



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
Telesource, CNMI, Inc.

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APPEAL NO. BP-A052

DECISION

I. SUMMARY

This is the Office of the Public Auditor's Decision on the Appeal filed by Telesource, CNMI, Inc. (Telesource). The Appeal was based on the failure of the Director of the Division of Procurement and Supply (P&S Director) and the Executive Director of the Commonwealth Utilities Corporation (CUC Executive Director) to act on a protest filed by Telesource regarding CUC RFP 07-001 (RFP).

The Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR), codified in subchapter 70-30.3 of the Northern Mariana Islands Administrative Code (NMIAC), are applicable to this Appeal.¹ The Office of the Public Auditor (OPA) has jurisdiction over this Appeal as set forth in the CNMI-PR at § 70-30.3-505 and as more fully discussed herein.

OPA finds that the procurement process involving CUC RFP 07-001 was not in compliance with the CNMI-PR and, therefore, orders it hereby cancelled pursuant to CNMI-PR § 70-30.3-510(a)(1).

¹ Citations in this decision will be made to the CNMI-PR by section number only, as set forth in the NMIAC including chapter number, except where directly quoted from another source.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. RFP 07-001

The notice regarding CUC RFP 07-001 Part 1 (RFP Notice) was first published² on February 9, 2007. CUC Report at 1. The title of the RFP is “PART 1: INVITATION TO APPLY FOR PRE-QUALIFICATION, AND PRE-QUALIFICATION REQUIREMENTS FOR PROPOSALS, FOR THE PRIVATIZATION OF THE CNMI’S POWER BUSINESS.”³ See RFP Notice and RFP at 1 and 4. The RFP Notice provided that “[b]eginning February 12, 2007, a copy of the ‘Pre-Qualification Requirements’ document will be available, upon receipt of a non-refundable payment of \$1,000.00 (US).” See Notice. The deadline for submission of proposals was set as “no later than March 12, 2007, midnight, Saipan local time, by electronic filing (“e-filing”), and follow-up via hand-delivery or courier.” RFP at 5. The RFP further required that a “hard copy of an e-filed Pre-Qualification Proposal must be received by CUC no later than 7 working days after the deadline.” *Id.* at 5-6. The e-filing deadline was extended to April 2, 2007, and then further extended to April 4, 2007.⁴ The RFP materials were made available to interested offerors only after payment of \$1,000.00, which was also “a prerequisite to submission of a Pre-Qualification Proposal.” See RFP Notice and RFP at 5. After receipt of the \$1,000 fee, the materials were also accessible on CUC’s website created for the RFP (www.cucnmi.com). *Id.* The website has certain information that is accessible without a password, *i.e.* the RFP Notice, but the RFP is password protected and, it is OPA’s understanding, access codes were issued to those paying the \$1,000.00 fee. See www.cucnmi.com.

² The RFP Notice can be found on the website created for the RFP, www.cucnmi.com. The RFP Notice was delivered to a variety of publications and companies, including the media, as set forth in the Notice Distribution posted on the website. See also RFP at 6. The RFP package, however, was not made available or accessible on the website until a fee of \$1,000 was paid.

³ OPA refers to the 42 page solicitation and the process of pre-qualification as the RFP, as that is what is the subject of this Appeal. The Attorney General refers to the second stage or Part 2, the privatization, as the RFP. The P&S Director uses the term Final phase. For clarification, unless in a direct quote, OPA has included the words privatization, second stage, part 2, or other descriptive term to distinguish between the pre-qualification (RFP) and the privatization solicitation that has not yet been published.

⁴ Addendum No. 1, which was later revised by Revision 1 – Addendum No. 1, extended the closing of the pre-qualification proposal for e-filing by 21 days to April 2, 2007. Revision 1 changed the term “hard copy” to “original and 7 copies” but kept the filing deadlines the same, April 2, 2007, for e-filing and 7 working days after for the original and copies. Addendum No. 2 extended the e-filing deadline to April 4, 2007, and stated that the “original and 7 copies of the e-filed Pre-Qualification Proposal must be received by CUC no later than April 17, 2007 by 4:30 P.M. Saipan local time.” (emphasis omitted).

B. The Protest, Appeal, Notices and Related Documents – Summaries

1. The Protest

By letter, dated February 22, 2007, to the CUC Executive Director and the P&S Director⁵ Telesource, through the law firm of O’Connor Berman Dotts & Banes, filed its Protest regarding CUC RFP 07-001 (Protest). Telesource, in addition to claiming that it “has already been certified by CUC, in its previous RFP attempts at privatization, as a Qualified Offeror” cites to the following as its grounds of protest:

1. the procurement is an invalid use of the RFP process;
2. the fees are unreasonable and unlawful;
3. the evaluation criteria: vague, ambiguous and capable of unilateral modification
 - a. CUC reserving the right to modify evaluation criteria is forbidden by regulation,
 - b. the evaluation criteria is vague and ambiguous;
4. the criteria for pre-qualification violates the procurement regulations;
5. the procurement should be a sealed bid not an RFP.

See generally Protest, pp. 2-6.

2. The Appeal

On March 30, 2007, Telesource, through counsel, filed a notice of appeal with OPA (Appeal). The Appeal was also addressed to the CUC Executive Director and the P&S Director. The Appeal provided, among other things, that Telesource was “concerned that after more than 30 days nothing has happened concerning this protest” and that “CUC is proceeding, contrary to the procurement regulations, as if no protest has been filed.” Appeal at 1. Telesource claimed that it considered the “inaction tantamount to a denial” of the Protest and asked the Public Auditor to consider the letter “an appeal of the de facto denial of the Telesource protest.” *Id.* at 2. A copy of the Protest was attached to the Appeal to act as Telesource’s statement to the Public Auditor in the Appeal. *Id.*

⁵ The Protest, as evidenced by the received stamps, was received by P&S on February 26, 2007, and by CUC on February 22, 2007. The letter reflects that it was sent both by facsimile and by hand delivery. Evidence of the dates the letter was faxed does not appear in the documents filed. The timeliness of the Protest, however, has not been raised as issue in this Appeal. In addition, the CUC Executive Director stated that “[o]n February 22, 2007, Telesource filed a ‘Letter of Protest’ pursuant to Section 5-101(4) of the CUC Procurement Regulations and Section 3-501(d) of the CNMI Procurement Regulations.” CUC Report at 1. Note, the CUC Procurement Regulations and the CNMI-PR are codified in the NMIAC and the section numbers were revised during the codification process.

3. Notice

On April 2, 2007, the next business day after the Appeal was filed, as required under the CNMI-PR, telephonic notice was given to P&S that Telesource had filed an Appeal with OPA. P&S informed OPA that, although P&S did receive a copy of the Protest, P&S did not entertain the Protest as it did not process the procurement. As such, on April 4, 2007, OPA prepared a letter (Notice) to the CUC Executive Director, the P&S Director, the Attorney General and counsel for Telesource. The Notice requested information and clarification regarding the procurement, the Protest, and the Appeal.

4. P&S Initial Response

P&S initially responded to OPA's Notice by facsimile (P&S Initial Response), which was dated and received on April 9, 2007.⁶ The P&S Initial Response consisted of three pages, which included a handwritten one-page facsimile transmittal cover sheet from Bob Florian,⁷ a copy of a one page memorandum to Assistant Attorney General Alan Barak from the P&S Director,⁸ and a copy of a one-page letter from the CUC Executive Director to the P&S Director, dated January 9, 2007,⁹ discussed further below.

5. CUC Report

The CUC Executive Director responded to OPA by letter dated April 9, 2007, with several attachments (CUC Report), which was received by OPA on April 10, 2007. The Executive

⁶ The third page of the facsimile received by OPA on April 9th was not readable. The third page, along with the cover page, was resent by P&S and received by OPA on April 10, 2007.

⁷ The handwritten body of the transmittal form reads:

1. Our memo of 2/27/07 to AAG Barak.
2. A CUC memo dated 1/9/07, received in P&S 2/12/07 after the date of the first publication of the RFP on 2/09/07. No action was taken on this memo.

Should you need a formal cover letter for these please advise. These are all we have besides a photocopy of the RFP Package without "Annexes" A-G.

⁸ The body of the Memorandum to Assistant Attorney General Alan Barak, dated February 27, 2007, reads: "Telesource has filed a protest against the propriety of this RFP through the Law Office of O'Connor Berman Dotts & Baner. We were not involved in the preparation of this RFP, nor did we approve its use or publication. A copy of the protest is attached for your disposition."

⁹ The copy of the letter from CUC Executive Director dated January 9, 2007, provided by P&S is marked as received by P&S on February 12, 2007. The discrepancy in between the date of the letter and the date received is further discussed in footnote 8.

Director, among other things, stated in the CUC Report that “CUC does not currently have decentralized procurement status for CUC RFP No. 07-001.” CUC Report at 2. The CUC Report also provided that the “RFP was issued pursuant to and under the centralized CNMI Procurement Regulations” and “[a]ll protests, disputes or other matters arising in relation to CUC RFP No. 07-001 are to be resolved in accordance with the CNMI Procurement Regulations.” *Id.* The CUC Report further provided that “CUC believed that P&S had the responsibility to respond to Telesource’s initial protest” and that “CUC has no objection regarding OPA’s assertion of jurisdiction over this matter at this present juncture.” *Id.* The CUC Report outlines the history of the procurement as follows:

1. On January 9, 2007, CUC notified the Director of the Division of Procurement and Supply (P&S) that the proposed RFP for the privatization of CUC was to be pursuant to the CNMI’s centralized procurement regulations, including the use of competitive sealed proposals. *See* Exhibit A (Letter to Director of P&S dated January 9, 2007 re: Privatization of CUC / Request for Competitive Sealed Proposals).¹⁰
2. CUC prepared and issued a Request for Proposals (RFP) for the privatization of its power generation and distribution systems. This RFP was designated as RFP No. 07-001 and was first published on February 9, 2007.
3. Telesource, on or about the date that RFP 07-001 was issued, paid the one thousand dollars (\$1,000.00) pre-qualification fee.
4. On February 22, 2007, Telesource filed a “Letter of Protest” pursuant to Section 5-101(4) of the CUC Procurement Regulations and Section 3-501(d) of the CNMI Procurement Regulations. *See* Exhibit B (Letter of Protest dated February 22, 2007).

¹⁰ Although the letter to the P&S Director is dated January 9, 2007, both the “faxed” stamp and the confirmation report show that the letter was faxed on February 8, 2007. The confirmation report shows the time of the fax to be a few minutes after six in the evening (start time 06:03 pm, end time 06:04 pm). In addition, although the letter references an “attached Invitation to pre-qualify for an RFP . . .” the confirmation report shows that only one page was sent. As noted in the previous footnote, the letter was stamped as received by P&S on Monday, February 12, 2007. If the letter was faxed from CUC on Thursday the 8th of February at six in the evening, as reflected in the confirmation report, the next working day of the government would be Monday, February 12, 2007, which is the “received” date marked on the copy provided by P&S in its Initial Response as discussed in footnote 7.

5. Telesource's protest was ostensibly pursuant to Section 5-101(4) of the CUC Procurement Regulations and Section 3-501(d) of the CNMI Procurement Regulations. The grounds set forth in the "Letter of Protest" included: (a) This is an "invalid" use of the RFP process; (b) Fees are unreasonable and unlawful; (c) Evaluation criteria are vague, ambiguous and capable of unilateral modification; (d) Pre-qualification criteria violate the procurement regulations; and, (e) CUC should have requested sealed bids, not proposals.

CUC Report, pp. 1-2 (*footnote added*).

