



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF

MARIANAS INFORMATION TECHNOLOGY CORP)

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APPEAL NO. BP-A030

DECISION ON APPEAL

(Protest Decision No. 02-0005)

SUMMARY

This decision is on an appeal filed by Marianas Information Technology Corporation (Maritech) from the denial of its protest by the Director of the Division of Procurement and Supply (P&S) concerning the issuance of Contract No. 378229-OC to A.O. Enterprises, Inc. (A.O. Enterprises) for computer maintenance services for the Business Gross Revenue (BGR) and Employer Withholding Receipt (EWR) CNMI Tax Subsystems of the CNMI Department of Finance, Division of Revenue and Taxation.

The Public Auditor denies the appeal in part and affirms the appeal in part. The Office of the Public Auditor (OPA) finds that (1) Contract No. 378229-OC failed to satisfy the required elements of section 3-108 of the CNMI Procurement Regulations (CNMI-PR) to support the approval of an expedited procurement, and (2) A.O. Enterprises does not appear to have violated any immigration or business licensing laws that would justify finding it unable to perform the work. OPA further finds that Maritech's appeal was sufficient in pleading form to satisfy the CNMI-PR requirements and that there were sufficient grounds for filing the appeal.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Contract No. 378229-OC was entered into between the Commonwealth, through the Department of Finance (DOF), and A.O. Enterprises for computer maintenance services in relation to the CNMI BGR and EWR CNMI Tax Subsystems. The contract was entered, without competitive selection, on an expedited procurement basis. The term of the contract was two months -- January 22, 2002 to March 22, 2002. On January 25, 2002, the Director of CNMI Division of Procurement and Supply (P&S) issued a memorandum notifying the Department of Finance that the contract had completed approval processing.

On February 21, 2002, Maritech filed a protest with the Director of P&S over the issuance of Contract No. 378229-OC to A.O. Enterprises. On April 8, 2002, the Director of P&S issued Protest Decision No. 02-0005 denying Maritech's protest.

On April 17, 2002, Maritech appealed P&S Protest Decision No. 02-0005 to OPA. On April 18, 2002, OPA informed the P&S Director of the filing of the appeal and requested a complete report pursuant

to CNMI-PR §6-102. P&S submitted such report on April 23, 2002, within the 10 days provided by the CNMI-PR. Maritech filed its comments on the P&S report on May 7, 2002. No comments on the appeal were received from A.O. Enterprises.

ANALYSIS

We now discuss the arguments submitted by Maritech and P&S and our comments on their merits.

Maritech's Protest to the Director of P&S

In its February 21, 2002 protest to the Director of P&S, Maritech alleged that (1) the government was not able to satisfy the factors required to justify an expedited procurement under CNMI-PR §3-108, (2) the two individuals performing the services on behalf of A.O. Enterprises under Contact No. 378229-OC could not lawfully provide services in the CNMI due to their immigration status, and (3) Maritech was entitled to preference under CNMI law.

P&S Director's Protest Decision No. 02-0005

On April 8, 2002, the P&S Director denied Maritech's protest, concluding that (1) all of the criteria listed in section 3-108(a)-(d) were satisfied in the award of the contract under an expedited procurement method, (2) the principals of A.O. Enterprises could lawfully provide services in the CNMI in the performance of the contract, and (3) Maritech was not entitled to U.S. citizen bidders preference in the procurement as such preference ceased to exist when repealed by P.L. 11-87 on July 30, 1999.

Maritech's Appeal to the Public Auditor

On April 17, 2002, Maritech appealed P&S's Protest Decision No. 02-0005 to OPA. In its appeal, Maritech raised only two of the three issues it had raised in its protest to the Director of P&S: (1) whether there was sufficient justification to support the expedited noncompetitive procurement under CNMI-PR §3-108; and (2) whether A.O. Enterprises was a "responsible contractor."

