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Filing PAG Reply to Opposition to Motion to Dismiss OPA-PA-24-002

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Mon, Oct 7, 2024 at 4:34 PM

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Hello Jerrick,

Please accept for filing the PAG's Reply to the Opposition to the PAG's Motion to dismiss in OPA-PA-24-002.

Thank you so much!



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 **Reply for Motion to Dismiss (signed).pdf**
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7 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
8 **PROCUREMENT APPEAL**

9 **IN THE APPEAL OF:**) **DOCKET NO. OPA-PA-24-002**
10)
11 **MORRICO EQUIPMENT, LLC,**)
12) **Appellant,**)
13) **and**) **REPLY FOR MOTION TO DISMISS**
14 **PORT AUTHORITY OF GUAM,**)
15 **Purchasing Agency.**)
16)

17 The Port Authority of Guam (“PAG”), hereby files its reply brief supporting its motion
18 for an order dismissing the appeal filed by Morrigo Equipment, LLC (“Morrigo” or “Appellant”)
19 in IFB-PAG-013-24, re: Re-bid Procurement of 180’ Telescopic Boom Lift.

21 **I. THE FACTS ARE UNDISPUTED**

22 A case must be dismissed under Rule 12(b) if, after assuming the truth of the allegations
23 made and construing them favorably to the complainant, it appears beyond doubt that the
24 complainant can prove no set of facts which would entitle it to relief. *First Hawaiian Bank v.*
25 *Manley*, 2007 Guam 2 ¶¶ 9 and 20.

27 Generally, “[i]f, on a motion under Rule 12(b)(6) ... matters outside the pleadings are
28 presented to and not excluded by the court, the motion must be treated as one for summary

1 judgment under Rule 56.” GRCP 12(b). However, “for documents the authenticity of which are
2 not disputed by the parties; *for official public records; for documents central to plaintiffs' claim;*
3 or for documents sufficiently referred to in the complaint,” courts may properly consider such
4 documents within a 12(b)(6) motion to dismiss. *Alternative Energy, Inc. v. St. Paul Fire and*
5 *Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir.2001) (emphasis added).
6

7 In this case, the PAG has filed the entire Procurement Record of IFB-PAG-013-24 (IFB
8 #2, or hereinafter, the IFB), including the previous record for IFB-PAG-004-24 (IFB #1) as
9 required by law. It is a public record, it is undisputedly central to the Appellant’s claims, and is
10 the source of the facts referenced in both the Appellant’s protest and appeal, and all of the PAG’s
11 responses and filings.
12

13 A careful review of all of Morrico’s filings reveals that Morrico does not dispute any of
14 the dates or actions set forth in any of the filings or documents in this case. The PAG also does
15 not dispute any of the dates or supported facts in this case. Morrico’s “factual assertions”
16 primarily consist of its attempts to ascribe dubious reasons or motivations to the PAG for actions
17 that have occurred and are documented in the Procurement Record. However, Morrico does not
18 dispute the Procurement Record, or the actions documented therein. Morrico’s interpretations of
19 the PAG’s actions do not amount to the creation of a genuine factual challenge. The PAG has
20 previously objected to Morrico’s inclusion of its mischaracterizations, depictions, and subjective
21 statements as “facts.” But ultimately, the parties do not disagree as to the documented acts that
22 occurred in this case. Even if this tribunal accepts Morrico’s descriptions of the PAG’s allegedly
23 bad intentions as true, these portrayals have no bearing on the case, and no effect on the outcome.
24
25

26 The Procurement Record filed in this appeal is an accurate record of the procedure of all
27 facts in this case, and it speaks for itself. There is no material factual dispute.
28