6. Attorney General Report

On April 30, 2007, OPA received a twenty-six page response from the Attorney General (AG Report), which included a thirteen page letter brief and various attachments. There were six sections to the letter brief, which appear to address:¹¹

- (i) OPA's jurisdiction over the Appeal;
- (ii) CUC's application of the CNMI-PR;
- (iii) CUC's answer to two issues raised in Telesource's Protest;
- (iv) Telesource had time to file and pay fee;
- (v) The plain language of the statute cited by Telesource; and,
- (vi) Telesource's lack of standing to Protest.

¹¹ OPA paraphrased the section headings used by the Attorney General in the AG Report. The section headings actually read:

1. You have jurisdiction.
2. CUC, which had been given procurement authority, properly conceded the jurisdiction when it applied CNMI procurement regulations.
3. CUC did answer the Telesource protest as to the non-law arguments, notably the fee issue and the evaluation criteria.
4. It appears that Telesource had plenty of time to file and pay its fee.
5. Telesource's statutory argument against the \$25,000 Pre-Qual fee contradicts the unambiguous language of the statute.
6. Telesource lacks standing to protest anything because it is neither an actual nor prospective offeror.

7. OPA Request for Notice and Information

On May 2, 2007, OPA wrote to the CUC Executive Director¹² requesting that CUC provide notice of the Appeal to all interested parties and additional information regarding the interested parties and the status of the procurement to OPA.¹³

8. Telesource Acknowledgment

By letter dated May 3, 2007, Telesource acknowledged that it received the AG Report (Telesource Acknowledgment). Telesource stated that it would “submit its comments on the AG’s letter within ten working days of April 30 – i.e., on or before May 15, 2007, unless otherwise instructed by OPA.”¹⁴ Telesource Acknowledgment at 1.

9. CUC Notice to Parties

On May 7, 2007, CUC provided notice of the Appeal, with enclosures, to the interested parties and provided a copy of the notices and the requested contact information to OPA.

10. P&S Reply

The P&S Director provided a reply to the AG Report, by letter to OPA dated May 7, 2007 (P&S Reply). The P&S Reply first questions whether “the CNMI Procurement Regulations apply to this RFP process in which there is no expenditure of public funds?” P&S Reply at 1. The P&S

¹² The letter was copied to the P&S Director, the Attorney General and counsel for Telesource.

¹³ The letter reads in part: “OPA is, therefore, requesting that CUC provide a list of all interested parties and their contact information . . . immediately provide a short written notice to all interested parties informing them that the appeal has been filed with OPA. The notice should include a copy of this letter and the list of contact information for all interested parties as attachments. The notice should advise the interested parties to promptly provide OPA with any response or comments to the appeal and should direct that copies of any correspondence with OPA should be provided to all other interested parties, including appellant and CUC. As time is of an essence in all procurement matters and to avoid additional delay in this matter, OPA is requesting that CUC advise the parties that OPA will allow comments on the appeal through the close of business on Monday, May 14, 2007. Please note, due to the delay in the notice to the interested parties, OPA will maintain a file of the written correspondence it has received since the filing of the appeal, without attachments, which may be reviewed by any interested party during regular business hours Monday, May 7th - Monday, May 14th at OPA’s office on Capitol Hill. . . . Please also advise OPA as to the current status of the procurement, with a copy to all interested parties.”

¹⁴ The OPA Request for notice and information was sent to CUC with a request that CUC notify the parties of the Appeal and “advise the parties that OPA will allow comments on the appeal through the close of business on Monday, May 14, 2007.” As OPA received the Telesource Acknowledgment prior to the notice of Appeal being issued by CUC to any interested party, and as the proposed date for response was within the time frame provided for response in the CNMI-PR and within one day after the shortened time frame proposed by OPA, OPA accepted the Telesource Acknowledgment without response.

Director further states “[s]econd, and more importantly, if it could be argued that somehow this RFP is subject to the CNMI[-]PR, then there is still the question of whether the RFP is indeed compliant with the regulations.” *Id.* The P&S Director interprets NMIAC § 70-30.3-250 to mean that “in order to be compliant with the CNMI-PR, no potential proposer can be denied the opportunity to propose in [the] Final phase of this RFP on the basis that it did not choose to be pre-qualified in the initial phase.” *Id.* at 2. The P&S Reply goes on to provide that “[t]he restriction which this RFP places on proposers not pre-qualified violates NMIAC Section 70-30.3-250” and “the P&S [D]irector could not find CUC’s RFP in compliance with the CNMI-PR pursuant to NMIAC Section 7[0]-30.[3-]130(b).” *Id.* The P&S Director urges “OPA to declare CUC’s RFP not subject to the CNMI-PR since no expenditure of public funds is involved, and, or in the alternative, to find that it is an improper use of the CNMI-PR for failing to comply with those provisions regarding pre-qualification of bidders, to include charging those who paid for participating in pre-qualification while not allowing others to have their qualification determined as of the time of bidding.” *Id.*

11. PMIC Response

Pacific Marine & Industrial Corporation (PMIC), through counsel, Stephen J. Nutting, by letter dated May 14, 2007, filed its comments on the Appeal (PMIC Response). PMIC stated that it “join[s] in each and every objection raised by Telesource in its original protest . . .”. The PMIC Response further reflected concerns about a procurement that is “shrouded in a cloak of secrecy” and stated that “[a]ll specifications, terms and conditions relative to this particular procurement should be open to review by the public and those who might consider submitting a proposal . . .”. In addition, PMIC discussed concerns regarding how its current IPP agreement with CUC might be handled in the privatization and in the RFP.

12. OPA Request for Website Access

On May 17, 2007, OPA by letter to the CUC Executive Director, which was copied to the interested parties, followed up on its previous request for information on the status of the procurement and, as suggested in the AG Report, requested access to www.cuccnmi.com. On Tuesday, May 22, 2007, a user name and password for use in OPA’s review of this Appeal were provided to OPA by e-mail.

13. Telesource Response

Telesource provided its comments (Telesource Response) to the AG Report on May 15, 2007. Telesource argues that it “is now, and was at the time it filed its protest on February 22, 2007, a prospective offeror, because it intended, and continues to intend, to submit a proposal and contend for award of the contract.” Telesource Response at 2. The second half of the Telesource Response includes Telesource’s arguments and discussion related to PL 15-40 under the heading “The Attorney General’s Interpretation of PL 15-40 Is Both Wrong and Irrelevant.” *Id.*

14. MAN Diesel Response

In a response dated May 9, 2007, addressed to CUC and received by OPA on May, 21, 2007, MAN Diesel North America Inc. (MAN Diesel) submitted its comments on the Telesource protest issues (MAN Diesel Response). In addition to raising concerns regarding several ethics in contracting issues, MAN Diesel argued that “it is crucial that the procurement process is fair and transparent” and “we find that important and potentially fatal flaws do in fact exist in the RFP.” MAN Diesel Response at 1. Further, MAN Diesel stated that “[u]nfortunately, the procurement process on this Project to date has fallen short of portraying even the appearance of fairness.” *Id.*

15. CUC Status Update

On May 25, 2007, the CUC Executive Director responded to OPA’s May 17th request for information regarding the status of the RFP (CUC Status Update). Among other things, the CUC Status Update informed OPA and, by copy of the letter, the interested parties that: 11 firms participated by purchasing the pre-qualification documents; three proposers paid the \$25,000 fee; pre-qualification stage was closed on April 4, 2007 for e-filing; the downloaded e-filed documents were distributed to the committee members; and, “CUC awaits the decision of the Office of the Public Auditor on the protest.” *See* CUC Status Update, pp. 1-2.

16. Attorney General Supplement

On June 14, 2007, the Attorney General filed a fourteen page document (AG Supplement) with OPA. The AG Supplement, although received after the time frame the CNMI-PR allow for rebuttal,¹⁵ was, given the nature of this Appeal, reviewed and considered in this decision. The AG Supplement included an introduction letter, on pages one and two, and a memorandum of law, on pages three through fourteen. The memorandum was divided into two parts, Part 1: PL 15-67 and *De Minimis* Impact on the Procurement, containing one section with six subsections,¹⁶

¹⁵ The CNMI-PR provide that “[a]ny rebuttal an appellant or interested party may make shall be filed with the Public Auditor within five days after receipt of the comments to which rebuttal is directed . . .”. and “[t]he failure of an appellant or any interested party to comply with the time limits stated in this section may result in resolution of the appeal without consideration of the comments untimely filed.” NMIAC §§ 70-30.3-505(d)(4) and (5). The Attorney General, however, on page 1 of the AG Supplement did request leave to file the AG Supplement by stating: “I hereby request leave to file with you this responsive letter brief.”

¹⁶ As set forth in the Table of Contents on page 3 of the AG Supplement, excluding page numbers, emphasis omitted:

PART 1: PL 15-67 AND DE MINIMIS IMPACT ON THE PROCUREMENT

1. Last week’s amendatory act changes nothing legally.
 - a. The Act appears to give Telesource a pass on “automatically” pre-qualifying
 - b. But the Act presents four pre-requisites, two of which Telesource cannot meet
 - d. (sic) Telesource fails to qualify for “automatic pre-qualification” because it has not paid the second required fee, \$25,000
 - e. Telesource still does not qualify for “automatic pre-qualification” because it is not

and Part 2: Response to Telesource May 15 Letter Brief, containing three sections,¹⁷ and a conclusion. The Attorney General concluded that the “amendatory act, PL 15-67, changes nothing in the conduct of this procurement” and reasserted the argument that “Telesource lacks standing under the P&S regulations to protest.” AG Supplement at 14. The AG Supplement included additional arguments and comments regarding PL 15-67,¹⁸ Telesource’s standing,¹⁹ and other matters.

17. Telesource Reply

On June 26, 2007, OPA received a letter from Telesource addressing the submission of the AG Supplement (Telesource Reply). The Telesource Reply included an introduction and argument under the following six headings:

- (i) The AG has no apparent standing to be heard regarding this appeal;
- (ii) The AG’s interpretation of PL 15-67 is motivated by his political purpose of making that law ineffective, thus undoing the Legislature’s veto override;
- (iii) PL 15-67 should be construed to accomplish, not defeat, its plain purpose;
- (iv) Telesource meets the “Closely Related” requirement;
- (v) Telesource does not need to pay the \$25,000 fee to be evaluated for a status that the law grants it automatically; and,

in a “business that is closely related to the utility service for which [CUC] publishes an RFP” – the integrated retail power business.

- f. The amendatory act is bad public policy, and merely a spoiler.
- g. The amendatory act’s benefit is an illusion – any firm, in order to compete for the CUC power business must demonstrate its qualifications in the final review.

¹⁷ As set forth in the Table of Contents on page 3 of the AG Supplement, excluding page numbers:

PART 2: RESPONSE TO TELESOURCE MAY 15 LETTER BRIEF

2. There is no dispute – the Public Auditor has jurisdiction.
3. CUC did timely answer the Telesource Protest as to the non-law arguments, notably the fee issue and the evaluation criteria.
4. Telesource lacks standing to protest anything because it is neither an actual nor a prospective offeror.

¹⁸ The Attorney General argues that PL 15-67 “is bad policy, for two reasons” and provides the following detail for the first of those reasons as follows: “First, it sends a destructive message to the international business community. At a time when the CNMI economy is hemorrhaging it tells the business world to avoid the CNMI because the Legislature plays favorites in the marketplace, and it does so unfairly, by changing our procurement rules in the middle of the process. This is hardly the stable, American commercial system which the CNMI Executive Branch weekly describes to potential foreign investors.” AG Supplement at 9.

¹⁹ The Attorney General argues that “the purpose of standing is to exclude a party from blocking a procurement when it has no real interest in the procurement.” AG Supplement at 12. The Attorney General goes on to argue that: “In the instant case, Telesource is an improper plaintiff. It had to earn its right to standing to protest. . . . here Telesource lacks standing by reason of its inaction – it refused to file even the basic paperwork, a firm resume, to show how it could enter the retail pwer business. Telesource possesses no *a priori* status that gives it a right to protest.” AG Supplement at 13 (emphasis omitted).