P&S Director's Report on the Appeal

On April 23, 2002, P&S filed its report on the appeal with OPA. In the report, the P&S Director recommended that the appeal be summarily dismissed. The report referred to the P&S protest decision as responding to the relevant issues. P&S further stated that the appeal filed by Maritech 1) failed to contain a concise, logically arranged, and direct statement of the grounds for appeal against such decision, as required by CNMI-PR §6-102(2)(c), 2) failed to request a ruling by the Public Auditor as required by CNMI-PR § 6-102(2)(d), 3) is frivolous as evidenced by its extreme brevity, and 4) was filed for the sole purpose of harassing the Government and was an abuse of the administrative appeals process.

Maritech's Reply to the P&S Report

In its reply to the report of the P&S Director filed with OPA on May 7, 2002, Maritech expanded on the claims made in its initial appeal to OPA by essentially setting forth the identical arguments made in its original protest to P&S. Specifically, Maritech alleged that (1) the government was not able to satisfy the factors required to justify an expedited procurement under CNMI-PR §3-108, and (2) that the two individuals who were performing the services for A.O. Enterprises under Contract No. 378229-OC could not lawfully provide services in the CNMI due to their immigration status.

Justification of the Expedited Procurement

Maritech argues that the expedited procurement of Contract No. 378229-OC failed to meet any of the four factors set forth in CNMI-PR §3-108(2). Maritech quotes the four factors required as follows:

- (a) The urgency of the government's need for the good or service;
- (b) The comparative costs of procuring the goods or service from a sole source or through the competitive process;
- (c) The availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and
- (d) Any other factors establishing that the expedited procurement is in the best interest of the Commonwealth Government.

Maritech argues that the Government created the urgency by failing to adequately plan in advance to solicit continuing computer system maintenance services to allow for a competitive procurement process when it knew that its prior maintenance contract, which was with Maritech, was expiring on December 31, 2001. Maritech argues that the comparative costs element is not satisfied because the Department of Finance did not sufficiently document its figures in alleging that the expedited procurement price would be 65% less than industry standard and that an RFP for the services would be "almost triple" the price of a negotiated expedited contract. With respect to the third element, Maritech alleges that Maritech's availability to perform the work mitigates against the need for an expedited procurement with A.O. Enterprises. Finally, Maritech alleges that the Department of Finance did not set forth any further factors establishing that the expedited procurement was in the Commonwealth's best interest.

The Ability of the A.O. Enterprises Principals/Employees to Legally Perform Services in the Commonwealth.

Maritech asserts that A.O. Enterprises is not a responsible offeror because its principals, and the employees who were going to perform the computer services, were unable to legally work in the CNMI. Maritech alleges that the two shareholders who were going to perform the work in the CNMI under Contract No. 378229-OC, Messrs. Ostergaard and Wibberly, are aliens who possess U.S. Green Cards. It is Maritech's position that, as aliens, Messrs. Ostergaard and Wibberly must each possess either a regular term, long term or foreign investor business certificate under the CNMI Foreign Investment law or regulations to be able to lawfully enter and engage in business in the CNMI .

OPA's Comments

The appellant in this matter raises the following two issues:

1. Whether there was sufficient justification provided to satisfy the elements set forth in CNMI-PR §3-108 to support approval of the expedited procurement of Contract No. 378229-OC; and
2. Whether A.O. Enterprises was a "responsible offeror."

The Director of P&S counterclaims that 1) the appellant failed to sufficiently plead its allegations in its appeal, and 2) the appeal was taken on frivolous grounds solely for the purpose of harassing the Government.

Justification for Expedited Procurement

Maritech argues that none of the factors set forth in CNMI-PR §3-108(2) are satisfied and therefore sufficient justification did not exist for the Director of P&S to approve the issuance of Contract No. 378229-OC on an expedited procurement basis. The four factors required under CNMI-PR 3-108(2) are as follows:

- (a) The urgency of the government's need for the good or service;
- (b) The comparative costs of procuring the goods or service from a sole source or through the competitive process;
- (c) The availability of the goods or service in the Commonwealth and the timeliness in acquiring it; and
- (d) Any other factors establishing that the expedited procurement is in the best interest of the Commonwealth Government

Urgency of the Government's Need for the Service.

