Suite 401 DNA Building
238 Archbishop Flores St.
Hagåtña, Guam 96910

FAX

To:	**David L. Manning** **Head of Purchasing Agency** **Guam Solid Waste Authority** Under the Management of Federal Receiver Gershman, Brickner, & Bratton, Inc. 542 North Marine Corps Drive Tamuning, Guam 96913	**From:**	**Doris Flores Brooks** **Guam Public Auditor** Office of Public Accountability
Phone: **Fax:**	(671) 646-4379 x 201 or 212 (671) 649-3777	**Pages:**	8 (including cover page)
CC:	**Kevin J. Fowler** **(Attorneys for Morrico Equipment, LLC)**	**Date:**	December 28, 2015
Phone: **Fax:**	(671) 646-1222 (671) 646-1223	**Phone:** **Fax:**	475-0390 x. 203 472-7951

Re: OPA-PA-15-017 Notice of Receipt of Appeal

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Thank you,
Jerrick Hernandez
Auditor
jhernandez@guamopa.org

OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

December 28, 2015

David L. Manning
Head of Purchasing Agency
Guam Solid Waste Authority
Under the Management of Federal Receiver
Gershman, Brickner, & Bratton, Inc.
542 North Marine Corps Drive
Tamuning, Guam 96911

VIA FACSIMILE: (671) 649-3777

Re: Notice of Receipt of Appeal – OPA-PA-15-017

Dear Mr. Manning,

Please be advised that Morrico Equipment, LLC ("Morrico") filed an appeal with the Office of Public Accountability (OPA) on December 24, 2015 regarding the Guam Solid Waste Authority's response to Morrico's protest relative to Invitation for Bid No.: GSWA004-15; a procurement solicitation for rear loader refuse packer bodies . OPA has assigned this appeal case number OPA-PA-15-017.

Immediate action is required of GSWA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Tuesday, January 5, 2016,** five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Tuesday, January 12, 2016,** ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Morrico. OPA respectfully asks that GSWA provide one original and two copies of the procurement record as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Llewelyn Terlaje at 475-0390 ext. 211, or lterlaje@guamopa.org, should you have any questions regarding this notice.

Sincerely,

for Llewelyn Terlaje
Audit Supervisor

Enclosure: First Five Pages of Notice of Appeal – OPA-PA-15-017

Cc: Kevin J. Fowler, Attorneys for Morrico Equipment, LLC

Kevin J. Fowler
DOOLEY ROBERTS & FOWLER LLP
Suite 201, Orlean Pacific Plaza
865 South Marine Corps Drive
Tamuning, Guam 96913
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Attorneys for Appellant
Morrico Equipment, LLC

THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Procurement Appeal of MORRICO EQUIPMENT, LLC, Appellant.	**NOTICE OF PROCUREMENT APPEAL** Docket No. OPA-PA_____

Appellant Information:

Morrico Equipment, LLC ("Morrico")
197 Ypao Road
Tamuning, Guam 96931

Tel: 649-1946
Fax: 649-1947

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 12/24/15
TIME: 3:50 ☐AM ☒PM BY: RS
FILE NO OPA-PA: 15-017

Appeal Information:

A) Guam Solid Waste Authority ("GSWA"), Under the Management of Federal Receiver, Gershman, Brickner & Bratton, Inc.

B) Invitation for Bid No. GSWA004-15; a procurement solicitation for rear loader refuse packer bodies.

C) Decision being appealed is the GSWA Denial of Procurement Protest, dated December 10, 2015, and received by Morrico's counsel on December 11, 2015.

D) Appeal is made from a decision on protest of method, solicitation or award.

E) Names of competing bidders:

ORIGINAL

Far East Equipment Company, LLC ("Far East").

Form and Filing:

1. On or about August 18, 2015, the GSWA let the subject Invitation for Bid ("IFB"), for rear loader refuse packer bodies. A copy of the pertinent IFB specifications is attached hereto as **Exhibit A**.

On September 14, 2015, Morrico submitted its bid on the IFB. *See*, **Exhibit B**. The GSWA conducted a bid opening on that same date. The only other bidder on the IFB was Far East. The GSWA Abstract of Bids for Far East illustrated that it failed to submit the descriptive literature required by the IFB. *See*, **Exhibit C**. The GSWA Abstract of Bids for Morrico's bid is attached as **Exhibit D**.

On September 24, 2015, Morrico received a document titled "Bid Status", that informed Morrico that its bid was rejected for failing to meet the delivery requirement in the IFB and that the IFB would be re-bid. The Bid Status is attached hereto as **Exhibit E**.