(vi) Telesource protested before even the pre-qualification submittal period closed.

See generally Telesource Reply.

C. The Laws – CUC Privatization

Title 4, Division 8 of the Commonwealth Code, 4 CMC § 8111 *et seq.*, sets forth the laws relevant to CUC. Executive Order No. 2006-04 (EO), executed by the Governor on May 5, 2006,²⁰ acted to amend 4 CMC § 8111 *et seq.*²¹ and reorganized CUC. The EO specifically amended 4 CMC § 8152(a) to read:

The corporation shall comply with the procurement regulations of the Commonwealth or such other procurement regulations as may be issued by the executive director and approved by the Secretary of Finance and the Attorney General. The corporation shall receive decentralized procurement status as provided in Section 2-201 of the procurement regulations and be exempt from the small purchase limitations set forth in Section 3-105; provided, however, that the corporation shall obtain three quotations for any purchase between \$10,000 and \$50,000.

In addition to the EO, several public laws include provisions directly related or relevant to this procurement. Those laws include: (1) Public Law 15-23, signed into law on August 10, 2006; (2) Public Law 15-30, signed into law on September 26, 2006; (3) Public Law 15-35, signed into law on October 24, 2006; (4) Public Law 15-40, signed into law on December 22, 2006; (5) Public Law 15-44, signed into law on January 23, 2007; and, (6) Public Law 15-67, which became law in June, 2007, upon the legislative override of the Governor's veto of HB 15-237.

Public Law 15-23 created a new chapter related to renewable energy, energy efficiency, and other energy and cost-saving measures. Public Law 15-30 amended portions of the law related to excise tax exemptions for renewable energy products and Energy Star products. Public Law 15-35 created the Public Utilities Commission and added a new subsection (c)²² to 4 CMC § 8122.

²⁰ Article III, Section 15 of the Constitution of the Commonwealth of the Northern Mariana Islands provides, in part, that: "The governor may make changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration. If these changes affect existing law, they shall be set forth in executive orders which shall be submitted to the legislature and shall become effective sixty days after submission, unless specifically modified or disapproved by a majority of the members of each house of the legislature."

²¹ The EO included a typographical error: citing to 1 CMC 8111 instead of 4 CMC 8111..

²² The new subsection (c) created by PL 15-35 provides that:

After the board makes a final decision to privatize or transfer ownership, control, management or operation, in whole or in part, of a utility pursuant to this chapter:

Public Law 15-40²³ amended 4 CMC § 8122(c), prior to the issuance of the RFP. Subsequent to both the issuance of the RFP and the filing of the Appeal by Telesource, 4 CMC § 8122(c) was further amended by PL 15-67.²⁴

III. PRELIMINARY ISSUES

1. The executive director shall submit a proposed, public notice to request for proposals stating the decision and intention of the board, the purpose of the request, pre-qualification criteria of prospective and soliciting sealed proposals from interested, qualified parties, to the Public Utilities Commission (PUC) for review and approval. Upon approval by the PUC, the executive director shall cause the public notice to be published in accordance with law or regulation providing for publication of such notices.
2. *A private, business entity that is licensed in the Commonwealth and, for at least ten years, has been engaged in business that is closely related to the utility for which the request for proposal is being published pursuant to subsection (1), is hereby deemed qualified to submit a sealed proposal. This subsection shall not be construed to preclude entities who are not pre-qualified to submit a sealed proposal pursuant to this subsection.*

(emphasis added).

²³ PL 15-40, "The PUC Amendments Act of 2006" repealed and re-enacted 4 CMC § 8122(c) as follows:

(c) Notwithstanding 4 CMC § 8439 and any other provision of law, the Commonwealth Utilities Corporation may (1) issue a request for proposals to privatize or transfer ownership, control, management, or operations, in whole or in part, of a utility service and the property relating to that service, and (2) award such a contract, contingent upon the contractor obtaining from the Public Utilities Commission a certificate of public convenience and necessity required in 4 CMC § 8441. The Commission's review shall include a determination as to whether the divestiture and the contractor's proposed rates, charges, assessments, and costs are consistent with the public interest. *A business, that is licensed in the Commonwealth and has been engaged for at least ten years in a business that is closely related to the utility service for which the Commonwealth Utilities Corporation publishes a request for proposals, shall be permitted to submit a proposal upon the payment of the required fees.*

(emphasis added).

²⁴ PL 15-67 further amended 4 CMC § 8122(c) to read:

(c) Notwithstanding 4 CMC § 8439 and any other provision of law, the Commonwealth Utilities Corporation may: (1) issue a request for proposals to privatize or transfer ownership, control, management, or operations, in whole or in part, of a utility service and the property relating to that service, and (2) award such contract, contingent upon the contract obtaining from the Public Utilities Commission a certificate of public convenience and necessity required in 4 CMC § 8441. The Commission's review shall include a determination as to whether the divestiture and the contractor's proposed rates, charges, assessments, and costs are consistent with the public interest. *A business, that is licensed in the Commonwealth for at least ten years and has been engaged in the Commonwealth for at least ten years and has been engaged in the Commonwealth for at least eight years in a business that is closely related to the utility service for which the Commonwealth Utilities Corporation publishes a requires for proposals or solicits bids, shall be permitted to submit a proposal upon the payment of the required fees and automatically pre-qualified as a responsible bidder or offeror for such request for proposal or bid.*

(emphasis added).

Two preliminary issues, the determination of applicability of the CNMI-PR and Telesource's standing to bring the Appeal, will be addressed prior to proceeding to the other issues raised in the Appeal.

A. The CNMI-PR are Applicable to this Procurement

Executive Order 2006-04, in its reorganization of CUC, amended 4 CMC § 8152(a) to read:

The corporation *shall comply with the procurement regulations of the Commonwealth* or such other procurement regulations as may be issued by the executive director and approved by the Secretary of Finance and Attorney General. The corporation shall receive decentralized procurement status as provided in Section 2-201 of the procurement regulations and be exempt from the small purchase limitations set forth in Section 3-105; provided, however, that the corporation shall obtain three quotations for any purchase between \$10,000 and \$50,000.

4 CMC § 8152(a)²⁵ (*emphasis added*).

Based upon this change made to the law, OPA presumed that the solicitation involving the RFP was subject to the CNMI-PR and that, as such, OPA has jurisdiction over the Appeal.²⁶ OPA, however, included a query to the Attorney General in its April 4th Notice asking for notification if this presumption was incorrect.²⁷ The Attorney General, in the AG Report, replied by stating that "CUC is, by law, the master of its own procurements, but must follow P&S' regulations" citing to 4 CMC § 8152(a), as set forth in the EO. AG Report at 2-3. The AG Report also provided that "[i]t was proper for CUC to apply CNMI procurement regulations."²⁸ *Id* at 2. The CUC Executive Director agrees that the "RFP was issued pursuant to and under the centralized CNMI Procurement Regulations" and "[a]ll protests, disputes or other matters arising in relation to CUC RFP No. 07-001 are to be resolved in accordance with the CNMI Procurement Regulations." CUC Report at 2. Further, the RFP states that the "solicitation complies with the

²⁵ The CNMI-PR have been codified in the NMIAC. CNMI-PR Section 2-201 is now (NMIAC) § 70-30.3-130 and Section 3-105 is § 70-30.3-220.

²⁶ The jurisdiction of the Public Auditor over appeals of procurement decisions is set forth in the CNMI-PR § 70-30.3-505.

²⁷ In OPA's April 4th Notice, OPA requested that "[i]n the event the Attorney General believes that OPA would not have authority to entertain an appeal related to this RFP or if CUC has been granted other procurement authority other than is set forth in the EO and the CNMI-PR, OPA would ask for immediate notification so as not to delay this matter any further."

²⁸ The AG Report further stated that "[a]s a CNMI entity, its procurement regulations must comply with P&S'" and cited to AG Op 2003-13. AG Report at 2. The AG Report goes on to conclude that "the CUC Executive Director, for procurement purposes, fills the roll of the Director of P&S. Ordinarily, appeals of his actions or failures to act would come by appeal to the Public Auditor. You have jurisdiction of the appeals under the procurement regulations." *Id* at 3.

CNMI Procurement Regulations, 70 NMIAC §§ 30.3-001 - 760, specifically § 3-210 (competitive sealed proposals).” RFP at 6. In addition, the sections of the CNMI-PR are available on CUC’s website as Annex B. *See Id*; *see also* www.cuccnmi.com. The RFP clearly provides that “CUC intends to conduct the privatization through a transparent process, scrupulously adhering to the standards of the CNMI Procurement & Supply regulations, 70 NMIAC §§ 30.3-001 - 760, specifically § 3-210 (competitive sealed proposals)(sections available on CUC’s website as Annex B).” RFP at 18.

The P&S Director, however, raises a question as to whether “the CNMI Procurement Regulations apply to this RFP process in which there is no expenditure of public funds?” P&S Reply at 1. Although the CNMI-PR clearly do “apply to every expenditure of public funds irrespective of source” as set forth in § 70-30.3-020,²⁹ it does not appear that § 70-30.3-020 would preclude this RFP, which obviously utilized and applied the CNMI-PR as discussed above, from being solicited pursuant to the CNMI-PR. Although § 70-30.3-020 appears to be written to ensure that the CNMI-PR apply to every procurement involving an expenditure of public funds, it does not expressly limit the application of the CNMI-PR to those instances. Further, § 70-30.3-020 does not appear to expressly exclude instances where an expenditure may not take place in a procurement.³⁰ Despite the fact that it is unclear at this juncture if there will be a direct expenditure of funds related to this RFP,³¹ in all other respects, the RFP appears to be a procurement subject to and solicited under the CNMI-PR.

The P&S Director concedes that in “retrospect it would appear that the P&S Director should have asserted jurisdiction over the protest submitted by Telesource based upon the responsibility given to him [by] NMIAC Section 7[0]-30.[3-]130(b).” P&S Reply at 2. This follows the P&S Director’s statement that he “could not find CUC’s RFP in compliance with the CNMI-PR pursuant to NMIAC Section 7[0]-30.[3-]130(b). The P&S Director also concludes that “because of inaction by P&S, it appears that OPA has proper jurisdiction in this matter.” *Id.* at 2.

²⁹ CNMI-PR § 70-30.3-020, entitled, Application of Regulations, reads, in part: “The regulations in this subchapter apply to every expenditure of public funds irrespective of source, including federal assistance monies and Covenant funds. . . .”

³⁰ The P&S Director cites to occasions where P&S has “assisted a number of agencies in the past in using an RFP process to solicit proposals where the government will receive monies, such as in the case of the Managaha franchise, where there is no expenditure of public funds. And we have specifically stated in the documents in such instances that the CNMI Procurement Regulations do not govern the RFP.” P&S Reply at 1. In this RFP, quite the opposite is true, as the RFP makes it abundantly clear that the CNMI-PR are intended to apply and govern the solicitation.

³¹ It is not clear in this RFP whether or not any expenditure of public funds will occur, as the second stage of the RFP has not been released publicly or reviewed by OPA in this Appeal. It appears, however, that: the RFP would result in assets that were purchased with public funds being relinquished, at least temporarily; the CNMI Government will expend public funds purchasing power from the prevailing proposer; and, PL 15-44’s impact the rebate and write-off of the CUC-CDA debt in the event privatization occurs involves funds that at some level may be considered public. OPA, however, did not analyze these or any other possible scenarios that might trigger the expenditure of public funds applicability of the CNMI-PR, as the RFP obviously is otherwise governed by the CNMI-PR.

Based on the foregoing, OPA finds that the CNMI-PR are applicable to the RFP and shall be applied in this Appeal.

