

allocated among Saipan, Tinian, and Rota to 60 classrooms on Saipan only. Other significant modifications included a change in the allocation of the 60 classrooms among the different public schools on Saipan, including the designation of 18 classrooms — 30% of the 60 Saipan classrooms — to a new school site in Dandan which had not been previously identified in the original scope of work. This allocation was further amended by the April 15, 1997 addendum in which the 18 classrooms previously assigned to Dandan were reduced to 16 classrooms, and 2 additional classrooms were given to San Vicente School.

Additionally, revisions and additions were made to the technical specifications on the civil, architectural, structural, mechanical, and electrical requirements for the 60 classrooms, such as the requirement that all classrooms were to be constructed on-grade (the original RFP stated that some classrooms were to be constructed on the second floor), and the air-conditioners would have to be split type units with provisions for fresh air made up as required by the Uniform Mechanical Code, among other changes to the original technical specifications.

Evaluation of the Proposals

As stated in the revised RFP, the proposals were to be evaluated based on the same criteria specified in the original RFP, which were: (1) time frame for design and construction, (2) price, (3) innovative design concepts, (4) warranty of products supplied, and (5) financial and manpower capabilities of the contractor.

Of the 12 original proposers, 5 companies submitted proposals on the revised RFP for the design-build of the 60 classrooms for various public schools on Saipan. The Evaluation Committee, composed of three employees from DPW and PSS, made its evaluation of the five proposals based on the six criteria stated in the RFP. The members of the Evaluation Committee reviewed and scored the proposals using a numeric scoring system in which maximum points for each criteria were as follows:

<u>Criteria</u>	<u>Maximum Points</u>
Time frame for design and construction	20
Price	20
Innovative design concepts	20
Warranty	20
Financial capability	10
Manpower	<u>10</u>
Total	<u>100</u>

Based on the above rating system, a proposer could receive a maximum total score of 300 points if each evaluator gave the maximum 100 points. On April 29, 1997, the Evaluation Committee compiled the individual score sheets in a proposal evaluation summary that was signed by the Committee’s Team Captain and concurred in by the DPW Secretary. The evaluation summary

showed the following top three proposers, in order of ranking: (1) Demapan Engineering and Construction Co. (Demapan) - 225 points, (2) MPI - 213 points, and (3) Western Equipment, Inc. (WEI) - 180 points. The other two proposers, GTS/Royal Building Systems (Guam), Inc. and North Pacific Builders, Inc., were considered non-responsive and received zero points.

The score sheets for Demapan and MPI showed that each evaluator had consistently given the same points for each of the evaluation criteria stated in the RFP, as follows:

Criteria	Demapan				MPI				WEI			
	E1	E2	E3	Ttl	E1	E2	E3	Ttl	E1	E2	E3	Ttl
Time Frame	17	17	17	51	14	14	14	42	11	11	11	33
Price	11	11	11	33	8	8	8	24	0	0	0	0
Innovative Design	19	19	19	57	19	19	19	57	19	19	19	57
Warranty	20	20	20	60	20	20	20	60	20	20	20	60
Financial Capability	0	0	0	0	0	0	0	0	0	0	0	0
Manpower	8	8	8	24	10	10	10	30	10	10	10	30
Total	75	75	75	225	71	71	71	213	60	60	60	180

E1 DPW Technical Services Division Director (Team Captain)
 E2 DPW Building Safety Official
 E3 PSS Facilities Specialist

As shown on the above table, Demapan, MPI, and WEI were given equal ratings on innovative design and warranty, but there were no points given on financial capability because as stated in the evaluation procedures, a proposal that fails to provide financial data must be awarded a zero rating. On the manpower criteria, WEI and MPI received higher points than Demapan because their construction supervision experience was deemed better than Demapan's. However, MPI and WEI received lower points than Demapan on time frame and price because their proposed number of days to complete the project and their price per square foot exceeded that of Demapan's.

On April 29, 1997, the DPW Secretary concurred with the result of the evaluation which recommended that the award be made to Demapan. The award to Demapan was concurred in by the P&S Director on the same day. By letter dated April 29, 1997, the DPW Secretary issued the notice to award the project to Demapan. The processing of Demapan's contract was completed on June 4, 1997.

