provides that “[a]ny bidder’s offering which does not meet the acceptability requirements shall be rejected as nonresponsive.” The school bus IFB specifically required the submission of drawings and seating plans. Triple J did not submit these required documents and, accordingly, its bid had to be rejected as nonresponsive pursuant to the plain terms of the procurement regulations. The GSA had no discretion in the matter. However, pursuant to its settlement agreement, the GSA has now agreed to allow Triple J to supplement its non-responsive bid and provide a one page seating plan, which still does not satisfy the mandatory terms of the IFB in numerous respects. Nonetheless, since the GSA does not have discretion to allow Triple J to supplement its non-responsive bid in this manner, Morrico is entitled to protest this illegal action and has done so herein.

Accordingly, Morrico’s protests and appeals herein were both timely and ripe.

## **II. OPA Jurisdiction Regarding Settlement Agreements.**

The OPA has jurisdiction to hear any dispute over the propriety of a procurement contract award, regardless of the terminology used in describing that award. In other words, it does not matter that an agency calls its award of a procurement contract a “settlement agreement”. It is the substance of what an agency does, not the form or terminology it uses. For example, in *Suburban Disposal, Inc., v. Township of Fairfield*, 892 A.2d 720, 727 (N.J. App. 2006), the court held that “[w]e reject as elevating form over substance defendants’ characterization of the arrangement as the settlement of a dispute rather than a contract.” The court further explained in support of its holding

that “[t]he Township put out to bid the very service that defendants later, after all bids were opened, decided should be the subject of the ‘settlement of a dispute’ rather than part of the award of a contract. Engaging in this arrangement outside the bidding process was improper, and in the circumstances of this case was a subterfuge to further manipulate the contract award after all bids were opened.” *See, Suburban Disposal*, 892 A.2d 720, 727.

In this appeal, the settlement agreement entered into between the GSA and Triple J merely illustrates that the GSA intended to award a procurement contract to Triple J. Most procurement protests begin with a bidder challenging an agency’s intent to award a procurement contract to a competitor of that bidder, when the competitor’s bid submission failed to satisfy the terms and conditions of the invitation for bid at issue or was otherwise in violation of the procurement code and regulations. If using the terminology “settlement agreement” is all that an agency needs to do to get around the OPA’s jurisdiction to determine whether a procurement award is in conformity with the procurement code and regulations, and the terms of the invitation to bid at issue, we will soon see a plethora of “settlement agreements”. However, this is not the law and an agency cannot enter into a settlement agreement by which it awards a procurement contract that is in violation of procurement law.

For example, in *In the Matter of Coulson Aviation (USA), Inc.*, attached as an Exhibit to Morrico’s January 23, 2015, Hearing Brief, the Government Accountability Office held that “A settlement agreement promising award of a contract on a sole-source basis in exchange for abandoning ongoing litigation, such as a bid protest, is not a permissible basis for restricting competition and excluding potential offerors. ... Quite simply, the existence of a settlement agreement does not permit a contracting agency to act in ways not otherwise permitted by applicable statutes and regulations.” *See, In the Matter of Coulson Aviation (USA), Inc.*, p. 16.

The ability of a disappointed bidder to protest a purported settlement agreement entered into between a government entity and a competing bidder in fact furthers the public interest in the fair operation of government procurement practices. For example, in *Johnson Turf and Golf Management, Inc., v. City of Beverly*, 802 N.E.2d 597 (Mass.App. 2004), a disappointed bidder sued the defendant city after losing a bid to manage a golf course. Thirty days before the trial that had been limited to damages, the city entered into a settlement agreement with the disappointed bidder and by which that bidder would obtain a contract to manage the golf course. The court then entered a consent decree judgment incorporating by reference all terms of the settlement agreement.

Upon learning this, a competing bidder, Friel, who had won the prior procurement contract, challenged the settlement agreement. The court held that “[n]ot only does Friel have a proprietary interest in having a fair shot at the management contract, its ability to challenge the somewhat questionable consent judgment serves a valuable public interest to ensure compliance with public bidding statutes.” See, *Johnson Turf and Golf Management, Inc., v. City of Beverly*, 802 N.E.2d 597, 600 – 601. Similarly, Morrico’s challenge to the GSA/Triple J settlement agreement, which violates the procurement law, serves a valuable public interest to ensure compliance with Guam’s public bidding statutes.

