



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF  
ALL AROUND SECURITY, INC.

)  
) IFB-MVA-002  
) DECISION ON APPEAL  
) No. BP-A021  
)

## SUMMARY

This is an appeal by All Around Security, Inc. (AASI), represented by its Legal Counsel Jesus C. Borja, from the denial of its protest pertaining to the procurement of security services for Marianas Visitors Authority (MVA) tourism sites under IFB-MVA-2002. Appellant alleges that the Procurement & Supply (P&S) Director violated the CNMI Procurement Regulations (CNMI-PR) when he allowed The Wackenhut Corporation (TWC) to submit certain bid documents after bid opening. AASI asserts that these bid documents were essential because they were characterized as “minimum requirements” in the bid solicitation.

The Office of the Public Auditor (OPA) grants the appeal in part. We determined that the P&S Director violated CNMI-PR Section 3-102(9) when he awarded the contract to TWC despite its failure to supply an essential element of the bid requirement at bid opening. We direct MVA to terminate TWC’s contract under CNMI-PR Section 5-103(2)(ii), and solicit new bids for its security services requirements. We believe that, absent any evidence of bad faith, this remedy is appropriate because: (1) the maintenance of confidence in the integrity of the CNMI procurement system outweighs any possible benefit in allowing TWC to continue its contract; (2) none of the present bidders were found responsive to the IFB.

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In August 1999, MVA thru P&S issued IFB-MVA-002 which was an invitation to interested parties to provide 1-year security services at three selected tourist sites on Saipan. Bidders were informed of the availability of the bid package (i.e. scope of work and listing of sites) at the MVA office, as well as the August 27, 1999 deadline for the submission of bids.

P&S received bids from four companies, including one from the appellant, AASI. After more than a month, on September 30, 1999, MVA's Managing Director advised losing bidders<sup>1</sup> that they had not been selected by MVA's evaluation committee. The selected bidder, The Wackenhut Corporation (TWC), was notified on the same day by a presentation of the security service contract with all the required government signatures. The processing of TWC's security service contract was also completed on the same day.

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

On October 6, 1999, AASI filed a written protest against award of the contract to TWC. AASI alleged that the P&S Director failed to follow the requirements in the scope of work and the CNMI-PR when he accepted TWC's bid submission despite non-compliance with 4 out of the 5 minimum requirements listed in the scope of work. According to AASI, CNMI-PR Section 3-102(6) requires bids to be evaluated based on the requirements set forth in the Invitation for Bids. As a remedy, P&S was requested to award the project instead to AASI, based on the protester's claim that it was the next lowest responsive and responsible bidder.

The P&S Director denied AASI's protest on November 8, 1999, asserting that TWC's failure to submit a number of IFB requirements should not cause the rejection of its bid because these requirements were not essential elements of the IFB. The P&S Director stated that MVA inappropriately included responsibility criteria as an essential requirement of the IFB, and made them appear to be mandatory. He stressed that these responsibility criteria did not become "essential" IFB requirements simply because they were made mandatory. The P&S Director added that such requirements pertained primarily to the bidder's ability to successfully carry out the contract and could be met even after the bid opening.

After seven days, AASI appealed the Director's decision to OPA. Appellant AASI alleges that the P&S Director misconstrued CNMI-PR Section 3-102(6) when he concluded that the term "minimum requirements" does not mean "essential requirements." AASI warns that affirming such a decision would lead to abuse of discretionary power and the government's loss of credibility, particularly if every agency were allowed to select a bidder who did not meet the published requirements. AASI also contends that the P&S Director violated CNMI-PR Section 3-102(8)(a) [Correction of Bids] when he allowed TWC to correct the deficiencies on its bid. Appellant requests OPA to reject the contract award to TWC and award the contract to AASI.

