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Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
ISLAND BUSINESS SYSTEMS & SUPPLIES

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APPEAL NO. BP- A057

REQUEST FOR RECONSIDERATION OF DECISION ON APPEAL OF NMC RFP 08-007

I. SUMMARY

This is a decision on a request for reconsideration filed by Island Business Systems & Supplies (IBSS) from the Office of the Public Auditor's denial of its appeal of its protest on NMC RFP 08 - 007 for copiers.

OPA has jurisdiction over this request for reconsideration. NMC PPR, 14 - A, Part II (9)(b), NMIAC 70-30.3-505(i)(2).

OPA affirms its earlier decision that IBSS did not timely file its protest.

II. PROCEDURAL AND FACTUAL BACKGROUND

OPA issued its decision on IBSS' appeal of Northern Marianas College (NMC or the College) response to its protest of NMC RFP 08-007 on February 10, 2009.

IBSS requested reconsideration of that decision the next day, on February 11, 2009.

NMC responded to IBSS' request for reconsideration on February 17, 2009.

III. RELEVANT REGULATIONS

NMC has its own Procurement Policy and Regulation (sic) (NMC PPR) that the College has been using at all times relevant to this protest and appeal. Though the NMC PPR were approved by its Board of Regents on January 26, 2000, they were neither properly promulgated

nor adopted through publication in the Commonwealth Register in accordance with the Administrative Procedures Act, 1 CMC §§ 9102 -9105.

In addition, the Office of the Attorney General issued a legal opinion wherein it determined that all autonomous agencies are required to use the CNMI's (through its Procurement and Supply Division within the Department of Finance) Procurement Regulations (P & S PR) or at the very least, issue their own regulations that do not conflict with the P & S PR.¹

OPA understands that the College has drafted new procurement regulations that are under review in the Office of the Attorney General that will presumably be properly promulgated and adopted and not conflict with the P & S PR.

The difference between the College's regulations and those of P & S are immaterial here as the same result is reached under both sets of regulations.

IV. JURISDICTION

According to the NMC PPR that the College has been using at all times relevant to this protest and appeal, OPA has jurisdiction over this request for reconsideration. NMC PPR, 14 - A, Part II (9).

Similarly, using the CNMI's Procurement Regulations, OPA has jurisdiction over this request for reconsideration as provided in Section 505(i) of the Procurement Regulations. NMIAC 70-30.3-505(i).

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. NMC PPR, 14 - A, Part II (9)(a), NMIAC 70-30.3-505(i)(1).

The request for reconsideration needs to be filed within ten days after the basis for reconsideration is known or should have been known. NMC PPR, 14 - A, Part II (9)(b), NMIAC 70-30.3-505(i)(2). IBSS' request for reconsideration was timely.

¹ On October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-13 regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Opinion 03-13 concluded, among other things, that "both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid." Opinion 03-13 at 8.

V. ISSUE

Has IBSS raised any errors in law or fact to cause OPA to reverse its decision on appeal?

VI. ANALYSIS

IBSS has not raised any new issue on appeal. IBSS argues that if “every rejected bidder was given the right, indeed the cause, to protest simply because their bid was not accepted, then the review process would overtake the procurement process.” Request for Reconsideration at pp 1-2. But if OPA were to accept IBSS’ rationale, every rejected proposer could merely bide its time until it found some basis upon which to protest an award, which would wreak havoc on the procurement process and the need for finality, issuance of a valid contract, and the products or services that are the subject of the contract.

IBSS was notified by letter dated March 4, 2008 that another company was selected to provide the copiers. IBSS does not allege delay in receipt of that letter. Instead, in its April 30, 2008 protest, IBSS argues that its employee “[a]fter puzzling over [the letter dated March 4, 2008, wherein NMC notified IBSS that it did not receive the contract award because “another company offered a lower fee when compared with your offer”]”, the IBSS employee wrote NMC a letter on March 28, 2008 requesting all documents related to the solicitation, to which the College responded on April 21, 2008.

IBSS misguidedly relies upon two cases. In *Guam Imaging Consultants [GIC] v. GMHA*, 2004 WL 181038, GIC was told on March 21, 2003 one of the other offerors was determined to be the most qualified. On April 26, 2003, GIC protested the methods used to determine which offeror was most qualified, but it later abandoned this protest. Then, in a May 14, 2003 memo, GMHA explained that the other offeror was given an “interim sole source contract” that was to be “exclusive.” Two days later, GIC filed its second protest. The court found this protest to be timely because GIC “first learned about this sole source contract when it received a copy of the May 14, 2003 letter.” Opinion at paragraph 33. In the instant case, IBSS was told that another proposer was selected because it provided a lower price. IBSS could have immediately requested information on the price offered by the competitor. Instead, it “puzzled” over the letter for 16 days, and then requested the information.

The other case relied on by IBSS, the Guam Public Auditor’s decision in *Town House Department Stores dba Island Business Systems and Supplies*, OPA - PA - 08 - 011² is distinguishable from the instant case in a myriad of ways. In that case, the Guam Public School System (GPSS) never did a valid procurement but entered into a sole source contract with Xerox, which it periodically extended, between 2000 and 2009. When IBSS attempted to obtain information from GPSS, it was told that GPSS intended to do an RFP in 2005 or 2006. But GPSS never issued its RFP.

² The decision is available on the Guam Public Auditor’s website, guamopa.org.

Rather, it amended its contract with Xerox to extend it several more years. The Public Auditor in Guam found that GPSS was providing misleading information on its intent to issue an RFP. Decision at page 10. So in the Guam case, there was never a valid procurement, the same contract was used for nine years (with at least 17 amendments), and the GPSS provided IBSS with misleading information. The determination of the appropriate time to protest in that case is much more complex since there was never a valid procurement and IBSS was provided misleading information on when the RFP would be issued. In the instant case, IBSS responded to a properly promulgated RFP and was provided written notice that its proposal was rejected because another company offered a lower price.

Rivera v. Guerrero, 4 N.M.I. 79 (1993), is controlling. On December 24, 1992, Mr. Rivera was provided written notice that his proposal to serve as contractor for a Saipan harbor project was rejected for failing to meet the requirements of the RFP. In that same letter, the Commonwealth Ports Authority (CPA) informed him that it would be negotiating with four other companies. On January 27, Mr. Rivera protested CPA's actions and demanded that he be included in the negotiations. CPA rejected the protest as untimely. The NMI Supreme Court agreed, concluding that the time limit for filing an intra-agency appeal is "mandatory and jurisdictional." 4 N.M.I. at 82.

VII. CONCLUSION

Based on the foregoing, OPA affirms its earlier decision that IBSS did not timely file its protest.

Dated this 11th day of March 2009.



Michael Pai
Public Auditor