

# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF  
SSFM (SAIPAN) ENGINEERS, INC.

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)  
) RFP No. DPW98-RFP-020  
) DECISION ON APPEAL  
) No. BP-A017  
)

## SUMMARY

This is an appeal filed by SSFM (Saipan) Engineers, Inc., hereinafter SSFM, represented by its Legal Counsel, Brien Sers Nicholas, from the Procurement and Supply (P&S) Director's denial of SSFM's December 3, 1998 protest pertaining to Request for Proposal (RFP) No. DPW98-RFP-020 issued by the Department of Public Works (DPW). Appellant SSFM claims that the original RFP is the only binding document, and that an amendment made to that RFP is null and void. It also alleges arbitrary and capricious actions on the part of the P&S Director and the DPW Secretary. We **deny** this appeal. We have concluded that the purpose of the amendment was reasonable and there were no violations of the CNMI-PR with respect to the amendment that would entitle SSFM to the remedies set forth in the CNMI-PR. As for SSFM's claim of arbitrary action on the part of the DPW Secretary and the P&S Director, OPA cannot sustain a claim that is unsupported by a factual basis. Our review of the procurement records for this procurement gives us no reason to believe that the two officials acted to deliberately disadvantage the appellant in this solicitation.

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The CNMI Government, through DPW, issued DPW98-RFP-020 to solicit proposals from Architect-Engineering (A-E) firms for the design of a solid waste sanitary landfill in Marpi. The scope of work included: (1) complete design of a solid waste disposal facility, (2) preparation of construction bid documents, and (3) development of project cost estimates, among other requirements. This RFP, which was dated July 20, 1998, was advertised during the months of July and August 1998 with an initial proposal submission deadline of 3:00 p.m. on August 31, 1998. As stated in the RFP (also referred to in this decision as the solicitation), proposers were required to submit six sets of their proposals not later than the stated deadline, along with a copy of their "Certificate of Authority" from the CNMI Board of Professional Licensing and their CNMI business license. A pre-proposal meeting was also scheduled on August 17, 1998 at the conference room of the Commonwealth Utilities Corporation (CUC).

Subsequently, on July 24, 1998, the venue of the pre-proposal meeting was moved to the Joeten-Kiyu Public Library. Likewise, on August 31, 1998, the deadline for the submission of

proposals was moved to September 8, 1998, and one of the requirements in the RFP was modified. Ten proposals, including the proposal submitted by Appellant SSFM, were submitted on this solicitation as of the September 8, 1998 deadline. An evaluation committee (Committee) was formed by DPW to rank the proposals according to the criteria set forth in the solicitation. The Committee's evaluation ranked SSFM sixth among the ten proposers who responded to this solicitation. After conducting the evaluation, it was determined that discussions would be held with the top five proposers<sup>1</sup>.

SSFM, through its Legal Counsel, filed a protest dated October 9, 1998 with the P&S Director. By letter to SSFM's Legal Counsel dated October 15, 1998, the P&S Director acknowledged receipt of the protest and stated that SSFM would be hearing from him as soon as a decision was reached. The P&S Director also sent notices to other affected parties and informed them of the protest filed by SSFM. Some of these parties responded by submitting comments on the protest.

Through its Legal Counsel, SSFM filed an appeal with OPA on November 9, 1998 claiming that the P&S Director had failed to render a decision on its protest within the time frame prescribed by the CNMI Procurement Regulations (CNMI-PR). Subsequently, by letter dated November 10, 1998, DPW requested the P&S Director to make a determination that the procurement should go forward under CNMI-PR Section 5-101(2)(c), because the "services to be contracted for are urgently required; delivery of performance will be unduly delayed by failure to make award promptly; and/or a prompt award will otherwise be advantageous to the Commonwealth." This determination, according to DPW, would allow it to continue with its selection process on this project. Accordingly, on November 17, 1998, the P&S Director made a determination that procurement under this Solicitation should proceed.