On December 22, 1999, the P&S Director responded to the appeal by emphasizing the arguments in the protest decision relating to the allegations on appeal. In his discussion, the P&S Director denies concluding that the word "minimum" does not mean "essential," while

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<sup>1</sup> MVA had previously rejected one of the four bidders for failure to complete the required list of prices for all the three tourist sites.

acknowledging that these two words are virtually interchangeable. To clarify his argument, the P&S Director reiterates that under CNMI-PR Section 3-102(7)(a) [Bid Rejection] a bid is found acceptable if it conforms to the “essential requirements” of the IFB. He explains that simply because MVA misrepresented certain IFB requirements as essential (by labeling them as “minimum requirements”) does not constitute a proper basis for rejecting TWC’s bid. As regards the concern raised by the appellant about the possible abuse of discretionary power, the P&S Director points out that the issue is the propriety of his determination that TWC met the essential requirements of the IFB, and not the discretion granted in the CNMI-PR.

On December 30, 1999, AASI submitted its comments to the December 22, 1999 report of the P&S Director. AASI states that it is the P&S Director’s responsibility to ensure that the IFB complies with the regulations, citing CNMI-PR Section 2-103 [Duties of the Chief]. Appellant points out that the P&S Director should have removed those minimum requirements that he claimed were not essential before issuing the IFB. AASI asserts that regardless of who is really responsible, the P&S Director admitted in his decision, as well as in his report on the appeal, that a mistake had been made.

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 AASI’s protest against awarding the security service contract to TWC is the issue of this appeal. We now discuss the arguments of AASI and P&S as they were presented in the protest and appeal process, including our comments on the merits of the arguments.

### **AASI’s Arguments in its Protest to the P&S Director**

In its October 6, 1999 protest letter, AASI mainly argued that the P&S Director failed to follow the requirements of the scope of work and the CNMI-PR in his selection of TWC for contract award. It explained that the IFB specifically stated that “...All bids must have in its proposal the following minimum requirements...” However, according to AASI, TWC failed to fully comply with the requirements listed in the scope of work, as follows:

Scope of Work Item No.	Scope of Work Item Description	TWC Submission
1	Cost/Price - Bidder must indicate the annual rate per security officer per site	None
2(a)	Policy & schedule of security officers	None
2(b)	Listing of company vehicles	Copy of the registration card of only one vehicle, with a note that it would be shipped to Saipan
2(c)	Compensation policy for personnel	Benefit plan (for employees)
3	Safety procedure and assumption of liability on vehicle/personnel	Insurance coverage submitted but no safety procedure
4	Total number and availability of manpower - Indicate the names of persons to be assigned and other manpower backup	None

According to AASI, TWC failed to fully meet requirement 2(b) because although this item asked for a list of vehicles, TWC submitted the registration card of only one vehicle. As for 2(c), AASI stated that a benefit plan may be a part of a compensation policy but is not the policy itself. It stressed that the P&S Director erred when he accepted TWC’s bid with all the above deficiencies.

Without making any specific allegations, AASI also stressed that bids should be evaluated based on the requirements set forth in the IFB, and that correction of bids may be allowed only in two instances, citing CNMI-PR Sections 3-102(6) and 3-102(8)(a). AASI stated that these two instances where corrections may be made after bid opening do not apply to TWC, and therefore according to AASI, TWC should not have been allowed to correct its incomplete bid.

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

In denying AASI’s protest, the P&S Director stated that the issue here was whether TWC’s failure to submit the lacking documents rendered its bid non-responsive to the essential elements of the IFB. Citing CNMI-PR Section 3-102(7) [Bid Rejection], the P&S Director explained that this section effectively provides that a bid is acceptable if it conforms to the essential requirements of the IFB, such as specifications or time of delivery. The P&S Director stated that the essential elements for this procurement were: “one year security service, service at three (3) different locations, with cost related to each, security services as defined by the MVA, and services to be performed according to the schedule set by the MVA.” He opined that the lacking documents in TWC’s bid do not magically become essential just because MVA made them mandatory in the IFB through their inclusion in the minimum requirements.

The P&S Director also noted in his decision that TWC was subsequently allowed to provide and explain the lacking documents. While he recognized that this may give the impression that TWC was permitted to correct bid deficiencies, the P&S Director pointed out that these items were not essential elements in the IFB which could harm the bidder's competitive standing. The P&S Director added that these lacking items are matters of responsibility, relating primarily to the ability of the bidder to successfully carry out the contract, and that the CNMI-PR allow the items to be submitted at the time of contract award. He admitted, however, that MVA's inclusion of responsibility criteria with the essential elements of the IFB (making them appear mandatory) was inappropriate.

