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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GOVERNMENT OF GUAM,
Defendant.

CIVIL CASE NO. 02-00022

ORDER
re *Ex Parte* Motion for Clarification

Pending before the court is the Receiver’s *Ex Parte* Motion for Clarification (“Motion for Clarification”). See ECF No. 1685. Therein, the Receiver requested that the court clarify its Order re Appointment of Receiver specifically with regard to the provision in said order that authorized the Receiver “[t]o enter[] into future contracts deemed necessary” and to “follow the procedures required in Guam’s statutes and regulations, unless, in the best judgment of the Receiver, such compliance would unreasonably delay the progress in meeting the mandates of the Consent Decree[.]” See Order Re: Appointment of Receiver (Mar. 17, 2008) (the “Appointment Order”) at 16, ECF No. 239. Having read the filings from the parties, the Receiver and Morrico Equipment LLC (“Morrico”) and heard argument on the matter, the court now issues the following Order.

BACKGROUND

On March 17, 2008, the court appointed as Receiver the solid waste management consulting firm Gershman, Brickner & Bratton, Inc. (“GBB”) and vested GBB with broad authority and power

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1 over the Solid Waste Management Division of the Department of Public Works¹ to ensure the
2 Government of Guam’s prompt compliance with the mandates of the Consent Decree. *See*
3 Appointment Order, ECF No. 239. Pursuant to the Appointment Order, the court authorized the
4 Receiver “[t]o enter[] into future contracts deemed necessary” and to “follow the procedures required
5 in Guam’s statutes and regulations, unless, in the best judgment of the Receiver, such compliance
6 would unreasonably delay the progress in meeting the mandates of the Consent Decree[.]” *Id.* at 16.

7 On September 18, 2014, the Guam Solid Waste Authority (“GSWA”) issued an Invitation
8 for Bid (“IFB”) to solicit bids on two categories of refuse collection trucks.² The IFB specified that
9 the cab and body should be “cab forward.”³ *See* Decl. R. Chace Anderson at 2, ECF No. 1686.
10 Chace Anderson, the Receiver Operations Manager, was responsible for drafting the IFB. Morrico
11 received a copy of the IFB on September 19, 2014.

12 On September 23, 2014, GSWA held a mandatory pre-bid conference, which Morrico
13 attended. K. Fowler Decl. at ¶3, ECF No. 1694, and Ex. 1 thereto, Office of the Public Auditor
14 (“OPA”) Decision (Feb. 20, 2015), Findings of Fact at ¶4. During this conference, GSWA indicated
15 it would not consider any conventional cab trucks. *Id.*

16 On September 25, 2014, Morrico submitted a written pre-bid question to GSWA requesting
17 that the bid specification allow for a conventional cab design. *Id.* at ¶5. On October 1, 2014, GSWA
18 issued to prospective bidders Addendum 1 to IFB GSWA001-15, which amended certain
19 specifications but did not amend the cab forward specification to permit a conventional cab design
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21 ¹ Guam Public Law 31-020 converted the Solid Waste Management Division (“SWMD”) to the
22 Guam Solid Waste Authority (“GSWA”), an autonomous, public corporation of the
23 Government of Guam. 10 GUAM CODE ANN. § 51A103. The court thereafter vested the Receiver
24 with “full power and authority over GSWA, to the full extent of its previously granted authority over
25 SWMD.” Order (Sept. 2, 2011) at 9, ECF No. 798.

26 ² This particular IFB was numbered IFB GSWA-001-15. *See* Decl. R. Chace Anderson at 2,
27 ECF No. 1686. It was for three 25-cubic yard refuse collection trucks and two 10-cubic yard refuse
collection trucks. *Id.*

³ “Cab forward” trucks are also known as “flat nose” or “cab over” trucks. Decl. R. Chace
Anderson at ¶7, ECF No. 1686.

1 or otherwise address the request by Morrico. *Id.* at 6.

