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7 **BEFORE THE PUBLIC AUDITOR OF GUAM**
8 **PROCUREMENT APPEAL**

10 IN THE APPEAL OF	OPA-PA-07-010
11 FAR EAST EQUIPMENT COMPANY,	THE PORT'S MOTION TO DISMISS
12 LLC,	
13 Appellant.	

14
15 **ARGUMENT**

16 ***THIS CASE MUST BE DISMISSED FOR LACK OF JURISDICTION:***
17 ***FAR EAST LACKS STANDING TO BRING THIS APPEAL BECAUSE***
18 ***ITS BID WAS NON-RESPONSIVE AND NON-COMPLIANT***

19 ***

20 **I. GOVERNMENT AGENCIES ARE ACCORDED SUBSTANTIAL DISCRETION**
21 **IN PROCUREMENT DECISIONS**

22 It is a well-settled principle of law that government procurement is a matter "best left free
23 from judicial intrusion." *Morriconi Equip. Co. v. Gov't of Guam*, No. CV1787-98, slip op. at 6
24 (Guam Super. Ct. Jan. 5, 1999). "[C]ourts should not substitute their judgments for pre-award
25 procurement decisions unless the agency clearly acted irrationally or unreasonably." *Cube Corp.*
26 *v. United States*, 46 Fed. Cl. 368, 375 (2000). Thus, a court will not disturb an agency's
27 procurement decisions unless the disappointed bidder shows that agency decisions had no
28 "rational basis." *Morriconi Equip.*, No. CV1787-98, slip op. at 4; *Halter Marine, Inc. v. United*

1 *States*, 56 Fed. Cl. 144, 157 (2003). Moreover, the disappointed bidder must meet its burden of
2 proof by clear and convincing evidence. *Forestry Surveys & Data v. United States*, 44 Fed. Cl.
3 493, 497 (1999); *Baird Corp. v. United States*, 1 Cl. Ct. 662, 664 (1983); *see also* 5 GCA § 5245
4 (agency's determinations are "final and conclusive unless they are *clearly* erroneous, arbitrary,
5 capricious or contrary to law" (emphasis added)). Similarly, although a disappointed bidder may
6 protest a procurement on grounds that a regulation or procedure has been violated, it must show
7 "a *clear* and *prejudicial* violation of applicable statutes or regulations" in order to justify judicial
8 intervention in the administrative process. *Halter Marine*, 56 Fed. Cl. at 157 (internal citations
9 and quotation marks omitted); *accord Multi-Line Corp., Inc. v. Aflague*, No. CV0667-88, slip op.
10 at 3 (Guam Super. Ct. Nov. 21, 1988). Absent such a showing, the agency's decisions must be
11 upheld. There is a "long-standing principle of competitive bidding that 'on judicial review,
12 courts, absent proof of fraud, collusion, bad faith or abuse of power, do not inquire into the
13 *wisdom* of municipal actions and *judicial* discretion should be not substituted for *administrative*
14 *discretion.*'" *J.J.D. Urethane Co. v. Montgomery Cty.*, 694 A.2d 368, 372 (Comm. Ct. Pa. 1997)
15 (emphasis in original).

16 Similarly, agencies are allowed to solicit and accept alternative bids and to evaluate them
17 according to the best interests of the government. "[G]overnment entities may solicit alternative
18 specification bids so that after the varying prices are bid, the entities may weigh the costs and
19 benefits of different proposals." *J.J.D. Urethane Co.*, 694 A.2d at 372. "Where bids for public
20 work are invited and received in the alternative, there is a presumption, in the absence of fraud or
21 collusion, that the public officials charged with the duty of awarding a contract thereunder acted
22 in good faith and in the best interests of the governmental agency in making the award." *Id.* at
23 370.

24 **II. AS A THRESHOLD JURISDICTIONAL MATTER, FAR EAST LACKS**
25 **STANDING TO BRING THIS PROCUREMENT APPEAL BECAUSE ITS BID**
26 **WAS NON-RESPONSIVE AND NON-COMPLIANT; THEREFORE, THE**
27 **APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION**

28 Before the merits of the challenged procurement can even be explored, the disappointed
bidder must, as a threshold matter, demonstrate that it has standing to protest the procurement and

1 appeal a denial of its protest. “Standing is a component of subject matter jurisdiction” and is a
2 “threshold jurisdictional matter.” *Baza v. Pacific 98*, No. CV 625-05, slip op. at 2 (Guam Super.
3 Ct. Jan. 28, 2008) (citing *Taitano v. Lujan*, 2005 Guam 26 ¶ 15 and *Guam Imaging Consultants,*
4 *Inc. v. Guam Mem’l Hosp. Auth.*, 2004 Guam 15 ¶ 17). “If a party does not have standing to
5 bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Taitano v. Lujan*,
6 2005 Guam 26 ¶ 15. Challenges to subject matter jurisdiction may be raised *at any time*.
7 *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548-49 (4th Cir. 2006) (emphasis
8 added).