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

In its appeal to OPA, Appellant AASI alleges that the P&S Director failed to follow the requirements of the scope of work and the CNMI-PR in concluding that TWC met the essential elements of the scope of work. Specifically, AASI states that the P&S Director violated CNMI-PR Sections 3-102(6) and 3-102(8)(a), the provisions pertaining to bid acceptance and evaluation, and correction of bids, respectively. AASI asserts that the P&S Director misconstrues Section 3-102(6) in a clear attempt to hide a violation of the regulations, warning that if the Director's decision is upheld, the bidding procedures would be looked upon by the public as a farce. According to AASI, such a ruling would enable every government agency to select a bidder who failed to meet the published requirements, on the basis that such requirements are not "essential."

As regards the P&S Director's alleged violation of Section 3-102(8)(a), Appellant states that it was surprised to learn that the Director met with TWC to correct the deficiencies on its bid. It claims that the P&S Director, instead of admitting his mistake, misinterpreted the CNMI-PR by stating that the meeting was to satisfy responsibility criteria and not to correct deficiencies on TWC's bid. Appellant calls the P&S Director's justification a "flimsy excuse," and requests OPA to reject the award to TWC and instead award the contract to the next lowest responsive and responsible bidder.

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

In his December 22, 1999 report, the P&S Director reiterates his arguments in the protest decision that relate to AASI's appeal allegations. The P&S Director denies concluding that the word "minimum" does not mean "essential," while acknowledging that the expressions "minimum requirements" and "essential elements" contained in the scope of work and the CNMI-PR, respectively, are virtually interchangeable. He clarifies that his protest decision merely stated that the lacking documents in TWC's bid do not magically become "essential" and constitute a proper basis for rejection just because they were erroneously labeled "mandatory" by MVA in the scope of work.

As for AASI's concern about the abuse of discretionary power, the P&S Director recognizes that there is always the possibility of abuse, but points out that the very reason his (discretionary) authority exists is to ensure that the public is not denied the benefit of full and open competition even in "conflicts" like this. He emphasizes that the sole issue here is not his discretionary authority but whether he is correct in concluding that TWC met the essential requirements of the IFB.

In response to AASI's allegation that he violated CNMI-PR Section 3-102(8)(a) [Correction of Bids], the P&S Director explains that the lacking documents in TWC's bid are not the same as the deficiencies in Section 3-102(8). He adds that these lacking documents are responsibility items which the CNMI-PR allow to be submitted at the time of award. He states that TWC had satisfied these responsibility criteria with MVA at the time of contract award. The P&S Director reiterates his position that TWC was the lowest responsive and responsible bidder, and that the award to TWC was in compliance with the CNMI-PR.

### **AASI's Comments on the Director's Report**

AASI, in its December 30, 1999 letter to OPA, asserts that it is the P&S Director's responsibility under CNMI-PR Section 2-103 to ensure that the IFB complies with the regulations, and states further that the P&S Director's attempt to shift the blame to MVA is misplaced. Appellant contends that the P&S Director should have removed those minimum requirements which the Director now claims are "not essential" prior to issuing the IFB. AASI also states that regardless of who is to blame, the Director's decision, as well as his report on the appeal, admitted that a mistake has been made in this procurement. AASI then restates its prior protest and appeal arguments.

### **OPA's Comments**

Appellant AASI alleges that the P&S Director violated CNMI-PR Sections 3-102(6) and 3-102(8) when he allowed TWC to submit the lacking documents after the bid opening. AASI asserts that the bid requirements are all essential requirements because they were stated as "minimum" requirements in the IFB, and therefore should all be submitted at bid opening.

Before we can decide whether the P&S Director violated the CNMI-PR in this procurement, we need to first determine those requirements in the IFB that are considered essential for purposes of accepting or rejecting the bids. It is necessary that we make this preliminary determination because it will affect consideration of the other arguments presented in this appeal.