1 *Corp. v. Vigman*, 764 F.2d 1309, 1318 (9th Cir.1985); *Bowers v. Hardwick*, 478 U.S. 186, 202
2 (1986); *accord Hill v. Booz Allen Hamilton, Inc.*, Civil Case No. 07 00034, 2009 WL 1620403,
3 *3 (D. Ct. Guam, June 9, 2009). Rule 8(a)(2) and (3) of the Guam Rules of Civil Procedure
4 requires that a party’s complaint must contain separate elements: (2) a short and plain statement
5 of the claim *showing that the pleader is entitled to relief*, and (3) a demand for judgment for the
6 relief to which the pleader seeks. GRCP Rule 8 (a)(2) and (3) (2013) (emphasis added).
7

8 In order to show that it is entitled to any relief for any of its claims, Morrico must allege:
9 1) “a violation of law”; or 2) a violation of the terms of the IFB. 5 GCA §§ 5425, 5450, 5451,
10 5452; and *DFS Guam, L.P. v. The A.B. Won Pat International Airport Authority, Guam*, 2020
11 Guam 20 ¶ 84.
12

13 **A. Morrico Fails to Identify a Licensing “Requirement”**

14 Morrico’s entire statement concerning some sort of licensing allegation is that FCC “fails
15 to have the necessary business and other licenses needed to make sales to the Port.” *App. Letters*
16 *of Protest ##3 and 4; Notice of Procurement Appeal*, pp. 3-4. Morrico has never stated what
17 licenses are required and has never once cited to either a law or a provision of IFB-PAG-013-24
18 that is being violated. The PAG has repeatedly noted the vagueness in this allegation, and again,
19 the PAG asks: what law is being violated? What provision of the IFB is being violated? The
20 answer is none. Morrico cannot cite to any law or provision of the IFB because there are no laws
21 or terms of the solicitation that have been violated in this case.
22
23

24 **B. Morrico Fails to Identify a Special Reminders Form “Requirement” Mandating**
25 **Rejection of FCC’s Bid**

26 Morrico’s allegation concerning the Special Reminders Form is that “FCC failed to execute
27 and provide the required Special Reminder to Prospective Bidders” *App. Letters of Protest ##3*
28 *and 4; Notice of Procurement Appeal*, pp. 3-4. Morrico has never once cited to either a law or a

1 provision of IFB-PAG-013-24 that is being violated. Again, the PAG asks: what law is being
2 violated? What provision of the IFB is being violated? The answer is none. There is no law that
3 requires such a form; but more importantly, there is no term of the IFB that requires rejection of
4 a bid if this form is not submitted. The IFB specifically states: "This reminder must be signed
5 and returned in the bid envelope together with the bid. Failure to comply *with the above*
6 *requirements* **may** be cause for disqualification and rejection of the bid." *PR IFB2*, p. 1
7 (emphases added). The "above requirements" refers to a checklist of other items, not the form
8 itself. *Id.* Further, this statement does not mandate rejection of a bid in any way. Neither the IFB
9 nor the law require the PAG to reject any bids for not submitting this form.
10

11 In fact, the law allows the PAG to waive the submission of this form.

12 *Minor informalities are matters of form*, rather than substance evident from the
13 bid document, or insignificant mistakes that can be waived or corrected without
14 prejudice to other bidders; that is, the effect on price, quantity, quality, delivery,
15 or contractual conditions is negligible. The Procurement Officer shall waive such
informalities or allow the bidder to correct them depending on which is in the best
interest of the territory.

16 2 GAR, Div. 4 § 3109(m)(B)(4) (emphases added).

17 There is no law or provision of the IFB that requires the PAG to reject FCC's bid for not
18 submitting this form.

20 **C. Federal Law Prohibits Imposition of a Bid Bond on FCC**

21 The IFB contained a requirement for bidders to submit bid bonding and a bid form. *PR*
22 *IFB2*, pp. 5 and 22. However, federal law prohibits the imposition of a bid bond on FCC. *FAR*
23 §§ 28.103-1(a) and (c), 28.101-1; and GSA Contract #GS-03F-113DA.