The information in the record relating to the urgency is contained in the justification documents submitted by the Department of Finance to P&S to support the request for an expedited procurement. In a January 11, 2002 memorandum to the Director of P&S, the Acting Director of the Division of Electronic Data Processing (EDP) stated:

[D]ue to personnel shortage, limited technical knowledge of the Cool2E utility tool, support of other software applications, numerous requests by CNMI governmental agencies for development of applications, and the absence of a maintenance service agreement in place; it has become apparent that EDP is growing in tasks but not in staff and is unable to provide a total 100% maintenance support that the Business Gross Revenue (BGR) and employers' Withholding Receipt (EWR) subsystems requires within the CNMI Tax Application System.

A January 21, 2002 supplemental support memorandum for the justification was submitted by the Acting Secretary of Finance to the Director of P&S stating that the services needed for computer maintenance could not be delayed pursuant to the normal time it would take to competitively procure a contractor, due to the upcoming business filing deadlines for the fourth quarter ending on January 31, 2002. The Acting Secretary expressed concern that failure to release the W-2s within the system would prevent timely release of refunds and rebates, which in turn would cause the CNMI to incur a “significant amount of interest charges.”

Maritech argues that the Government created the urgency by failing to adequately plan in advance to solicit continuing computer system maintenance services to allow for a competitive procurement process. Maritech contends that the government knew that the Maritech maintenance contract expired on December 31, 2001 and therefore had sufficient time to solicit bids or proposals for the continued maintenance of the EWR and BGRT subsystems.

Maritech cites *Signals & Systems, Inc.*, B-288107 at 8-9 (Comp. Gen. Sept. 21, 2001) for the proposition that the urgency supporting an expedited procurement request cannot result from inadequate advance planning. The *Signals & Systems, Inc.* case reviews three elements in determining whether there was sufficient justification of an urgent need to support a noncompetitive procurement in that situation. The first of these elements is the urgency of the need, the second is whether more than the minimum amount necessary to address the emergency was procured, and the third is whether there was a lack of advance planning.

It appears from the justification documents concerning the situation before OPA for review that there was clearly an “urgency of the government” that required obtaining the services. The deadlines for tax filings were approaching, and failure to maintain the system could have resulted in financial harm to the government. Furthermore, it appears that the Department of Finance only sought the amount of services required to address the urgency by limiting the contract to a two-month term. The Department of Finance stated that the purpose of Contract No. 378229-OC was to allow it the necessary time to proceed under the required competitive process for a long-term service arrangement.

With respect to the lack of advance planning, *Signals & Systems, Inc.* was based on the language of 10 U.S.C. sect. 2304(f)(5)(A) which clearly and strictly prohibits an award of a contract where the need has arisen from the failure to plan. OPA notes that a clear statement to that effect does not exist in the CNMI Procurement Regulations as it does in federal statutes. However, such an interpretation is a logical extension of the language and intent of the requirement found in CNMI-PR 3-108(2)(a) because to rule otherwise would create a loophole where one was clearly not intended by the CNMI-PR. It is also in line with the purposes and policies of the CNMI-PR, particularly items (c), (d), and (g) of Section 1-101(2):

- (c) to provide for increased public confidence in the procedures followed in public procurement;
- (d) to insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth;

- (g) to provide safeguards for the maintenance of a procurement system of quality and integrity.

It appears from the record that there was sufficient notice to the Department of Finance that it needed to seek continued services. DOF knew that its contract with Maritech was ending on December 31, 2001 and appears to have been aware that the level of ability of its EDP staff was insufficient to assume the full maintenance responsibilities. The record does not indicate why the Department of Finance did not adequately address the upcoming expiration of the Maritech contract at an earlier date. Failure to do so created the urgency relied upon to justify the expedited procurement. As such, OPA finds that a justifiable urgency of the government to support an expedited procurement did not exist.