## The “Essential Requirements” of the IFB

CNMI-PR Section 3-102(7) [Bid Rejection] provides that a bid may be rejected for “failure to conform to *essential requirements* of the Invitation for Bids such as specifications or time of delivery.” [Emphasis added]. Although the CNMI-PR use the term “essential requirements,” they contain few guidelines on what should be considered as essential requirements in a bid solicitation for purposes of evaluating bids, other than the cited examples of specifications and time of delivery. There are several sections under the sealed bidding procedures of the CNMI-PR that discuss bid requirements; however, these provisions pertain to solicitation requirements in general. For instance, Section 3-102(1) lists the minimum information required in an invitation for bids which includes bid instructions, purchase description, essential contractual terms and conditions, and other requirements. Additionally, the provisions on bid acceptance and evaluation found in Section 3-102(6) provide only that bids shall be evaluated based on the IFB requirements which may include “criteria as is necessary to reasonably permit a determination of the acceptability of the bid for the purpose intended.”

The CNMI-PR also do not provide a definition of the term “essential.” However, “essential” is defined as “Indispensably necessary; important in the highest degree; requisite” in Black’s Law Dictionary (Abridged Fifth Edition). Based on this definition and the CNMI-PR provisions on minimum IFB information and bid evaluation, essential requirements are those stated purchase descriptions, instructions, terms, criteria, or other solicitation requirements which are indispensably necessary to accomplish the purpose of the procurement, including the determination of the acceptability of the bid for the purpose intended. Determination of essential requirements depends on the circumstances of each solicitation, and our review focuses on the reasonableness of the agency’s basis for determining the essential requirements.

Although the CNMI-PR use the term “essential requirements” as discussed above, they also refer to the word “material” when discussing responsiveness of bids. Under sealed bid procedures, contract award is made to the lowest responsive bid by a responsible bidder. The word “responsive,” in reference to a bidder, is defined as “a person who has submitted a bid which conforms in *all material respects* to the invitation for bids.” [CNMI-PR Section 1-201(17), [Emphasis added]. A reasonable reading of this definition leads to a requirement that a bidder should be responsive to all the material terms of the invitation for bids in order to be awarded a contract. This is similar to the bid responsiveness guidelines set by the U.S. General Accounting Office (GAO). According to GAO, the test for responsiveness is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the solicitation, so that upon acceptance the contractor will be bound to perform in accordance with all the IFB’s *material terms and conditions*. [Booth & Associates, Inc., B-277477.2, March 27, 1998, also see *Mike Johnson, Inc.*, B-271943, August 14, 1996, Emphasis Added].

As with the term “essential requirements,” the CNMI-PR lack a definition or guidelines for determining material solicitation requirements. However, Black’s Law Dictionary [Abridged Fifth Edition] defines “material” as “Important; more or less necessary...; having to do with

matter, as distinguished from form.” Compared with the definition of “essential,” “material” carries with it a lesser degree of necessity or significance. Accordingly, to qualify as an essential requirement, a specification must of necessity also qualify as a material requirement for purposes of determining bid responsiveness. However, for a separate determination of “material requirements”, there are available guidelines established by other jurisdictions, such as in GAO bid protest decisions and the U.S. Federal Acquisition Regulations (FAR).

According to GAO, material terms of a solicitation are those that affect the price, quantity or delivery of the goods or services offered. Under the FAR, the general rule is that a bid must be rejected as nonresponsive when it does not strictly comply with the solicitation’s requirements. However, the rule does not apply if the deviation from a requirement is immaterial, or one that is merely a matter of form and not of substance. [FAR 14.405]. One instance of an immaterial deviation cited in a GAO protest decision involved a bidder’s failure to submit a mandatory solicitation requirement, similar to the issue in this appeal. In that case, GAO held that failure to submit a solicitation requirement is not material *simply because bidders are warned that bids will be rejected should they fail to furnish information*, if the government does not need the information in order to evaluate bids or the information otherwise does not have an impact on the bidder’s promise to perform as specified. [*In the matter of American Spare Parts, Inc.*, B-224745, January 2, 1987].

### Responsiveness vs. Responsibility Requirements

Another issue on this appeal is whether certain requirements in this solicitation should be treated as a responsiveness or a responsibility issue. The P&S Director does not dispute that he allowed TWC to subsequently submit certain documents but maintains that the late submission was not a violation of the CNMI-PR. He explains that those documents pertained to the issue of responsibility, and evidence of responsibility can be submitted after bid opening.

