



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

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

IN RE REQUEST FOR RECONSIDERATION
OF OPA APPEAL DECISION BP-A020 FILED BY
THE DIVISION OF PROCUREMENT AND SUPPLY

DECISION ON REQUEST
FOR RECONSIDERATION
No. BP-A020.1

SUMMARY

The Division of Procurement and Supply (P&S) of the Department of Finance (DOF) has filed a request for reconsideration of the Office of the Public Auditor's (OPA) appeal decision no. BP-A020. The decision involved the Department of Public Works' (DPW) use of the emergency procurement method in making the award for its Saipan Anti-skid Overlay Project. We *deny* the request for reconsideration because there was never a disagreement with P&S on the matters submitted for reconsideration.

In the appeal decision, OPA determined that the award had not been made to the lowest responsive and responsible bidder, Hawaiian Rock Products Corporation (HRPC), because the P&S Director had not properly interpreted the emergency procurement regulation. However, since the project had already been completed, OPA had no option other than to deny HRPC's appeal and ratify the contract awarded to Western Equipment, Inc. (WEI).

The P&S reconsideration request asks OPA to review and modify its decision which P&S claims would require full competition in every emergency procurement. Although not disagreeing with OPA's appeal finding that it was practicable for this particular procurement to have been awarded to the lowest responsive and responsible bidder, P&S contends that award on this basis should be made only "if practicable under the circumstances," and not in every emergency procurement.

Our review showed that there is no need to reconsider or modify our earlier decision on the appeal. There is basic agreement between the substance of P&S's reconsideration arguments and OPA's appeal ruling. P&S's reconsideration arguments basically restate OPA's conclusion in its appeal decision that normal competitive procedures for emergency procurement should be employed when practicable under the circumstances.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

P&S filed with this office on March 14, 2000 a timely request for reconsideration of OPA's February 29, 2000 decision no. BP-A020. That decision denied the appeal filed by HRPC concerning DPW's Saipan Highway Anti-Skid Overlay Project which was procured using the emergency procurement method. HRPC's appeal had sought the disqualification of WEI, the selected contractor on this project, on the ground that WEI was not a responsible bidder.

OPA's Appeal Decision

In its February 29, 2000 appeal decision, OPA denied HRPC's appeal because it determined that the P&S Director: (1) had the discretion to consider all unpaid obligations arising from former and ongoing contracts under the ITB; (2) did not have a reasonable basis to ignore WEI's unpaid obligations because WEI failed to supply the requested information about its financial condition; and (3) misinterpreted the CNMI-PR when he determined that finding a bidder to be responsible was not required in an emergency procurement, and thereafter proceeded with the contract award to WEI while disregarding the fact that WEI was not a responsible bidder under Section 3-301(2). OPA determined, however, that absent any evidence of bad faith, the P&S Director could not be held at fault for this action because the CNMI-PR lack clear guidelines for emergency procurement.

OPA recognized that the award should have been made to the lowest responsive and responsible bidder if the P&S Director had properly interpreted and applied the regulations pertaining to this procurement. However, the appeal decision concluded that since the project had already been completed, OPA had no option other than to ratify WEI's contract. Therefore, OPA was compelled to deny HRPC's appeal.

Reconsideration Request Filed by P&S

In his reconsideration request, the P&S Director asks OPA to reconsider and modify its decision, particularly as to: (1) finding that the CNMI-PR guidelines on emergency procurement are unclear and subject to differing interpretations; and (2) requiring full competition in every emergency procurement. The P&S Director contends that OPA has no justification for requiring that *every* emergency procurement be awarded not only on the basis of the lowest responsive bid but also to a responsible bidder. He states that this will destroy P&S's ability to respond to the need for emergency procurement. The P&S Director asserts that award to the lowest responsive and responsible bidder in emergency procurement should be made only "if practicable under the circumstances," citing a number of authorities and references.

However, the P&S Director did not express any disagreement with OPA's finding in its appeal decision that it would have been practicable to award this particular procurement to the lowest responsive and responsible bidder, and that therefore the award should not have been made

to WEI. He now asks OPA to limit its decision to the particular facts and circumstances presented in the protest and appeal.

ANALYSIS

After analyzing P&S's arguments in its reconsideration request, we conclude that there is no need to reconsider or modify our earlier appeal decision. Our analysis of P&S's arguments shows that there is basic agreement between the substance of P&S's reconsideration arguments and OPA's appeal ruling.

Although P&S raised two issues in its reconsideration request, we believe that both arguments are interrelated and stem from its disagreement with what it claims is OPA's conclusion that *every* emergency procurement must be awarded not only to the lowest responsive bid but also to a responsible bidder. P&S claims that OPA's interpretation that the CNMI-PR emergency procurement provisions require full competition in every emergency procurement is incorrect because the CNMI-PR provide clear guidelines about this. Accordingly, we will address the two issues together as one argument.