24 These two requirements conflicted, and therefore, the PAG was required to follow the
25 federal law. No bid bond or bid form could be required of FCC, and therefore, there is no
26 violation.
27
28

1 **D. There is No “Requirement” that the PAG Purchase Training Along with the Boom**
2 **Lift**

3 Morrigo contends that because certain training, warranty, and other services were listed on
4 the bid form, FCC was required to bid on and offer all of those separate services. Under Guam’s
5 Procurement Law, a solicitation may or may not require a bidder to bid on all bid items. “All or
6 None Bids or Proposals. Only when provided by the solicitation may a bid or proposal limit
7 acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be
8 deemed to be nonresponsive.” 2 GAR, Div. 4 § 3115(f). The law clearly states that any bidder
9 who tries to limit the government to acceptance of an entire bid, when it does not choose to be
10 so limited, will have its bid rejected. The PAG is not limited to acceptance of all these bid items.

11 The IFB specifically did not require the bidders to bid all bid items, and did not include a
12 limitation of the PAG’s acceptance of the bids to all bid items or none. The IFB shows that check
13 box #7 in the General Terms and Conditions is not checked. It explicitly states: “‘ALL OR
14 NONE’ BIDS: NOTE: By checking this item, the Government is requesting all of the bid items
15 to be bided (*sic*) or none at all.” *PR IFB2, 2a*, General Terms and Conditions, p. 22, ¶ 7. The
16 PAG did not require all bid items to be bid for this IFB. The PAG is not limited to acceptance
17 of an entire bid and all bid items or nothing.

18 The PAG is specifically authorized to “award, cancel, or reject bids in whole or in part for
19 any one or more items” if it is in the best interests of the government. *PR IFB2, 2a*, General
20 Terms and Conditions, p. 23, ¶ 22; and 2 GAR, Div. 4 § 3115(e)(2). “The Government reserves
21 the right to increase or decrease the quantity of the items for award and make additional awards
22 for the same type items and the vendor agrees to such modifications and additional awards ...
23 after original award.” *PR IFB2, 2a*, General Terms and Conditions, p. 23, ¶ 22.

24 By law, and as stated in the IFB, the PAG was allowed to award on any part of the bid
25 submissions and reject the remainder of any bid items it does not need. 2 GAR, Div. 4 §§ 3115(f).
26 Per the terms of the IFB, individual awards were specifically allowed to be made for the items or
27
28

1 combinations of bid items that result in the best interests of serving the needs of the PAG. *Ids.*
2 There is no requirement that the PAG must award on all of the different and optional bid items
3 in the IFB.

4 The PAG awarded a contract for the purchase of the boom lift, and was not required by any
5 law or the terms of the IFB to award a contract for all of the listed items, including any training,
6 which constitutes a separate and additional “service.” 5 GCA § 5030(s) (“Services means the
7 furnishing of labor, time or effort by a contractor, not involving the delivery of a specific end
8 product”). Morrico cannot force the PAG to purchase additional items it does not want or need.
9

10 **E. There is No “Requirement” that the PAG Purchase a Warranty Along with the**
11 **Boom Lift**

12 Morrico contends that because certain warranty services were listed on the bid form, FCC
13 was required to bid on and offer such separate services. Pursuant to the same laws and IFB
14 provision set forth in Section D above, there is no requirement that the PAG must purchase every
15 item listed in an IFB. The government of Guam always has the right to decline to purchase any
16 items or options.