On November 19, 1998, DPW sent a written notice to SSFM that it had not been ranked among the top five proposers with whom discussions would be held pursuant to CNMI-PR Sections 4-102(3). In view of this written notice, SSFM, through its Legal Counsel, inquired of OPA whether it should file another protest with P&S. To resolve this issue, we called the P&S Director on December 2, 1998 at 3:30 p.m. and requested that he explain the November 19, 1998 written notification from DPW. We were informed that this was the official notice to unsuccessful proposers of this procurement, and that SSFM's earlier protest was premature as it was based on unofficial information. According to the P&S Director, this premature filing was the reason why P&S did not act on SSFM's October 9, 1998 protest. We then concluded that SSFM should re-file its protest with P&S no later than December 4, 1998.

### **The Re-Filed Protest and Subsequent Appeal to OPA**

On December 3, 1998, SSFM re-filed its October 9, 1998 protest with the P&S Director through its Legal Counsel. Pursuant to the CNMI-PR, the P&S Director notified the interested parties of SSFM's protest by letter dated December 18, 1998, and invited them to

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<sup>1</sup> It was determined, as early as October 1998, that discussions should be conducted with the top five proposers based on a review of the scores given to the ten proposers. According to DPW, the Evaluation Committee conducted and completed its interviews and evaluations of the top five proposers in early January 1999. On January 5, 1999, DPW gave written notification of its selection to the firm determined by the Evaluation Committee to be the most qualified.

submit their comments within five working days. In a separate letter, the P&S Director informed SSFM that he intended to issue a decision on the protest on or before January 8, 1999. Some of the interested parties on this appeal responded by submitting their comments to the P&S Director. The P&S Director's decision, which was issued on January 11, 1999, denied SSFM's protest.

On January 19, 1999, SSFM, through its Legal Counsel, timely appealed the P&S Director's denial of its protest to OPA. Subsequently, OPA informed the P&S Director of the appeal filed by SSFM, and instructed him to provide the required notice of appeal to all interested parties and to furnish an agency report to OPA as required in the CNMI-PR. The Office of the Public Auditor (OPA) has jurisdiction over this appeal as provided in Section 5-102 of the CNMI-PR.

In early February 1999, P&S provided OPA with access to documents pertaining to this appeal, and furnished OPA with an agency report dated December 2, 1999. Upon submission of the agency report, we reiterated our instruction that P&S provide copies of the report, including protest and appeal documents, to the Appellant and other interested parties pursuant to CNMI-PR Section 5-102(4)(c). We also asked that P&S send us copies of transmittal documents or other evidence showing that the agency report was sent to the required parties. As shown in transmittal documents submitted to OPA, the proposers and involved DPW officials (determined by P&S to be interested parties on this protest appeal) were provided copies of the agency report on February 11, 1999 and February 25, 1999, respectively.

SSFM, through its Legal Counsel, submitted to OPA its comments on the agency report by letter dated February 16, 1999. On February 25, 1999, we informed the Appellant's Legal Counsel that copies of his comments should also be provided to the interested parties on this appeal. He then sent copies of his comments to the interested parties by mail on March 2, 1999. There were no rebuttals submitted by interested parties. OPA is issuing its decision on this appeal pursuant to CNMI-PR Section 5-102(8)(c)(i) which provides that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received. Although no rebuttals from interested parties were received, we have gathered the necessary information to render a decision on this appeal.

## ANALYSIS

The P&S Director's denial of SSFM's protest for lack of merit is the issue of this appeal. Following is a discussion of the arguments presented by SSFM and P&S in the protest and appeal processes, as well as OPA's comments on the relevant issues.

### **SSFM's Arguments in its Protest to the P&S Director**

In its December 3, 1998 protest to the P&S Director, SSFM re-filed the same protest grounds as in its October 9, 1998 protest. SSFM claimed that it should have been included as one of the firms determined to be highly qualified to perform the services required in this RFP. In discussing its protest, SSFM argued that:

- C The July 20, 1998 RFP was the “only legally binding” document pursuant to CNMI-PR Section 3-106, *et. seq.*; and
- C It met the deadline and the requirements set forth in the July 20, 1998 RFP.