The Second Protest by MPI and Subsequent Appeal to OPA

After receiving its notice on the rejection of its proposal on May 3, 1997, MPI filed a formal protest with the P&S Director by letter dated May 13, 1997. The protest was formally received by P&S on May 15, 1997. On the same day, the P&S Director initially considered the protest as untimely filed. However, after some clarification from MPI on May 16, 1997, the P&S Director reversed his previous decision and considered the protest as timely filed on May 20, 1997. On May 28, 1997, the Director of P&S certified the need to proceed with the award of the project during the pendency of MPI's protest due to the urgency of the school classrooms project. Also, due to the complexity of the matter, the P&S Director reset the date for rendering a decision on the protest from June 18, 1997 to June 23, 1997. The P&S Director, in his decision dated June 23, 1997, denied MPI's protest in its entirety.

MPI then filed an appeal with OPA by letter dated July 4, 1997 which was officially received by OPA on July 7, 1997. As required in the CNMI-PR, the following actions were taken -- Within one day after receiving the appeal on July 7, 1997, our office informed P&S both orally and in writing about the appeal filed by MPI, and requested that a written report on the appeal be submitted to us as soon as possible. On July 23, 1997, the P&S Director provided OPA his written report on MPI's appeal in which copies of the transmittal letter was also provided to the affected parties. To date, we have not received any comments on the P&S Director's report from the affected parties. Although no comments were received on the P&S Director's report, we have gathered sufficient information to enable us to render a decision on this appeal.

ANALYSIS

The denial by the P&S Director of MPI's second protest is the issue of this appeal. We now discuss the arguments of MPI and P&S as they were presented in the protest and appeal process, as well as OPA's comments on the merits of those arguments.

MPI's Arguments in its Second Protest to the P&S Director

In its second protest to the P&S Director, MPI presented four grounds for the protest, namely:

1. MPI claimed that it was not afforded fair and equal treatment with respect to any opportunity for discussion and revision in accordance with CNMI-PR Section 3-106(6). According to MPI, Demapan was privy to other proposers' prices and schedules; therefore, Demapan was accorded an advantage over the other proposers. MPI also asserted that Demapan should not have been allowed to re-submit a revised proposal on the April 15, 1997 revised scope of work. MPI added that the decision on MPI's first appeal indicated that OPA suggested proposal re-submissions by proposers other than Demapan.

2. MPI claimed that the intent and tenor of the CNMI-PR as provided in Section 1-101(2) (c), (d), (e), (f) , and (g) had been violated. According to MPI, despite the on-going proceedings of the first appeal, there were continued negotiations with Demapan, and that there was no single incident during the appeal proceedings where P&S and DPW indicated their willingness to assist in a fair investigation.
3. MPI claimed that it was disadvantaged by the disclosure of its price in violation of CNMI-PR Section 3-301(3).
4. MPI claimed that Demapan does not possess a satisfactory record of integrity and business ethics as provided for in CNMI-PR Section 3-301(1)(d) because the corresponding reduction in Demapan's price (as a result of the exclusion of the Tinian and Rota classrooms from the scope of work) was unrealistic. MPI claimed that an award to Demapan by DPW officials would then be in contradiction of CNMI-PR Section 6-201(1) and (2).

P&S Director's Decision on MPI's Protest

By letter dated June 23, 1997, the P&S Director denied the protest of MPI in its entirety. In his decision, the P&S Director responded to the arguments presented in MPI's protest as follows:

Whether DPW Erred by Allowing Demapan to Submit a Best and Final Offer in Response to Addendum No. 1

The P&S Director stated that OPA did not order that Demapan be excluded from the recompetition. He added that excluding Demapan from the recompetition after releasing information regarding its price would have been unfair to Demapan and would have been equivalent to barring Demapan from the competition. In addition, the protest decision stated that OPA's appeal decision on April 4, 1997 was clear in that *all* proposers on the original RFP should be given the opportunity to revise their proposals.

