



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Site: <http://opacnmi.com>

2nd Floor J. E. Tenorio Building, Chalan Pale Arnold

Gualo Rai, Saipan, MP 96950

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

E-mail Address:  
[mail@opacnmi.com](mailto:mail@opacnmi.com)

Phone: (670) 234-6481  
Fax: (670) 234-7812

IN RE APPEAL OF

SABLAN CONSTRUCTION COMPANY, LTD.

)  
) DPW99-IFB-005  
) DECISION ON APPEAL  
) No. BP-A019  
)

## SUMMARY

This is an appeal by Sablan Construction Company, Ltd. (SCCL), represented by its Legal Counsel Brien Sers Nicholas, from the denial by the Director of Procurement & Supply (P&S) of its protest on the Department of Public Works' (DPW) Invitation to Bid (ITB) No. DPW99-IFB-005 pertaining to the construction of two pre-engineered buildings for the Northern Marianas College (NMC) Tinian campus. Appellant SCCL argued in its protest that Telesource CNMI, Inc. (Telesource) should not be awarded the contract for this procurement because it failed to timely submit required bid documents. The P&S Director denied the protest and ruled that Telesource's original bid submission, even though not in the required form, was in compliance in all material respects with the requirements of the ITB. The appellant raises the same protest arguments in its appeal and also alleges that the selection of Telesource was arbitrary and capricious.

We deny the appeal. We conclude that the failure of Telesource to timely submit required documents was caused by an error in the distribution of the bid package by DPW. Allowing Telesource to submit the lacking documents after opening of bids was only fair since the earlier error that caused its failure to submit the prescribed forms was not its fault. As regards SCCL's allegation that the selection of Telesource as the lowest responsive and responsible bidder was arbitrary and capricious, no facts were presented to support this allegation.

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On February 3, 1999, the Department of Public Works (DPW) issued ITB No. DPW99-IFB-005 for the construction of two pre-engineered buildings for the NMC Tinian campus. Bidders were given until March 2, 1999 to submit their bids to the Director of P&S. In this solicitation, bidders were instructed that they could obtain the scope of work and bid documents (bid package) for this project at the Technical Services Division (TSD) of DPW beginning February 4, 1999. Six days after the issuance of the ITB, DPW issued Addendum No. 1 to clarify that the performance time for this project would be 180 calendar days from the "Notice to Proceed" date. The addendum also reduced the liquidated damages from \$500 to \$150 per calendar day. On March 2, 1999, the

established deadline for bid submission, the Division of Procurement & Supply (P&S) received seven bids from various contractors. A bid opening summary prepared by P&S showed that one of the bidders, Telesource, did not have in its bid submission the following:

1. Proposal<sup>1</sup>
2. Non-collusion affidavit
3. Equal employment opportunity certificate
4. Certificate regarding drug-free workplace
5. Certificate of non-segregated facilities
6. Business license

After the opening of bids, Telesource wrote a letter to the DPW-TSD Director requesting that it be allowed to submit the above lacking bid documents. It explained that the bid package it had received from DPW did not contain the "Instruction to Bidders" which required the inclusion of these documents in the bid submission, and which was supposed to be included in the bid package given by DPW to interested parties.

On March 31, 1999, the P&S Director granted Telesource's request and allowed it to submit those documents which its original bid lacked. The P&S Director determined that these documents would have no effect on the price, quantity, and delivery data contained in Telesource's earlier bid submission. In addition, he stated that granting such request would not prejudice other bidders because it did not improve Telesource's competitive position. After two days, on April 2, 1999, Telesource submitted the lacking documents to the DPW-TSD Director. In its transmittal letter, Telesource certified that it also received Addendum No. 1 which specified a performance period of 180 days and liquidated damages of \$150 per day.

On April 6, 1999, the DPW Secretary informed SCCL that it intended to award the project to Telesource after determining it to be the lowest responsive and responsible bidder among the seven bids received.

### **The Protest and Subsequent Appeal to OPA**

On April 18, 1999, SCCL filed a protest to the P&S Director against DPW's finding that Telesource was the lowest responsive and responsible bidder. SCCL, thru its counsel, mainly argued that the six documents missing from Telesource's bid submission (see Page 1) were mandated to be submitted before bid opening, a requirement stated in the Instruction to Bidders.