Resolution of this issue depends on whether the requirements in question were essential or material requirements of the solicitation, as discussed above. Although it may appear to pertain to a bidder’s responsibility, a requirement could properly become a basis for determining responsiveness if it is an essential or material requirement in the IFB. Requirements do not become material or essential in this case just by labeling them as “minimum requirements.” Instead, the determination should be based on the necessity of the requirement and other considerations discussed above.

CNMI-PR Section 3-301(2) provides that “...Prior to award, the Chief shall obtain information from the bidder or offeror necessary to make a determination of responsibility....” The P&S Director is correct in pointing out that documents pertaining to responsibility can be submitted after bid opening. Responsiveness, on the other hand, must be ascertained from the bid documents themselves and not from explanations or clarifications provided by the bidder after the bids have been opened. Since only information available at the bid opening

may be considered in determining responsiveness, it is not proper to consider a bidder's submission of a material or essential requirement after the bids have been opened, nor is it proper to seek additional data affecting such a material or essential requirement. To be responsive, a bid as submitted must represent an unequivocal offer to perform, without exception, in accordance with the requirements set forth in the IFB, so that the bidder will be bound to fulfill all the material terms and conditions.

As a general guide, GAO has held that solicitation requirements for information relating to a bidder's capability and experience pertain to the bidder's responsibility, while those concerned with the product to be furnished involve bid responsiveness. [*Beta Construction Company*, B-274511, December 13, 1996]. Although not specifically stated, it follows that solicitation requirements involving services to be provided, as with goods to be furnished, would also relate to responsiveness. There are many more guidelines from GAO and the FAR that pertain to sealed bidding procedures; however, we presented only those we believe are relevant to resolve the issues raised in this appeal.

### **Whether the Lacking Documents in TWC's Bid were Essential or Material Requirements**

Since we have determined that a requirement does not necessarily become "essential" just because the IFB labeled them as "minimum" requirements, our analysis focuses next on whether the lacking documents<sup>2</sup> in TWC's bid were "material" or "essential" requirements based on the above guidelines. As we have stated, in determining the essential requirements for a particular solicitation, we need to ascertain if a specific requirement is indispensably necessary to accomplish the purpose of the procurement, including the determination of the acceptability of the bids for such purpose. In this particular procurement, the purpose of the solicitation was to contract for daily security services under the following schedule: from 7:30 a.m. to 4:30 p.m. (nine hours) for each of the three specified tourist sites, with a relief person for a one-hour lunch period, over a period of at least one year.

Requirements pertaining to the schedule of security services are essential requirements in this procurement because they are indispensably necessary in accomplishing the purpose of the solicitation. Similarly, information required in the solicitation to determine compliance of the bids with the required schedule of security services is an essential requirement. Accordingly, we have determined that certain required information relating to the schedule of security

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<sup>2</sup> The P&S Director did not present any arguments to dispute the appellant's claim that TWC failed to submit the following six documents: (1) annual rate per security officer per site; (2) policy and schedule of security officer; (3) listing of company vehicles; (4) employee benefit plan; (5) safety procedure; and (6) assigned personnel and manpower back-up. Our review of TWC's bid showed that it submitted a brochure containing its various company policies possibly addressing the required policy in (2) above. However, the rest of the documents were clearly not included in TWC's bid submission prior to the opening of the bids.

officers is an essential requirement: (1) schedule of security officer, (2) assigned personnel and manpower back-up, and (3) annual rate per security officer per site.

To be deemed responsive and eligible for award, TWC's bid as submitted must be found to be an unequivocal offer to perform, without exception, the material terms and conditions of the IFB. We have determined that the three pieces of information required in the IFB are necessary in ascertaining the responsiveness of the bids. We will now discuss how each of those three items of information relates to the evaluation of bid responsiveness.

*Requirement No. 1. Annual Rate Per Security Officer Per Site*

*Requirement No. 2. Schedule of Security Officers*

*Requirement No. 6 - Assigned Personnel and Manpower Back-up*

Our review showed that TWC failed to submit all three required items of information with its bid submission. TWC provided an annual rate for each of the three sites on the face of the "Scope of Work" provided with the IFB, similar to the submissions by the other bidders in this solicitation. The only difference was that the other bidders gave hourly and monthly rates per site, although this additional information was clearly not required by the IFB. What was required, based on the language of the IFB, was the annual fee per security officer assigned to each site. Our review showed that this information was not contained in any of the three bids.