On September 28, 2015, Morrico filed a protest with respect to the GSWA's rejection of its bid. *See*, **Exhibit F**. Morrico based its protest on the fact that the GSWA could not reject Morrico's bid for failure to meet a ninety (90) day delivery specification, without otherwise complying with the provisions of 5 GCA § 5010. In pertinent part, that statute provides that "[d]elivery time may be considered as a factor in making an award to a responsive bidder ***only if*** his average delivery time bid is at least ten percent (10%) shorter than the average delivery time bid of a lower price responsive bidder and if the price offered by the bidder offering the faster delivery or performance does not exceed one hundred five percent (105%) of the lower price bidder." Given that Far East's bid was rejected due to not providing descriptive literature, there was no delivery time/price comparison that the GSWA could have conducted under 5 GCA § 5010. Accordingly, the GSWA should have awarded the bid to Morrico.

In a letter dated November 22, 2015, but received by Morrico's counsel on November 23, 2015, the GSWA denied Morrico's protest over the rejection of its bid. *See*, **Exhibit G**. The only explanation given by the GSWA for the denial was that "your protest is untimely." The GSWA also stated that Morrico's protest "is also moot as GSWA is cancelling IFB GSWA004-15." Morrico appealed the denial of its protest to the OPA on December 7, 2015.

In a letter dated November 24, 2015, but received by Morrico on November 25, 2015, the GSWA purported to cancel IFB GSWA004-15. *See*, **Exhibit H**. The ostensible reason for the cancellation was that "in the best judgment of the Receiver continuing with the procurement would unreasonably delay the progress in meeting the mandates of the Consent Decree by endangering

GSWA's immediate capacity to provide services to its customers thus endangering the revenue of GSWA. This revenue is essential to meeting the mandates of the Consent Decree."

In a letter dated December 7, 2015, and served on the GSWA on December 9, 2015, Morrico protested the GSWA's cancellation of IFB GSWA004-15. *See*, **Exhibit I**. In its protest letter, Morrico pointed out that the cancellation was void because it was issued while a stay of procurement was in effect under 5 GCA § 5425(g) as a result of Morrico's prior protest over the rejection of its bid and its appeal of the GSWA's denial of that protest to the OPA. In addition, Morrico pointed out that the GSWA's purported reasons for the cancellation of the IFB were improper under 2 GAR § 3115, which governs the cancellation of procurement solicitations. The GSWA's purported reasons for cancellation of the IFB satisfied none of the provisions of that regulation. Finally, Morrico pointed out that any delay in meeting the mandates of the consent decree was the result of the GSWA's own actions in improperly refusing to award a contract to Morrico despite the fact that it was the lowest responsive and responsible bidder. In addition, the GSWA did not issue its rejection of Morrico's bid until 10 days after bid opening, did not respond to Morrico's protest over the rejection of its bid for nearly one month and did not purport to re-solicit the identical IFB until December 4, 2015.

In a letter dated December 10, 2015, and served on Morrico's counsel on December 11, 2015, the GSWA denied Morrico's protest over the cancellation of the IFB. *See*, **Exhibit J**. It argued that the cancellation was a mere formality because it had rejected both bids received on the IFB as non-responsive, and that this was a cogent and compelling reason for cancellation. The GSWA also argued that its denial of Morrico's protest over the cancellation of the IFB was proper because the cancellation was "issued pursuant to the authority of the Federal Receiver under District Court of Guam in CIVIL CASE NO. 02-0022 United States of America v. Government of Guam." The GSWA also argued that the notice of cancellation did not violate any stay of procurement arising upon Morrico's protest over the rejection of its bid because the GSWA's denial of that protest on November 24, 2015, ended the stay. None of the GSWA's arguments for denying Morrico's protest over the cancellation of the IFB are legally sound.

GSWA's denial of Morrico's protest over the rejection of its bid did not end the stay of procurement under 5 GCA § 5425(g). *See*, *Teleguam Holdings, LLC v. Territory of Guam*, 2015 Guam 13, ¶ 31 (2015)("we hold that in a procurement controversy under 5 GCA § 5425, the automatic stay set forth in section 5425(g) remains in effect during the fourteen day period following OPA's decision and commencement of a civil suit within the Superior Court and continues until final resolution of the action by the Superior Court."). *See*, *also*, *In the Appeal of JMI Edison*, Appeal No: OPA-PA-13-010, September 20, 2013, Order Granting Motion Re Automatic Stay ("JMI filed a timely Procurement Protest and thereafter filed a timely Notice of Appeal to the Office of Public Accountability ("OPA"). By doing so, an automatic stay is triggered and remains in effect until final resolution of JMI's protest. The automatic stay is triggered upon the filing of a timely protest; the filing of a timely appeal to the OPA; and the filing of a timely appeal to the Superior Court of Guam. … Final resolution of a protest includes the time period of an appeal after protest.").