By letter dated May 3, 1999, Telesource, thru its counsel, submitted its comments on SCCL's protest, contending that the facts presented in the protest were not adequate to warrant a rejection of its bid as non-responsive. Telesource presented a number of arguments to support this position.

---

<sup>1</sup> The bid package actually contained a bid form and a bid proposal form. The main difference between these two is that the bid form asked for the bid price.

On May 19, 1999, the P&S Director denied SCCL's protest. The P&S Director stated that even though Telesource's bid was not submitted on the required forms, it was in compliance in all material respects with the requirements of the ITB. According to the Director, the government may allow the subsequent correction of a defect in a bid caused by failure to use a mandated form, when the failure to use such form had no effect upon the substance of the bid in question. He stated that Telesource's submission of lacking forms after the bid opening had no effect on the elements of price, quantity and delivery in the bid submitted, and did not improve Telesource's competitive position vis-a-vis other bidders. As regards SCCL's other argument, the Director stated that P&S was unable to comment without knowing the details of SCCL's claim that DPW in prior bid solicitations had disqualified bidders who failed to submit required forms.

On June 1, 1999, SCCL appealed the decision to OPA, claiming that Telesource was not the lowest responsive and responsible bidder because (1) it failed to timely submit required documents, and (2) DPW's finding to the contrary was arbitrary and capricious. As required by the CNMI-PR, on June 7, 1999, the P&S Director notified all interested parties in this appeal, and also provided them copies of protest and appeal documents. After a month, Telesource thru its counsel submitted to OPA its comments on the appeal.

On June 14, 1999, 13 days after SCCL filed an appeal to OPA, the DPW-TSD CIP Coordinator, who had supervised the scope of work and bid documents distribution, issued a certification that the bid package received by Telesource CNMI was incomplete and did not include the "required bid documents." He did not elaborate on what was in the "required bid documents."

On July 27, 1999, the processing of the contract on this procurement between the CNMI Government and Telesource was completed. Subsequently, on August 9, 1999, DPW notified Telesource that the project should be completed by February 4, 2000. The processing of this contract, despite SCCL's protest, was approved by the P&S Director on May 24, 1999. This determination was based on DPW's assertion that there was an urgent need to complete the project for the students and faculty of NMC Tinian.

OPA is issuing its decision on this appeal pursuant to 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.

## **ANALYSIS**

The P&S Director's denial of SCCL's protest is the issue on this appeal. We now summarize the arguments as presented in the protest and appeal process, including our comments on the relevant issues.

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

In its protest letter, SCCL questioned the decision to award the contract to Telesource despite its failure to submit a number of bid documents as required by the Instruction to Bidders. SCCL

claimed a review of previous bid solicitations showed that DPW had disqualified bidders for failure to follow instructions, such as submission of required documentation.

### **Telesource's Comments on the Protest**

Telesource disagreed with the protest argument by stating that its failure to submit the required forms and certifications before bid opening did not warrant rejection of its bid. Telesource cited the following supporting arguments:

- CNMI-PR Section 3-102(8)<sup>2</sup> states that a bid should be rejected only in very limited circumstances, one of which is failure to conform to the ITB's essential requirements such as specifications or time of delivery. Telesource claimed that all of the material and essential requirements which comprised the substance of the ITB were addressed and included in its bid, including price, construction specifications, and time for delivery.
- A bid should not be allowed to be supplemented after bid opening if it gives the bidder a substantial advantage over the others, particularly in a situation which restricts or stifles competition. Telesource emphasized that it did not gain any advantage over other bidders when it was allowed to submit the lacking documents.
- Nowhere did the ITB or other materials given to Telesource describe any requirements for bids to be submitted on a specific form or for the bidder to include any specific affidavits or certificates. According to Telesource, these requirements were stated in the Instruction to Bidders which it received only after the opening of the bids.
- The failure to include the bid forms and certifications constituted only a minor irregularity which had no impact on the price, quality, work, or time of performance. Telesource stated that, at most, this constituted a mistake in bid that could be corrected after bid opening, citing CNMI-PR Section 3-102(8). It further argued that under Federal Acquisition Regulation (FAR) Section 14.407, missing or incomplete documentation can be submitted after bid opening to correct a mistake in a bid provided that: (1) the original bid submitted contains the material or essential requirements that go to the substance of the bid, (2) there is a clear intent on the part of the bidder to be bound, and (3) the terms of the bid are sufficient to bind the bidder to a contract based upon the ITB.