B. Telesource's Standing to Protest and Appeal

1. Attorney General Argues Telesource Has No Standing

The Attorney General proposed that “the Protest must be dismissed, because Telesource lacks standing to protest because it is neither the actual nor prospective offeror which the P&S regulations require, having voluntarily chosen to forego filing anything substantive in response to the RFP.” AG Report at 2. Subsequently, the Attorney General continued this argument by stating, among other things,³² that “Telesource lacks standing to protest anything because it is neither an actual nor a prospective offeror.” AG Supplement at 10.

2. CNMI-PR Provisions Control Jurisdiction³³

What is currently before OPA at this time is an appeal brought after protest. In order to determine if OPA has jurisdiction over this Appeal and may, therefore, be reviewed and determined by OPA, three sections of the CNMI-PR, §§ 70-30.3-505(a), 70-30.3-501, and 70-30.3-501(a)(3), must be read and applied.

The jurisdiction of the Public Auditor is addressed in the CNMI-PR as follows:

A written appeal to the Public Auditor from a decision by the P&S Director may be taken provided that the party taking the appeal has first submitted a written protest to the P&S Director as provided in section § 70-30.3-501 of these procedures, and the P&S Director has denied the protest or has failed to act on the protest within the time provided for in § 70-30.3-501(a)(3) above.

§ 70-30.3-505(a) (*emphasis added*).

³² “Ultimately, I urge you to dismiss the Protest, on the ground that Telesource lacks standing under the P&S regulations to protest.” AG Supplement at 14. “The bottom line is that Telesource has no right under the P&S regulations to file a protest because Telesource is not an ‘actual or prospective offeror’. It has no standing to Protest, or to further disrupt this procurement. Only the P&S regulations give the right to protest, and only to an actual or prospective offeror: . . .” AG Supplement at 11. “Telesource is not an actual offeror, and offers no prospect of being an offeror. It might have been an actual offeror if it had done what the other offerors did by April 4 – file its firm resume and answer the questions on financial and operating experience. Stage 1 has closed.” AG Supplement at 11. “[a]s of the closing of offers, on April 4, 2007, Telesource had not made an offer and presented no prospect of doing so. It was not the required ‘actual or prospective offeror’. Consequently, it lacked standing to bring a protest.” AG Report at 12.

³³ Arguments regarding standing were made by Telesource and the Attorney General. *See generally* Telesource Response and AG Supplement. As the CNMI-PR control and dictate the requirements and procedures regarding protests and appeals, including OPA’s jurisdiction, it is not necessary to address the issue of standing outside of the CNMI-PR.

The Appeal Telesource submitted to the Public Auditor was in writing. Prior to filing its Appeal with OPA, Telesource submitted a written protest to the P&S Director.³⁴ As such, it must only be determined if the Protest filed by Telesource was: (1) in accordance with § 70-30.3-501; and, (2) whether that Protest was either denied or not acted upon within the time set forth in § 70-30.3-501(a)(3). Although § 70-30.3-501 discusses all facets of a protests before the P&S Director, subsection (a)(1) contains the requirements applicable to the filing of protests. That provision reads, in pertinent part:

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the P&S Director. The protest shall be received by the P&S Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto. . . .

§ 70-30.3-501(a)(1) (*emphasis added*).

The Attorney General’s argument for dismissal due to Telesource’s lack of standing under the CNMI-PR is based on the premise that Telesource is neither an actual or prospective offeror.³⁵

No issue regarding the timeliness of the filing of the Telesource’s Protest has been raised.³⁶

3. Telesource – A Prospective Offeror at Time of Filing

It is not disputed that Telesource was not, at the time of filing its Protest, an actual offeror under the RFP.³⁷ Telesource, however, acted as a proposed offeror and participated in the RFP process

³⁴ CNMI-PR § 70-30.3-505(a) requires that the written protest be first made to the P&S Director. Telesource submitted its written Protest to both the P&S Director and the CUC Executive Director. Some confusion as to the administration of the solicitation existed. *See generally* AG Report at 2. That confusion continued at the time of receipt of the Protest by CUC and P&S as is evidenced by the information set forth in the P&S Initial Response, CUC Report, AG Report, AG Supplement and P&S Reply regarding decentralization and the receipt and handling of the Protest. OPA presumes that Telesource filed its Protest with both agencies due to this confusion. The filing of the Protest with both the CUC Executive Director and the P&S Director does not negatively impact Telesource in this Appeal. Indeed it alleviates the burden that OPA may have had to make a determination as to whether the filing with only one or the other would have been sufficient under the CNMI-PR subsequent to the EO.

³⁵ *See* footnote 30.

³⁶ Although the question of timing was not raised in this matter, the following information was noted by OPA: 1) the RFP was issued/first publicized on February 9th and materials were available on February 12th; 2) Telesource paid the fee and presumably received the RFP materials on or about that date; and, 3) Telesource filed its Protest on February 22nd. *See* CUC Report; *see also* RFP at 5. As § 70-30.3-501(d)(1) provides that “days” are “deemed to be working days of the Commonwealth government” unless otherwise stated, the Telesource Protest could not be untimely.

³⁷ Offeror is defined in the RFP to mean “any person who has purchased the Pre-Qualification Invitation Document and thereafter submits a pre-qualification proposal according to the Invitation’s terms to CUC.” RFP at 22. Although the RFP definitions cannot modify the requirements and/or rights set forth in the CNMI-PR, it is noteworthy that Telesource did purchase the pre-qualification document and, at the time of the filing of the Protest and the Appeal, no pre-qualification submissions had been made and none were due. As such, at the time of the filing

up and until³⁸ the time of filing its Protest. Telesource paid the \$1,000 fee to receive a copy of the RFP package and access to the internet site created by CUC for the procurement. *See* CUC Report at 1 and AG Report at 4. Telesource then filed its Protest with the P&S Director and CUC Executive Director by letter dated³⁹ February 22, 2007, which was prior to the time any filing or additional fee was due under the RFP instructions.⁴⁰ Therefore, at the time Telesource filed its Protest, the solicitation was outstanding and Telesource was participating in the process to the same extent as was required of any other participants. Further, when Telesource took the next step and filed this Appeal with OPA, the solicitation remained outstanding. At that time, no additional fees or action was required on the part of Telesource or any of the proposed offerors.

The five grounds cited by Telesource in its Protest are all related to alleged defects or improprieties in the solicitation. *See* Protest. The CNMI-PR require that a “protest shall be received by the P&S Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto.” § 70-30.3-501(a)(1). Filing a protest regarding alleged improprieties or defects in a solicitation prior to closing of a solicitation, although not specifically required by the CNMI-PR, may be required depending on how many days prior to closing such impropriety is discovered or should have been discovered, and is otherwise normal practice.⁴¹

of the Telesource Protest there were no actual offerors.

³⁸ In addition, after the submission of its Appeal, in a letter dated April 4, 2007, the date for submission of the initial stage information, Telesource wrote to the CUC Executive Director: “This is to inform you that Telesource CNMI, Inc. meets all the criteria for automatic pre-qualification for the above referenced RFP as per Public Law 15-40 and we intend to submit a sealed proposal for the upcoming privatization of CUC’s power business. We intend to pay the required proposal fee as mandated by PL 15-40. It is our understanding that as a local company pre-qualified under PL 15-40 we are not required to pay the \$25,000 pre-qualification fee.” In addition, the letter stated: “This letter is submitted without prejudice to our protest filed on February 22, 2007.” *See generally* AG Report attachment.

³⁹ The Protest, as evidenced by the received stamps, was received by P&S on February 26, 2007, and by CUC on February 22, 2007. The letter reflects that it was sent both by facsimile and by hand delivery. Evidence of the dates the letter was faxed does not appear in the documents filed with OPA; however, as discussed in footnote 34, timeliness of the filing is not an issue.

⁴⁰ The initial closing date for the e-filing for the RFP was March 12, 2007, and the final was April 4, 2007. *See* footnote 2.

⁴¹ It would be commonplace for an impropriety or defect in a solicitation to be or become apparent prior to the closing of a solicitation. Protests to the U.S. Government Accountability Office (GAO) based on improprieties in solicitations that are apparent prior to bid opening or the time set for receipt of initial proposals are required to be filed before bid opening or the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Those subsequently incorporated must be protested not later than the next closing time for the receipt of proposals following the incorporation. *Id.* The CNMI-PR, however, simply require that protests be filed within ten days after the protestor knows or should have known of the facts giving rise to the protest. § 70-30.3-501(a)(1). The C.F.R. similarly require that protests to GAO on grounds other than improprieties in solicitations are required to be filed with GAO within ten calendar days after the basis of the protest is known or should have been known, whichever is earlier. *See* 4 C.F.R. § 21.2(a)(2). The separate time frame for protests based on improprieties in a solicitation under the GAO rules may actually give a slightly longer or shorter time frame than the ten days found in the CNMI-PR or 4 C.F.R. § 21.2(a)(2), depending on when the protestor learned or should have learned of the defect.

4. Case Law – Supports Standing to File Protest

In procurement protests and appeals in the Commonwealth, the CNMI-PR, or other applicable regulation, and the laws of the Commonwealth, along with interpretive case law, control. In the event additional guidance is necessary, a review of procurement matters in other jurisdictions is common.⁴² When attempting to apply case law from other jurisdictions, however, caution must be exerted prior to concluding applicability. In addition to assuring that the facts are not distinguishable, the particular procurement laws and regulations must be carefully reviewed and compared with the applicable laws and regulations of the CNMI, as both small and great differences exist that may be significant.

In reviewing the arguments⁴³ made by Telesource and the Attorney General, dispute exists in the interpretation and applicability of *MCI Telecommunications Corp. v. U.S.*, 878 F.2d 362 (Fed.Cir. 1989). The Attorney General argues that the “federal circuit court of appeal which reviews US Government procurements, and with a very similar fact pattern before it, upheld the dismissal of a disgruntled competitor for lack of standing.” AG Supplement at 11. The Court in *MCI*, however, agrees with the government’s argument made in that case that “the solicitation must be outstanding when protested in order for those having not yet submitted bids to be considered prospective bidders on the proposed contract.” *MCI*, 878 F.2d 362, 365. Unlike *MCI*, Telesource filed both its Protest and Appeal while the solicitation was open and outstanding. The *MCI* protest, however, unlike Telesource’s, was filed post-award and *MCI* “failed to either bid in response to the original solicitation or to protest before the close of the proposal period for the original solicitation.” *Id* at 364. Further *MCI* discusses the use of persuasive reasoning in a determination that a “would-be protestor, even though appearing to have a direct economic interest, was not an interested party because it neither bid nor protested before the close of the proposal period.” *Id* at 365 (citing to *Waste Management of North America, Inc., v. Weinberger*, 862 F.2d 1393 (9th Cir. 1988)). The reasoning and argument in *MCI* supports the finding that Telesource was at the time of filing the Protest (and the Appeal) a prospective offeror, as the Protest was made at a time when the solicitation was outstanding.⁴⁴

⁴² OPA often looks to decisions published by the General Accountability Office (GAO). In addition, guidance can also be found in treatises, federal case law, state case law, contract appeal board’s decisions, and various federal and state agencies’ decisions.

⁴³ Telesource and the Attorney General debate whether or not Telesource may be pre-qualified pursuant to law (Public Laws 15-35, 15-40 and 15-67), however, that issue is not necessary to determination of the preliminary issue of standing.