The reason for the cancellation articulated in GSWA's letter dated November 24, 20154, does not satisfy any of the provisions of 2 GAR § 3115(d)(2)(i) – (vi). The GSWA's reliance on the status of GBB as a federal receiver and the necessity to timely comply with the Consent Decree is unfounded and does not override local Guam procurement law.

Although the GSWA argues that this IFB is of great importance to its ability to timely meet the mandates of the Consent Decree, it was not even important enough to include in the latest quarterly report that GBB filed with the District Court of Guam on October 21, 2015. *See*, **Exhibit K**. GBB did discuss other procurement issues in that report, but not the IFB at issue here. Actions speak louder than words and GBB's omission of this IFB from its mandated reports to the District Court of Guam obviously speaks volumes. If the Receiver's neglect of GWSA vehicles was so severe as to jeopardize completion of Consent Decree projects, one would expect the receiver to so advise the District Court.

In addition, the subject Consent Decree required that the government of Guam close the Ordot Dump, construct a cover so no further pollutants were discharged into waters of the United States, and construct an environmentally compliant new landfill. *See*, **Exhibit L**. While in its letter dated December 10, 2015, the GSWA argues that it needs to repair some vehicles and repurpose others that are no longer needed for their original purpose due to the closure of the Dededo Residential Transfer Station, these are not a Consent Decree projects. Even if they were, the express terms of the Consent Decree require that the projects mandated thereunder be performed in accordance with the procurement laws of the government of Guam. *See, e.g.*, **Exhibit L**, p. 11, ¶ 9(h)("DPW shall award a construction contract for the new MSWLF in accordance with applicable procurement rules and policies of the Government of Guam.").

Additionally, federal law governing receiverships expressly requires that a receiver operate the receivership property in conformance with local law, which would obviously include Guam's procurement law. *See*, 28 USC section 959(b)("a … receiver appointed in any cause pending in any court of the United States … shall manage and operate the property in his possession as such … receiver … according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner of possessor thereof would be bound to do if in possession thereof."). The government of Guam has to pay for the completion of the above-described Consent Decree projects, regardless of whether the money comes from GSWA system fees or elsewhere. *See*, *Id.*, ¶ 10(a)("If funding from the Solid Waste Operations Fund is not sufficient to fully implement the projects, the Government of Guam shall seek funding through legislative appropriation, loans, grants, and rates charged for consumer services such as tipping or user fees."). Finally, the Ordot landfill is closed, work to seal it has progressed to near completion and a new environmentally sound landfill has been opened.

2. Morrico requests that the Office of Public Auditor ("OPA") rule that the GSWA's denial of Morrico's protest was unreasonable, arbitrary, capricious and an abuse of discretion.

3. Morrico has attached all supporting documents as exhibits hereto.

Declaration regarding court action:

Morrico confirms that an action in court has not been commenced.

Dated this 24th day of December, 2015.

DOOLEY ROBERTS & FOWLER LLP

By: _____
KEVIN J. FOWLER
Attorneys for Appellant
Morrico Equipment, LLC

VERIFICATION

I, Torgun Smith, Executive Vice President for Appellant Morrico, hereby declare under penalty of perjury under the laws of Guam that I have read the foregoing Notice of Appeal and that it is true and correct of my own knowledge, except as to those matters alleged upon information and belief and as to those matters, I believe them to be true.

Dated this 24th day of December, 2015.

_____
TORGUN SMITH

KJF: tg/M-278.25

TRANSACTION REPORT

DEC/28/2015/MON 12:54 PM

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#	DATE	START T.	RECEIVER	COM.TIME	PAGE	TYPE/NOTE	FILE
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002		12:53PM	6461223	0:01:30	8	MEMORY OK SG3	5348
TOTAL				0:03:01	16		

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To:	**David L. Manning** **Head of Purchasing Agency** **Guam Solid Waste Authority** Under the Management of Federal Receiver Gershman, Brickner, & Bratton, Inc. 542 North Marine Corps Drive Tamuning, Guam 96913	**From:**	**Doris Flores Brooks** **Guam Public Auditor** Office of Public Accountability
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Thank you,
Jerrick Hernandez
Auditor
jhernandez@guamopa.org