### **The P&S Director’s Decision on SSFM’s Protest**

In his January 11, 1999 decision, the P&S Director denied SSFM’s protest based on his finding that SSFM had neither pointed out any defect in the procurement process nor shown that it was entitled to relief. The P&S Director’s analysis of the relevant protest arguments is presented below:

- C Section 3-106 Does Not Apply in this Procurement. The P&S Director stated in his decision that SSFM’s contention that Section 3-106 applied to this procurement was incorrect. He explained that this section applies to competitive sealed proposals which are used when sealed bids are neither practical nor advantageous to the Commonwealth. He further concluded that this was an Architect-Engineer (A-E) services procurement which had been conducted under CNMI-PR Section 4-102.
- C SSFM Has No Unique Right to be Ranked Among the Most Highly Qualified Proposers. The P&S Director stated that SSFM’s belief that its submission should be ranked among the top firms’ proposals did not entitle it to favorable treatment. He added that the authority and responsibility to evaluate the qualification of firms seeking to perform the work required is solely that of the government.

### **SSFM’s Arguments in its Appeal to the Public Auditor**

On January 19, 1999, Appellant SSFM filed with the Public Auditor an appeal of the P&S Director’s denial of the above protest. In its appeal, SSFM requests that “no awards of any contracts be made until such time that this matter [probably referring to its appeal] has been completely and fully resolved.” SSFM’s arguments on appeal, including its comments on the protest decision which it attached to the appeal, are presented below (for presentation purposes, we have combined related arguments/comments and supplied section titles):

#### The Amendment<sup>2</sup> to the Original RFP

Appellant states that the original RFP is the only binding document, and that amendments made to that RFP are null and void. Appellant argues that the P&S Director and the DPW Secretary announced the RFP amendment only on the original closing date of August 31, 1998. SSFM claims that it was not aware of such amendment (which extended the closing date to September 8, 1999) and therefore submitted its proposal on August 31, 1998 as required in the original RFP.

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<sup>2</sup> This solicitation contained two amendments, labeled as amendments 1 and 2. The amendment which is the subject matter of this appeal is amendment no. 1, which extended the closing date and deleted the requirement in the proposal for the submission of a certificate of authority. Accordingly, use of the word “amendment” in this appeal decision refers to amendment no. 1.

Appellant mentions that it had the required certificate of authority on August 31, 1998 (the requirement for such certificate in the proposal submission was deleted by the amendment). SSFM questions whether the RFP amendment was added to accommodate other proposers who were not able to meet the requirements of the original RFP, and surmises that the P&S Director's amendment of the original RFP prevented SSFM's proposal from being fairly and equally judged.

### The Alleged Arbitrary and Capricious Actions of the P&S Director and the DPW Secretary

Appellant does not present any specific argument supporting this claim.

### Other Issues

SSFM discusses other matters in an attachment to its appeal which are not specifically cited as appeal grounds. Nevertheless, we include them here and will discuss their merits to help resolve these issues.

SSFM argues that the P&S Director was incorrect in stating that only Section 4-102 applies to this case. SSFM asserts that Section 4-102 gives the P&S Director the authority to procure A-E services and Section 3-106 sets forth "how to go about it."

### **The P&S Director's Comments in his Report to the Public Auditor**

In his agency report dated February 2, 1999, the P&S Director states generally that with respect to the merits of the re-filed protest, it was difficult to determine what the alleged defect in the procurement process was. Nevertheless, the P&S Director comments on the appeal grounds as follows:

### The Amendment to the Original RFP

The P&S Director sets forth Appellant's claim that it was damaged by the amendment because only five<sup>3</sup> firms, including SSFM, were prepared to submit their proposals on the original closing date, which would have qualified Appellant for further discussions. However, this is "pure conjecture", according to the P&S Director. He explains that SSFM could allege a right to be included in the group of most highly qualified firms if it somehow had a unique right to be included, but states that no such unique right existed. He also mentions that SSFM had no right to inclusion even though discussions were actually held with the top five firms selected after the extended deadline date.