### **Decision on the Protest by the Director of Procurement & Supply**

The P&S Director denied the protest based on his finding that Telesource's original bid submission, even though not on the required forms, was in material compliance with the requirements of the ITB. The P&S Director determined that it was appropriate to allow the subsequent submission of the lacking bid forms because of the following:

---

<sup>2</sup> This section of the CNMI-PR refers to Correction or Withdrawal of bids. The prior subsection, Section 3-102(7) on Bid Rejection, appears to be the section referenced by Telesource.

- A governmental error had prevented Telesource from submitting the required documents before the bid opening date.
- The later submission had no material effect on the original bid.
- The later submission did not improve Telesource's competitive position.

As to SCCL's other argument, SCCL provided no details for its allegation that DPW, in its prior biddings, had disqualified bidders for failure to submit required forms. Accordingly, the P&S Director was unable to respond to this argument.

### **SCCL's Arguments in its Appeal to the Public Auditor**

Appellant SCCL reiterates its main protest argument that Telesource was not the lowest responsive and responsible bidder because it failed to timely submit required documents. In its June 1, 1999 appeal letter, SCCL claims that DPW's selection of Telesource as the lowest responsive and responsible bidder was arbitrary and capricious, but does not elaborate on this assertion.

### **P&S Director's Report on the Appeal**

In his response dated June 23, 1999, the P&S Director states that the appellant's "bare bones" assertions in its appeal provides no new or different information on which to comment. He re-emphasizes his protest decision that the documents which were not submitted by Telesource before the bid opening date could be treated as if they had been timely submitted.

As to SCCL's allegation that DPW's finding was arbitrary and capricious, the P&S Director notes that it was P&S and not DPW that determined Telesource to be the lowest responsive and responsible bidder. The P&S Director states, in any event, that since the appellant has not presented any specific arguments to support its claim, he is unable to comment on the issue.

### **Telesource's Comments on the Appeal**

By letter dated July 6, 1999, Telesource submitted its comments on the June 23, 1999 P&S report. In this letter, Telesource through its counsel reiterates its earlier arguments in the protest and presents additional arguments in response to the P&S Director's report on the appeal. Telesource states generally that the facts raised by SCCL in its protest were not adequate to warrant a rejection of its bid as non-responsive. Specifically, Telesource comments as follows:

- The CNMI-PR require that a contract must be awarded to a responsible bidder who submits the lowest responsive bid meeting the requirements of the ITB and the CNMI-PR. Telesource claims that all of the material and essential requirements which comprise the substance of the ITB were addressed in its original bid submission. According to Telesource, its March 2, 1999 bid submission, although not containing the prescribed

forms, included all the information as to price, specifications of construction, and the time for delivery.

- Telesource argues that the prescribed forms, affidavits or certificates missing from its submission were contained only in the Instruction to Bidders and were not mentioned in the ITB or in the other materials given to it. DPW, in a certification dated June 14, 1999, admitted its failure to supply the complete bid requirements.
- Telesource contends that the absence of these documents constitutes a minor irregularity which had no material impact on the price, quality of work or time of performance. Telesource asserts that this constitutes a mistake that can be corrected after bid opening, citing Section 3-102(8). Moreover, Telesource states that under FAR §14.407, missing or incomplete documentation can be submitted after bid opening to correct a mistake in bid provided that: (1) the original bid submitted contains the material or essential requirements that go to the substance of the bid, (2) there is a clear intent on the part of the bidder to be bound, and (3) the terms of the bid are sufficient to bind the bidder to a contract.
- Telesource argues that where the terms of the ITB reserve the government's right to waive any imperfections in a bid proposal (similar to this ITB), the procuring agency may accept a bid as responsive even in the absence of required documents and forms provided that: (1) the bidder does not receive an advantage or benefit over other bidders, (2) the imperfection in the bid proposal does not affect price, quality, or quantity, and (3) there is no opportunity for fraud or favoritism, citing *J.H. Parker Construction Company, Inc. v. Board of Aldermen of the City of Natchez*, 721 So.2d 671 (Miss. 1998).