Whether DPW Erred by Soliciting Best and Final Offers from All 12 Proposers Rather Than Just from the Three Short Listed Proposers

The P&S Director stated that there was no way in which the decision to include all 12 proposers from the competition impacted MPI. The P&S Director explained that both MPI and the successful proposer were in the original competitive range, and MPI was not prevented from receiving the award by the fact that the other 9 proposers were offered the opportunity to submit best and final offers.

Additionally, the P&S Director pointed out that federal contracting officers have broad discretion in determining whether to place a proposal within the competitive range, and their

decisions in that regard will not be disturbed by the United States General Accounting Office (GAO).

Whether MPI was Unfairly Disadvantaged by the Disclosure of its Price

The protest decision asserted that the prices of all top three proposers under the original RFP had been disclosed, and therefore each was equally advantaged or disadvantaged by the disclosure. The P&S Director concluded that the disclosure impacted all proposers equally and gave no one greater advantage. The P&S Director added that once price information was disclosed, there was no remedy that would have cured the damage except for canceling the RFP; however, canceling the RFP was not an option in view of the urgent need for the classrooms. As an example, the P&S Director stated that GAO has upheld disclosure of all competitors' price information in order to remedy an improper disclosure of one competitor's price.

With regard to MPI's allegation that the disclosure of its price violated CNMI-PR Section 3-301(3), the P&S Director clarified that the information referred to in that section is the information which is obtained in the process of making a decision on *contractor responsibility*, while price is a part of the original proposal and is not considered in a responsibility investigation. The P&S Director added that no contractor was found to be non-responsible in this procurement, nor was price considered to be information relating to integrity or ethics under CNMI-PR Section 3-301(1)(d). Accordingly, the protest decision stated that the publication of MPI's price did not violate CNMI-PR Section 3-301.

Whether Demapan Should be Ineligible for Award Because of (1) Errors in the Original Evaluation, or (2) Its "Non-Conforming" Original Proposal

Regarding Demapan's alleged non-conforming proposal, the protest decision stated that it was not clear whether Demapan's original proposal was non-conforming. Nevertheless, the P&S Director clarified that under procedures for competitive sealed proposals, responsiveness of proposals is determined as of the time of award, not at the initial proposal stage. With regard to MPI's rehashing of other complaints from the original RFP, the P&S Director commented that MPI already had been given the opportunity in its first protest to seek redress for any errors committed in the original RFP.

The P&S Director agreed that the first procurement had been seriously flawed, and that an award could not properly have been made under it. The P&S Director also agreed with the substance of OPA's decision that the appropriate remedy was to disseminate to all competitors the information which had previously been provided to only one competitor, and allow best and final proposals to be prepared and submitted on an equal basis. The protest decision stated that the remedy ordered by OPA was authorized and appropriate under CNMI-PR Section 5-103(1).

MPI's Arguments in its Appeal to the Public Auditor

In its appeal, MPI specifically requested that the award of DPW96-RFP-015 to Demapan be canceled and that the award be made to MPI. MPI also requested that OPA advise the P&S Director to furnish MPI a copy of the complete report, and documents and information relating to the bid being protested. MPI presented six grounds in its appeal to the Public Auditor. Although the discussion in the appeal was not grouped strictly in accordance with the six protest grounds, the details of the appeal arguments are presented as they relate to each of the six protest grounds, as follows:

Ground No. 1

MPI questions the credibility, ability, and reliability of the P&S Director because he was allowed to decide on MPI's second protest although (1) the P&S Director was not able to timely act on MPI's first protest, (2) the P&S Director's credibility and ability were criticized in OPA's appeal decision on MPI's first appeal, (3) the P&S Director has a history of wrongful awards, and (4) the P&S Director failed to ensure that procurements were made in accordance with the CNMI-PR.

Ground No. 2

MPI titles this section as "Chief's history of wrongful awards." There were no other details provided in the appeal.

Ground No. 3

MPI appears to be arguing about the denial of its request to the P&S Director for certain information on this RFP. MPI alleges that it was discriminated against by the P&S Director when addressing CNMI-PR Section 5-101(1)(d), and was treated differently from other protesters in similar circumstances (Judicial Complex procurement). The appellant explains that the P&S Director has never offered an explanation on why it would release documents to other protestors and deny MPI. MPI requests in its appeal that the P&S Director provide it a copy of the entire Demapan file in this RFP in accordance with CNMI-PR Section 5-102(4)(c), and sought the assistance of OPA to compel P&S to release such documents.

