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THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of	)	**REPLY BRIEF**
	)	
MORRICO EQUIPMENT, LLC,	)	Docket No. OPA-PA-14-011
	)	Docket No. OPA-PA-14-012
Appellant.	)	
	)	

Morrico Equipment, LLC ("Morrico"), hereby submits its reply brief with respect to its appeal herein and the January 28, 2015, Order of the Office of Public Auditor ("OPA").

I. Morrico's Protest was Timely.

Morrico has protested any award of a contract to Triple J Enterprises, Inc. ("Triple J"), whether by settlement agreement or otherwise, because of its failure to provide the drawings and seating plans mandated by the subject invitation for bid ("IFB"). The General Services Agency ("GSA"), argues that Morrico cannot protest Triple J's non-responsive bid because "Morrico should have known these concerns at the time of bid opening" and did not protest within 14 days of that time. *See*, GSA February 2, 2015, Brief, p. 2. There is no logic to this argument. Morrico was advised that the GSA would rebid the procurement, so it was obvious that Triple J's bid, like Morrico's, was not accepted. There was no reason for Morrico to protest Triple J's bid submittal

since it was rejected. It is true that Morrico did not know at that time why the Triple J bid was rejected, but that is not a basis for a protest.

The GSA also argues that Morrico did not timely protest its rejection on the exterior component rivet specification. But, again, Morrico knew the IFB was going to be rebid because that is what the GSA told it. Instead of litigating the point, Morrico communicated its concerns about the rivet specification through correspondence with the GSA and DPW in an effort to obtain an amendment of that specification as there was no substantive basis for requiring that only rivets could be used in the assembly of the exterior bus components.

Morrico offered buses manufactured by Thomas Built Buses ("TBB"). TBB uses anti-corrosive rivets to assemble exterior bus components, so it in fact met the specification. The problem appears to be that TBB also uses anti-corrosive screws and an advanced bonding technology to assemble the exterior bus components. In fact, once the bonding has cured and set, the rivets and screws are of no structural significance. In testing done by TBB on joint strength, the use of bonding to fasten joints together results in far superior strength than can be achieved through the use of rivets, screws, or a combination of them. The Federal Motor Vehicle Safety Standards for school buses strictly regulate joint strength. Those standards do not require that a manufacture use only rivets, only screws, or only a combination of rivets and screws; they require joint strength. The TBB buses built with its advanced bonding technology provide far superior joint strength than the strength that can be achieved through the use of rivets or screws. Accordingly, the GSA exterior rivet specification simply has no substantive basis as a minimum specification. The fact is that Morrico did not bid an equal to the exterior rivet specification; it bid a far superior technology that was only available when TBB recently opened its manufacturing facility for its new line of C2 buses.

Nonetheless, it appears that the GSA contends that "only" rivets can be used to assemble the exterior bus components. And, the GSA now wants to punish Morrico for trying to informally resolve an unsubstantiated and insignificant exterior rivet specification. The apparent message is to litigate immediately instead of seeking informal resolution of product specification issues, which is counter to all of the underlying principles set forth at 5 GCA § 5001 of Guam's procurement code.

The GSA also argues that it was not deceitful when it notified Morrico that the IFB would be rebid. However, Morrico has not alleged that the GSA was deceitful, only that it misled Morrico to its detriment when it advised that it would rebid the IFB. Had Morrico known that the GSA was going to instead award a contract to Triple J, Morrico would have protested that proposed award as well as the GSA's rejection of the Morrico bid based on the exterior rivet specification.

The GSA should be estopped from claiming that Morrico's failure to immediately protest and litigate the rivet specification bars it from protesting that issue now. In *Limtiaco v. Guam Fire Dept.*, 2007 Guam 10, ¶ 55 (Guam 2007)(citing *Mariano v. Guam Civil Service Commission*, 1983 WL 30227, at *3 (Guam App.Div. 1983)), the Court recognized equitable tolling. It upheld the lower court's reasoning as follows: "In finding that the Government of Guam should be estopped from denying Mariano's claim because they induced inaction on Mariano's part, the court stated, '[t]o hold otherwise would be contrary to public policy and would require an employee to file a formal grievance with his employer fifteen (15) days from the date his check was due instead of informally attempting to resolve the problem with his superiors.'" This public policy argument is equally applicable to the resolution of procurement issues. It is far better to work out these issues informally instead of engaging in knee-jerk litigation. Because the GSA advised Morrico that it would rebid the procurement, Morrico was induced to forgo a protest and work with the GSA to

amend the exterior rivet specification. This should be encouraged and the GSA should therefore be estopped from arguing that Morrico should have protested earlier.

II. The Morrico Protest is Ripe.

The GSA, citing *Davis v. Guam*, 2013 WL 204697, *7 (D. Guam Jan. 9, 2013), also argues that Morrico's protest and appeal herein are not ripe because it has not yet awarded a contract to Triple J. *See*, GSA February 2, 2015, Brief, p. 3. But the GSA is making inconsistent arguments on this point. As noted above, the GSA argues on the one hand that Morrico should have protested Triple J's non-responsive bid submittal within 14 days of bid opening or upon Morrico's inspection of the Triple J bid on October 14, 2014. *See*, GSA February 2, 2015, Brief, p. 2. On the other hand, it argues that Morrico cannot protest Triple J's non-responsive bid until the GSA formally announces its award of a contract to Triple J. *See*, GSA February 2, 2015, Brief, p. 3. The GSA obviously cannot have it both ways.