⁴⁴The Attorney General further argues that “[f]our panels of the Federal Circuit Court of Appeals have followed the *MCI* decision” citing to *Rex Service Corp. v. U.S.*, 448 F.3d 1305 (Fed.Cir. 2006). AG Supplement at 11. The Attorney General citing to *Rex* claims that a “party which could have bid before the close of the relevant period, but chose not to, is ‘not a prospective bidder’ for standing purposes.” *Id.* *Rex*, however, is an appeal of a denial of a post award protest made to the Court of Federal Claims. *Rex* at 1305. The Court in *Rex* states that “[i]n the end, *Rex* did not submit a bid; nor did it file a timely bid protest in the Court of Federal Claims . . .” and in a footnote the Court noted that it was “not presented with, and do not decide, whether an *agency* protest, filed before the end of the solicitation period . . . may meet the requirements of *MCI* and secure prospective party status for a subsequent bid protest action.” *Id* at 1308. The Attorney General concludes that “[a]s in the federal procurement cases, *MCI* through *Rex*, the Protest must be dismissed for lack of standing.” AG Supplement at 13. Note must be taken that the protest

5. No Action on Protest Under CNMI-PR

The Attorney General makes the argument that the record allows OPA “to find that CUC timely responded to Telesource’s factual claims, through the RFP-FAQ website page” and urged that OPA “conclude that CUC was not required to provide a legal rebuttal of Telesource’s incorrect, unsupported legal claims.” AG Supplement at 14. The Attorney General, however, conceded that “[n]o one would claim that the Executive Director addressed the legal arguments of the protest. Nor would anyone claim that the Director issued a document identified as a response to a formal protest. He did neither.” AG Report at 8-9. In the AG Supplement, the Attorney General notes that “Telesource fails to respond to my observation that CUC in fact answered all its claims. CUC simply did not do so with a formal document.” AG Supplement at 10 (emphasis omitted).

It is undisputed that P&S did not entertain the protest. *See* P&S Response and P&S Reply. The CNMI-PR address protests to the P&S Director in § 70-30.3-501, which requires much more than providing an informal response to protest claims. Subsection (a)(2)⁴⁵ provides for notice to be given to those affected by a protest and allows for submission of information from those parties and subsection (a)(3) specifically calls for a decision. Notice of the Protest was not given; opportunity to respond, therefore, was not available, and a decision was not issued. In the event the arguments of the Attorney General that the website postings did timely address the matters raised in the Telesource Protest,⁴⁶ the Appeal to OPA would, however, still be viable.⁴⁷

and appellate procedures related to these federal cases vary from the procedures set forth in the CNMI-PR, which does not provide for protests other than to the P&S Director, or designee. In addition, the timing of the filing of the Protest and the Appeal herein, while the solicitation was outstanding, must be considered.

⁴⁵ § 70-30.3-501(a)(2) provides that “[o]ther persons, including bidders involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases. These persons shall also be advised that they may submit their views and relevant information to the P&S Director within a specified period of time. Normally, the time specified will be one week. Exceptions are to be considered exceptional and will be granted sparingly.”

⁴⁶ The Attorney General argues that “[i]mportantly, the materials on the website did address the matters raised in the Telesource protest, on or about March 13, 2007. CUC created the ‘FAQ’ web page in (sic) to answer all participants’ questions in a way to avoid *ex parte* communications. The answers were available to anyone who paid the initial \$1,000 fee, as did Telesource.” AG Report at 4 (emphasis omitted). The AG goes on with the argument by stating that “Telesource protested by letter of February 22, 2007. (Telesource Protest letter) Twenty days later would have been March 14. My records show that the FAQ page responses to the factual issues were posted 19 days later, on March 13, 2007. The final post was March 19, 2007, with responses to Mr. Long’s five questions. I believe that CUC or the webmaster could verify the dates which appear on the page printout I have attached.” AG Report at 8.

⁴⁷ The CNMI-PR provide in § 70-30.3-505(c) that “[a]n appeal from the P&S Director’s decision must be received by the office of the Public Auditor not later than ten days *after the appellant receives the decision* of the P&S Director, or, in the event that the P&S Director has not decided the protest within ten days from the date that he should have decided the protest pursuant to § 70-30.3-501(a)(3) above. Any appeal received after these time limits shall not be considered by the Public Auditor unless good cause is shown or unless the Public Auditor determines that the appeal presents issues significant to procurement practices that are not outweighed by the detriment to the Commonwealth should the appeal be considered.” In the event that the FAQ responses were considered a decision, the Appeal to OPA would not be due until at least March 29, 2007. That would be ten working days of the Government after March 13th. There is no evidence that Telesource received the information on that date. If the due date is calculated from the second date used by the Attorney General, the 19th, Telesource’s Appeal to OPA would

6. Appeal is Properly Before OPA

OPA finds that at the time the Protest was filed, the solicitation was outstanding and Telesource had participated in the RFP up and until the time it filed the Protest. Telesource was, therefore, a prospective offeror at the time of filing the Protest. The Protest was not timely handled under § 70-30.3-501. The solicitation was still outstanding at the time the Appeal was filed with OPA. Telesource has standing under the CNMI-PR to have brought both the Protest and the Appeal.

IV. DISCUSSION: ULTIMATE ISSUE

As is set forth in the Procedural and Factual Background section of this Decision, five issues were raised by Telesource in its Protest, which were incorporated into its Appeal. Additional issues were raised in the comments to the Appeal filed by other agencies and entities. The CNMI-PR § 70-30.3-030 provides that “[n]o government contract shall be valid unless it complies with the regulations in this subchapter.” As this Appeal is pre-award, CNMI-PR § 70-30.3-510(a) is applicable and provides that:

If prior to award the P&S Director or the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor shall have the solicitation or proposed award:

- (1) Canceled; or
- (2) Revised to comply with law or regulation.

The issues raised by Telesource, along with relevant issues raised in the various comments submitted on the Appeal, have, therefore, been reviewed in order to determine whether the solicitation is in compliance with applicable laws and regulations or whether the solicitation is in violation of laws or regulations and should be canceled or revised.

V. DISCUSSION – ULTIMATE ISSUE

A. Solicitation Not a Public Process

1. CNMI-PR Provide for Public Confidence and Access

The CNMI-PR “shall be construed and applied to promote their underlying purposes and policies.” § 70-30.3-001(a). The following are four of those purposes and policies that relate to the issues raised:

still be timely.

1. To provide for increased public confidence in the procedures followed in public procurement;
2. To insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth;
3. To foster effective broad-based competition within the free enterprise system; and,
4. To provide safeguards for the maintenance of a procurement system of quality and integrity.

See § 70-30.3-001(b)(3), (4), (6), and (7).

Although confidential information may be kept confidential when necessary⁴⁸ to insure proper bidding procedures, “[p]rocurement information shall be a matter of public record and shall be available for public inspection.” § 70-30.3-050. Good faith is required of all parties, including government employees, involved in the negotiation, bidding, performance and administration of government contracts. See § 70-30.3-015.

2. RFP Claims Yet Contradicts Transparent Process⁴⁹

The RFP states that “CUC intends to conduct the privatization through a transparent process, scrupulously adhering to the standards of the CNMI Procurement & Supply regulations, 70 NMIAC §§ 30.3-001 - 760, specifically § 3-210 (competitive sealed proposals) (sections available on CUC’s website as Annex B).” RFP at 18. However, in order to receive a copy of the “Pre-qualification Requirements” document a non-refundable payment of \$1,000 had to be paid. RFP Notice and RFP at 6, *see also* RFP at 9 (\$1,000 - Payment made in order to receive this Invitation document.). Further “[t]he RFP will be made available *only* to a pre-qualified Offeror and *only* upon payment of a non-refundable \$50,000 (US).” RFP at 6 (*emphasis added*); *see also* RFP at 9 (\$50,000 - Payment due in order to pick up RFP).

3. Solicitation Process Counter to CNMI-PR

Although the Attorney General claims that the final payment of \$50,000 is not due until submission of an offer under the privatization/second stage of the RFP, the RFP states the payment of \$50,000 is due in order to pick up the RFP.⁵⁰ RFP at 9. The RFP clearly states that

⁴⁸ The decision to keep procurement information confidential shall be made only by the P&S Director. § 70-30.3-050.

⁴⁹ The Attorney General also states that “[w]e have undertaken the most careful and transparent of procurement processes.” AG Supplement at 3.

⁵⁰ The Attorney General comments: “There appears to be a damned-if-you-do-damned-if-you-don’t approach to the split process and the split charges – \$1,000 registration, \$25,000 Pre-Qual submission, \$50,000 RFP submission.” AG Report at 11. “The procurement does not require an offeror to wager everything before it receives a copy of the RFP – the first charge is only \$1000. Nor must it wager the heaviest amount if it fails to be found qualified to manage a power utility after merely assembling resumes and financial information – the second charge is only \$25,000. Only at the final stage, in which an offeror submits the equivalent of a carefully crafted business plan, would a party pay another \$50,000.” *Id* at 12.

“[t]he RFP will be made available *only* to a pre-qualified Offeror and *only* upon payment of a non-refundable \$50,000 (US).” RFP Notice and RFP at 6 (*emphasis added*). In describing “the next stage” the RFP states that CUC will “issue a Certificate of Pre-Qualification, which will indicate the time and place for the issuance of the Request for Proposals.” RFP at 28. “CUC will thereafter issue the RFP to each Pre-Qualified Offeror paying the non-refundable participation fee of \$50,000.00 (US).” *Id.* As such, in order to view the actual RFP for privatization/franchise a person must pay a total of \$76,000, have submitted financial and other information as required under the RFP, and been deemed to be pre-qualified by CUC. It is difficult to discern how these requirements might be construed to provide for increased public confidence in the procedures followed in public procurement, foster effective broad-based competition, or provide safeguards for the integrity of the CNMI procurement system. Further, there is no indication that the RFP, either regarding the pre-qualification as set forth in this solicitation or regarding privatization/franchise under a second solicitation/part/stage, is being maintained as a public record and is available for public inspection, as required by § 70-30.3-050.⁵¹

Comments received on the Appeal support the conclusion that the RFP process has not been public.⁵² Further, despite the statement presented by the Attorney General in the AG Supplement that “CUC is an integrated retail electric utility, identical to those thousands of firms found in the private and public sectors in the US” only three entities paid the \$25,000 and submitted responses to the RFP. *See* CUC Status Update 1-2. It is unknown if any of the three will be selected⁵³ or will choose to proceed to the next stage. When there are so few participating in a solicitation, actions that result in the exclusion of even one potential responsible offeror can act to significantly diminish the level of competition. The closed nature of this solicitation, including requiring pre-qualification and payment of substantial fees for a future potential unpublished solicitation, the terms of which are virtually undisclosed and uncertain,⁵⁴ has likely acted to limit the competition

⁵¹ OPA believes that the RFP should be maintained as a public record and available for public inspection. Making the RFP available for public inspection does not in any way contradict maintaining the confidentiality of proposals during the solicitation and negotiation process.

⁵² The PMIC Response includes the following comments related to the transparency of the solicitation: “Because of the method and manner by which CUC has chosen to pursue this particular RFP, PMIC and other would-be proposers have not been allowed to review the specification, or the terms and conditions of the proposed privatization. . . . I cannot imagine a procedure better designed to chill the desire of any legitimate, qualified firm from involving itself in the process. . . . We can discern no legitimate reason for the secrecy involved related to the specification and terms and conditions of the proposal package. . . . There can be nothing about a public procurement that is shrouded in a cloak of secrecy, which would lend any confidence in the procedures, or the integrity of the process. . . . All specification, terms and conditions relative to this particular procurement should be open to review by the public and those who might consider submitting a proposal, whether CUC deems them ‘qualified’ or not.”

The MAN Diesel Response states that “it is crucial that the procurement process is fair and transparent.” MAN Diesel urges “OPA to ensure that this very important and high profile RFP is administered fairly and with transparency.”

⁵³ “CUC selects the Offerors who can proceed to the next stage.” RFP at 8.

⁵⁴ The time and place for the issuance of the Request for Proposals will be indicated in the Certificate of Pre-Qualification issued to the pre-qualified offerors. *See* RFP at 28.

in the RFP, contrary to the purpose of the CNMI-PR to foster effective broad-based competition and to the requirement of full and open competition as set forth in § 70-30.3-201 of the CNMI-PR.