9 A disappointed bidder who has “submitt[ed] a nonresponsive bid has no standing to
10 protest an award, because it has no chance of receiving the award.”¹ *Dismas Charities, Inc., v.*
11 *United States*, 75 Fed. Cl. 59, 61 (2007); *A&D Fire Protection, Inc. v. United States*, 72 Fed. Cl.
12 126, 138 (2006) (“A bidder submitting a nonresponsive bid has no standing to protest an award,
13 because it has no chance of receiving the award”); *Protests of Rocky Mountain Trading*
14 *Company-Systems Div. et al.*, 90-2 BCA P 22739, 1990 WL 15700 (G.S.B.C.A. 1990) (“a bidder
15 lacks standing to protest an award if it has submitted a nonresponsive bid”); *Ryan Co. v. United*
16 *States*, 43 Fed. Cl. 646, 657-59 (1999) (nonresponsive bidder has no standing to assert
17 deficiencies in agency’s evaluation of the responsiveness of winning bidder); *CHE Consulting*
18 *Inc. v. United States*, 47 Fed. Cl. 331 (2000) (same).

19 ***Far East does not dispute that its bid was non-responsive to the Invitation for Bid at***
20 ***issue in this case.*** In fact, the procurement record in this case shows that Far East was
21 nonresponsive for both of the bids submitted in this case, *i.e.* (1) its bid for the 40,000 lb. fork
22 truck; and (2) its option bid for the 44,000 lb. fork truck.

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25 ¹ In competitive sealed bidding, contracts shall be awarded to the lowest responsible and
26 responsive bidder whose bid meets the requirements and criteria set forth in the invitation for
27 bids. 5 GCA § 5211(g) and 2 GAR Div. 4 § 3109(n)(1). The term “responsive bidder” is defined
28 as a bidder who has submitted a bid which conforms in all material respects to the invitation for
bids. 5 GCA § 5201(g) and 2 GAR Div. 4 § 3109(n)(2). Rejection is warranted if the bid fails to
“conform in all material aspects to the Invitation for Bids.” 2 GAR Div. 4 § 3115(e)(3)(A)(ii).

1 A. **The 40,000 lb. Fork Truck Bid**

2 General Services Agency/Port Authority of Guam's ("GSA/PAG") specification for the
3 40,000 lb. fork truck required a minimum engine horsepower of 230. (Procurement Record²
4 ("PR") at LAP00049.) Far East submitted a bid which specified an engine horsepower of 220 on
5 a "Cummins" engine model. (*Id.*) GSA/Port cited this deficiency as one of the reasons for
6 rejection of Far East's bid. (PR at LAP00014 and LAP00017.) Indeed Far East specifically
7 *admitted* in its October 17, 2007 Protest Letter that its bid did not comply with the 230
8 horsepower requirement. (PR at LAP00015.)

9 But Far East's own descriptive literature does not even show an engine horsepower of 220
10 on a Cummins model. It shows a lesser horsepower. Far East's bid identifies a **Kalmar DCE**
11 **180-6** model as its bid. (PR at LAP00052.) The only *Cummins* engines available for the DCE
12 180-6 model have a rated horsepower of 185 hp.³ (PR at LAP000116.) And the only engines that
13 have a rated horsepower of 230 and above are the *Volvo* engines. (*Id.*) However, Far East did *not*
14 specify a Volvo engine for its proposed DCE 180-6 model.

15 Furthermore, the GSA/PAG Bid specifications required a minimum fork length of 96
16 inches. (PR at LAP00049 (§ 4(b)).) And although Far East indicated "COMPLY" in this section
17 of the bid form, its descriptive literature indicates that it did *not* comply. In describing the fork
18 length of the DCE 180-6 model, the manufacturer's literature says that the fork length is *not* 96
19 inches, but **47 inches** instead. (PR at LAP000112.)

