



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

Internet Address: <http://www.opacnmi.com>

2nd Floor J. E. Tenorio Building, Middle Road

Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 1399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: 1-670-234-6481
Fax: 1-670-234-7812

IN RE APPEAL OF MERCED V. REYES
doing business as M. V. REYES CATERING

PSS RFP 97-005
DECISION ON APPEAL
No. BP-A011

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal by Merced V. Reyes, doing business as M. V. Reyes Catering (M. V. Reyes), from the denial of her protest by the Commissioner of Education (Commissioner) pertaining to the Public School System (PSS) Request for Proposals (RFP) 97-005. The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of the PSS Procurement Regulations (PSSPR). M. V. Reyes filed its appeal with OPA on July 18, 1996.

PSS RFP 97-005 was a solicitation of proposals from vendors for the operation of the PSS school breakfast and lunch program for the school year 1997-1998, with an option to renew for a period up to four years based upon an annual review. This RFP covered all the public and some private elementary, junior high, and high schools, as well as head start centers and peer programs on Saipan, Tinian, and Rota. Proposers on this RFP were allowed to submit proposals for all the school covered, or for just one or several of them. The proposals under this RFP were to be evaluated based on the following criteria and percentages: (1) food catering capabilities - 75%, and (2) financial capabilities - 25%. The proposer who obtained the highest overall rating would be considered first for schools covered in this RFP. The second highest ranking proposer would have the second opportunity, and so forth. PSS reserved the exclusive right to distribute school sites in the best interest of the students.

The specifications for the RFP required the vendor(s) to prepare, deliver, and serve meals to the school site; collect meal revenue; and prepare and clean up the cafeteria. The awarded vendor's contract cost would be based on the number of meals served for breakfast and lunch at the preestablished rate per meal. The meals would be provided free of charge to predetermined eligible students. Other students would pay a portion of the cost of the meal in accordance with the rates established by the Board of Education (BOE) for each meal served, which would be collected by the vendor and subsequently deducted from its total billing. The awarded vendor would be paid by PSS on a biweekly basis.

The RFP was advertised during the months of March and April 1997, and the pre-bid conference which was held on April 9, 1997 was attended by six interested food service

companies. The proposals were opened as scheduled on April 28, 1997 at 2:00 p.m. at the office of the PSS Procurement and Supply Officer (P&S Officer). Three Saipan vendors submitted proposals to PSS for the 24 schools on Saipan covered in this RFP, which included 10 head start centers, 2 peer programs, 10 public elementary, junior high, and high schools, and 2 private schools. One vendor proposed for the schools in Rota and another proposed for the schools in Tinian. The three proposers for Saipan schools were Auntie Mag’s Catering Services (Auntie Mag’s), M.V. Reyes, and Casa de Felipe (Casa). Mar-Pac and JQC Corp. were the proposers for Rota and Tinian, respectively. As shown in **APPENDIX A**, Auntie Mag’s, M.V. Reyes, and Casa proposed for 21, 15, and 6 schools, respectively, out of the 24 Saipan schools covered in this RFP.

Evaluation of the Proposals

The evaluation criteria for this RFP were divided into two main criteria - food catering capability and financial capability, with each main criteria assigned a separate set of evaluators (as used in the succeeding discussions, technical evaluators or technical evaluation refers to the food catering capabilities criterion while financial evaluators or financial evaluation refers to the financial capabilities criterion). The specific evaluation criteria and the corresponding percentages are presented below:

1. Food Catering Capabilities	75%
Breakdown of Food Catering Capabilities Criteria	
(a) Food service management and personnel qualifications	20%
(b) Adequacy of facilities and equipment	20%
(c) Capability to produce meals in compliance with nutritional standards set forth by the USDA	20%
(d) Capability to deliver meals and maintain cafeteria premises	10%
(e) Additional services - a la carte and increasing student participation	5%
2. Financial Capabilities	<u>25%</u>
Total	<u>100%</u>

The “Instruction to Proposers” included in this RFP specified the factors to be considered under each criterion, such as work flow of employees and adequate staffing, preference on hiring former PSS food service employees, and range of catering activities currently being performed, among other factors under the “food service management and personnel qualifications” criterion. The technical evaluators consisted of the Food and Nutrition Services (FNS) Administrator, FNS Nutritionist, a Public Health employee, and a Food and Beverage Manager of a local hotel. The evaluators of the financial capability criterion consisted of the PSS Budget and Fiscal Officer, the PSS Accountant, and a PSS Consultant.

The technical evaluators reviewed the proposals and identified additional documents and information that should be submitted by the proposers. Subsequently, the technical evaluators conducted a site inspection by visiting the facilities of M.V. Reyes, Auntie Mag’s, and Casa, specifically the kitchen facilities where the proposers planned to prepare

school meals and the cafeterias that they were currently serving. This was used to evaluate capability to maintain cafeteria premises. The technical evaluators also inquired from other government agencies, namely, the Commonwealth Health Center (CHC), the Department of Public Safety (DPS) Correctional Facility, and the Manamko about food service contracts that were granted to any of the proposers on the RFP. On May 16, 1997, after their evaluation of the proposals, the technical evaluators submitted their recommendation.