2 On October 9, 2016, Morrico protested the cab forward specification. Decl. R. Chace
3 Anderson at 2, ECF No. 1686. GSWA denied the protest as untimely and advised Morrico that the
4 cab forward specification was necessary to meet GSWA's needs. *Id.*

5 On November 6, 2014, Morrico filed a procurement appeal with the OPA. OPA Decision
6 (Feb. 20, 2015), Findings of Fact at ¶12, Ex. 1 to ECF No. 1694. On February 20, 2015, the OPA
7 determined that Morrico's protest was timely and that the cab forward specification unnecessarily
8 restricted competition⁴ in violation of 5 GUAM CODE ANN. § 5268(a).⁵ OPA Decision (Feb. 20,
9 2015), Conclusions of Law at ¶¶1-2, Ex. 1 to ECF No. 1694. The OPA thus ordered GSWA to
10 immediately amend the IFB to allow vendors to bid conventional cab models for the refuse
11 collections trucks. *Id.* at ¶3.

12 On March 6, 2015, GSWA filed a Verified Complaint for Judicial Review before the
13 Superior Court of Guam. *See* Findings of Fact and Conclusions of Law at ¶21, *GSWA v. Brooks*,
14 Superior Court of Guam Civil Case No. CV0185-15, attached as Ex. B to ECF No. 1706. On
15 August 2, 2016, the Superior Court of Guam held a bench trial and gave the parties an opportunity
16 to file post-trial briefs. *Id.* at ¶32. The Superior Court of Guam took the matter under advisement
17 following a status hearing held on September 12, 2016. *Id.* at ¶36.

18 On October 14, 2016 – before the Superior Court of Guam decided the matter – the Receiver
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21 ⁴ In coming to this decision, the Public Auditor noted that “the procurement record includes
22 no papers or material used by GSWA in the development of the IFB specifications. . . . Without this
23 information, the Public Auditor cannot review GSWA's justification in requiring only the cab
24 forward specifications in the IFB.” OPA Decision (Feb. 20, 2015) at 9-10, Ex. 1 to ECF No. 1694.

25 ⁵ This provision of Guam's Procurement Law states:

26 Specifications shall not include requirements, such as but not limited to restrictive
27 dimensions, weights or materials, which unnecessarily restrict competition, and shall
include only the essential physical characteristics and functions required to meet the
Territory's minimum needs.

1 issued IFB GSWA-002-017,⁶ pursuant to the authority granted to it by the court's Appointment
2 Order.⁷ Decl. R. Chace Anderson at ¶16, ECF No. 1686. This IFB also called for "cab over" trash
3 trucks. *Id.* and Ex. F thereto. Mr. Anderson stated the Receiver issued this IFB because it could no
4 longer wait to procure the trucks. *Id.* at ¶17. He noted that "GSWA's current fleet is well past its
5 useful life expectancy," and that "repairs and maintenance costs has almost doubled since FY2014."
6 *Id.*

7 On October 28, 2016, Morrico asked the Superior Court of Guam to stay IFB GSWA-002-
8 017 and refrain GSWA from purchasing any new trucks. *Id.* at ¶18. The Superior Court of Guam
9 granted the request that same day. *Id.* and Ex. G thereto.

10 On November 4, 2016, the Receiver filed the instant *Ex Parte* Motion for Clarification. ECF
11 No. 1685. The United States, the Government of Guam, and Morrico were all given an opportunity
12 to respond to the Receiver's motion. *See* ECF Nos. 1693-94, 1696-98. Additionally, the Receiver
13 filed a Reply brief to Morrico's response. *See* ECF No. 1707.

14 On December 16, 2016, the Superior Court of Guam issued its Findings of Fact and
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16 ⁶ Similar to the original IFB issued by GSWA in 2014, IFB GSWA-002-017 sought bids for
17 three 25-cubic yard refuse collection trucks and two 10-cubic yard refuse collection trucks. *See* Decl.
18 R. Chace Anderson at ¶16, ECF No. 1686, and Ex. F thereto.