A reasonable reading of the scope of work shows that there should be more than one guard assigned to one location on a given day: a main guard who is stationed on the post, and a reliever<sup>3</sup> for a one-hour lunch period. The solicitation provides that "The security company is responsible for scheduling of guards to ensure that the 1 hour lunch period is covered by a relief person." Also, it is unrealistic to expect that only one regular guard would be assigned at a site during the duration of the contract because each guard would need to take certain days off. In this case, it is necessary that another guard be assigned during the days that the regular guard is not working. Therefore, to ensure the proper delivery of the required security service, at least three guards would have to be assigned at each site for the duration of the contract: one regular guard, one daily reliever for the lunch period, and one reliever for the regular guard's days off.

The actual number of security officers at each site, however, depends on the schedule of guards, assigned personnel, and the annual rate per security officer per site that are provided with the bid. This related information, which was asked in requirements 1, 2, and 6 of the solicitation, is necessary to determine whether the bid complies with the terms of the solicitation. Without all of this information, it cannot be determined whether a bid is an unequivocal offer to perform the required level of service called for in the solicitation. That

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<sup>3</sup> It should be noted that the bid solicitation required each bidder to provide a relief person to fill in for a one-hour lunch period.

was the case with TWC's bid as it failed to furnish any of the required information with its bid submission. However, we also found Appellant AASI to be non-responsive in this solicitation because it too failed to submit any of the three items of required information. The third bidder, as well, was not responsive because the schedule of security officers submitted with its bid failed to provide for the reliever required during the one-hour lunch period.

TWC and AASI may argue that the annual rate per security officer can be inferred from the bid submission by prorating the annual rate per site among the guards (regular and reliever) on each site. However, this calculation can be made only if the number of security officers assigned to each sites and the number of service hours to be provided by each guard were submitted with the bid. As discussed above, the bids of both TWC and AASI failed to provide this information because they did not comply with requirements 1, 2 and 6 of the solicitation which called for the submission of this information. Besides, having to draw an inference regarding these requirements is not appropriate in this case, because they were material terms and conditions of the solicitation. Having to make assumptions does not cure an uncertain offer.

Nor does submission of the required documents after bid opening make a bid responsive. On March 15, 2000, we were provided a copy of TWC's schedule of security officers which, according to knowledgeable MVA employees, was submitted after the bid opening date. Since a determination of responsiveness is based only on the documents submitted at or before bid opening, the subsequent submission by TWC of its schedule of security officers does not cure its bid deficiency. Again, to be determined responsive, a bid as submitted should be an unequivocal offer to perform, without exception, the material terms and conditions of the IFB.

Not only was TWC's bid unresponsive for failure to submit the necessary information required by the solicitation, we also found it unresponsive because it contained no signature and only the calling card of a company representative was attached to the submission. This lack of a signature on the bid made it even more doubtful that the bidder agreed and promised to supply the services required under this procurement.

A bid submission must be signed by the bidder to indicate an intention to be bound by the terms and conditions of the solicitation. In *SWR, Inc.* [B-278415, December 17, 1997], GAO ruled that an agency properly rejected a proposal which itself was unsigned and where no other documents submitted with the proposal contained an original signature. Although this decision dealt with a proposal, we believe that the same principle also applies to bidding procedures. The solicitation in *SWR* stated that the agency intended to make an award without discussions, a format similar to the bidding process where generally no discussions are allowed after bid opening. GAO explained that "An offer which is **not signed** and lacks some other material indication of the offeror's intention to be bound generally must be rejected since the government's acceptance of the offer would **not** result in a binding contract without resort to confirming the offeror's intention to be bound." [Emphasis in original.]

We have concluded from our review of certain bid documents submitted that TWC's bid was not responsive because it lacked three essential requirements of the solicitation, nor did any of the other bids meet those requirements. We need not review the remaining bid documents because regardless of our findings, the necessary remedy in this case would be the same.