As for the financial evaluation, PSS requested copies of the 1996 financial statements from each proposer on May 20, 1997, which were used in the evaluation of the proposers' financial capability. The financial evaluation was based only on the proposer's financial statements using financial statement ratios to evaluate the financial capability of the proposers, such as profitability, liquidity, and solvency ratios. A total of thirteen financial ratios were used to determine the financial strength of each proposer. Points were given based on the ranking of each proposer for each financial ratio, e.g., 15 points for the first-ranked proposer, 10 points for the second-ranked proposer, and 5 points for the third-ranked proposer.

Basis of Award for Each School

On June 9, 1997, the PSS Consultant and the PSS Nutritionist met to finalize their evaluations. Under the selection process formulated by PSS, the proposer receiving the highest score from the evaluation committees would be considered first for school sites requested. The second highest ranking proposer would have the second opportunity, and so on. The pre-bid conference dated April 9, 1997 indicated that each proposer would not be awarded all the schools proposed for even if that proposer garnered the highest combined technical and financial scores. PSS reserved the right to distribute school sites found to be in the best interest of the students. Schools were also chosen based on meal participation, that is, the maximum number of lunch meals per day the proposer could potentially produce and the location of the kitchen facility which could affect the timely delivery of meals. Included in the schools awarded¹ to Auntie Mag's under this RFP were William S. Reyes (WSR) Elementary School and San Antonio Elementary School, both of which had been previously contracted to M.V. Reyes.

By memorandum dated June 12, 1997, the Committee (represented by both the technical and financial evaluators) completed its evaluation of the proposals and notified the Commissioner of the results. On the same day the Commissioner informed the proposers of the PSS decision by sending "intent to award" letters to the successful proposers and notification letters to unsuccessful proposers. Out of the maximum total score of 100%, the proposers received the following scores in order of ranking: (1) Auntie Mag's- 83.8%, (2) M.V. Reyes- 70.5%, and (3) Casa- 55.5%. Auntie Mag's (the top-ranked proposer) was awarded 13 of the 24 schools covered in this RFP, while M. V. Reyes (the second-ranked

¹To date, the award of the food service contracts under RFP 97-005 for WSR Elementary School and San Antonio Elementary school has been withheld by PSS until the protest issue is resolved. Instead, PSS entered into 3-month (August 1 to October 31, 1997) food service contracts with Auntie Mag's for both schools under emergency procurement, using as justification the health and welfare concerns of students attending the two schools.

proposer) was awarded the remaining 11 schools. Casa (the third-ranked proposer) was not awarded any school under this RFP.

The Protest and Subsequent Appeal to OPA

After receipt of its letter from PSS regarding the result of the evaluation, M. V. Reyes requested on June 17, 1997 copies of the evaluation documents for its review. PSS responded on June 20, 1997 and informed M. V. Reyes of the date and time the evaluation files could be reviewed. Also, on June 20, 1997, M. V. Reyes requested the Commissioner to reconsider PSS' decision on the award of WSR Elementary School and San Antonio Elementary School. M. V. Reyes claimed that it had provided excellent service to these two schools in the past, among other protest grounds. On June 24, 1997, M. V. Reyes submitted another letter to PSS containing additional information on its June 20, 1997 request for reconsideration. M. V. Reyes requested PSS to consider the protester's assertions about certain factors affecting the evaluation, including its expanded facility and improvements purportedly available for the upcoming school year. On July 3, 1997, the Commissioner responded to M. V. Reyes' request for reconsideration. The Commissioner stated that PSS maintained its June 12, 1997 decision selecting the proposer for each school covered in this RFP and he did not believe that further consideration was necessary.

On July 18, 1997, M. V. Reyes filed with the Public Auditor a timely appeal of the Commissioner's adverse decision on its reconsideration request. The appeal covered WSR Elementary School and San Antonio Elementary School food service programs. On July 21, 1997, the Public Auditor informed the Commissioner of M. V. Reyes' appeal and requested him to submit a complete report on the appeal and to instruct interested parties to communicate directly with OPA. On the same date, the Acting Commissioner of Education issued PSS' notification letters to interested parties regarding M. V. Reyes' appeal to OPA.

The Commissioner submitted his report to OPA on August 21, 1997. OPA has not received any comments on the Commissioner's report from either the appellant or any other affected parties. OPA is therefore issuing its decision on this appeal pursuant to PSS Procurement Regulations which provide that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received. Although no comments on the Commissioner's report were received, we have gathered all information necessary to render a decision on this appeal.