## OPA's Comments

SCCL's primary assertion in its appeal is that Telesource is not the lowest responsive and responsible bidder and should not be awarded the contract because it failed to timely submit certain documents prescribed in the ITB. We believe that a fundamental issue in this appeal is whether it was proper to allow Telesource to submit the prescribed bid forms after the bid opening date. Accordingly, we begin by discussing the events and circumstances that led to Telesource's non-submission of the prescribed bid forms before the bid opening date.

### *Allowability of Telesource's Later Submission*

A bid summary entitled "Bid opening" dated March 2, 1999, which was signed by the P&S Director and a DPW official, showed that Telesource's bid submission did not include the following bid documents:

1. Proposal (bid form & bid proposal)
2. Non-collusion affidavit
3. Equal employment opportunity certificate
4. Certificate regarding drug-free workplace

5. Certificate of non-segregated facilities
6. Business license

A day after the bids were opened, Telesource requested permission from the DPW-TSD Director to submit these lacking documents. Telesource claimed that the bid package it received from DPW did not include the Instruction to Bidders which required the submission of these documents. The DPW-TSD Director, then asked the P& S Director to respond to Telesource. On March 31, 1999, the P&S Director allowed Telesource to submit the lacking documents after determining that these would not affect the price, quantity and delivery elements in Telesource's original bid submission.

On June 14, 1999, the DPW-TSD CIP Coordinator who supervised the packaging and distribution of the bid requirements (also referred to as the bid package) issued a certification affirming Telesource's claim that it received an incomplete bid package. He explained that Telesource was the first one to pick up the bid package from the DPW office. He added that the bid package was not ready for pick-up at that time, which apparently contributed to the error. The CIP Coordinator stated that this was unintentional and was not discovered until after the bids had been received.

Our review of DPW's "Proposer's List," the form evidencing receipt of the bid package, showed that Telesource was among the first of 21 interested contractors to pick up the bid package. In an interview, the CIP Coordinator explained that DPW did not devise a checklist or any similar form to ascertain the completeness of the bid package that was distributed. He said that because of the volume of documents included in a bid package, DPW normally issues the bid package in a binder(s) with all the A&E design and technical specifications. He added that in this case, since the bid package contained only general drawings (technical specifications) and was not voluminous, DPW-TSD used a black paper clip to hold all the bid documents together.

We believe that the failure of Telesource to timely submit the required documents was caused by an error in the distribution of the bid package by DPW. It appears that Telesource's bid submission was consistent with DPW's certification that the bid package given to Telesource did not include the Instruction to Bidders; as a result, the bid forms and documents required in the Instruction to Bidders were not included in Telesource's bid submission. We find nothing to suggest that DPW acted in bad faith or that Telesource intentionally left out these documents in its bid submission in order to gain an unfair advantage.

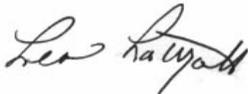
We find that there was a sufficient basis to justify Telesource's later submission of the lacking documents. Although the CNMI-PR do not address this specific situation, we believe that the action of the P&S Director is consistent with one of the underlying policies of the CNMI-PR, which is to ensure fair and equitable treatment of persons who deal with the Commonwealth procurement system. [CNMI-PR Section 1-101(2)(d)]. As regards SCCL's allegation that DPW's selection of Telesource as the lowest responsive and responsible bidder was arbitrary and capricious, no facts were presented in support of this claim.

Because we have concluded that under these circumstances it was proper to allow Telesource to submit bid documents after the bid opening date, we do not need to rule on the appellant's other arguments.

## DECISION

We **deny** this appeal, and uphold the decision of the P&S Director to allow Telesource to submit the lacking documents after the bid opening date. We found nothing to indicate that DPW acted in bad faith when it erred in giving Telesource an incomplete bid package. Allowing Telesource to submit the lacking documents after opening of bids was only fair since the earlier error that caused its failure to submit the prescribed forms was not its fault. As regards SCCL's allegation that the selection of Telesource as the lowest responsive and responsible bidder was arbitrary and capricious, no facts were presented to support the allegation.

Section 5-102(9) of the CNMI-PR provides that the appellant, any interested party who submitted comments during 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 for 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

September 10, 1999