### Recommended Remedy

We conclude that a violation of CNMI-PR Section 3-102(9) occurred because the contract was awarded to a nonresponsive bidder. TWC failed to submit three pieces of required information which were necessary to determine the acceptability of the bid for the purpose of this particular procurement. This information constituted essential requirements of the IFB. For such a violation, the remedies set forth in the CNMI-PR state that if a person awarded the contract has not acted fraudulently or in bad faith<sup>4</sup>, the contract may either be: (1) ratified and affirmed, if doing so is in the best interest of the Commonwealth, or (2) terminated, with the person awarded the contract compensated for actual expenses incurred, prior to termination, plus a reasonable profit.

We believe that in the absence of bad faith, the termination of the contract and compensation of TWC for actual expenses incurred is the appropriate remedy in this appeal. Even if TWC has been performing well, we believe that the maintenance of confidence in the integrity of the CNMI government procurement system outweighs any possible benefit in continuing with TWC's contract. One of the purposes of the CNMI-PR is "to provide for increased public confidence in the procedures followed in public procurement."

Additionally, allowing the contract of a nonresponsive bidder to continue could impair the integrity of the competitive bidding process where, as here, the recommended remedy is still very feasible. Unlike a situation involving the delivery of specific goods or construction work, it would not be difficult to implement the remedy here because TWC could be allowed to continue rendering security services under its contract until a contractor is selected through a new solicitation. Since MVA has a continuing need for this security service, TWC's contract should not be terminated until the new contractor's starting date.

MVA may expedite the re-bidding and contract award process as long as it is not prejudicial to fair and open competition and is in compliance with the CNMI-PR. One way to expedite the bidding process would be to shorten the bidding period from the usual 30 calendar days to perhaps 2 weeks if the P&S Director determines it to be reasonable and necessary. CNMI-PR Section 3-102(3) provides that a bidding period of at least 30 calendar days shall be provided *unless the Chief* [now P&S Director] *determines a shorter period is reasonable and necessary.* [Emphasis added].

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<sup>4</sup> Our review of the applicable documents in this procurement showed no evidence that the person awarded the contract has acted fraudulently or in bad faith.

Furthermore, we believe that terminating the current contract and soliciting new bids is the better remedy, considering that **none** of the bidders were found responsive to the IFB. In the spirit of fair competition, we suggest that MVA exclude from its solicitation all insignificant elements that have no relevance in determining the responsiveness of bids.

### Other Matters

Although not necessary for our decision, we would like to comment on some matters that came to our attention during our review of this solicitation. We suggest that MVA and P&S consider the following in their future solicitations.

Solicitation requirement no. 2 asked not only for the submission of the schedule of security officers but also for the submission of a “policy”. The bid solicitation, however, did not specify what particular policy pertaining to security officers was being requested. This could place bidders in a position of guessing what the required policies were. A bidder could submit a policy pertaining to security officers and still be found not in compliance with this unclear requirement.

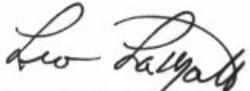
CNMI-PR Section 3-102(1)(f) provides that an invitation for bids shall include at the minimum “a purchase description in sufficient detail to permit full and open competition and allow bidders to properly respond,” among other requirements. Invitation requirements without sufficient details can lead to a number of different interpretations, and may eventually lead to protests. Solicitation requirements should always convey the specific needs of the agency in a clear and concise manner, particularly when using the sealed bidding method. Furthermore, those requirements dealing specifically with responsibility determination under Section 3-301 of the CNMI-PR may be excluded from the IFB requirements since they can be submitted after bid opening but prior to award of the contract.

## DECISION

The Office of the Public Auditor *grants the appeal in part*. We have determined that the P&S Director violated Section 3-102(9) when he awarded the contract to TWC despite the fact that it failed to supply essential requirements of the solicitation at bid opening. We therefore direct MVA to terminate TWC’s contract under CNMI-PR Section 5-103(2) (ii), and solicit new bids for its security services requirements. The effective date of this termination should be upon commencement of the new contract.

Additionally, we urge MVA and the P&S Director to consider our comments in this appeal decision to ensure the integrity of the competitive sealed bidding process. MVA and the P&S Director should ensure that any bid solicitation consist of clear and specific requirements necessary to determine responsiveness of bids. Prior to bid advertisement, MVA may properly exclude from the solicitation requirements those criteria pertaining specifically to a bidder’s responsibility since they can be submitted prior to contract award.

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

April 4, 2000