Ground No. 4

MPI claims that the DPW Secretary was biased against MPI and alleges that press statements made by the DPW Secretary, such as "Guerrero insisted PSS has already moved to junk MPI's move", "Demapan Engineering was the firm that topped again the list of best and final offers", and "Not to be left out, MPI filed a protest and Demapan won again", were unbecoming of his position. MPI further claims that it was obvious that the DPW Secretary treated MPI as a nuisance in his original intent to award the contract to Demapan.

Ground No. 5

MPI argues that neither the P&S Director nor the DPW Secretary conducted themselves in keeping with the intent and tenor of CNMI-PR Sections 1-101(2)(a) to (g) inclusive, 1-103, 1-104, 1-105, and 1-107. No other details were provided that specifically discussed the appellant's arguments on this ground. However, this appeal included arguments previously presented in MPI's protest under the same ground stated above, as follows: (1) wrongful discussions conducted with Demapan pertaining to the original RFP, and opportunity for revision of original proposal that was accorded only to Demapan after the revisions were made in the original RFP, and (2) issuance of the amendment to the RFP immediately after the release of OPA's April 4, 1997 decision, which is allegedly contrary to the regulations because due process was interrupted and interested parties were not given the chance to respond to the decision.

Ground No. 6

MPI claims that the P&S Director's comments on integrity and business ethics referred to the generality of the bid process, and that MPI's point was that DPW allowed Demapan to propose a lucrative price during the first RFP and then substantially reduce its price when the amendment was issued. MPI further alleges lack of ethics in this matter, and asserts that this action would have been a sufficient reason to reject Demapan's proposal.

The P&S Director's Report to the Public Auditor

The P&S Director did not provide additional comments pertaining to the appeal filed by MPI. In his agency report to the Public Auditor dated July 23, 1997, the P&S Director stated that his June 23, 1997 decision on the protest of MPI constitutes his statement as required by the CNMI-PR.

OPA's Comments

CNMI-PR Section 5-102(1) provides, in pertinent part, that a written appeal to the Public Auditor from a decision by the Chief (now Director) may be taken, provided that the party taking the appeal *has first submitted a written protest to the Chief* and the Chief has *denied the protest* or has failed to act on the protest [Emphasis added]. OPA has jurisdiction to hear this appeal as the appellant has complied with the requirements of CNMI-PR Section 5-102(1) and has filed the appeal within ten working days as required in CNMI-PR Section 5-102(3).

As earlier discussed in this appeal decision, MPI cites six grounds for its appeal: (1) the credibility, ability, and reliability of the P&S Director to correctly interpret the CNMI-PR, (2) the P&S Director's history of wrongful awards, (3) the P&S Director's previous discrimination against MPI when addressing CNMI-PR Section 5-101(1)(d), and different treatment in similar circumstances to other protestors, (4) the influence of the Secretary of Public Works by way of

biased press statements, his disregard of CNMI-PR Section 6-201(1)(2), and his attitude by continuing to proceed with an award despite the appeal process, (5) the conduct of the P&S Director and the Secretary of Public Works was not in keeping with the intent and tenor of CNMI-PR Sections 1-101(2)(a) to (g) inclusive, 1-103, 1-104, 1-105, and 1-107, and (6) the disregard of ethical standards in accepting the “blatant reversal” in Demapan’s amended bid as opposed to Demapan’s position on February 22, 1997. Following is our discussion of the merits of each of the above six appeal grounds (we supplied the titles below based on the grounds stated above):

1. Credibility, Ability, and Reliability of the P&S Director. MPI questions the credibility, ability, and reliability of the P&S Director citing the situation in which the P&S Director ruled on MPI’s second protest although (a) he had not timely acted on MPI’s first protest, (b) his credibility and ability were criticized in OPA’s earlier appeal decision, (c) he had a history of wrongful awards, and (d) he failed to ensure that procurements were made in accordance with the CNMI -PR. We find this argument without merit as it merely expresses an opinion critical of the manner in which the appellant’s protest was handled but does not demonstrate any impairment of the P&S Director’s ability to fairly decide the appellant’s protest on the four points stated above.