B. RFP's Pre-qualification Outside CNMI-PR

1. Pre-qualification of Contractors Under CNMI-PR

The CNMI-PR do provide for the pre-qualification of contractors in certain instances.⁵⁵ Prospective suppliers of goods or services may “be pre-qualified for particular types of construction, goods and services when determined necessary by the P&S Director.” § 70-30.3-250. The opportunity for qualification before solicitation must, however, “be afforded to all suppliers” and “[s]olicitation mailing lists of potential contractors shall include, but shall not be limited to, pre-qualified suppliers.” *Id.*

2. Pre-Qualification as Described in the RFP

The RFP describes its endeavor as a “two-stage offering process, which CUC has adopted to ensure fairness, clarity and provide for consideration of the best offers” and specifically provides for stage one as follows:

Stage 1 - Pre-Qualification. As described in this Invitation, responding firms provide information on their technical and financial ability to own and manage a private CNMI power utility. CUC selects the Offerors who can proceed to the next stage.

RFP at 8.

The pre-qualification, which is referred to as both Part 1/Stage 1, is set forth in the RFP and is entitled an “Invitation to Apply for Pre-Qualification, and Pre-Qualification Requirements for Proposals, for the Privatization of the CNMI’s Power Business.” RFP Notice and RFP at 1. CUC, through the RFP, invited “interested persons, including project developers, electric power generators, and operation and maintenance (O&M) service providers, consortia and joint ventures, to apply to be pre-qualified to submit a proposal for the privatization of CUC’s power business through a 25-year franchise agreement, namely generation, transmission and distribution systems, billing, collection and customer service.” RFP Notice and RFP at 4-5. A copy of the “Pre-qualification Requirements” document was available to persons that paid a non-refundable fee of \$1,000. *Id.* at 5. An additional non-refundable fee of \$25,000 was required as “a condition of CUC’s acceptance of the Pre-Qualification Proposal.” *Id.* CUC reserved “the right to reject a

⁵⁵ “Pre-qualification of Contractors. Prospective suppliers of goods or services may be pre-qualified for particular types of construction, goods and services when determined necessary by the P&S Director. Opportunity for qualification before solicitation shall be afforded to all suppliers. Solicitation mailing lists of potential contractors shall include, but shall not be limited to, pre-qualified suppliers. In no event will bidders be allowed to qualify after the bid opening.” § 70-30.3-250.

Pre-Qualification Proposal for any reason and to waive any non-material defect in a proposal or its submission, if, in its sole opinion, to do so would be in the best interest of CUC.” Notice at 2, RFP at 6.

CUC “divided the RFP process into two stages in order to conserve CUC and proposers’ resources, minimize costs, and focus the privatization process on firms best qualified to submit a competitive proposal for the CUC’s power business.” RFP at 7. The “pre-qualification stage is the first step” after which CUC will “produce a list of candidates for the RFP” that are “eligible to submit a proposal for the franchise.” *Id* at 19. “Offerors who meet CUC’s pre-qualification requirements will be issued a Certificate of Pre-Qualification and will be eligible to bid for privatization. The RFP will be made available only to a pre-qualified Offeror and only upon payment of a non-refundable \$50,000 (US).” *Id* at 6. The proposals under the second stage/privatization will consist of a “sealed technical proposal and a sealed price proposal.” *Id* at 19. “CUC intends to review and evaluate the technical proposals first” and will only open the “price proposals for the ‘responsive’ submissions.” *Id*. CUC “will address the technical proposal and pricing proposal as a whole, and rank proposers according to published criteria.” *Id*.

3. Capability and Responsibility in the CNMI-PR

The CNMI-PR provide that awards shall be made only to responsible contractors. *See* § 70-30.3-245(a). Specifically, in competitive sealed proposals pursuant to § 70-30.3-210(h), “[a]ward shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the government taking into consideration price and the evaluation factors set forth in the request for proposals.” Responsible “means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” § 70-30.3-040(s). In order to be determined responsible, the CNMI-PR require that a prospective contractor must:

- (1) Have adequate financial resources to perform the contract, or the ability to obtain them;
- (2) Be able to comply with the required delivery or performance schedule;
- (3) Have a satisfactory performance record;
- (4) Have a satisfactory record of integrity and business ethics;
- (5) Have the necessary organization, experience and skills, (or the ability to obtain them), required to successfully perform the contract;
- (6) Have the necessary production, construction and technical equipment facilities, or the ability to obtain them; and
- (7) Be otherwise qualified and eligible to receive an award under applicable laws and rules.

See § 70-30.3-245(a)

4. CUC's Method of Pre-qualification Outside of CNMI-PR

In this instance, the P&S Director did not determine that pre-qualification was necessary.⁵⁶ The P&S Director in commenting on pre-qualification, however, stated that “in order to be compliant with the CNMI-PR, no potential proposer can be denied the opportunity to propose in Final phase of this RFP on the basis that it did not choose to be pre-qualified in the initial phase.” P&S Reply at 2. The Director further stated that “[t]he phrase ‘In no event will a bidder be allowed to qualify after bidding’ does not mean that only proposers who were pre-qualified can propose, but only that proposers not pre-qualified can propose and must be ultimately found to be qualified, or not qualified, on the qualifications they possessed at the time of submission of their proposal.” *Id.* The P&S Director concluded that the “restriction which this RFP places on proposers not pre-qualified violates NMIAC Section 70-30.2-250” and the Director “could not find CUC’s RFP in compliance with the CNMI-PR pursuant to NMIAC Section 7[0]-30[.3-]130(b).” *Id.* CNMI-PR § 70-30.3-130(b) requires that delegated procurement activity still must “be shown to the reasonable satisfaction of the P&S Director to be in compliance with the regulations” when the authority of the P&S Director has been delegated.⁵⁷

“An essential step in every procurement involves a determination that the potential contractor is qualified to serve as a Government contractor.” John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 403 (3rd Ed. 1998). It is a well-established policy that awards will only be made to “responsible” contractors. *Id.* The CNMI-PR specifically require an affirmative responsibility determination as a pre-requisite to award. *See* § 70-30.3-245(a). A review of the CNMI-PR requirements regarding responsibility, § 70-30.3-245(a), clearly supports the idea that a contractor that may not be responsible at the time of submission may become responsible prior to the time for award. Three of § 70-30.3-245(a)’s subsections allow the

⁵⁶ Although the EO gave CUC decentralized procurement by amending 4 CMC § 8152 (a) to include the provision that the “corporation shall receive decentralized procurement status as provided in Section 2-201 [NMIAC § 70-30.3-130] of the procurement regulations” the Executive Director claimed that CUC did not have “decentralized procurement status for CUC RFP 07-001.” *See* CUC Report at 2. Despite the CUC Executive Director’s statement, if delegated, OPA found no determination from the Executive Director and, as set forth herein, the pre-qualification was not to the satisfaction of the P&S Director to be in compliance with the regulations as required by § 70-30.3-130(b).

⁵⁷ The EO amended 4 CMC § 8152(a) to read:

The corporation shall comply with the procurement regulations of the Commonwealth or such other procurement regulations as may be issued by the executive director and approved by the Secretary of Finance and th Attorney General. The corporation shall receive decentralized procurement status as provided in Section 2-201 of the procurement regulations and be exempt from the small purchase limitations set forth in Section 3-105; provided, however, that the corporation shall obtain three quotations for any purchase between \$10,000 and \$50,000.

Section 2-201 of the procurement regulations is codified at NMIAC § 70-30.3-130. Subsection (b) (previously Section 2-201(2)) requiring that the procurement activity must be “to the reasonable satisfaction of the P&S Director to be in compliance with the regulations” appears to be incorporated and not excluded from the language of the EO and 4 CMC § 8152(a).

contractor that has “the ability to obtain” certain resources to be found responsible.⁵⁸

As such, despite discretion of the contracting officer in making a responsibility determination, CUC’s statement that it may “reject a Pre-Qualification proposal for any reason . . . , if, in its sole opinion, to do so would be in the best interest of CUC” is contrary to the CNMI-PR, unless such rejection was a determination of non-responsibility pursuant to § 70-30.3-245(d). *See generally* Notice at 2, RFP at 6. In addition, CUC’s use of the pre-qualification process to “focus the privatization process on firms best qualified to submit a competitive proposal for the CUC’s power business” is also outside the CNMI-PR’s responsibility determination and pre-qualification provisions, §§ 70-30.3-245 and 70-30.3-250. *See generally* RFP at 7. Further, the intention of CUC to exclude any offerors not participating in the pre-qualification stage from the privatization/stage 2, appears to be both contrary to the CNMI-PR and not to the satisfaction of the P&S Director to be in compliance with the CNMI-PR as required by § 70-30.3-130(b).

C. Evaluation Method in RFP Outside CNMI-PR

1. Comparison, Ranking, Cutoff and Limiting Focus Not Appropriate

Under the CNMI-PR, prior to award of a contract, the proposed contractor must be found to be qualified and responsible or determined to be non-responsible. *See* § 70-30.3-245. In the event of a finding that the proposed contractor is non-responsible, a written determination stating the basis for the finding shall be placed in the contract file and the award will not be made. § 70-30.3-245(d). If not qualified or responsible at first review, a proposer may be given the opportunity to submit additional documentation to support a finding of responsibility so that award can be made.

In this RFP, CUC, however, “intends to compare the Offerors’ submissions for this Pre-Qualification stage.” RFP at 42. CUC will rank the offerors by score, will set a cutoff score, and will only invite those that have scored above the cutoff to participate in the privatization stage. *See Id.* at 26. The RFP provides that “CUC’s ranking decision will be final.” *Id.* The cutoff score does not appear in the RFP. Further, CUC claims it divided the RFP process into two stages, in part, to “focus the privatization process on firms best qualified to submit a competitive proposal

⁵⁸ § 70-30.3-245(a) has three subsections, which appear to allow leeway to a contractor in responsibility determination. To be determined responsible, a prospective contractor must:

- (1) Have adequate financial resources to perform the contract, *or the ability to obtain them*;
. . .
- (5) Have the necessary organization, experience and skills, *(or the ability to obtain them)*, required to successfully perform the contract;
- (6) Have the necessary production, construction and technical equipment facilities, *or the ability to obtain them*; and
. . . .
(emphasis added).

for the CUC’s power business.” RFP at 7.

Establishing a competitive range is not only appropriate in a solicitation utilizing competitive sealed proposals, it is required. *See* § 70-30.3-210(e)(2). The competitive range, however, is established after review of all proposals, is based on recommendations of the evaluator or evaluation team, and includes all proposals that have a reasonable chance of being selected for award. *Id.* All evaluation factors stated in a solicitation must be considered in determining those allowed to participate further in the selection process. *See* § 70-30.3-210(e)(1). In the pre-qualification stage set in the RFP, the evaluation factors are limited and do not include all the factors that will be used in the privatization/second stage. Utilizing a pre-qualification method based upon limited evaluation factors with the stated purpose to “focus the privatization process on firms best qualified to submit a competitive proposal” is premature, and contrary to the full and open competition requirement of the CNMI-PR. Further, comparing submissions, setting an undisclosed numerical cutoff point and allowing only those above that cutoff to participate past a pre-qualification stage limits the extent of the competition, which also violates the CNMI-PR requirement of full and open competition. In addition, exclusion at the pre-qualification stage would be equivalent to a non-responsibility determination under § 70-30.3-245(d) made, however, in a method contrary to that set forth in § 70-30.3-245.