In addition, the GSA did not enter into a settlement agreement pursuant to 5 GCA § 5425(b), which provides generally that the “Chief Procurement Officer ... shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder ... .” Instead, the GSA acted pursuant to 5 GCA § 5425(c), which provides that “[i]f the protest is not resolved by mutual agreement, the Chief Procurement Officer ... shall promptly issue a decision in writing.” See, 5 GCA § 5425(c). On September 26, 2014, the GSA denied the Triple J protest in writing. See, *In the Matter of Appeal of Triple J Enterprises*,

*Inc.*, OPA-PA-14-009, Notice of Appeal, Exhibit L. Thereafter and upon Triple J's appeal to the OPA, there was no longer any protest pending before the GSA which it could resolve pursuant to 5 GCA § 5425(b).

Despite this, the GSA maintains that it entered into a settlement agreement pursuant to 5 GCA § 5425(b), and that the OPA has no authority or jurisdiction to set that settlement agreement aside. But this argument runs counter to the express jurisdiction of the OPA. 5 GCA § 5703, governing the jurisdiction of the OPA, provides that the OPA "shall have the power to review and determine de novo any matter properly submitted to her or him." This section further provides that "[n]otwithstanding § 5425 of this Chapter, no prior determination shall be final or conclusive on the Public Auditor or upon any appeal from the Public Auditor." Therefore, no determination by the GSA to settle or resolve the Triple J protest or appeal, pursuant to Section 5425, is final or conclusive on the OPA. The OPA quite clearly has jurisdiction to set aside settlement agreements purportedly entered into by the GSA that are in violation of the Guam procurement code and regulations.

This is not to say, however, that the GSA cannot work out a settlement of a procurement dispute that is pending before the OPA. However, the GSA cannot enter into a settlement agreement that violates the provisions of Guam's procurement code and regulations, or that purports to eviscerate a bidder's rights to protest illegal procurement awards, as the settlement agreement in this matter does. The OPA retains jurisdiction to set aside a settlement agreement that violates the procurement law in exercise of the power of de novo review.

Based on the foregoing, Morrico respectfully requests that the OPA find Morrico's protests timely, that the OPA proceed with its jurisdiction over this matter and review whether the GSA's

proposed award of a contract to Triple J is in violation of the Guam procurement code and regulations.

Respectfully submitted this 2<sup>nd</sup> day of February, 2015.

DOOLEY ROBERTS & FOWLER LLP

By:   
\_\_\_\_\_  
**KEVIN J. FOWLER**  
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Morrico Equipment, LLC





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**FW: Triple J -- Acceptance of Settlement Offer (OPA-PA-14-009)**

1 message

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**Fred Nishihira** <fnishihira@guamag.org>

Fri, Nov 7, 2014 at 1:19 PM

To: Claudia Acfalle <Claudia.Acfalle@gsa.guam.gov>, Robert Kono <robert.kono@gsa.guam.gov>, Carl Dominguez <carl.dominguez@dpw.guam.gov>

Below an email from Matthew Kane Triple J's attorney for your review.

**From:** Matthew S Kane [mailto:mk@cmlaw.us]  
**Sent:** Friday, November 07, 2014 12:35 PM  
**To:** Fred Nishihira  
**Cc:** Rawlen Mantanona  
**Subject:** Triple J -- Acceptance of Settlement Offer (OPA-PA-14-009)  
**Importance:** High

Hi Fred,

I am pleased to inform you that our client, Triple J, has authorized and does hereby accept the offer of settlement you extended this morning in our phone conversation wherein you explained that you have settlement authority from your client and asked me to communicate the following terms to my client for acceptance, to wit:

1. Triple J will be awarded nine (9) of the buses for this procurement (GSA-065-14), and Morrico will be awarded the remaining three (3) of those buses.
2. Triple J will not engage in a media spectacle on this issue.
3. Triple J's submission of the schematic (drawing/seating plans), which is attached to its protests as an exhibit, will constitute submission as part of its bid. In the event, upon verification, that it is determined that this schematic does not meet the specifications of the bid, then neither Triple J nor Morrico will be awarded any buses under GSA-065-14, and GSA will instead proceed with cancellation and re-bidding of this procurement.
4. Because this is an IDIQ, as additional buses are procured under available funding, buses shall be purchased from Triple J and Morrico in a 3 to 1 ratio. For example, for the purchases of buses 13, 14, 15, and 16, GSA will purchase buses 13, 14, and 15 from Triple J, and bus 16 from Morrico.

EXHIBIT

A

Please confirm receipt of this acceptance of your offer at the earliest opportunity.

Thank you for your prompt attention to this matter.

I look forward to hearing from you soon.

Sincerely,

~Matt

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