The alleged improper action on this issue is unpersuasive - we do not see how appellant’s points (a) through (d) could directly affect the fairness of the P&S Director’s decision on MPI’s protest. The appeal has not clearly established the occurrence of an improper action. Although we clearly understand points (a) and (b), points (c) and (d) are broadly stated without additional details. Although points (c) and (d) may have been indirectly discussed in other sections of the appeal, we cannot rule on an issue which is not clearly stated by an appellant. As to the merit of points (a) and (b), we can find no reason to agree with the appellant. We believe that points (a) and (b) were independent of the protest decision, and any improper action with respect to those points would not necessarily amount to an improper action in the protest decision.

The lack of independent corroborating evidence on this issue renders unpersuasive the appellant’s claim regarding the credibility and reliability of the P&S Director’s decision on the protest. Indeed, we found no support in the procurement records for this RFP that would show bias or unfairness regarding the P&S Director’s decision on MPI’s protest. We believe that the P&S Director ruled objectively on the merits of MPI’s protest based on the requirements of the CNMI-PR. Nor did we find any evidence in the records that the four points raised above had any influence on the P&S Director’s protest decision.

Additionally, there is no specific provision in the CNMI-PR that disqualifies the P&S Director from handling subsequent protests on those points raised in the appeal. In our view, the arguments presented on this issue do not amount to a convincing showing that

there was a violation of the CNMI-PR that would warrant the remedy requested by the appellant - the cancellation of the award made to the successful proposer.

2. History of Wrongful Awards. MPI does not provide any details in its appeal that specifically discuss this ground, except for stating that the P&S Director's history of wrongful awards should have made the P&S Director ineligible to rule a second time on its protest. We can not rule on this issue because it was broadly stated without additional details. Nevertheless, if the appellant meant to point out the wrongful award on other solicitations, such as the Judicial Complex Specialty Electrical System, we believe that these solicitations were independent of each other, and any improper action as to those other solicitations would not necessarily amount to an improper action on this RFP. Additionally, the issue on the eligibility of the P&S Director to rule a second time on the protest has been answered by our comments on ground 1.
3. P&S Director's Discrimination Against MPI. MPI alleges that it was discriminated against by the P&S Director when addressing CNMI-PR Section 5-101(1)(d) in that the P&S Director never offered an explanation on why it would release documents to other protestors and deny MPI. In its appeal, MPI is asking the P&S Director to provide it with the documents requested in accordance with CNMI-PR Section 5-102(4)(c), and also seeks the assistance of OPA to compel P&S to provide such documents.

We acknowledge the fact that the P&S Director provided access to procurement information to a proposer of the Judicial Complex Specialty Electrical System even though a contract had not yet been entered into. In MPI's case, MPI was not able to access the procurement file on this RFP even after the contract with the winning proposer had already been executed. Although this situation may indicate a difference in the way this RFP was handled compared to other solicitations, we do not believe that such a difference warrants a grant of the relief requested by MPI in this appeal. The alleged improper action pertains to a previous matter which does not have a bearing on the propriety of the award made to the winning proposer, nor to the manner in which the proposers competed based on the revised RFP. Besides, we can find no evidence to show that the P&S Director willfully discriminated against MPI in this case, or acted in bad faith to disadvantage MPI.

On the appellant's request for OPA assistance for the release of the requested documents, we have repeatedly asked P&S to supply MPI with the information requested in this appeal; however, we understand that P&S has not to date provided such information to MPI. We believe that the data requested by MPI are considered public records since the bidding phase has already been completed. CNMI-PR Section 1-301 states that procurement information shall be a matter of public record and shall be available for public inspection, and that procurement information may be kept confidential *when necessary to insure proper bidding procedures* [Emphasis added]. Specifically, in this case where the contract has already been executed, the P&S Director

should provide MPI access to or copies of those documents pertaining to this RFP, except as provided in CNMI-PR Section 3-301(3) where information furnished by a bidder or offeror pursuant to the determination of responsibility may not be disclosed outside of the office of the Director, or any other government official involved without the prior consent by the bidder or offeror.