20 Consequently, Far East's bid was non-responsive.

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23 ² For ease of reference, the Port submits concurrently herewith a modified Procurement
24 Record (hereinafter "PR") with all pages consecutively stamped in numerical sequence from
LAP0001 to LAP000367.

25 ³ Indeed, its Bid form specified not only a Cummins engine but a particular transmission,
26 the "Dana TE 13000." (PR at LAP00049 [Item C.2]). The only Cummins-Dana TE13000
27 configuration specifies a horsepower of 185 hp. (PR at LAP000116. ["Cummins 6B5, 9E
(138kw) + Dana TE 13000"].).

1 **B. The 44,000 lb. Fork Truck Option**

2 Far East submitted a 44,000 Fork Truck as an option to the 40,000 lb. Fork Truck bid.
3 (PR at LAP00053.) In its Bid form, Far East indicated that it exceeded the 230 minimum
4 horsepower requirement by indicating an engine of supposedly greater horsepower (“Cummins
5 264 hp”). However, its descriptive literature does not support this assertion. Far East’s option
6 bid specified a “Kalmar DCE [sic] 200-12” fork truck model. (PR at LAP00056.) The
7 designation of a Kalmar “DCE” model appears to be a mistake because the only descriptive
8 literature Far East submitted concerned Kalmar “DCD” models. (PR at LAP000102.) In the
9 submitted literature, the only engine type available for the Kalmar DCD 200-12 model is a
10 “Cummins 6CT8.3 – C215.” (PR at LAP000105-106). According to the manufacturer’s
11 literature, that particular engine type only has a rated horsepower of *215 hp* (PR at LAP000106) –
12 which falls short of the 265 hp that Far East indicated on its Bid form. (See also PR at
13 LAP000104.)

14 The descriptive literature submitted by the bidder is important. Under Item 20 of the
15 GSA/PAG Invitation for Bid (“IFB”) General Terms and Conditions, it states:

16 **DESCRIPTIVE LITERATURE:** Descriptive literature(s) as
17 specified in this solicitation must be furnished as a part of the bid
18 and must be received at the date and time set for opening Bids. The
19 literature furnished must clearly identify the item(s) in the Bid. *The*
20 *descriptive literature is required to establish, for the purpose of*
21 *evaluation and award, details of the product(s) the bidder*
22 *proposes to furnish* including design, materials, components,
23 performance characteristics, methods of manufacture, construction,
24 assembly or other characteristics which are considered appropriate.
25 *Rejection of the Bid will be required if the descriptive literature(s)*
26 *do not show that the product(s) offered conform(s) to the*
27 *specifications and other requirements of this solicitation.* Failure
28 to furnish the descriptive literature by the time specified in the
Solicitation will require rejection of the bid.

(PR at LAP000127 (bold italics added).) The IFB required submission of Manufacturer’s
Brochures and Technical Literature. (See, e.g., PR at LAP00051-52 [Sections F.2 and F.3].)

1 Thus, because the literature submitted by Far East did not show that its 44,000 option met the 230
2 hp requirement, Far East's bid was nonresponsive.⁴

3 **CONCLUSION**

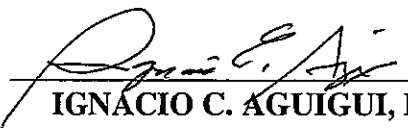
4 For the foregoing reasons, Far East's procurement appeal should be dismissed with
5 prejudice.

6 Submitted this 13th day of May, 2008.

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⁴ Even if Far East's bid was responsive (*i.e.*, met the minimum 230 hp requirement), its bid was still properly rejected by GSA/PAG because the model proposed by Morrico complied with the 230 hp specifications (*see* PR at LAP000146 and LAP000197) and Morrico's price was lower than Far East's: \$252,999 (Morrico [see PR at LAP000149]) vs. \$286,610.40 (Far East [PR at LAP00053].) – a difference of \$33,611.40. Guam's Procurement Law states that a bid may be properly rejected based on a high price. 2 GAR Div. 4 § 3115(d)(2)(A). Furthermore, Morrico's model exceeded the lift capacity of Far East's model. Morrico's was a 45,000 lb. Fork Truck (PR at LAP000149 [Hyster 450HD]; PR at LAP000203 [Hyster 450HD rated at 45,000 lbs.]), compared to Far East's 44,000 lb. fork truck (PR at LAP000106 [44,000 lbs. for DCD 200-12]).