ANALYSIS

The denial of M. V. Reyes' request for reconsideration by the Commissioner on the award of WSR Elementary School and San Antonio Elementary School food services under PSS RFP 97-005 is the issue of this appeal. The following discusses the arguments by PSS and M. V. Reyes as they were presented in the protest and appeal process, including OPA's comments on the merits of the arguments.

M.V. Reyes' Arguments in its Protest to the Commissioner

In its protest letters to the Commissioner on June 20 and 24, 1997, M. V. Reyes asked for a reconsideration of the award of WSR Elementary School and San Antonio Elementary School. As support for its protest, M.V. Reyes provided the following arguments to the Commissioner (for presentation purposes, we numbered the three main arguments as Grounds A, B, and C):

Ground A: M. V. Reyes claimed that it had provided excellent service to WSR Elementary School and San Antonio Elementary School in the past. It added that past performance was a required factor in PSSPR Section 3-301. M. V. Reyes further explained that it had provided food service to WSR Elementary School since the privatization of the PSS school food service four years ago. M. V. Reyes reminded PSS that it had supported school events and fund raising, donated playground equipment during the 50th anniversary celebration at WSR Elementary School, and provided free refreshments for the PTA. It believed that this relationship should not be interrupted without a valid reason. M. V. Reyes also believed that PSS should review the comments from parents and school staff which would purportedly show that M. V. Reyes was highly regarded and rarely subjected to complaints.

In its June 24, 1997 letter to the Commissioner, M. V. Reyes presented additional information on its request for reconsideration and raised the following points:

Ground B: M.V. Reyes argued that PSS considered the “profitability” factor in the bid evaluation to ensure that the bid went to responsible and reliable vendors. M. V. Reyes stated that it was responsible, reliable and financially sound and that it was committed to hiring local labor at higher wages than foreign workers. M. V. Reyes stated that hiring local labor is a practice that fulfills its commitment to the community. However, M. V. Reyes explained that this commitment would mean less profit because of higher wages to its employees. According to M. V. Reyes, this situation did not necessarily mean that its business was not well managed. M. V. Reyes reminded PSS that it provided special menus (which cost more at holidays for the students), refreshments to the PTA, donations to schools, and support on fund raising activities. M. V. Reyes further stated that “it would be a grave mistake to penalize a capable, proven, and responsible vendor for hiring local people and contributing to the school.”

Ground C: M. V. Reyes alleged that PSS ignored its expanded capacity and facility improvements that would be in place for the new school year. According to M. V. Reyes, it had a new facility under construction. Furthermore, because of that construction, it did not invest in a new water heater and counter tops for its old facility. M. V. Reyes added that the floor plan of its new facility was included in its bid package.

Decision on the Protest by the Commissioner

In his decision dated July 3, 1997, the Commissioner maintained the decision set forth in his June 12, 1997 “intent to award” letters to the proposers. Additionally, the Commissioner did not believe that further consideration was necessary. The Commissioner’s decision commented on the protest arguments, as follows:

Ground A: The Commissioner stated that past performance is only one of the evaluation criteria, and that the evaluators considered other factors as well in determining whether a bidder was responsible and which bidder should be awarded the contracts. He added that it is important that consistency in the selection procedure be maintained. PSS also recognized M. V. Reyes' previous working relationship with PSS, students and staff and thanked M. V. Reyes for its quality services in the past.

The Commissioner explained that RFP 97-005 was developed based on the previous year's RFP, with some changes. The changes were intended to make the competitive bidding of the food services as objective and reasonable as possible. The Commissioner further explained that under the selection process, proposers were evaluated based on the following criteria:

1. Food Catering Capabilities Evaluation (20%)
2. Adequacy of Facilities and Equipment (20%)
3. Capability to Produce Meals in compliance with Nutritional Standards set forth by the USDA (20%)
4. Capability to Deliver Meals and Maintain Cafeteria Premises (10%)
5. Additional Services - A La Carte & Increasing Student Participation (5%)
6. Financial Capabilities (25%)

The Commissioner explained that based on the above criteria, the RFP package specified that the evaluation of the food catering and financial capabilities criteria would be separate. He added that whichever proposer received the highest rating would be considered first for school sites requested. The second highest proposer would have the second opportunity to choose sites, and so forth. The Commissioner believed that this was a fair process for awarding the school sites.

Ground B: On the issue of profitability, the Commissioner stated that the criteria identified in the RFP package were the criteria used to determine contract awards. The Commissioner explained that the committee took an in-depth look at the financial information for each bidder and scored them according to the set criteria. The Commissioner added that PSS appreciated M. V. Reyes' social consciousness and the decisions it made to support the community. However, the Commissioner stressed that the selection process under RFP 97-005 was based on whoever received the highest scores based on those criteria identified in the RFP.

Ground C: The Commissioner did not argue with M. V. Reyes regarding alleged failure of the technical evaluators to consider M. V. Reyes' facility under construction.