2. Ambiguities and Uncertainties in Criteria

The RFP includes the principal goals for the privatization and CUC plans to evaluate the pre-qualification Proposals in accordance with those goals of the privatization.⁵⁹ RFP at 7. The evaluation criteria presented on page 42 of the RFP is said to reflect the principal goals. *Id.* The pre-qualification evaluation criteria are summarized in the RFP and CUC “reserves the right to modify the criteria.” RFP at 42. The criteria are set forth on page 42 of the RFP and are organized into four categories, named and weighted as follows:

- | | | |
|----|--------------------------|-----|
| 1. | Technical qualifications | 57% |
| 2. | Financial qualifications | 23% |
| 3. | Business Experience | 10% |
| 4. | Other objectives | 10% |

The Attorney General claims that “[w]hile any good attorney could find something to question about any given criterion, the RFP procedure overall provides a highly objective and understandable basis for review.” AG Report at 8. Telesource claims that the criteria set forth on page 42 of the RFP “is imprecise, vague, ambiguous and in some cases irrelevant.” Protest at 4. Telesource specifically points out three of the listed criteria with which it has concerns.⁶⁰ In

⁵⁹ “The following are the CNMI’s main goals of privatization of the CUC power business: 1. Maintain low electric rates; 2. Deliver reliable, high-quality service; 3. Reduce dependence on expensive imported oil; 4. Ensure that CUC gets maximum value of the investment to date; 5. Minimize negative environmental impacts; 6. Maximize efficient employment of local citizens; and 7. Help enhance economic development of the CNMI.” RFP at 7-8.

⁶⁰ Telesource’s concern regarding the criteria is set forth on pages 4-5 of the Protest as follows: “For instance . . . 4% for ‘location in or close to the Marianas.’ What is considered to be ‘close to the Marianas’? Would this mean

addition, questions were posed to CUC about the criteria, which appear in the FAQ section of www.cuccnmi.com.⁶¹ Questions as to the clarity, application, and weighting of the criteria listed on page 42 can be raised, even when read with the submission requirements related to the category and the answers in the FAQ.⁶²

The pre-qualification evaluation criteria also appear to go well beyond the issues typically covered in simply determining responsibility. Although OPA acknowledges that application of special standards may, at times, be necessary in order to determine whether the contractor is capable of performance, the inclusion of certain criteria in a pre-qualification evaluation, such as approach to the environment, creatively minimize dependence on foreign oil, creative approaches to economic development and likely focus on and investment in the CNMI, found on page 42 of the RFP, is not appropriate. Such criteria are not capability criteria and, as such, belong in the evaluation of the proposal and not in an evaluation of the ability or financial capability of a contractor to perform. In order to argue that such special factors are appropriate to a responsibility/qualification determination, the final criteria would have to be disclosed and a connection to capability established. Further, as the procurement has been split into two stages,

a neighboring island? Asia? . . . Six percent . . . deals with ‘Years of Experience’ . . . essentially undefined and potentially irrelevant. . . 50 points (5%) is ‘Generation partner in at 30+% or self’. That is incomprehensible. We don’t know what that means.”

⁶¹ Questions regarding “worth” in reference to the \$30 million, the electric power experience in Form 6, plants are meant in 3.2.6.1/diesel engine plants, the term “these individuals” in 3.2.8.2, determination of aggregate net assets, measurement of experience, and impact of joint venture on experience. *See generally* FAQ.

⁶² For example, the technical qualifications on page 42, representing 57% of the evaluation, list the following as criteria: 90 MW+ generation system, 90 MW+ demand on system, 34.5 kV transmission system, 13.8 kV distribution system, 20,000+ customers meter & bill, and 3.25 MW+ renewable energy. Form 6, 3.2.6, addressed on page 35 of the RFP, contains the areas of technical requirements, 3.2.6.1.- 9, and requests experience in the electric power business during the last five years. The FAQ response regarding what type of “plants” is meant in 3.2.6.1 states:

Any form of thermal generating units are acceptable. Again, if you refer to page 42 and the evaluation criteria, you can see that we are interested in understanding your experience in running power generation facilities that would be used to meet loads experienced in our system. Here is a hypothetical situation: Presently we run certain oil fired units. You, as a potential offeror, might suggest that, as a new utility company, you phase those units out and substitute d different kinds of units. We would want to know what experience you had with both types of units.

As 57% of the points available under the proposed evaluation are in this category, OPA is concerned that, even with the response given in the FAQ, it is not easily discernable how the points will be allotted under each criteria in this category.

The financial qualifications are weighted as only 23% of the evaluation. If the proposer is not financially capable of performing, the proposer should not be found responsible and should not be awarded a contract. Although the net asset figure of \$30 million+ may be a viable gauge of financial responsibility, OPA has not reviewed the reasoning for that amount. The other three criteria, however, do seem to be vague in their wording and inclusion as part of the financial evaluation. It is unclear why a generation partner, if one exists, must be “in at 30+%” and a T&D partner, if one exists, must be “in at 10+%” and why less of an interest by those partners would be together equal to the point total for the net asset requirement. In addition, it is unclear why “purchases fuel on its own” is part of the financial qualification, unless it is simply the ability to do so financially.

the second contingent on the first, without having the benefit of review of the requirements, terms, criteria, etc., in the privatization/stage two, a determination as to whether any special standards related to the capabilities of a contractor are necessary or appropriate to the solicitation cannot be made.

VI. DISCUSSION – OTHER MATTERS

A. FEES

Telesource claims the “\$25,000 and the \$50,000 fees are either a tax or a user’s fee.” Protest at 2. Telesource also claims the fees “bear no logical relationship to the cost of work to be done or the services to be rendered in return by CUC or its representatives.” *Id.* The Attorney General breaks down the fees as follows: “\$1,000 registration, \$25,000 Pre-Qual submission, \$50,000 RFP submission.” AG Report at 11. The Attorney General further explains the fees:

CUC had consciously tried to address this issue by splitting the process, and the related calculated fee, into three manageable parts. The procurement does not require an offeror to wager everything before it receives a copy of the RFP – the first charge is only \$1000. Nor must it wager the heftiest amount if it fails to be found qualified to manage a power utility after merely assembling resumes and financial information – the second charge is only \$25,000. Only at the final stage, in which an offeror submits the equivalent of a carefully crafted business plan, would a party pay another \$50,000.

AG Report at 12.

As previously discussed herein in section V.A.2 and 3, the RFP calls for the payment of the \$50,000 to receive the RFP for the privatization/second stage, not at submission of a proposal as the Attorney General has stated.

OPA has not addressed whether the fees are a user’s fee or tax, although such issue may, at some point, need to be addressed and determined by the courts. OPA has, however, reviewed the fee schedule from the view of compliance with the CNMI-PR and the policies thereof. The CNMI-PR do not specifically allow or prohibit the charging of fees. OPA assumes that fees reasonably related and necessary to the procurement, for example reasonable copying or reproduction charges for an extensive RFP package containing blueprints or other bulky or large items, that is otherwise made available for review by the public, would be held viable. In the instant solicitation, however, as previously discussed herein, the fees as set forth in the RFP act to potentially restrict competition. The RFP stage 1 package, forty-two 8.5 x 11 pages, was not made available without paying the first fee of \$1,000 and the payment of the fee was required of all entities or persons intending to submit a proposal and be considered for pre-qualification. Further, as previously discussed, the timing of the fees is not appropriate and is counter to the CNMI-PR and full and open competition. As such, even if the fees are reasonable and necessary to the procurement, the

requirement that the \$50,000 be paid just to receive a copy of the RFP and that the previous \$26,000 be paid for pre-qualification for the RFP privatization/second stage before even being able to review the actual RFP cannot be said to meet a bona fide need of the government. Further, such a fee scheme cannot be construed to be in accordance with the requirement that the procurement process be a public one or to foster full and open competition.

B. Choice of Solicitation Method

The most common reason for using competitive proposals (negotiation) is typically the need to make award on the basis of non-price-related factors. There appears to be little controversy as to the discretion of agencies to use negotiation procedures in these circumstances. “Officials with expenditure authority shall provide for full and open competition through the use of the competitive procedure that is best suited to the circumstances of the contract action.” *See* § 70-30.3-201. Competitive sealed proposals are available for use in fulfilling the requirements of full and open competition. *See Id.* Competitive sealed proposals are addressed in § 70-30.3-210 with the conditions for use set forth in subsection (a), which provides that “[w]hen the official with expenditure authority determines in writing that the use of a competitive sealed bidding is either not practical or not advantageous to the government and receives the approval of the P&S Director, a contract may be entered into by competitive sealed proposals.”

As such, OPA does not agree with Telesource’s assertion that the privatization of the power plant, which appears to be what stage 2 will be, should be done by bid. However, the use of the RFP process in the split system manner utilized by CUC does not comply with the CNMI-PR for the reasons detailed herein.

C. Addressing Protest – Limited Delays

Telesource filed a written Protest with both the CUC Executive Director and the P&S Director. The P&S Director, by memorandum dated February 27, 2007, forwarded a copy of the Protest to the Office of the Attorney General with a Memorandum to Assistant Attorney General Alan Barak. The Memorandum stated:

Telesource has filed a protest against the propriety of this RFP through the Law Office of O’Connor Berman Dotts & Baner. We were not involved in the preparation of this RFP, nor did we approve its use or publication. A copy of the protest is attached for your disposition.

P&S Response, p. 2.

Therefore, as of February 27, 2007, P&S, CUC and the Attorney General knew of the Protest filed by Telesource. In addition, as of that date, the Attorney General was aware that the P&S Director did not intend to entertain the Protest. Unfortunately, although well before the closing date for submissions under the RFP, no action was taken on the Protest as set forth in the CNMI-

PR. Telesource's timely Protest brought to light issues that may have led to corrective action in the RFP process prior to the closing date for submissions. Action taken on the Protest may have eliminated the necessity for the filing of this Appeal and the delay that has resulted in entertaining the Appeal and the future delay that is now inevitable.

D. Proceeding Pending Appeal

On May 25, 2007, the CUC Executive Director informed OPA that "CUC awaits the decision of the Office of the Public Auditor on the protest." See CUC Status Update at 2. The CNMI-PR § 70-30.3-505(e) provides that "[w]hen an appeal has been filed before award, the P&S Director, will not make an award prior to resolution of the protest except as provided in this section." If the P&S Director makes a determination that "award is to be made during the pendency of an appeal, the P&S Director will notify the Public Auditor." See § 70-30.3-505(e).

E. Re-solicitation Considerations

As the Attorney General stated, "this is probably the largest procurement action that the CNMI will ever take." AG Supplement at 1. The Legislature found "that privatization of a utility service of the Commonwealth Utilities Corporation (CUC) is a monumental task that must be cautiously undertaken." PL 15-67, Section 1. The availability and cost of power is, at this time, critical to everyone in the Commonwealth. It is obvious, however, that the RFP is replete with issues, uncertainties and discrepancies. The RFP further contains clauses and procedures that are contrary to the CNMI-PR and, as published, appears to impair and be contrary to open competition. The solicitation as it stands is not functional. Although one of the three current participants may, in the long run, prevail as the provider under a procurement for privatization of a portion of CUC, the solicitation cannot proceed without remedying the defects. As such, the solicitation must be cancelled. In the event the endeavor is undertaken at a later date, the solicitation and the process must be revamped. Any future solicitation for this endeavor must be given even more careful thought and planning than this RFP. If a splitting of the solicitation occurs it should be done in a manner that does not limit competition or otherwise run contrary to the CNMI-PR or whatever regulations may be applicable to a future solicitation. In addition to taking into consideration the issues raised in this Appeal, perhaps greater emphasis should be taken in the planning stages related to the criteria, establishing the competitive range, ensuring full and open competition under the CNMI-PR, and establishing and judging evaluation criteria. OPA cannot fully comment on the privatization endeavor as what CUC referred to as stage 2 of the solicitation was never revealed to OPA, the public, or, to OPA's knowledge, to any of the offerors.