In any event, the GSA states that it must first review and approve the Triple J seating plan before it will award a contract to Triple J. However, Morrico is protesting the GSA's intent to award a contract to Triple J and the GSA's decision to allow Triple J to supplement or modify its bid submission after bid opening. This violates the procurement code and it has already happened; it is not some future event that may not occur. The GSA is not permitted to allow Triple J to modify or supplement its bid to supply materials that the IFB mandated be submitted with its bid and that Triple J failed to provide. The failure of Triple J to submit the mandatory drawings and seating plans is a material omission and not some minor informality. Title 2 GAR §3109(n)(3), provides that "[a]ny bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive." Triple J's bid was non-responsive under this provision and the GSA had no discretion but to reject it. Further, the GSA made no written determination necessary to allow

Triple J to supplement its bid after bid opening as a minor informality, and by which Triple J sought to correct its alleged mistake in failing to supply the mandatory drawings and seating plans. The procurement record submitted on this appeal contains no such documentation. *See*, 2 GAR § 3109(m)(6); *In the Appeal of Pacific Data Systems, Inc.*, OPA-PA-10-005, p. 14 ("Finally, to allow GTA to correct their original Major Shareholders Disclosure Affidavit as a minor informality requires that GCC's Procurement Officer for the IFB prepare a written determination granting the correction of the minor informality. … A review of the procurement record in this matter reveals that no such written determination was made by GCC's Procurement Officer.").

Morrico's protest is ripe as it challenges actions that the GSA has already undertaken which are illegal and which violate Guam's procurement code and regulations.

III. The OPA Has Jurisdiction to Set Aside Settlement Agreements.

The GSA argues that the OPA does not have authority to set aside settlement agreements which resolve procurement protests or appeals, including settlements under 5 GCA § 5425. However, the GSA does not cite any procurement cases for that proposition, nor does it analyze the procurement code regarding that issue, beyond stating that Section 5425 allows it broad authority to settle.

For example, the GSA cites to an Alaskan worker's compensation case, *Blanas v. Brower Co.*, 938 P.2d 1056 (Alas. 1997), to support its argument that the OPA cannot set aside a settlement agreement. However, the worker's compensation board in Alaska, like Guam, is required to approve or disapprove the settlement of worker's compensation claims. *See*, *Blanas v. Brower Co.*, 938 P.2d 1056 (Alas. 1997)("The statute provides that settlement agreements are not valid until they are approved by the Board. Upon approval by the Board, settlement agreements have the same legal effect as awards, except that they are more difficult to set aside"). The jurisdiction of worker's

compensation boards to approve or disapprove settlements has no relevance to the jurisdiction of Guam's public auditor. Worker's compensation boards have to approve settlements before they can become effective. The OPA, however, does not have to approve GSA settlement agreements unless a disappointed bidder appeals them to the OPA.

The GSA cites the child support case of *Fields v. McPherson*, 756 A.2d 420 (D.C. App. 2000), for the proposition that settlement agreements can only be set aside for fraud, duress, mistake or other compelling circumstances. It also cites the divorce case of *Colton v. Colton*, 244 P.3d 1121 (Alaska 2010), for the proposition that courts are reluctant to set aside settlement agreements. Obviously, child support and divorce settlement agreements, like worker's compensation settlements, are entered into under completely different statutory schemes. Most if not all jurisdictions have child support guidelines governing the establishment of child support and the circumstances under which support may be modified. But, like worker's compensation settlements, child support and divorce settlement agreements must be approved by the court hearing the matter. These statutory schemes have no relevance to the jurisdiction of Guam's public auditor over GSA settlement agreements. Again, the OPA does not have jurisdiction over GSA settlement agreements absent an appeal.

The interesting case cited by the GSA is *Perez v. Uline, Inc.*, 68 Cal.Rptr.3d 872, 873 (Cal.App. 2007), in which the court acknowledged that a severance agreement could not contravene the Uniformed Services Employment and Reemployment Rights Act of 1994. This is the same concept as that upon which the OPA's jurisdiction over settlement agreements is based as set forth in 5 GCA § 5703. This statutory procurement provision is precisely why the OPA has jurisdiction over settlement agreements resolving procurement protests. It provides in part that "[n]otwithstanding § 5425 of this Chapter, no prior determination shall be final or conclusive on the

Public Auditor … ." Accordingly, notwithstanding any resolution of a protest by the GSA under Section 5425, whether by a settlement agreement or otherwise, is not "final or conclusive on the Public Auditor." If it were otherwise, the OPA's jurisdiction over procurement would be a mirage because the GSA could simply call all of its protest resolutions "settlement agreements" and thereby eviscerate any OPA oversight of the Guam procurement system.

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 5th day of February, 2015.

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