4. Influence by the Secretary of the Public Works. MPI alleges that press statements made by the Secretary of Public Works, such as "Guerrero insisted PSS has already moved to junk MPI's move" and other similar comments to the press, were unbecoming of his position. Our review of the newspaper article showed that it was P&S, not PSS, which was referred to as having junked MPI's move. Similar to our comment on ground 1, the appellant's argument on this issue merely expresses an opinion critical of the allegedly biased statements by the DPW Secretary, but does not demonstrate an actual impairment on the DPW Secretary's ability to fairly act in his capacity as contracting officer and expenditure authority on this procurement. The alleged improper action is merely speculative as we have not seen any concrete evidence that the DPW Secretary made such press statements intending to damage or prejudice MPI in the bid competition. The appeal has not presented any proof of harm to MPI caused by the Secretary's press statements.

The arguments presented by the appellant on this issue do not amount to a showing that the DPW Secretary in fact influenced, by way of statements to the press, the result of the bid competition to the disadvantage of MPI. Even our review of the May 21, 1997 issue of the local newspaper cited by the appellant as the source of the allegedly biased statements showed no clear evidence of improper action. Taken in the context of the news item, we believe that the word "junk", as allegedly used by the DPW Secretary, refers to the denial of MPI's protest by the P&S Director on the basis of untimely filing. The denial of MPI's protest was factual and we do not see an intention to prejudice the merits of MPI's substantive arguments.

5. Conduct of the P&S Director and DPW Secretary. MPI claims that neither the P&S Director nor the DPW Secretary conducted themselves in accordance with CNMI-PR Sections 1-101(2), 1-103, 1-104, 1-105, and 1-107. CNMI-PR Section 1-101(2) refers to the purposes and policies of the CNMI-PR, Section 1-103 refers to supplementary principles of law, and Section 1-105 refers to the applicability of the CNMI-PR. These sections consist of general provisions under the CNMI-PR and we do see any clear and specific violations of these sections based on the arguments presented in this appeal.

CNMI-PR Section 1-104 requires that all parties, including government employees, involved in the procurement process should conduct themselves in good faith. Our review of the appeal arguments and the records on this RFP showed no clear evidence of bad faith or willful violation of the CNMI-PR by the parties involved. CNMI-PR Section 1-107 provides that no government contract shall be valid unless it complies

with the CNMI-PR. However, the appeal arguments have not convincingly demonstrated any impropriety or violation of the CNMI-PR that warrants cancellation of the contract awarded to the winning proposer.

A previous issue that was addressed in OPA's first appeal decision was again raised in this appeal - an assertion that only one proposer was initially given the opportunity to revise its proposal where there were changes made to the original scope of work. We believe that this was remedied by the subsequent issuance of the amendment to the RFP in accordance with OPA's recommendation. Therefore, MPI's argument in this respect is considered irrelevant.

On another issue, MPI claims that the issuance of the amendment to the original RFP immediately after the issuance of OPA's decision was contrary to the regulations. We disagree, because there is no requirement in the CNMI-PR that restricts implementation of an appeal decision while the 10-day period for filing a reconsideration request is still in effect. Additionally, although corrective actions were taken by DPW in response to OPA's recommendation, this should not have hindered any interested party in filing a motion for reconsideration. We do not see how MPI would be harmed by the immediate implementation of OPA's decision on its first appeal, especially since MPI was able to submit a proposal on the RFP amendment issued by DPW.

6. Disregard of Ethical Standards. MPI claims that DPW allowed Demapan to propose a lucrative price when the scope of work was originally revised which was later reduced when the amendment was issued. MPI further claims that this action would have been a sufficient reason for DPW's rejection of Demapan's proposal. We disagree. A change in a proposer's price would not necessarily result in a violation of ethics standards by the parties involved. With the finalization of the scope of work for the school classroom project and the re-bidding of the RFP, it would naturally be expected that the proposal of Demapan and all other proposers would change. Whether the change showed a decrease or increase in price is irrelevant. It is the agency's responsibility to evaluate whether proposed prices from the solicitation are reasonable. An appellant's disagreement with the awarded contractor's price does not necessarily render such price unreasonable.

