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IN RE REQUEST FOR RECONSIDERATION
OF OPA APPEAL DECISION FILED BY PACIFIC
MARINE & INDUSTRIAL CORPORATION

CUC RFP 97-0002
DECISION ON REQUEST
FOR RECONSIDERATION
No. BP-A015.1

BACKGROUND

Pacific Marine & Industrial Corporation (PMIC), represented by its legal counsel, Klemm, Blair, Sterling & Johnson, filed with this office on June 19, 1998 a timely request for reconsideration of the June 9, 1998 decision of the Office of the Public Auditor (OPA) referenced as appeal decision no. BP-A015. OPA's earlier decision denied PMIC's appeal which was based on the Commonwealth Utilities Corporation (CUC) Executive Director's (Director) failure to issue a decision on PMIC's December 19, 1997 protest pertaining to CUC's Request for Proposal (RFP) No. 97-0002. CUC RFP 97-0002 was a solicitation of competitive sealed proposals from independent power producers for the design, construction, and operation of a power generation facility on the island of Tinian. OPA has jurisdiction of this reconsideration request as provided in Section 5-102(9)¹ of the CUC Procurement Regulations (CUCPR).

OPA's Appeal Decision

In its June 9, 1998 appeal decision, OPA denied PMIC's appeal because OPA determined that PMIC did not timely file its protest with the Director pursuant to CUCPR Section 5-101(1)(a), which requires that the protest be received by the Director in writing within ten days after the aggrieved person knows or should have known the basis of protest. The appeal decision stated that PMIC's knowledge that Telesource offered four 2.5 MW units provided sufficient information for PMIC to have lodged a timely protest within 10 days after it acquired such information. In addition, PMIC should have promptly initiated an inquiry to CUC after learning that Telesource offered 2.5 MW generators instead of 5 MW units if it

¹ CUC's Procurement Regulations that were published in the Commonwealth Register on June 15, 1990 refer to "Appeals of Director's Decisions to the Public Auditor" as Section 54-192; however, this section should have been numbered 5-102 based on the sequence of section numbers.

needed more information for its protest. OPA's decision further stated that even if we were to consider PMIC's receipt of the contract file on December 3, 1997 as the date from which the 10-day period should start, the protest was still untimely because it was filed eleven working days after PMIC received a copy of Telesource's contract file. Accordingly, OPA concluded that it did not have jurisdiction to hear the appeal filed by PMIC on this RFP.

PMIC's Reconsideration Request

PMIC filed its timely reconsideration request with OPA on June 19, 1998. In its reconsideration request, PMIC asks that OPA reconsider its decision on the timeliness of its protest, particularly its argument that the contract with Telesource would cost CUC more than it would have spent had CUC accepted PMIC's initial offer. PMIC specifically requests that OPA address the merits of this issue. PMIC contests OPA's conclusion that the cost issue was untimely raised by arguing that the cases cited by OPA involving the U.S. General Accounting Office (GAO) Bid Protest Regulations contained factual situations different from those in PMIC's case, and that GAO Bid Protest Regulations are not identical to the CUCPR.

PMIC also argues that it was entitled to a reasonable period of time within which to review the fairly substantial contract file obtained from CUC, review the materials contained therein, and evaluate whether it had a factual basis for a protest before it should be charged with knowledge of all materials in the contract file. PMIC argues that assuming it was reasonably entitled to only two working days to review the entire contract file from its receipt on December 3, 1997, the filing of PMIC's protest on December 19, 1997 was within 10 days from the date on which it reasonably should have known that the contract file included factual information sufficient to support its protest.

ANALYSIS

After analyzing PMIC's arguments in its reconsideration request, we conclude that there is no basis to reconsider our earlier decision on its appeal. PMIC's arguments have neither persuaded us that our appeal decision contained errors of fact or law, nor presented information not previously considered in our appeal decision which would warrant reversal or modification of our decision. Our analysis follows:

PMIC Alleges that GAO Bid Protest Regulations Are Not Identical With the CUCPR

In its reconsideration request, PMIC argues that the GAO cases cited in OPA's decision involved bid protest regulations which are not identical to the CUCPR. We are not persuaded by PMIC's contention. While GAO's Bid Protest Regulations' 14 calendar day period for the filing of protests is not identical to CUCPR's 10 working days period, both regulations provide that protests shall be filed within a stated period *after the aggrieved person knew or should have known* the facts giving rise to the protest. For all grounds other than those based on solicitation improprieties, GAO Bid Protest Regulations (4 CFR Section 21.2(a)(2) (1996)), provide that

the protest must be filed within fourteen calendar days from the date the protester *knew or should have known the basis of the protest*. CUCPR Section 5-101(1)(a), on the other hand, provides that the protest shall be received by the Director in writing within ten days after such aggrieved person *knows or should have known of the facts giving rise to the protest*. It is clear from the pertinent provisions cited above that the CUCPR and the GAO Bid Protest Regulations use the same legal basis. Because of the absence of guidelines in the CUCPR as to when a protester “should have known of the facts” for a protest, it is only reasonable to look to available guidelines from the Federal Government which has the same legal basis for the timeliness requirement for filing protests.

PMIC also argues that the facts relating to its appeal differ from the factual situations in the cases cited in OPA’s decision. Although the cited cases involve different factual situations, they apply the same principle that protests must be filed within a certain period after the aggrieved person knew or should have known the basis for a protest. These cases also use the same point from which to start the time period for filing protests, i.e., the point at which the protester knew or should have known the basis for the protest.

PMIC received the contract file on December 3, 1997, and therefore should have known the basis for its protest on that day. This interpretation is consistent with the affirmative duty of the protester to diligently pursue information forming the basis of its protest, and not wait until a number of days pass before examining the documents obtained. Protesters should not be able to unilaterally determine the point at which they should have known the basis for a protest, by allowing them indefinite time for review before commencing the 10-day filing period. As shown by its own response to CUC’s report on the appeal, PMIC waited until the 10th day from the time it was provided the CUC documents before beginning its review of those documents.

PMIC has not persuaded us that our decision contained errors of fact or law which would warrant reversal or modification of our decision, and has also failed to present information not previously considered in our appeal decision.

PMIC Alleges that it was Entitled to a Reasonable Period of Time to Review the File

PMIC argues that it was properly entitled to a reasonable period of time within which to review the contract file it obtained from CUC. The CUCPR does not provide that a protester is entitled to a review period after receipt of pertinent documents before the mandatory 10-day filing period begins. Such a policy would contradict the purpose of setting a definite time frame within which protests can be considered. The cases cited in OPA’s appeal decision clearly used the date of receiving pertinent documents as the starting point of the prescribed period for filing protests. It must reasonably be concluded that the 10-day filing period includes whatever review time may be necessary for filing a bid protest.

PMIC asserts that its protest was timely assuming that it was entitled to only two working days to review the contract file. Because we have already determined that PMIC is not entitled to


any additional review time, it is not necessary that we address the proposition that two working days are reasonable for reviewing such contract file.

DECISION

To obtain reconsideration of an appeal decision under the CUCPR, the requesting party is required to present a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law or information not previously considered. For reasons set forth above, PMIC's arguments in its reconsideration request provide no basis for us to reconsider our earlier decision on its appeal, because those arguments have neither persuaded us that our appeal decision contained errors of fact or law, nor presented information not previously considered in our appeal decision which would warrant reversal or modification of our decision.

We therefore affirm the findings of fact presented in our appeal decision, as well as our legal conclusions based thereon.

PMIC's request for reconsideration is denied in its entirety.


Leo L. LaMotte
Public Auditor, CNMI

July 20, 1998