Comparative Costs

Maritech argues that the comparative costs element is not satisfied because the Department of Finance did not sufficiently document its allegation that the expedited procurement price would be 65% less than the industry standard and that an RFP for the services would be "almost triple" the price of a negotiated expedited contract. The record is not clear on where the 65% reduced figure was derived from, but the protest decision from the Director of P&S states that it "very likely results from [its] experience with Maritech's charges for similar services over the past few years."

The CNMI-PR do not require that the price paid under an expedited procurement be a specific amount less than what would have been paid to the awardee under a standard RFP. As such, whether the price was 65% or 6% less is not determinative. Furthermore, the regulations do not even require that the price be less. It is conceivable that in an emergency situation, seeking the services on a competitive basis might yield a lower price, but the urgency of the situation justifies a higher price necessary to address the emergency.

Finally, Maritech does not allege that it would have provided the services at a lower cost if provided the opportunity. It simply states that the lack of documentation supporting the cost comparison "renders the comparative cost justification useless." The Department of Finance contends that it compared the price it was going to pay to the industry standard. Maritech has not demonstrated that this is a false comparison. As such, this element appears to have been satisfied.

Availability of the Goods or Services in the Commonwealth.

Maritech alleges that the fact that it was able and available to perform the work mitigates against allowing an expedited procurement. As with the cost element, the regulations do not require that no other person or firm be able to provide the service. They simply state that the availability of other firms should be considered. The Department of Finance documented that it did consider other firms and rationally explained why it elected not to select the other firms and instead selected A.O. Enterprises. It is irrational to read the third element to require that no other firm be available to do the work because that would mean that whenever there was more than one firm or person in the Commonwealth to provide a service or good, an expedited procurement could never be approved regardless of the extent of the emergency or urgency.

Other Factors Establishing that the Expedited Procurement was in the Commonwealth's Best Interest

Maritech alleges that the Department of Finance did not set forth any other factors establishing that the expedited procurement was in the Commonwealth's best interest pursuant to 3-108(2)(d). This is not a requirement. It merely allows the agency to provide any additional support if it exists. Failure to provide other items for consideration does not invalidate a request for expedited procurement.

The Ability of the A.O. Enterprises Principals/Employees to Legally Perform the Services in the Commonwealth.

Maritech asserts that A.O. Enterprises is not a responsible offeror because its principals, the employees who performed the services under the contract, do not possess business entry permits or have not made the required deposit in accordance with the CNMI Foreign Investment Regulations.

This identical issue was addressed by OPA in Appeal No. BP-A029. That matter had the same parties -- Maritech as the appellant and A.O. Enterprises as the party awarded the contract. In that case, Maritech raised the identical issue regarding the ability of the same two employees, Messrs. Ostergaard and Wibberley, to perform services in the CNMI on the basis of their U.S. Green Card status. OPA renders the same opinion on this issue as it did in Appeal No. BP-A029.

The ability of Mr. Ostergaard and Mr. Wibberley to perform the work required under the contract in the CNMI is an immigration issue. In making its decision that A.O. Enterprises was responsible, and able to perform services in the situation surrounding OPA Appeal No. BP-A029, P&S alleged that it relied on the representations of officials from the Department of Labor and Immigration that U.S. Green Card holders are permitted to work in the Commonwealth without obtaining a separate CNMI entry permit. In the earlier matter, OPA reconfirmed such position with both the Department of Labor and Immigration and the Attorney General's Office. Since there do not appear to be any new facts presented in this matter which differ from the earlier situation and it appears that P&S approved this contract with the same understanding that it had regarding the contract which was the subject of the earlier protest, OPA upholds P&S's decision that A.O. Enterprises is able to perform work in the CNMI.

P&S Allegations Concerning the Form of the Pleadings.

In its report to OPA, P&S alleges that the appeal filed by Maritech 1) failed to contain a concise, logically arranged, and direct statement of the grounds for appeal against such decision, as required by CNMI-PR §6-102(2)(c), 2) failed to request a ruling by the Public Auditor as required by CNMI-PR §6-102(2)(d), 3) is frivolous as evidenced by its extreme brevity, and 4) was filed for the sole purpose of harassing the Government and was an abuse of the administrative appeals process.