M. V. Reyes' Arguments in its Appeal to the Public Auditor

In its appeal to the Public Auditor, M. V. Reyes specifically requested that it be awarded the contract under the subject RFP for WSR Elementary School and San Antonio Elementary School for the following reasons (for presentation purposes, we numbered the appellant's arguments as Grounds 1 and 2):

Ground 1

M. V. Reyes claimed that the criteria used in evaluating the proposals did not comply with PSSPR Section 3-301, specifically asserting that:

- (a) The financial criteria did not evaluate adequacy as stated in the regulation, but created a competitive measure which penalizes a proposer who hires local people at higher wages, makes an effort to support school activities, and provides service and food over and above what was required.
- (b) There was no comparative evaluation of either past performance or record of integrity of the proposers. Also, M. V. Reyes adds that there was no information obtained from school officials, parents, and students about past performance or a review of complaints or comments received by PSS concerning the performance of the proposers. M. V. Reyes further claims that there was no evaluation of vendors' and financial institutions' records which would show credit history or insufficiency of funds.
- (c) The evaluators overlooked M. V. Reyes' new facility under construction. M. V. Reyes adds that the information about the new facility, including hot water capacity, was provided to the evaluators; however, such information was not made part of the evaluation.

Ground 2

In its appeal to OPA, M. V. Reyes claimed that the previous RFP covering school year 1996-1997 (RFP 96-004) stated that contracts to be awarded were renewable upon satisfactory performance by the vendor for a period of four years. The appellant alleges that PSS did not make an effort to fulfill this element of the award under the RFP.

The Commissioner's Comments in his Report to the Public Auditor

The Commissioner concluded in his report that there was no proper basis for appealing his July 3, 1997 protest decision, and that PSS acted within its lawful authority and within the PSS Procurement Regulations. Following is a summary of his comments on M. V. Reyes' appeal arguments:

Ground 1

The Commissioner stated that M. V. Reyes' allegation that the bid criteria for RFP 97-005 did not comply with PSSPR Section 3-301 indicated a misunderstanding of how competitive sealed proposals are awarded by PSS. He explained that vendors' proposals are assessed to determine if they are responsible based on the criteria set forth in PSSPR Section 3-301, namely:

- a) have adequate financial resources to perform the contract, or the ability to obtain them;
- b) be able to comply with the required delivery or performance schedule;
- c) have a satisfactory performance record;
- d) have a satisfactory record of integrity and business ethics;

- e) have the necessary organization, experience and skills (or the ability to obtain them), required to successfully perform the contract;
- f) have the necessary production, construction and technical equipment facilities, or the ability to obtain them;
- g) be otherwise qualified and eligible to receive the award under applicable laws and rules; and
- h) submit a valid original business license and other certification as may be required.

The Commissioner also stated that under PSSPR Section 3-301(2), the official with expenditure authority will obtain information from the bidder or offeror necessary to make a determination of responsibility using the factors mentioned above. The Commissioner added that if the vendors are found to be responsible according to the criteria, discussions are then held in order to determine their ability to comply with the criteria set forth in the RFP. The Commissioner stressed that those criteria stated in the RFP are clearly allowed to be different from the criteria used to determine bidder responsibility.

The Commissioner added that PSS, after full consultation with OPA, lawfully set the criteria to be used for awarding the contracts. He further stated that the criteria were different from the criteria set by the PSSPR for determining bidder responsibility, and that this is allowed by the regulations. The Commissioner then concluded that M. V. Reyes misunderstood the process when it appealed the Commissioner's decision.

Ground 2

The Commissioner stated that M. V. Reyes implied in its appeal that PSS must renew the contract upon satisfactory performance. He contended that there was no factual or legal basis for this claim which should therefore be denied. The Commissioner mentioned the renewability provision of PSS' previous RFP covering school year 1996-1997 which stated that "the term of agreement will be for school year 1996-1997 in accordance with Board of Education- approved school calendars, with an option to renew based upon annual review with both parties agreeing to renewal, for a period of up to four years." Additionally, there was also a provision in M.V. Reyes' previous contract that if the contractor had exercised substantial compliance during the previous months of operation, and had given 60 days advance written notice prior to February 1997 of its intention to renew for another year, PSS reserved the option to extend the contract for another school year, upon mutual agreement of both parties. The Commissioner explained that the language regarding renewability was clearly permissive rather than mandatory. He added that M. V. Reyes did not notify PSS 60 days in advance of its intention to renew for another year. He clarified that the renewal of a contract between M. V. Reyes and PSS required the approval of both parties.

The Commissioner, moreover, expressed the belief that the Public Auditor's ability to decide appeals is limited by the requirement in PSSPR Section 5-102 that issues appealed must first have been raised with the Commissioner in the original protest. The issue on the renewability of M.V. Reyes' previous contract was not raised by the appellant in its protest with the Commissioner. The Commissioner contended that although PSS responded on this issue, it still believed that OPA is precluded from deciding it because of lack of jurisdiction.