Aside from Demapan's price proposal, the appellant appears to argue about Demapan being able to submit a revised price proposal after the amendment on the RFP was issued by DPW. We do not see any impropriety in such action because DPW and P&S merely implemented the recommendation made in our decision on MPI's first appeal. On this first appeal decision, we explicitly recommended that *all* the proposers on the original RFP be given the opportunity to revise their proposals (nobody was excluded in this recommendation). Because this issue was already addressed by the remedy called

for in the first appeal decision and the responsible agencies implemented such remedy, we consider this issue moot.

In the appeal, MPI presented other arguments which were not specifically related to the six appeal grounds. We would like to comment on these issues to address the appellant's concern. First, MPI argues that the regulations requiring the non-disclosure of bid information without the consent of the bidder was violated and has disadvantaged MPI. CNMI-PR Section 3-301(3) does state that information furnished by an offeror pursuant to the determination of responsibility may not be disclosed outside of the office of the Chief (P&S Director), or any other government official involved, without prior consent by the offeror. Based on the appellant's argument, we can find no violation of CNMI-PR Section 3-301(3) because the information that was alleged to have been improperly disclosed was not related to the determination of responsibility. This argument had been earlier rebutted by the P&S Director in his protest decision on June 23, 1997. We agree with the P&S Director that price is part of a proposal and is not solicited in a responsibility investigation.

Second, MPI questions an alleged comment by the P&S Director that the criteria laid down in the RFP can be disregarded. Our review of the protest decision showed that the P&S Director discussed the procedures involved in a competitive RFP in that proposals which vary from the solicitation requirements need not be automatically rejected but instead discussions can be conducted to ensure responsiveness of the proposals. It appears that the appellant has confused the aspect of responsiveness of proposals with the process of proposal evaluation. Although a non-responsive proposal may not be rejected during the evaluation phase, a proposal can only be evaluated and a contract awarded based on the evaluation factors stated in the RFP. CNMI-PR Section 3-106(7) states, in pertinent part, that "award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous taking into consideration price and the evaluation factors set forth in the RFP. No other factors or criteria shall be used in the evaluation..." [Emphasis added]. Thus, a proposal which, at the initial stage varies from the solicitation requirements, such as specifications stated in the RFP, may still be the basis for a contract award provided that after negotiations and before contract award it is determined both responsive to the solicitation requirements and the most advantageous considering price and the evaluation factors set forth in the RFP.

DECISION

The Office of the Public Auditor **denies** this appeal. The grounds cited by the appellant in this appeal are either (1) unpersuasive as having no valid bases, (2) without merit as they are merely the appellant's critical opinions which were not supported by convincing evidence, (3) considered irrelevant since they have already been addressed by OPA's previous decision dated April 4, 1997, or (4) not an adequate basis for relief since we can find no proof of prejudicial harm or damage to the appellant.

The appeal grounds do not warrant a cancellation of the contract award already made on this RFP, which was the relief requested in this appeal. In this appeal, we did not find sufficient and valid reasons to disturb the contract award made to the winning proposer. Accordingly, on the appellant's request that OPA cancel the award made to Demapan and award the contract to MPI, we cannot grant this request.

As for MPI's request for documents on this RFP, since the bidding phase has already been completed, we have determined that the documents requested by MPI are public records; accordingly, the P&S Director should provide MPI access to or copies of those documents requested, except as provided in CNMI-PR Section 3-301(3) where information furnished by a bidder or offeror pursuant to the determination of responsibility may not be disclosed outside the office of the Chief (P&S Director) or any other government official involved without prior consent by the bidder or offeror.

CNMI-PR Section 5-102(9) provides that the appellant, any interested party who submitted comments during consideration of the protest, the Chief (P&S Director), and 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 upon 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 basis for reconsideration is known or should have been known, whichever is earlier.

ORIGINAL SIGNED

Leo L. LaMotte
Public Auditor, CNMI

September 19, 1997