19 ⁷ The IFB stated:

20 The services GSWA provides to its paying customers is important both to the health
21 of the community and the environment. Compliance with the Consent Decree is
22 required through Orders of the District Court and to comply with federal law. The
23 Government of Guam has decided to finance both the operations of GSWA and
24 certain aspects of the Consent Decree through fees charged to the customers of
25 GSWA. The revenue generated by GSWA is vital to completion of the Consent
26 Decree projects. Given that maintaining a fleet of trash collection vehicles is vital
27 to the operations of GSWA and thus vital to the revenue necessary to complete the
Consent Decree, the Receiver is invoking its authority to depart from Guam Law for
this procurement as it relates to protests by bidders or prospective bidders and any
other provision of Guam Law or regulation that would, in the best judgment of the
Receiver unreasonably delay meeting the mandates of the Consent Decree.

Decl. R. Chace Anderson at ¶16, ECF No. 1686 and Ex. F thereto.

1 Conclusions of Law with regard to the Receiver's Verified Complaint for Judicial Review and
2 affirmed the OPA's Decision. *See* Ex. B to ECF No. 1706. GSWA was ordered to immediately
3 amend the IFB to allow vendors to bid conventional cab models for the refuse collection trucks. *Id.*
4 at 9. Morrico asked this court to take judicial notice of said Findings of Fact and Conclusions of
5 Law, as well as the Judgment issued in the Superior Court of Guam action. *See* ECF No. 1706. The
6 court orally granted this request on January 13, 2017. *See* Minutes, ECF No. 1708.

7 DISCUSSION

8 In the instant motion, the Receiver seeks clarification from the court regarding the authority
9 granted to it under the court's Appointment Order. The Receiver asks the court to explicitly find that
10 (1) the Receiver has the authority to depart from adherence to Guam's statutes and regulations when,
11 in the judgment of the Receiver, expeditious compliance with the Consent Decree requires it, (2) the
12 Receiver is not required by this court to seek its explicit approval for departing from Guam law but
13 instead may rely on its "best judgment" as authorized by this court's Appointment Order, and (3) the
14 court approves the Receiver's exercise of authority in issuing IFB GSWA-002-017, to immediately
15 proceed with the purchase of refuse collection trucks in order to timely meet the mandates of the
16 Consent Decree. Mot. for Clarification at 8, ECF No. 1685.

17 The court notes that before it made the difficult decision to appoint a Receiver, it interviewed
18 seven of the nine candidates nominated by the parties. Appointment Order at 8, ECF No. 239. The
19 court ultimately selected GBB as the most qualified among the nominees. In drafting the
20 Appointment Order, the court was cognizant of the fact that GBB, an international consulting firm,
21 had decades of experience in solid waste management, and the court would have to rely on and
22 sometimes defer to GBB's expertise to ensure expeditious compliance with the Consent Decree. The
23 need for cab forward refuse collection trucks is one of those instances when the court defers to the
24 Receiver's expertise on the matter.

25 Chace Anderson, the Receiver Operations Manager, has over 20 years of waste management
26 experience. Decl. R. Chace Anderson at ¶1, ECF No. 1686. In Mr. Anderson's professional
27 experience and opinion, cab forward trucks are "demonstrably safer refuse collection trucks for both

1 the driver and the community than the conventional cab.” *Id.* at ¶7. Relying on a study conducted
2 by the United States Bureau of Labor and Statistics, Mr. Anderson asserts that “[r]efuse and
3 recycling collectors are the fifth most dangerous civilian occupation , in terms of risk of death or
4 injury to the workers in America.” *Id.* and Ex. A thereto. Mr. Anderson notes that even the
5 Government of Guam recognizes the inherent danger in refuse collection since it provides these
6 workers with hazardous pay. *Id.* Based on both his personal and professional experiences,
7 Mr. Anderson states that cab forward trucks “are the industry standard in refuse collection in urban
8 areas on the U.S. mainland and Europe.” *Id.* at ¶8.