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<sup>3</sup> In this appeal, P&S and the Appellant have each stated that there were five firms which submitted proposals or were prepared to submit proposals on the original closing date of August 31, 1998. However, the procurement records neither support this statement nor show how many and who actually did submit or were ready to submit proposals on the original closing date. The records do suggest that fewer than five proposers had submitted or were ready to submit proposals on that date. Any discrepancies in the records on this point are of no consequence to the main issues in this appeal which, as shown later in our comments, are whether the amendment's purpose was reasonable and whether it complied with the CNMI-PR. The number of proposals actually submitted or ready for submission on the original closing date is immaterial to our consideration of these issues.

Furthermore, the P&S Director states that “to allege that the government has no right to amend an RFP, particularly where the obvious intention was to increase competition and benefit the government by maximizing the number of proposers, is pointless.”

#### The Alleged Arbitrary and Capricious Actions of the P&S Director and the DPW Secretary

The P&S Director does not present comments on this matter.

#### Other Issues

The P&S Director makes no specific comment on the applicability of Section 3-106 to this procurement, but does cite CNMI-PR Section 4-102(3)'s requirement that discussions be held with at least three firms determined to be the most highly qualified. As for the selection process, the P&S Director states that the government has the sole discretion to determine proposers with whom discussions will be held.

#### **SSFM's Comments on the P&S Director's Report**

Appellant SSFM provides the following comments on the Director's February 2, 1999 report, which were also provided to the interested parties on this appeal on March 2, 1999.

#### The Amendment to the Original RFP

Appellant comments that “by amending the original ‘RFP’ ... other firms who were not prepared or qualified to submit there (sic) proposals were made eligible.” SSFM seems to argue that it would have been one of the five most highly qualified firms had there been no amendment to the original RFP, considering that it was one of the only five firms that were prepared to submit proposals on the original closing date.

#### The Alleged Arbitrary and Capricious Actions of the P&S Director and the DPW Secretary

Appellant makes no comment on this matter.

#### Other Issues

SSFM comments that the P&S Director is “incorrect in saying that the Procurement Regulations gives him the unlimited discretion in picking the firms with whom discussions will be held...” No specific authority was cited to support this contention. Lastly, SSFM requests that the P&S Director be ordered to disclose all information he has with respect to this RFP.

#### **OPA's Comments**

This appeal raises what we believe is a threshold issue that needs to be addressed first in this decision. That issue is whether the procurement method for competitive sealed proposals under CNMI-PR Section 3-106 applies to this procurement. Accordingly, we first discuss this threshold issue, followed by the other issues presented in this appeal.

## Applicable Provision of the CNMI-PR

Appellant SSFM argues that the P&S Director is incorrect in stating that only Section 4-102 applies to this case, asserting that Section 4-102 gives the P&S Director the authority to procure Architect-Engineer (A-E) services, and Section 3-106 sets forth the procedures to be followed. It is evident from a fair reading of the solicitation announcement that the procurement method for A-E services under Section 4-102 is the appropriate one for this procurement. The solicitation specifically stated that this was a solicitation of proposals from A-E firms for the design of the Marpi Sanitary Landfill. The selection procedures set forth in the same advertisement pertain to the A-E procurement method; see CNMI-PR Sections 4-102(3) and (4).

It cannot reasonably be argued that the solicitation intended to use the procedures in both Sections 4-102 and 3-106 because these sections cover two significantly different procurement methods. This does not mean, however, that only CNMI-PR Section 4-102 would apply in this procurement because other sections in the CNMI-PR may also be applicable (while others may be used as guide) throughout the procurement process. Although this solicitation uses the term “Request for Proposals” (RFP), we believe that this reference does not intend the use of the competitive sealed proposals procurement method under Section 3-106. It appears that the reference to RFP in this solicitation was merely a matter of terminology usage.

Since we have determined that this procurement was made under CNMI-PR Section 4-102, the selection procedures for A-E services under subsections (3) and (4) apply. These procedures are different from the selection process for competitive sealed proposals under Section 3-106<sup>4</sup>. The selection process in this procurement was generally consistent with the procedures set forth in Section 4-102.