OPA's Comments

We first discuss the threshold issue of whether or not OPA has jurisdiction to hear the arguments about the renewal of contracts as discussed under Ground 2 above. Ground 2 of this appeal raised the issue of the non-renewal of M. V. Reyes' previous food service contracts with WSR Elementary School and San Antonio Elementary School. PSS believes that OPA is precluded from deciding the issue presented in Ground 2 because it was not protested first to PSS. PSSPR Section 5-102 provides that a written appeal to OPA from a decision by the Commissioner may be taken, provided the party taking the appeal has first submitted a written protest to the Commissioner. However, the PSSPR does not specifically require that *each ground* must be protested to the Commissioner to justify the relief requested by the appellant. M. V. Reyes is appealing the Commissioner's decision denying it the award of the food service contracts for the two schools -- the same relief requested from PSS which had been denied by the Commissioner.

In a previous request for reconsideration of an appeal decision [AJ Commercial Services, Division of Corrections (DOC) Food Service Program, March 31, 1995], OPA concluded that:

“The CNMI Procurement Regulations do not restrict the Public Auditor from taking all relevant matters into consideration when reviewing an appeal... The Public Auditor is also allowed to obtain all necessary information from all interested parties. By being able to review all facts and not just the documents related to the appellant, the Public Auditor can render a decision that serves the best interest of the CNMI Government and all interested parties.”

In an earlier appeal decision on PSS' food service solicitation for school year 1996-1997, we again concluded that the PSSPR do not specifically require that each appeal ground raised by the appellant must be protested first to the Commissioner. In this previous appeal decision, OPA concluded that it had jurisdiction to hear all grounds presented in the appeal because there had been an earlier valid protest of the decision.

Accordingly, we conclude that OPA *has jurisdiction* to consider ground 2, as well as all the other grounds presented in this appeal. Following are our comments on the appeal arguments in the order they were presented by the appellant.

Ground 1 - Failure to Comply with PSSPR 3-301

The appellant claims that PSS failed to comply with PSSPR Section 3-301, specifically the evaluation of the proposals in three areas: (1) financial capability, (2) past performance or record of integrity, and (3) ability to meet facility standards.

We agree with PSS that M.V. Reyes' arguments under this ground indicate a misunderstanding by the contractor of how competitive proposals are awarded under PSSPR Sections 3-106 and 3-301. PSSPR Section 3-106 governs the procedures for making an award under the Competitive Sealed Proposals method (the method used in this procurement). Specifically, Section 3-106(7) requires that “award shall be made to the *responsible offeror* whose proposal is determined in writing to be most advantageous to PSS *taking into consideration price and the evaluation factors set forth in the RFP.*” [Emphasis added].

PSSPR Section 3-301, on the other hand, further sets forth additional requirements in determining a *responsible contractor*. Section 3-301(1)(a) provides that awards shall be made only to responsible contractors who have adequate financial resources to perform the contract, or the ability to obtain them, among other requirements.

There is no question that both PSSPR Sections 3-106 and 3-301 should be complied with in making an award under this RFP. The criteria for determining a responsible contractor are specifically provided in Section 3-301; however, the criteria for determining the most advantageous proposal depend on whatever criteria are set forth in the RFP. It is evident from the PSSPR that the determination of responsibility and the evaluation of most advantageous offers are two separate procedures and may involve different sets of criteria. There may be instances where some of the criteria set forth in Section 3-301 are used as evaluation factors in determining the most advantageous offer. However, there is no specific requirement in the PSSPR that the specified criteria on contractor responsibility under Section 3-301 should always be considered in developing the criteria for the most advantageous offer. The latter criteria are normally developed based on the requirements of each specific RFP.

The PSSPR requires that the most advantageous offer be determined based on price and the evaluation criteria set forth in the RFP. The evaluation criteria as stated in the “Instruction to Proposers,” which properly excluded price as an evaluation factor, had specified the relative importance of each criterion (in terms of percentage), in compliance with Section 3-106(5). The criteria that were specified in this RFP and upon which PSS based its evaluation consisted mainly of food service catering capabilities and financial capabilities. Price was properly not stated as an evaluation criterion because the price of each meal to be paid by PSS had already been determined regardless of who would get the award for each school.

