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Attorneys for Appellant Mid Pac Far East

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

<p>In the Appeal of</p> <p>MID PAC FAR EAST,</p> <p style="text-align: center;">Appellant.</p> <hr/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. OPA PA-17-012</p> <p>APPELLANT’S HEARING BRIEF</p>
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Appellant MID PAC FAR EAST (“MPFE”), hereby submits its Hearing Brief for the January 24, 2018 hearing in this matter.

This appeal concerns the invitation for bid on GSA/PAG’s Invitation for Bid No. GSA/PAG-025-17, seeking five 11,000 Lbs (5.5 Ton) Fork Trucks.

The basis of MPFE’s protest is that the color specification unduly restricts competition on this invitation for bid and that it unduly restricts competition based on an entirely non-essential characteristic of the equipment PAG wishes to procure.

A. THE COLOR SPECIFICATION IN GSA/PAG-025-17 VIOLATES GUAM PROCUREMENT LAW

The color specification required by GSA/PAG-025-17 violates Guam procurement law as it unlawfully restricts competition by limiting the number of bidders and the ability of those bidders to compete. The color specification in question required bidders to provide equipment with a “Main Body Safety Yellow and Black trimming” color. In issuing its protest decision, GSA claimed that MPFE’s protest was with merit, yet did not remove the color specification.

Instead, GSA amended the color from “Main Body Safety Yellow and Black trimming” to “yellow and black trimming”, thus maintaining the restrictive color requirement that MPFE protested. MPFE maintains that the color specification required by GSA/PAG-025-17, even as amended by the November 14, 2017 procurement decision, violates Guam law by improperly narrowing specification and unduly restricting competition.

Guam’s procurement law requires that “[a]ll specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory’s needs, and shall not be unduly restrictive.” 5 G.C.A. § 5265. This section is in line with the underlying purpose and policy of procurement law “to foster effective broad-based competition within the free-enterprise system.” 5 G.C.A. § 5001(b)(6). Further, Guam’s procurement regulations specifically state that “[s]pecifications shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall include only the essential physical characteristics and functions required to meet the government of Guam’s minimum needs.” 2 G.A.R. § 4109(a).

The Office of Public Accountability itself has recognized in prior instances that “generally, specifications shall not include requirements which unnecessarily restrict competition and shall include only the essential physical characteristics and functions required to meet the Government of Guam's minimum needs.” *Morrice Equipment, L.L.C.*, Appeal No. OPA-PA-13-001, 7 (2003).

The color specification is a non-essential characteristic of the subject equipment. No functional purpose has been attributed to the yellow and black specification by GSA or PAG. Furthermore, PAG currently uses equipment, purchased in January of 2017, that does not meet the yellow and black color specification. *See* Exhibit A through Exhibit I. The equipment shown in the exhibits are both orange and yellow. Further, the trim on all of the equipment is

red and white. Therefore, even if the amended specification is seen as to limit the color specification only to the trim on the equipment, the fact remains that there is a great deal of equipment at the port that does not comply with that specification. Clearly, the colors specified in the equipment are not necessary for the safe or effective use of the equipment at the port if there is currently equipment being used at the port that do not meet the color specification.

The color specification also restricts competition based on brand as opposed to the minimum needs of the government of Guam. Heavy equipment of the type specified in this solicitation typically comes in one of two colors: orange and yellow. Whether a producer makes equipment that comes in yellow or orange depends on the producer's brand. By specifying that the solicited equipment come in yellow as opposed to orange, the solicitation is restricting the brands and companies that may bid on the solicitation.

B. GSA AND PAG'S STATED REASON FOR THE COLOR SPECIFICATION IS UNSUPPORTED BY AGENCY DOCUMENTATION IN PART AND SUPPORTS THE BASIS FOR MID PAC FAR EAST'S PROTEST IN PART

In defense of the color specification, GSA and PAG stated in their agency report that:

Procuring Agency (PAG) has determined that it wishes to standardize the color of vehicles that it obtains for safety reasons as well as for obtaining spare equipment parts in the future.

See Agency Report for OPA-PA-017-17.