The RFP states that CUC "divided the RFP process into two stages in order to conserve CUC and proposers' resources [and] minimize costs" in addition to focusing "the privatization process on firms best qualified to submit a competitive proposal for the CUC's power business." RFP at 7. OPA is a proponent of economy and efficiency in government operations. As responsibility, however, is a pre-requisite to award, not a pre-requisite to submission, a determination of

responsibility is not needed for each offeror and is not meant to be made at the onset of a solicitation. The CNMI-PR promote economy and efficiency and help ensure that the government has the benefit of full and open competition. The competitive range determination for competitive sealed proposals, § 70-30.3-210(e)(2), provides that proposals that have no reasonable chance of being selected for contract award are no longer considered for selection. The CNMI-PR provide, however, that “[a]ll evaluation factors stated in the solicitation shall be considered in determining proposals in the competitive range.” § 70-30.3-210(e)(1). This process ensures fairness in the competition and the selection of a proposal that will best serve the interests of the government and, in this solicitation, perhaps the public at large.

F. Pre-qualification Under the Public Laws

Three laws have addressed various levels of qualification/pre-qualification regarding privatization at CUC.⁶³ Most recently PL 15-67 amended 4 CMC § 8122(c) to allow a business with certain experience/qualifications to not only “be permitted to submit a proposal upon the payment of the required fees” but provided for an automatic pre-qualification of such a business “as a responsible bidder or offeror for such request for proposal or bid.”

The Attorney General adamantly argues that the “amendatory act’s benefit is an illusion – any firm, in order to compete for the CUC power business must demonstrate its qualifications in the final review.” AG Supplement at 9. “Even if Telesource met the criteria ‘automatically pre-qualifying’ it, the firm would still have to prove its ability to provide the complete, integrated retail power utility service that the RFP requires.” *Id.* “As a practical matter, the Stage 2 evaluation grid must include the criteria addressed in the pre-qualification stage.” *Id.* The Attorney General goes on to state that “if allowed, would get the firm nowhere.” The Attorney General makes further argument specifically regarding Telesource’s qualifications and lack thereof under both PL 15-40

⁶³ PL 15-35 added a new subsection (c) to § 8122, which is where the discussion regarding qualifications began in subsection (2) which read: “(2) A private, business entity that is licensed in the Commonwealth and, for at least ten years, has been engaged in business that is closely related to the utility for which the request for proposal is being published pursuant to subsection (a), is hereby deemed qualified to submit a sealed proposal. This subsection shall not be construed to preclude entities who are not pre-qualified to submit a sealed proposal pursuant to this subsection.”

The PUC Amendments Act of 2006, PL 15-40, repealed and reenacted 4 CMC § 8122(c) in pertinent part as follows: “A business, that is licensed in the Commonwealth and has been engaged for at least ten years in a business that is closely related to the utility service for which the Commonwealth Utilities Corporation publishes a request for proposals, shall be permitted to submit a proposal upon the payment of the required fees. “

PL 15-67, most recently amended the portion of 4 CMC § 8122(c) related to qualification to read: “A business, that is licensed in the Commonwealth for at least ten years and has been engaged in the Commonwealth for at least eight years in a business that is closely related to the utility service for which the Commonwealth Utilities Corporation publishes a request for proposal or solicits bids, shall be permitted to submit a proposal upon the payment of the required fees and automatically pre-qualified as a responsible bidder or offeror for such request for proposal or bid.”

and 15-67.⁶⁴ The Attorney General’s argument in this area appears to be a pre-determination of a finding of non-responsibility, which is not appropriate at this stage in the solicitation.

It is not necessary for OPA to make a determination at this time whether or not PL 15-40 or 15-67 would automatically qualify entities, specifically Telesource, to submit proposals and be deemed automatically pre-qualified as a responsible offeror. As OPA has addressed herein, the CNMI-PR require that responsibility be affirmatively determined prior to contract award, pursuant to § 70-30.3-245. OPA is, therefore, concerned that this newest amendment to the law, in addition to perhaps allowing an entity to skip any pre-qualification stage that occurs and avoid certain fees, states that the business shall be “automatically pre-qualified as a responsible bidder or offeror for such request for proposal or bid” without taking into account the many factors set forth in the CNMI-PR.

G. Public Trust

The CNMI-PR provide that public employment is a public trust and “[i]n governmental contracting, public employees shall discharge their duties impartially so as to:

- (a) Insure fair competitive access to governmental procurement by reasonable contractors; and
- (b) Conduct themselves in a manner as to foster public confidence in the integrity of the government procurement process.

§ 70-30.3-705.

⁶⁴ Regarding PL 15-67, the Attorney General’s comments include, but are not limited to:

“Put a bit differently, Telesource is as ‘closely related’ to the business to be sold through the RFP as is a janitorial company, or an accounting firm, or a company that digs ditches for laying cables. CUC does all of those things, but doing only one of them fails to capture the ‘close relationship’ that the RFP envisions. AG” Supplement at 6 (footnote omitted). The footnote text goes on to address “that the Legislature may have been addressing: If CUC had once again put out for competitive proposal for the supply of power from one power plant, as it had done twice in recent years, Telesource would have met the criterion.”

Regarding PL 15-40, the Attorney General’s comments include, but are not limited to:

“But, even assuming for the sake of argument that the Act gave a pass on the fee to a qualified firm, Telesource failed to qualify for this treatment . . .” AG Report at 9. “The RFP seeks a company to be a power utility – generation, transmission, operations, maintenance, customer service, billing and collections. Telesource is not, and has never been a retail utility company. It is construction firm with experience running only a small power plant. This is not ‘closely related’.” *Id.* at 9-10.

It does not appear that all the public employees involved in this procurement have acted in a manner as to foster public confidence in the integrity of the procurement system as set forth in this policy. For example, if CUC had properly entertained the Protest, given adequate notice to all interested parties, accepted comments and issued a decision on the issues raised in the Protest, public confidence in the process would have been fostered by those actions. Unfortunately, although confusion may have existed as to the extent of the duties delegated under the EO, the potential controversy was brought to light on February 27th by the memorandum the Director of P&S used to forward the Protest to the Office of the Attorney General. Persons with knowledge of the duties and obligations under the CNMI-PR could have worked to sort out the matter and the Protest could have been properly and timely entertained.⁶⁵ Other examples of the conduct OPA fears worked contrary to both insuring fair competitive access and fostering public confidence can be gleaned from the facts set forth elsewhere in this decision. OPA would hope that this policy of public trust will be in the forefront of the minds of all of those that continue the government's efforts in this area.

VII. SUMMARY OF FINDINGS

Based on the foregoing, OPA finds:

1. Telesource filed a timely written Protest with the P&S Director and the CUC Executive Director under the CNMI-PR;
2. At the time Telesource filed its Protest, the solicitation was outstanding and Telesource was a prospective offeror under the CNMI-PR;
3. Both the CUC Executive Director and the P&S Director failed to act on the Protest within the time provided for in § 70-30.3-501(a)(3);
4. Telesource filed a timely written Appeal with OPA pursuant to § 70-30.3-505;
5. OPA has jurisdiction over the Appeal;
6. The CNMI-PR are applicable to the Appeal;
7. The RFP was not maintained as a public record and is not available for inspection as required under §70-30.3-050 of the CNMI-PR;
8. The RFP, specifically the portions of the solicitation requiring a person to pay fees totally \$76,000, submit financial and other information, and be selected by CUC as pre-qualified

⁶⁵ The Attorney General claims that “[t]here was some confusion over who was to respond to the Telesource Protest.” See AG Report at 2. As of February 27th however, just days after the date of the Protest, it was made clear to the Office of the Attorney General that the P&S Director was not planning to entertain the Protest as he claimed P&S was not involved in the preparation of the RFP nor did it approve its use or publication. See P&S Initial Response; see also Footnote 8 herein.

prior to being able to obtain a copy or review the actual request for proposal for the privatization/franchise, does not support the stated purposes and policies of the CNMI-PR § 70-30.3-001(b)(3), (4), (6) and (7);

9. The RFP, specifically the portions of the solicitation requiring a person to pay fees totaling \$76,000, submit financial and other information, and be selected by CUC as pre-qualified prior to being able to obtain a copy or review the actual request for proposal for the privatization/franchise, may have acted to diminish the level of competition, contrary to the CNMI-PR's requirement of full and open competition set forth in § 70-30.3-201;
10. The closed nature of the solicitation, including requiring pre-qualification and payment of substantial fees for a future unpublished solicitation, the terms of which are basically undisclosed, may have potentially limited the competition, contrary to the purpose of the CNMI-PR to foster effective broad-based competition within the free enterprise system and to the requirement of full and open competition as set forth in § 70-30.3-201 of the CNMI-PR;
11. Executive Order 2006-04, reorganized CUC and amended 4 CMC § 8152(a) to, among other things, order CUC to comply with the CNMI-PR and grant CUC decentralized procurement status as provided in § 70-30.3-130;
12. The pre-qualification process set forth in the RFP was not to the satisfaction of the P&S Director as set forth in § 70-30.3-130(b);
13. The pre-qualification process set forth in the RFP, including the rejection of a pre-qualification proposal for any reason by CUC, absent a determination of non-responsibility is contrary to the CNMI-PR;
14. CUC's use of the pre-qualification to focus on firms best qualified to submit a competitive proposal appears to be contrary to open competition and is outside both the CNMI-PR's responsibility and pre-qualification provisions;
15. The evaluation method set forth in the RFP included comparison, ranking, and cutoffs that are not appropriate to pre-qualification;
16. The evaluation methods set forth in the RFP are contrary to full and open competition and act to limit the extent of competition;
17. Ambiguities and uncertainties appear in the pre-qualification criteria and their weighting;
18. The pre-qualification criteria go beyond the issues typically covered in determining responsibility/qualification. Appropriateness of the criteria cannot be determined as the final terms, conditions, standards, and criteria of the actual privatization have not been disclosed;

19. The fee schedule imposed does not appear in accordance with either the requirement in the CNMI-PR that the procurement process be a public one or the policy regarding full and open competition;
20. Telesource's assertion that the privatization should be done by bid or ITB rather than RFP is not supported by the CNMI-PR;
21. The splitting of the RFP into two phases in the manner set forth in the RFP does not comply with the CNMI-PR;
22. The P&S Director informed the Attorney General, through his Assistant Attorney General, that the Protest had been filed and that the Director was not going to take action on the Protest;
23. No action was taken on the Protest by the CUC Executive Director, the Attorney General or the P&S Director;
24. The Protest could have been timely addressed by CUC and corrective action may have limited delays in this process;
25. The inconsistencies and non-compliance issue are too extensive to order that the solicitation be revised to comply with the CNMI-PR;
26. Public Law 15-67 appears not only to allow for potential skipping of a pre-qualification stage and/or payment of certain fees, but provides for potential automatic pre-qualification of a business as a responsible offeror. PL 15-67, however, does not address the considerations or factors set forth in the CNMI-PR regarding responsibility; and,
27. The CNMI-PR provide that public employees shall discharge their responsibilities in government to "[i]nsure fair competitive access to governmental procurement" and "to foster public confidence in the integrity of the government procurement." Actions in this solicitation and protest/appeal process indicate that this policy may not have been fully implemented.

VIII. CONCLUSION

Based on the foregoing, OPA finds that the solicitation is not in compliance with the CNMI-PR. As such, the RFP, CUC RFP 07-001 PART 1: INVITATION TO APPLY FOR PRE-QUALIFICATION, AND PRE-QUALIFICATION REQUIREMENTS FOR PROPOSALS, FOR THE PRIVATIZATION OF THE CNMI'S POWER BUSINESS is hereby cancelled pursuant to CNMI-PR § 70-30.3-510(a)(1).

Telesource's Appeal is, therefore, granted in part.

So ordered.

The CNMI-PR § 70-30.3-505(i) provides that Telesource, CNMI, Inc., any interested party that submitted comments during consideration of the protest, the Director, or any agency involved in the Protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than ten (10) days after the date of this decision.



Michael S. Sablan, CPA
Public Auditor

July 20, 2007