## The Amendment to the Original RFP

We believe that the main issue regarding the amendment is whether its purpose was reasonable, and whether it complied with the CNMI-PR. Our decision on this issue affects the other arguments presented on this ground. Accordingly, we first discuss the reasonableness of the purpose of the amendment and the compliance of the amendment with the CNMI-PR, followed by the rest of the arguments.

### *Reasonableness of Purpose*

The amendment had two purposes: (1) to extend the closing date for the submission of proposals, and (2) to delete the requirement for submission of a certificate of authority in the

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<sup>4</sup> One such difference is the conduct of discussions with proposers qualifying after the initial selection process (under Section 4-102, these proposers are called “most highly qualified firms”, while under Section 3-106, they are commonly called “competitive range offerors”). Under Section 4-102, negotiation is conducted first with the highest qualified firm and if a fair and reasonable price is reached, then the contract is awarded to that firm (this means that negotiation with a qualified firm is possible only when a fair and reasonable price cannot be reached with any higher ranking firm). On the other hand, under Section 3-106, discussions are conducted with all competitive range offerors regardless of their initial ranking, with the contract being awarded to the one with the offer most advantageous to the government.

proposal (instead, such certificate will be required from the successful firm within 60 days of contract award). As discussed below, we have concluded that these purposes had a reasonable basis. Therefore we will not question the decision to amend the solicitation. In a bid protest decision, GAO has stated that “Because contracting agencies have broad discretion in determining their needs and the best method of accommodating those needs, we will not question an agency’s determination of its needs unless that determination has no reasonable basis. [HG Properties A, L.P., B-277572.4, February 11, 1998].

Additionally, SSFM questions whether the amendment was added to accommodate other proposers who were not able to meet the requirements of the original RFP. SSFM, however, does not provide any legal or factual basis to support this allegation. We dismiss this claim since OPA cannot sustain a contention that is unsupported by facts and law. Besides, our review of the pertinent procurement records gives us no reason to believe that the government officials involved acted to deliberately disadvantage the appellant in the submission of proposals. In another bid protest decision, GAO stated that “Our office will not attribute improper motives to government officials on the basis of inference or supposition.” [L. Washington & Associates, Inc., B-276556, B-276556.2, B-276556.3, June 26, 1997].

As for the first purpose, the Assistant Attorney General (AAG) who was directly involved in this amendment stated that the overwhelming reason for the extension of the closing date was the failure of the government to send out the minutes of the pre-proposal conference. The AAG expressed her view that failure to send out the minutes would have been devastating to the procurement process since it would have resulted in proposals based upon differing criteria. She cited the possibility that some would have decided not to submit proposals at all because of the uncertainty generated and stated that this would have negatively impacted competition.

We agree that the failure to send the minutes of the pre-proposal conference to prospective proposers would have had a negative impact on obtaining full competition. The minutes of the pre-proposal conference contain the official answers to questions pertaining to the requirements for the project and other information related to this procurement. Having the official answers in writing helps ensure that prospective proposers do not misunderstand or misinterpret the solicitation requirements. Accordingly, we believe that it was reasonable to extend the closing date to ensure transmittal of the minutes of the pre-proposal conference so that prospective proposers would clearly understand the requirements under this solicitation. It is also reasonable to assume that clarity in the solicitation requirements has a positive impact on securing full competition and in enhancing the responsiveness of proposals that are submitted for consideration. This translates to better competition and serves the best interest of the government in ultimately obtaining the best possible proposal.

The P&S Director’s report states that the obvious intention of the amendment was to increase competition and maximize the number of proposers. The amendment obviously increased competition because it allowed more proposers to participate in this procurement. As stated by the P&S Director, five (possibly fewer, based on the procurement records, see fn 2) proposals were submitted on the original closing date, which increased to ten proposals by the extended deadline. The result (at least twice as many proposers) produced a significant increase in competition, and is consistent with one of the purposes of the CNMI-PR stated

in Section 1-101(2)(f), “to foster effective broad-based competition within the free enterprise system.” We note that the U.S. General Accounting Office (GAO) dismisses protests alleging improper extension of closing date when the reason for such extension is to increase competition. In Ivey Mechanical Company, B-272764, August 23, 1996, GAO stated that “we have repeatedly approved of the issuance of amendments extending closing dates after the expiration of the original closing date when the result is enhanced competition.” In the same decision, GAO further ruled that “...we will not object to an extension when its primary purpose is to increase competition.”