Accordingly, we do not agree with the appellant’s appeal ground as discussed in this section because it lacks a valid basis. Since we have determined that the appeal ground has no valid basis, we need not comment on the merits of the specific arguments presented on this ground. Nevertheless, we would like to present the following additional information to address the concern raised by the appellant on this RFP, and to guide PSS in its future RFP solicitations (we supplied the section titles below based on the arguments under this ground):

Financial Capability

The appellant claims that the financial criteria did not evaluate adequacy as stated in the regulation [perhaps the appellant was referring to the adequacy of the contractor’s existing financial resources to perform the contract, or the ability to obtain them as required in PSSPR Section 3-301(1)(a)]. This, according to the appellant, created a “competitive measure” which penalizes a proposer who hires local people at higher wages, makes an effort to support school activities, and provides service and food over and above what was required. *We do not agree* with the appellant. PSS used financial statement ratios to evaluate the financial capability of the proposers in which points were given based on the ranking of the proposers, such as 15 points for the first-ranked proposer, 10 points for the second-

ranked proposer, and 5 points for the third-ranked proposer. The “competitive measure” argument which alleges that the appellant was penalized for hiring local people at higher wages is unpersuasive and without a valid basis. The test of profitability was only 15% of the total maximum score under the financial capability criteria and is determined by dividing the net income by total sales and total owners’ equity. The argument that the appellant gives higher wages to employees and therefore achieves lower income is not necessarily true. There are more significant factors that affect the increase or decrease in net income such as sales, cost of sales, and total operating expenses. Salary cannot be deemed solely responsible for a lower income because it is just one of the components of total operating expenses. The evaluation criteria for this RFP pertaining to financial capability properly considered only those factors that are relevant to a contractor’s financial capability, which reasonably excluded matters raised in this appeal ground.

Supporting school activities, such as by giving donations to the schools and providing food and services over and above what was required, cannot be a reason for making a contract award because it is clear that these were not among the specified criteria for awarding the contract. Besides, in view of ethical constraints, the award of a government contract should not be influenced by donations or gifts from prospective contractors. 1 CMC § 8551 provides, in pertinent part, that no person shall give to any public official or public employee based upon any explicit or implicit mutual understanding that the votes, official actions, *decisions or judgments of any official, employee, or Commonwealth contractor concerning the business of the Commonwealth would be influenced thereby*. [Emphasis added].

Past Performance or Record of Integrity

The appellant claims that (1) there was no comparative evaluation of either the proposers’ past performances or record of integrity, and (2) PSS did not obtain information from school officials, parents, and students about the proposers’ past performance or review complaints or comments received by PSS concerning the performance of the proposers. We *do not agree* with these two arguments. Our review of the “food service management and personnel qualification” criterion evaluation showed that PSS considered past performances based on available information, such as any termination of previous contracts, and checked on the integrity of the proposers. For this item, the three proposers on Saipan each received the highest possible score of 3 points. Additionally, the weight of this factor on the technical evaluation, *i.e.*, 3 points out of 75 possible points, would not be sufficient to change the overall ranking of the proposers even if the numbers given on this factor were wrong. Our review of the proposal package also showed that the PSS P&S Officer obtained additional information to verify the proposers’ past performance. PSS records revealed that the PSS P&S Officer contacted CHC, the DPS Correctional Facility and the Manamko to determine food service contracts granted to any of the proposers on this RFP. The PSS P&S Officer requested such information as contract performance and reasons for contract termination, to aid PSS in determining responsible bidders. Records for this RFP showed that only the DPS Correctional Facility had contracted out its food service program, and among the proposers, only Casa de Felipe had a prior food service contract with DPS.

Regarding the allegation that comments were not obtained from school officials, parents, and students regarding the proposers’ past performance on PSS food service contracts, our

review showed that this factor was not among the criteria set forth in this RFP, and therefore was properly not considered in the evaluation of the proposals. However, this issue may be related to the determination of a responsible contractor, specifically as to satisfactory performance record as provided in PSSPR Section 3-301(1)(c). The PSSPR requires only that contractors have a *satisfactory performance record*, which need not necessarily be confirmed by the employees or other persons involved in the service procured. Nevertheless, according to the PSS Nutritionist, there were some documented exceptions, based on the cycle menus, reflecting instances in which Auntie Mag's and M.V. Reyes had not complied with the required menu; however, according to PSS these findings were not so significant as to warrant termination of their food service contracts. We have no reason to question PSS' decision in this matter. Our review of previous PSS food service contracts granted to Auntie Mag's showed no record of contract termination due to unsatisfactory contract performance. Additionally, records pertaining to the previous school year's contract performance by Auntie Mag's showed no documented findings about significant unsatisfactory contract performance.

Based on the foregoing information, we have determined that PSS reasonably evaluated the proposers' past performance as it relates to the determination of a responsible contractor. Furthermore, we have no reason to doubt Auntie Mag's responsibility as a contractor with regard to satisfactory contract performance.

Additionally, the appellant claims that there was no information obtained from vendors and financial institutions that would show credit history or insufficiency of funds. The appellant argues that the evaluation of the financial capability criterion failed to consider two things - (a) information from financial institutions, and (b) supplier credit line. We *agree* that there was no evaluation done on records with vendors and financial institutions which would show credit history or insufficiency of funds. However, regarding the information from financial institutions, the criteria set forth in the RFP did not include this factor as a basis for evaluating the financial capability criterion. The PSSPR Section 3-106(7) provides, in pertinent part, that award under competitive sealed proposals method shall be made to the most advantageous proposal *taking into consideration price and the evaluation factors set forth in the RFP*. [Emphasis added.] PSS properly did not include any information from financial institutions in its evaluation since this item was not stated as an evaluation criterion in the RFP.