In response to the Agency Report, Mid Pac Far East submitted a Sunshine Reform Act of 1999 request to PAG to request any rules, regulations or policies from PAG, which had anything to do with the color of vehicles and other equipment used by PAG. Specifically, MPFE requested the following:

1. All rules, regulations, or policies of the Port Authority of Guam that relate to the color of vehicles and other equipment used by the Port Authority of Guam.
2. All rules, regulations, or policies of the Port Authority of Guam that relate to the relationship between vehicle color and spare parts for vehicles used by the Port Authority of Guam.

3. All materials related to the promulgation of the rules, regulations, and policies described in requests number 1 and 2 including, without limitation, to notices required by the Guam Administrative Adjudication Law.

4. Any inventory documents listing the make and model of all vehicles owned by the Port Authority of Guam.

See Exhibit “L” (Mid Pac Far East Sunshine Act Request, dated December 22, 2017). In response, the Port Authority of Guam provided Mid Pac Far East with (1) invoices for paint of various colors, including haze gray, safety yellow, safety green, safety red, black, and white and (*See* Exhibit “M” (PAG Purchase Orders) (2) an inventory list of PAG vehicles and equipment (*See* Exhibit “O” (List of PAG Vehicles and Equipment Inventory).

The inventory list seems questionable as certain equipment labeled as yellow in the inventory list, when seen in pictures next to other equipment also labeled as, actually seems orange. *See* Exhibits “A”, “B”, “D”, and “G” (Picture of PAG Equipment). Also, certain equipment appears to be mislabeled as having the wrong manufacturer.

Agency rules, as defined by 5 G.C.A. § 9107, must be developed according to the procedures set forth in 5 G.C.A. § 9300 to § 9312. When Mid Pac Far East asked PAG for rules and any materials related to the promulgation of rules specifying the color of PAG vehicles and equipment, PAG failed to provide any such documents. Since PAG is required to provide such documents in response to a Sunshine Reform Act of 1999 request and no such documents were provided, it seems evident that no policy specifying the color of PAG vehicles or equipment has ever been adopted by PAG.

Furthermore, the Agency Report states that the vehicle color standardization is also meant to help in “obtaining spare equipment parts in the future” thereby tacitly agreeing that the color specification was included so that PAG could buy equipment of a specific color, so that it could buy equipment from a specific vendor who (who supplies equipment of a certain

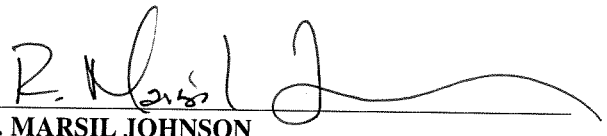
color) so that spare parts obtained in the future would be uniform. Even if PAG would like to ensure that its equipment is all made from the same manufacturer in order to ensure that parts are uniform, it can do so in ways that do not unduly restrict competition. Further, even if PAG were looking to ensure uniformity in the manufacture of its equipment, it shouldn't matter whether that uniformity is brought about through yellow equipment in particular. If uniformity is what PAG wishes to accomplish, that uniformity can be accomplished no matter what color of equipment it purchases, so long as the equipment is made by the same manufacturer.

CONCLUSION

MPFE respectfully requests that that the Office of Public Accountability issue a ruling, ordering the General Services Agency and the Port Authority of Guam to remove the color specification from the GSA/PAG-025-17, in its entirety.

DATED this 22th day of January, 2018.

BLAIR STERLING JOHNSON & MARTINEZ
A PROFESSIONAL CORPORATION

BY: 
R. MARSIL JOHNSON
Attorneys for Appellant Mid Pac Far East

CERTIFICATE OF SERVICE

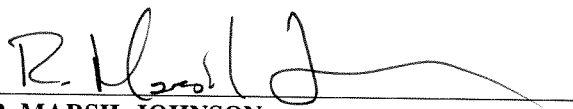
I, **R. MARSIL JOHNSON**, do hereby certify that on the 22nd day of January 2018, I caused a copy of the **APPELLANT'S HEARING BRIEF** to be served upon the following, via hand delivery:

**Purchasing Agency's
Counsel:**

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DATED this 22nd day of January, 2018.

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