9 Mr. Anderson’s opinion is bolstered by the Declaration of Thomas D. Parker. *See* ECF No.
10 1697. Mr. Parker is a Licensed Professional Engineer with “over 30 years of civil and environmental
11 engineering experience specializing in solid waste management, with particular expertise in
12 evaluating safety in the solid waste industry.” Decl. Thomas D. Parker at ¶1, ECF No. 1697.
13 Mr. Parker currently serves as the Safety Committee Chair of the Solid Waste Association of North
14 America (“SWANA”).⁸ *Id.* In this capacity he “advise[s], monitor[s], provide[s] training, and
15 develop[s] programs on safety in the solid waste industry” and has “authored a number of safety
16 publications.” *Id.* A July 2016 article Mr. Parker co-authored “confirms that for the second
17 consecutive year, waste and recyclable collection employees had the fifth highest worker fatality rate
18 for all occupational categories.” *Id.* at ¶4. Furthermore, “[a]ccording to an analysis performed by
19 SWANA, a disproportionate number of these fatalities occurred at small employers, such as
20 GSWA’s collection operation on Guam.” *Id.* Specifically with regard to refuse collection trucks,
21 Mr. Parker states:

22 The collection truck is a *critical* safety component in the solid waste industry.
23 Collection trucks with a cab forward (also referred to as cab over) design, as required
24 by the Receiver in its solicitation specification, is the *industry standard* in the United
25 States for safety reasons. Cab forward trucks have significantly greater visibility for
26 the driver, which is particularly important in areas that have potential poor sight
distances, narrow roads, the possibility of people or animals entering the roadway
suddenly, or where weather and vegetation can impact visibility. See the Anderson
Declaration documenting that these potential safety hazards are common on Guam.

27 ⁸ Mr. Parker states that SWANA has 8,000 members.

1 ECF No. 1686 at 2.

2 Based on my experience, the majority of residential and commercial
3 collection trucks manufactured today have the cab forward design because it
4 represents the industry standard for safety in solid waste management. Consequently,
there are many manufacturers of collection trucks with cab forward design.
*Elimination of the cab forward design requirement is inconsistent with the industry's
standard for safety in solid waste management.*

5 *Id.* at ¶¶6-7 (emphasis added)

6 Based on the information presented before the court, the court finds that cab forward
7 collection trucks would provide GSWA workers with a safer working environment than conventional
8 cab trucks and that such a specification would not unduly restrict competition under Guam's
9 Procurement Law. The court is mindful of the deplorable and unsanitary working conditions that
10 existed for GSWA employees at the start of the Receivership. *See* Order re Cash Payments (Feb. 13,
11 2009) at 6-7, ECF No. 359. Almost all of the government-owned equipment was in a severe state
12 of disrepair,⁹ with most of it inoperable due to a lack of parts and maintenance, resulting in excessive
13 use of rental equipment at an extraordinarily high cost.¹⁰ With the assistance of the emergency
14 declaration by then-Governor Felix P. Camacho, the Receiver was able to expedite the procurement
15 of equipment and improve conditions for the employees. The court shares the Receiver's desire to
16 ensure the safety of GSWA employees and the public that they serve. As Mr. Anderson notes,
17 "competition to acquire the lowest cost safe vehicle is GSWA's goal and it should not be relegated
18 to a less safe vehicle in order to achieve a savings at the expense of the safety of its crew and the
19 public." Decl. R. Chace Anderson at ¶9, ECF No. 1686.

20 Additionally, because the procurement of these collection trucks has been delayed,¹¹ the
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22 ⁹ During one of its site visits, the court observed that the original seat was removed from one
23 garbage collection truck and replaced with an unsecured seat for the driver, which certainly posed
a safety hazard. *See* Receiver's Quarterly Report (July 10, 2008) at Slide 19, ECF No. 250-2.

24 ¹⁰ The cost of rental equipment averaged about \$11,000 per day or over \$4 million annually.
25 *Id.* at 8.