P&S Request Was Already Addressed in the Appeal Decision

The P&S Director contends that OPA erred in its interpretation of the CNMI-PR provisions on emergency procurement, particularly Section 3-105(1), in concluding that competition is required in every emergency procurement to select the lowest responsive and responsible bidder. He states that "(f)ar from being unclear, we believe this part of the regulation recognizes the reality that there will be some procurements in emergency circumstances which cannot be accomplished in compliance with any of the CNMI-PR." The P&S Director stresses that the emergency procurement provisions in the CNMI-PR clearly establish that competition in emergency procurement should be employed only "if practicable under the circumstances."

We believe there is no real issue here. OPA's appeal decision did not conclude that P&S is required to award to the lowest responsive and responsible bidder in *every* emergency procurement. P&S apparently focused only on certain statements made by OPA in its appeal decision that "it is important in *every* government procurement to establish [not only the responsiveness of the bid but also] the responsibility of the successful bidder before an award is made," and "the requirement of competition *even* for emergency procurement is in keeping with this policy [CNMI-PR Section 1-101(2)(f), Purposes and Policies¹]." (Emphasis in appeal decision). P&S apparently missed our succeeding statement that: "Emergency procurement should be conducted *as competitively as practicable*, and there is nothing in the record to show that award of the contract to the lowest responsive **and responsible** bidder

¹ One of the underlying purposes and policies under CNMI-PR Section 1-101(2) is "...(f) to foster effective broad-based competition within the free enterprise system...."

would have been impracticable at the time of award.” [Page 10, *In re Appeal of Hawaiian Rock Products Corporation*, BP-A020, February 29, 2000] (Bold emphasis in original, italics added).

P&S should have considered the entire wording of the appeal decision, not merely one or two statements from the Decision which it incorrectly interpreted as OPA’s overall conclusion. OPA clearly recognized in its appeal decision the distinctive nature of emergency procurement which may not always be subject to normal competition requirements, but emphasized that whenever practicable under the circumstances, competition should be enforced and *not disregarded* in emergency procurement.

It should be noted that the above discussion stemmed from the P&S Director’s prior interpretation of the CNMI-PR emergency procurement provisions. In his report on the Appeal, the P&S Director claimed that an emergency procurement is not subject to the normal rules of the CNMI-PR, citing CNMI-PR 3-105(1) which states that “...Notwithstanding any other provisions of these regulations, the government may make emergency procurement...” He contended that this provision gave him the discretion to disregard those CNMI-PR provisions which would otherwise have caused him to reject WEI as a non-responsible bidder. The P&S Director then used the “notwithstanding any other provision” clause to justify an award to a non-responsible bidder even though award to the lowest responsive and responsible bidder would still have been practicable.

In his reconsideration request, however, the P&S Director no longer focuses on the “notwithstanding” clause and recognizes that if practicable under the circumstances, award in an emergency procurement should be made to the lowest responsive and responsible bidder. The government could not have awarded this particular DPW contract to a non-responsible bidder if the P&S Director had applied his current interpretation of the emergency procurement provisions at that time.

The P&S Director now asserts in his reconsideration request that normal procurement procedures, including the selection of the lowest responsive and responsible bid, should be applied in emergency procurement *only when practicable* in the circumstances. He claims that OPA’s ruling would require full competition in every emergency procurement, and asks OPA to modify its ruling.

As can be seen from the earlier discussion, however, there is basic agreement between the substance of P&S’s argument and OPA’s appeal ruling. Normal competitive procedures for emergency procurement should be employed only when practicable, as stated in the appeal decision. OPA’s point was that under the particular circumstances in this case, making award to a responsible bidder *was* practicable, a conclusion that the P&S Director now apparently agrees with. Because there is no disagreement, there is no reason to modify our appeal decision.

In his reconsideration request, the P&S Director also cites a number of authorities and references to support his arguments. Since we have concluded that the substance of those

arguments has already been addressed in OPA's appeal decision, we find it unnecessary to discuss the authorities and references cited by P&S.

DECISION

Under CNMI-PR 5-102(9)(a), to obtain reconsideration of an appeal decision, the requesting party must 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. As set forth above, there is no need to reconsider the issues raised in P&S's request for reconsideration.

We find basic agreement between the substance of P&S's reconsideration arguments and OPA's appeal decision. P&S and OPA both agree that normal competitive procedures for emergency procurement should be employed if to do so is practicable under the circumstances.

This request for reconsideration is denied in its entirety.



Leo L. LaMotte
Public Auditor, CNMI

June 5, 2000