17 However, Morrico’s claims regarding this “requirement” are baseless, as the JLG 180’
18 Telescopic Boom Lift purchased from FCC comes with the JLG manufacturer’s warranty, just
19 as specified on page 36 of the IFB. *PR IFB2, 2a, p. 36, and 6b.*
20

21 **F. There is No “Requirement” that the PAG Purchase Technical Assistance Along**
22 **with the Boom Lift**

23 Morrico contends that because certain technical services were listed on the bid form, FCC
24 was required to bid on and offer such separate services. Pursuant to the same laws and IFB
25 provision set forth in Section D above, there is no requirement that the PAG must purchase every
26 item listed in an IFB. The government of Guam always has the right to decline to purchase any
27 items or options, this includes additional services.
28

1 **G. There is No “Requirement” that the PAG Purchase Other Services Along with the**
2 **Boom Lift**

3 Morrigo contends that because certain other services were listed on the bid form, FCC was
4 required to bid on and offer such separate services. Pursuant to the same laws and IFB provision
5 set forth in Section D above, there is no requirement that the PAG must purchase every item
6 listed in an IFB. The government of Guam always has the right to decline to purchase any items
7 or options, this includes additional services.
8

9 **H. There is No Local Authorized Dealer “Requirement”**

10 Morrigo contends that because a requirement that the “manufacture[r] shall have a local
11 authorized dealer” was listed on the bid form, FCC was required to bid on and offer the same.
12 *PR IFB2, 2a*, p. 33. Pursuant to the same laws and IFB provision set forth in Section D above,
13 there is no requirement that the PAG must purchase every item listed in an IFB. The government
14 of Guam always has the right to decline to purchase any items or options, this includes this
15 purported item.
16

17 More importantly, 2 CFR § 200.319(c) requires that the PAG “must conduct procurements
18 in a manner that *prohibits the use of statutorily or administratively imposed state, local, or tribal*
19 *geographical preferences* in the evaluation of bids or proposals” *Id.* (emphasis added). This
20 purported requirement is prohibited by federal law.

21 Most importantly, the PAG cannot require a third-party manufacturer, such as JLG, who
22 is not a vendor or bidder, and is not a participant in the procurement, to maintain a local
23 authorized dealer. This “requirement” of a third party who is not a party to the contract is absurd,
24 and simply is not valid or enforceable.
25

26 **I. There is No Familiarization Training “Requirement”**

27 Morrigo contends that because certain other familiarization training services were listed on
28 the bid form, FCC was required to bid on and offer such separate services. Pursuant to the same

1 laws and IFB provision set forth in Section D above, there is no requirement that the PAG must
2 purchase every item listed in an IFB. The government of Guam always has the right to decline
3 to purchase any items or options, this includes additional training services.

4 3) Morrigo Fails to Address Dispositive Guam Law

5 Morrigo has not set forth any facts or law to show that the award of the contract to FCC is
6 in violation of Guam's laws. In fact, the PAG is required by Guam law to award to FCC through
7 operation of both the Organic Act and 5 GCA § 5122. 48 USC § 1423(l) and 5 GCA § 5122.

8 Morrigo doesn't even contest this. Morrigo simply does not address these laws in its
9 Opposition. Morrigo's silence is deafening.

10 Morrigo's failure to raise any opposition reveals the most fatal flaw in its case: the award
11 to FCC is mandated because it saved the government of Guam almost \$135,000. This is money
12 that is needed and will be used toward other necessary projects for the PAG. In contrast, an
13 award to Morrigo, with its exorbitant price tag of \$652,137.06 and an over 20% markup from the
14 federal GSA contract price would be a waste and abuse of public resources. Such an award would
15 be unconscionable, and clearly prohibited by Guam's Procurement Law. *Ids.*; 5 GCA §§ 5001,
16 5002, 5003, and 5004.

17
18 **III. CONCLUSION**

19 For the foregoing reasons, and with good cause shown, PAG moves the Public Auditor
20 and the Office of Public Accountability to dismiss this appeal and all of Appellant's claims under
21 Rule 12(b) for lack of subject matter jurisdiction, standing, failure to request appropriate relief,
22 and failure to state a claim.

23 Submitted this 7th day of October, 2024.

24
25
26 PORT AUTHORITY OF GUAM

27
28 By: 

JESSICA TOFT