26 ¹¹ The original IFB was issued in September 2014. GSWA appealed the OPA's Decision
27 on March 6, 2015. Although trial in the Superior Court of Guam was originally scheduled for
January 2016, it was continued twice to accommodate the parties' schedules and was delayed further

1 Receiver states that this puts at risk the quality of service to its residential customers, the revenue
2 needed to operate GSWA, and the ability of GSWA to achieve compliance with the Consent Decree.
3 See Receiver's Reply Brief at 1, ECF No. 1707. Despite Morrico's arguments to the contrary, the
4 court agrees that GSWA's ability to comply with the Consent Decree will be impacted by the further
5 delay in the procurement of these refuse collection trucks.

6 The Consent Decree required the Government of Guam to submit a post-closure care and
7 monitoring plan. See Consent Decree at ¶8(b)(i), ECF No. 55. Pursuant to U.S. EPA regulations,¹²
8 GSWA is required to continue monitoring and maintaining the landfill for a 30-year period to
9 protect against the release of hazardous constituents to the environment. The Receiver estimates that
10 the net present value of the total 30-year monitoring cost is \$15,670,893.97.¹³ See Quarterly Report
11 (Oct. 21, 2015) at 48, ECF No. 1634-1. Under the financing plan approved by the court, all
12 commercial haulers on Guam will be ordered to make their payments through a court-appointed
13 trustee, and, upon receipt of said funds, the trustee will deduct approximately \$374,758.08 per month
14 to fund the Ordot Dump Post-Closure Reserve and pass the balance through to GSWA for
15 operations. See Order (May 2, 2016) at 10, ECF No. 1668. These monthly set asides by the trustee
16 into the Ordot Dump Post-Closure Reserve would continue until the reserve was fully funded, which
17 was anticipated to occur in FY2023. While this financial plan encompasses the use of income
18 generated from large commercial accounts only, the viability of such a plan *presumes* that GSWA
19 revenue from residential customers remains stable. To produce the revenue necessary to assure that

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22 because the Public Auditor failed to submit a complete administrative record to the court. Decl. R.
Chace Anderson at ¶¶12-14, ECF No. 1686.

23 ¹² See Title 40, Code of Federal Regulations, Part 258, Subpart F - Closure and Post-Closure
24 Care.

25 ¹³ This estimate does not include the compensation of the trustee the Receiver proposes the
26 court appoint when the Receivership ends to manage the funds in the Ordot Dump Post-Closure Care
27 Reserve. Additionally, the estimate does not include the compensation for the independent engineer
the trustee will have to retain to inspect and certify that the post-closure care operator is performing
all of the work necessary for the proper care of the environmental closure of the Ordot Dump.

1 funding for all Consent Decree projects materializes, GSWA must ensure that all its financial
2 resources, including revenue from residential customers, remains secure. As the Receiver notes,

3 When service is poor, many residential and commercial customers stop paying their
4 bills.¹⁴ This was the condition that existed when the Receivership began. . . . Most
5 of these problems were created by the terrible condition of the residential fleet of
6 trash trucks. Allowing this problem to occur again would put more than a third of
7 GSWA’s revenue at risk. As it did before, old equipment in need of more and more
8 maintenance work will destabilize all of GSWA’s revenue since GSWA would have
9 to rapidly spend down its reserves creating an inability for GSWA to pay all of its
10 bills.

11 Receiver’s Reply Brief at 5, ECF No. 1707.

12 Over the almost nine years this receivership has been in place, the court and the Receiver
13 have worked diligently with the parties to ensure that compliance with the Consent Decree would
14 not cripple the Government of Guam financially. The current financing plan approved by the court
15 to pay for the remaining Consent Decree projects will not detrimentally affect the Government of
16 Guam’s ability to meet its other financial obligations. The court will not risk the viability of the
17 current financing plan and interrupt the funding required to achieve full compliance with the Consent
18 Decree by allowing residential services to fall apart again by allowing the fleet of collection trucks
19 to deteriorate. As stated by Mr. Anderson, GSWA “can no longer wait to procure these trucks.”
20 Decl. R. Chace Anderson at ¶17, ECF No. 1686. He further stated that “GSWA’s current fleet is
21 well past its useful life expectancy” and that maintenance costs for the fleet has increased from
22 \$405,480.50 in FY2014 to \$738,766.34 in FY2016. The urgency to replace GSWA’s fleet of
23 collection trucks is also supported by Mr. Parker’s Declaration, which states:

24 In corrosive salt environments such as on Guam, collection trucks may need
25 to be replaced at a greater frequency than in other areas. Typically, collection trucks
26 have a published lifespan of 5-7 years. Trucks on Guam, however, are likely to have
27 a shorter lifespan due to the corrosive environment.