As for the supplier credit line, this item was stated as an evaluation factor under the financial capability criterion; however, this factor was not considered in the evaluation of the proposals. The financial capabilities' evaluation which was based solely on the financial statements submitted by the proposers resulted in the following ranking: Auntie Mag's - first, M. V. Reyes - second, and Casa de Felipe - third. Our review of the credit lines from suppliers presented by the proposers showed the following: Auntie Mag's - \$100,000 from one supplier and an unspecified amount of credit lines from two other suppliers, Casa de Felipe - \$120,000 from three suppliers, and M.V. Reyes - \$65,000 from three suppliers.

If the supplier credit line of each proposer had been evaluated, the ranking of Auntie Mag's and M.V. Reyes on the financial capability criterion would remain the same since Auntie Mag's would still have been ranked ahead of M. V. Reyes. Although Casa de Felipe

submitted a higher amount of supplier credit line than either Auntie Mag's or M.V. Reyes, we determined that the overall ranking of the three proposers would not change even if the supplier credit line had been considered in the evaluation of the financial capability criterion. Although Casa may rank first on supplier credit line, Auntie Mag's and M.V. Reyes would still rank ahead of Casa considering all the criteria set forth in this RFP.

As for the requirements of PSSPR Section 3-301 [Contractor Responsibility], we have determined that PSS had obtained sufficient information to decide whether the contractor for the two schools covered in this appeal was financially capable of performing its contract. Records for this RFP showed that the credit lines and financial statements submitted by the contractor are sufficient to cover the financial requirements of the food service contracts awarded to the contractor under this RFP.

Ability to Meet Facility Standards

Appellant M. V. Reyes claims that the Evaluation Committee did not consider PSSPR Section 3-301(1)(f) - the proposer's ability to meet facility standards. The appellant states that the evaluators inspected only the existing facilities and ignored M. V. Reyes' facility that was purportedly under construction. M. V. Reyes added that information about its new facility, such as hot water capacity, was provided but was not made part of the evaluation as is allegedly required by the regulation.

At a May 5, 1997 meeting, the technical evaluators were instructed to base their evaluations on the existing facilities and not on what the proposers were planning to build or purchase. According to one of the evaluators, the Evaluation Committee did not look at those proposed facilities because at the time there were only plans without evidence of construction in-progress and there was no completion date indicated. The evaluators added that the proposed facilities would be of no benefit to PSS because they could not be completed by the time the food service started on August 4, 1997.

We have no reason to believe that the evaluators deliberately excluded information on M.V. Reyes' proposed facilities to disadvantage the proposer in the evaluation process. On the other hand, we believe that the evaluators properly considered only those facilities that were actually being used by the proposer for its food service operation. It is our view that this approach was consistent with the evaluation factors under the "adequacy of facilities and equipment" criterion. The evaluation factors required information relevant to the currently existing facilities of the proposers, such as whether: facilities have a good work flow, food preparation and packaging equipment are adequate and in proper working condition, proper sanitation methods are being used, and kitchens are arranged for efficient work, among other factors. The evaluation criterion had no requirement that proposed facilities or facilities under construction should be considered in the evaluation.

Under PSSPR Section 3-301(1)(f), for a contractor to be determined responsible, he must have the necessary production, construction and technical equipment facilities, or the ability to obtain them. The PSSPR further requires that information necessary to make a determination of responsibility be obtained from the offeror prior to award. The PSSPR

does not specifically provide that all information be considered, only that which is necessary to make a determination of responsibility as required in Section 3-301.

Ground 2 - Renewability of Old Contract

We do not agree with the arguments presented by the appellant on this appeal ground. Our review of M.V. Reyes' previous contract with PSS for the breakfast and lunch programs at WSR Elementary School and San Antonio Elementary School showed the following provision on renewal: "If the contractor has exercised substantial compliance during the previous month of operation, and upon 60 days advance notice, prior to February of 1997, in writing by said contractor of its intention to renew for another year, PSS reserves the option to extend the contract for another school year, upon mutual agreement of both parties." [Emphasis added]. It is clear from the terms of this contract that there was no automatic renewal beyond the contract period even if there had been satisfactory performance under the contract. As provided in this previous contract, even if the contractor had exercised substantial compliance and had notified PSS of its intention to renew, PSS was not obligated to renew the contract unless PSS chose to exercise its option to extend the contract and both parties agreed to the extension. Request for Proposals No. 96-004, the earlier solicitation of proposals that covered M.V. Reyes' prior contracts, did not provide for automatic renewal because, as stated in the "Instruction to Proposers," both PSS and the contractor would have to agree to a renewal.