CNMI-PR 6-102(2)(c) is fairly lenient on the required form of a pleading. It does, however, require that four items be contained in the documents submitted: 1) the name and address of the appellant, 2) the contracting agency and number of the contract or solicitation, 3) a concise, logically arranged, and

direct statement of the grounds for appeal, and 4) a request for a ruling.

The appeal filed by Maritech in this case was extremely abbreviated, bordering on failure to satisfy the minimum requirements. However, it did state that its grounds were that the procurement did not comply with CNMI-PR §3-108 of the regulations and there was a deficiency in the responsibility of the contractor. These allegations were further expanded upon in Maritech's reply to the P&S report. OPA recognizes the leniency intended to be granted by the regulations. While we would discourage such brevity in future filings, we find that the appeal minimally satisfied the requirements of the CNMI-PR.

P&S further alleges that the sole purpose of the appeal was to harass the Government. As stated above, Maritech filed similar allegations with respect to the immigration status of the parties performing the contract in BP-A029. Maritech has taken OPA's decision in Appeal No. BP-A029 to the Superior Court for review. This fact, combined with OPA's finding that the criteria set forth in CNMI-PR §3-106(2)(a) were not satisfied in the issuance of Contract No. 378229-OC, supports a finding that there were sufficient grounds for filing of an appeal.

DECISION

The Public Auditor affirms the appeal in part and denies the appeal in part. The Public Auditor denies the counterclaims raised by the Director of P&S.

OPA finds that there was not sufficient justification to satisfy the urgency criterion set forth in CNMI-PR 3-108(2)(a) because the urgency claimed by the Department of Finance appears to have been, in part, created by the failure of the agency to adequately plan for the expiration of its prior maintenance contract for the BGR and EWR CNMI Tax Subsystems. OPA further finds that A.O. Enterprises does not appear to have violated any immigration or business licensing laws that would justify finding it unable to perform the work. OPA further finds that the appeal filed by Maritech was sufficient in form to satisfy the CNMI-PR requirements and that there were sufficient grounds for filing the appeal.

REMEDIES

CNMI-PR §6-103(2) sets forth the remedies available when a determination is made by the Public Auditor after the award of a contract. This appeal was filed with OPA after the award of Contract No. 378229-OC. The protest was filed with the Director of P&S on February 21, 2002, almost one month after the contract was issued and halfway through the contract term. The Director of Procurement and Supply issued his decision on April 8, 2002.¹ The appeal was filed with OPA on April 17, 2002, almost

¹ The P&S Director twice extended the deadline for issuance of his decision. He notified the parties in a memorandum dated February 22, 2002 that the final day for comment was March 1, 2002. The final day for decision pursuant to CNMI-PR §6-101(1)(c) would have been March 21, 2002. The first extension issued by the Director of P&S extended the deadline until April 2, 2002 and was issued in a memorandum dated March 19, 2002. The Director again extended the deadline to April 12, 2002, pursuant to a memorandum he issued on April 2, 2002. The initial deadline of March 21, 2002 was one day before the expiration of the contract term.

four weeks after the end of the contract term.

There is no allegation, nor does it appear, that A.O. Enterprises acted fraudulently or in bad faith. Section 6-103(2) provides for an award where the party awarded the contract has not acted fraudulently or in bad faith. It provides two alternatives, as follows:

- (i) ratify or affirm the contract provided it is determined that doing so is in the best interest of the Commonwealth; or
- (ii) terminate the contract and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination.

Because the term of the contract has long since expired and the CNMI has obtained the benefit of the services provided, OPA elects the option set forth in section (i), although either section would effectively yield the same result. As such, Contract No. 378229-OC is hereby affirmed.

Section 6-102(9) of the revised CNMI-PR provides that Maritech, 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 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 10 days after the date of this decision.



Michael S. Sablan, CPA
Public Auditor

July 8, 2002