 According to the Receiver, GSWA’s collection trucks have an expected
lifespan of about 5 years. Several of GSWA’s trucks are 12 years old. These trucks
are at the end of or past the typical lifespan in a non-corrosive environment, and may
be well past the typical lifespan in Guam’s corrosive environment. A further delay
in procurement is inconsistent with standard safety practices, given that GSWA’s
entire fleet of collection trucks may be well past its prime.

¹⁴ The court recalls that approximately 4,000 customers were receiving service for free.

1 Declaration of Thomas D. Parker at ¶¶8-9, ECF No. 1697 (internal citation omitted).

2 The court is unpersuaded by Morrico’s argument that the Receiver’s exercise of the authority
3 granted to it under the Appointment Order violates 28 U.S.C. § 959(b). The court intended for the
4 Receiver to exercise the authority granted to it in a manner consistent with Guam laws, but the court
5 recognized that conformity with local law may not always be possible. For the reasons discussed
6 above, this is one of those instances, and compliance with the Consent Decree necessitates such a
7 finding. Based on the timeline previously approved by the court, the receivership will end by
8 December 2017. Delaying the procurement of these refuse trucks will have an impact on GSWA’s
9 resources to complete the Consent Decree projects on the timeline previously approved by the court
10 and may further affect the timeline for GSWA’s transition from Receivership to GSWA Board
11 control, which the court is not prepared to extend at this time. Accordingly, the court approves the
12 Receiver’s exercise of authority in issuing IFB GSWA-002-017, as contemplated under the court’s
13 Appointment Order, without the pre-approval of this court.

14 **CONCLUSION**

15 In light of the above discussion, the court hereby concludes that the cab forward specification
16 is critical to the safety needs of GSWA and the public and that GSWA can no longer wait to procure
17 these trucks. Accordingly, the court approves the Receiver’s exercise of authority in issuing IFB
18 GSWA-002-017. However, in light of the concerns raised by the OPA Decision and the Superior
19 Court of Guam’s Findings of Fact and Conclusions of Law,¹⁵ the court orders the Receiver to issue

21 ¹⁵ When the OPA and the Superior Court of Guam concluded that the cab forward
22 specification unnecessarily restricted competition in violation of Guam law, this conclusion was
23 based on their finding that the “procurement record include[d] no papers or material used by GSWA
24 in the development of the IFB specifications.” OPA Decision (Feb. 20, 2015) at 9, Ex. 1 to ECF
25 No. 1694. *See also* Findings of Fact and Conclusions of Law at 8, *GSWA v. Brooks*, Superior Court
26 of Guam Civil Case No. CV0185-15, attached as Ex. B to ECF No. 1706. The Public Auditor stated
27 that without this information, she “cannot review GSWA’s justification in requiring only the cab
forward specification in the IFB.” OPA Decision (Feb. 20, 2015) at 10, Ex. 1 to ECF No. 1694.
What is troubling, however, is that rather than directing GSWA to amend the IFB to include the
documentation that would support the inclusion of the cab forward specification by the Receiver, the
Public Auditor ordered GSWA to accept a truck design that is not the industry standard.

1 a new invitation for bid for the cab forward refuse collection trucks and include in the procurement
2 record all papers and materials used by GSWA to develop the cab forward specification, including
3 a copy of this Order and Mr. Parker's Declaration.

4 IT IS SO ORDERED.



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6 /s/ Frances M. Tydingco-Gatewood
7 Chief Judge
8 Dated: Jan 27, 2017
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