Based on the foregoing discussion, we conclude that PSS did not violate any provision in M.V. Reyes' previous contract pertaining to renewal or option to renew. Even in other jurisdictions, such as the Federal Government with its Federal Acquisition Regulations, the renewability provision of a contract is an "option" which means a unilateral right under which, for a specified time, the Government may elect to extend the term of the contract (Federal Acquisition Regulation 17.201). We agree with PSS that this argument should be denied.

Others

In its appeal to OPA, the appellant attached a copy of its earlier reconsideration request to PSS in which M.V. Reyes claimed difficulty in understanding the big difference between the rating it received under RFP 96-004 (the previous solicitation), and RFP 97-005 (the current solicitation). We reviewed the summarization of the scores under RFP 96-004 and found a mathematical error that incorrectly increased the scores of all the proposers evaluated. However, the error did not skew the result of the evaluation because the ranking of the proposers did not change after effecting the corrections. The following table shows the recomputation of M.V. Reyes' score under RFP 96-004:

Evaluation	Maximum Score	Original Evaluation Score	Should Be Scores (from our recomputation)	Remarks
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Technical	75%	56.03%	56.03%	no recomputation needed
Financial	25%	38.75%	19.87%	original evaluation score was 13.75% higher than the maximum score allowed
Total	100%	94.78%	75.90%	total original score was overstated by 18.88%

Out of the maximum score of 100%, the financial capability criterion represented 25%. The financial capability criterion was first scored by assigning to each proposer points out of 195 maximum points. In converting the points to % score, the 25% maximum score for financial capability should be multiplied by a fraction consisting of the points received over the 195 maximum points. M. V. Reyes received 155 points out of 195 maximum points and PSS computed the financial capability score as $155 \times 25\% = 38.75\%$ instead of $155/195 \times 25\% = 19.87\%$. This resulted in a 38.75% financial score for M.V. Reyes which is 13.75% higher than the maximum score of 25%. The overall result is an overstatement of 18.88% for the combined technical and financial score of M.V. Reyes. Re-computation of the financial score of the three proposers under RFP 96-004 would only change the scores but the ranking would remain the same. As for the appellant’s concern about its higher points on the previous RFP, M.V. Reyes’ corrected score of 75.90% is close to its score of 70.5% in the current RFP, and there appears to be no significant difference as alleged by M.V. Reyes.

DECISION

The Office of the Public Auditor **denies** this appeal. Based on our review, we conclude that the appellant’s allegations are either (1) unpersuasive as having no valid bases, (2) without merit as they constitute merely appellant’s opinions without convincing supporting evidence that there was a significant violation of the PSSPR.

The appeal grounds do not warrant a cancellation of the “intent to award” under this RFP. In this appeal, we did not find sufficient and valid reasons to disturb the “intent to award” made to Auntie Mag’s for the two schools covered in this appeal. Accordingly, we cannot grant the appellant the contracts for WSR Elementary School and San Antonio Elementary School under this RFP for which Auntie Mag’s was selected. PSS should therefore proceed with its award of the two schools to Auntie Mag’s.

Although we found some deficiencies in the evaluation process, we consider them insignificant because the overall ranking of the proposers was not affected, and therefore they were not sufficient to warrant a change in the contractor selected for the schools covered in this appeal. However, to help improve the procurement process at PSS, we recommend that PSS consider the points we have raised in this appeal decision in future RFP solicitations.

Section 5-102(9) of the PSSPR provides that the appellant, any interested party who submitted comments during consideration of the protest, the Commissioner of Education, 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 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

November 19, 1997

**PSS School Breakfast and Lunch Program
Proposals Received for Saipan Schools Under PSS RFP No. 97-005
School Year 1997 - 1998**

Schools	Schools Proposed by the Vendors		
	Casa	M. V. Reyes	Auntie Mag's
<i>Head Starts</i>			
Paupau	X	X	
Tanapag	X	X	X
Kagman		X	X
Garapan	X		X
Oleai			X
San Vicente			X
Dandan			X
Susupe		X	
Chalan Kanoa		X	X
San Antonio		X	X
<i>Peer Programs</i>			
Chalan Kanoa Peer Program			X
San Antonio Peer Program		X	
<i>Public Elem., Jr. High, and High Schools</i>			
Gregorio T. Camacho Elementary School	X	X	X
Tanapag Elementary School	X	X	X
Garapan Elementary School	X	X	X
Oleai Elementary School			X
San Vicente Elementary School			X
William S. Reyes Elementary School		X	X
San Antonio Elementary School		X	X
Koblerville Elementary School			X
Marianas High School		X	X
Hopwood Jr. High School			X
<i>Private Schools</i>			
Mt. Carmel		X	X
Sr. Remedios		X	X
Number of Schools Proposed	6	15	21