When asked about the reason for the amendment’s second purpose, the AAG stated that “the requirement [certificate of authority] was removed after verifying with BPL [Board of Professional Licensing] that the certificate was not normally required at the offer stage of a procurement and that regulations did not require a certificate at that stage.” She explained that imposing such a requirement as a condition of the RFP, without any basis or showing that it was needed, would be an improper restraint on competition. The Administrator of BPL told us in an interview that she informs prospective proposers making an inquiry that a certificate of authority is not required when firms merely submit proposals for government projects. Accordingly, it was only reasonable to delete a requirement that is no longer needed in this solicitation.

#### *Compliance with the CNMI-PR*

As for compliance with the CNMI-PR, we have determined that there were no violations of the CNMI-PR that would require the cancellation or revision of this solicitation. The CNMI-PR do not provide specific requirements for, or restrictions on, the amendment of solicitations. Generally, however, the CNMI-PR requires government employees and other parties involved in the bidding and negotiation of government contracts to act in good faith. We have no reason to believe that the government employees involved in the amendment to the original RFP did not act in good faith.

Although the CNMI-PR has no specific provisions on solicitation amendments, guidelines are available from other jurisdictions, such as the U.S. Federal Acquisition Regulations (FAR) and protest decisions from GAO. Our review of the accepted practice on solicitation amendments from these sources showed that there was nothing improper in the amendment or the manner in which it was undertaken. Changes to solicitation requirements, such as those covered in the amendment, are specifically allowed. Section 15.206(a) of the FAR (revised as of October 1, 1997) provides that “when, either before or after receipt of proposals, the Government changes its requirements or terms and conditions, the contracting officer shall amend the solicitation.” Subsection (b) of the same FAR section states that “amendments issued before the established time and date for receipt of proposals shall be issued to all parties receiving the solicitation.”

Based on a facsimile transmission report, this amendment was issued on August 31, 1998 and was faxed to prospective proposers, including SSFM, from 2:01 p.m. to 2:22 p.m. on the same day. SSFM’s copy of the amendment was faxed at 2:09 p.m., as shown in the transmission report. Accordingly, we have determined that the amendment was issued before the original closing time of 3:00 p.m. on August 31, 1998. As stated above, amendments can be issued

before or even after the established time and date for receipt of proposals.

*Whether SSFM was Disadvantaged or Unfairly Treated by the Amendment*

Our analysis of the records pertaining to the amendment gives us no reason to believe that Appellant SSFM was disadvantaged or unfairly treated. The extension of the closing date from August 31, 1998 to September 8, 1998 was not the reason for the exclusion of SSFM from the five most highly qualified firms. It was excluded because in the evaluation of proposals, it ranked below those top five. Its proposal was not rejected because of the amendment. SSFM was allowed to compete in this procurement on the same basis as the rest of the proposers, each of whom was allowed to submit a proposal which was subsequently evaluated and ranked by the Committee.

The receipt of the amendment was acknowledged by Appellant's president at 2:10 p.m. on the same day, based on a receipt acknowledgment form. Since SSFM was notified of the extension before the closing time of 3:00 p.m., it had the option to still file its proposal on August 31, 1998 or file a new or revised proposal within the extended submission period. If SSFM had already submitted its proposal before notification of the extension, it could have withdrawn its proposal and filed a new or modified proposal sometime before the new deadline. We do not see how the extension disadvantaged SSFM considering that the amendment still allowed it to compete using either its current proposal or a new and perhaps improved presentation. The amendment, which only extended the closing time for another eight days and deleted one submission requirement, was not so restrictive as to affect SSFM's opportunity to be considered and evaluated fairly. Although the timing of the amendment was very close to the closing hour of 3:00 p.m., we have no reason to believe that this was done deliberately to disadvantage SSFM. The provisions of the amendment were not so extensive as to require notification well in advance of the original closing date.

Additionally, since this procurement used the selection procedures for A-E services under Section 4-102, we do not see how it would be beneficial for SSFM to be included in the top five firms at this point inasmuch as negotiations with the highest-ranked firm have already successfully concluded. We obtained a copy of a signed contract with the highest-ranked firm which showed that the processing of this contract was certified complete by the P&S Director on May 3, 1999. Under the A-E services selection procedures, lower ranking firms will advance to the negotiation stage only when a fair and reasonable price cannot be reached with any of those more highly ranked. In this case, even assuming that the negotiation stage was still in process, four firms (aside from the highest-ranked firm) would be in line for negotiation before SSFM would have its turn. Accordingly, we fail to see how SSFM's chance of award in this procurement could be prejudiced considering its ranking in the initial evaluation.

Generally, it seems that SSFM is arguing that it would have been included among the five selected firms had there been no amendment to the RFP. This claim assumes that had there been no extension of the closing date, the five firms which met the original closing date would all fill the top five positions since there would have been no other firms subject to consideration. There is no need to discuss the merits of this argument since we have already determined that the amendment did not violate the CNMI-PR, and its purpose justified extending the closing date.

## The Alleged Arbitrary and Capricious Actions of the P&S Director and the DPW Secretary

SSFM provides no details or specific cases to support its claim of arbitrary and capricious actions on the part of the P&S Director and the DPW Secretary. We dismiss this claim because OPA cannot sustain a contention that is unsupported by facts and law. Besides, our review of the procurement records in this solicitation gives us no reason to believe that these officials acted to deliberately disadvantage the appellant in the competition process. In HG Properties Inc., cited above, GAO stated that “Where a protester alleges bias on the part of government officials, the protester must provide credible evidence clearly demonstrating bias against the protester or for the awardee, and that the agency’s bias translated into action that unfairly affected the protester’s competitive position.”

### Other Issues

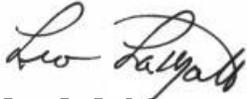
On the issue of discretion, amending a solicitation is within the sound discretion and judgment of the procuring agency. Although agencies have discretion to determine their needs and the best method of accommodating those needs, such discretion should be exercised in compliance with the CNMI-PR and other applicable laws and regulations. In a recent conversation, P&S clarified that its statement that “the government has sole discretion to determine proposers with whom discussions will be held” means that this discretion has to be consistent with the intent and purpose of the CNMI-PR, and that the requirements of the CNMI-PR must be met while exercising this discretion. Additionally, we will not question an agency’s action in this regard unless it is shown to be arbitrary or in violation of the CNMI-PR or other applicable laws and regulations. As stated above, nothing presented in this appeal indicates that there was a violation of the CNMI-PR or that an arbitrary action occurred.

As to SSFM’s request for disclosure of all information on this RFP, we believe that this is a matter between SSFM and P&S. P&S is the custodian of the records for this procurement and is the appropriate agency to determine if the request should be granted. Additionally, we feel that this is an issue more appropriately addressed under the Open Government Act rather than through this protest appeals forum.

## DECISION

The Office of the Public Auditor **denies** Appellant SSFM’s appeal on DPW98-RFP-020. OPA has determined that the purposes of the amendment were reasonable, and that there were no violations of the CNMI-PR with respect to the amendment that would entitle SSFM to the remedies set forth in the CNMI-PR. As for SSFM’s claim of arbitrary action on the part of the DPW Secretary and the P&S Director, OPA cannot sustain a claim that is unsupported. Our review of the records in this procurement gives us no reason to believe that the two officials acted to deliberately disadvantage Appellant. Additionally, SSFM’s request that the contract award in this procurement be withheld cannot be granted as P&S has already determined the need to proceed with the award, as allowed under Section 5-101(2)(c) of the CNMI-PR, and has actually proceeded with the contract award.

CNMI-PR Section 5-102(9) provides that the appellant, any interested party who submitted comments during the consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds 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.



Leo L. LaMotte  
Public Auditor, CNMI

May 17, 1999