



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
DB HEALTHCARE, INC.

)
) APPEAL NO. BP-AO33
) DECISION ON APPEAL
) (Protest Decision No. 02-009B)
)

SUMMARY

This decision is on an appeal filed by DB Healthcare Inc. of Burlington, Massachusetts (DB Healthcare (USA)) from the denial of its protest by the Director of the Division of Procurement and Supply (P&S) pertaining to the solicitation for manpower services to provide nurses and other medical health care professionals to the Commonwealth Health Center (CHC) under Request for Proposals (RFP) 02-CHC-0092.

The Public Auditor grants the appeal. The Office of the Public Auditor (OPA) finds that (1) DB Healthcare (USA) and DB Healthcare (CNMI), Inc. (DB Healthcare (CNMI)) are distinct and separate legal entities; (2) DB Healthcare (CNMI) is within the Commonwealth and DB Healthcare (USA) is outside of the Commonwealth for purposes of RFP 02-CHC-0092 and Section 3-102(7) of the Commonwealth Procurement Regulations (CNMI-PR); (3) the proposal received by P&S via Express Mail on August 30, 2002 at 11:00 a.m. was submitted by DB Healthcare (USA); (4) DB Healthcare (USA) had provided Notice of Intent to Propose within the required time set forth in RFP 02-CHC-0092 and CNMI-PR § 3-102(7); and (5) the proposal DB Healthcare (USA) submitted on August 30, 2002, was within the additional 7 working days beyond the due date provided by RFP 02-CHC-0092 and CNMI-PR §3-102(7), and was therefore acceptable.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The P&S Protest Decision states that, on August 2, 2002, RFP 02-CHC-0092 was issued by P&S and the Secretary of Public Health under CNMI-PR § 3-103 Competitive Sealed Proposals for health care professionals manpower services and that the solicitation was published in local papers during the month of August 2002. The published deadline for submission of proposals was Tuesday, August 27, 2002 at 3 p.m. The RFP required that:

Proposals submitted from vendors outside the Commonwealth must be postmarked by August 27, 2002, and received within seven (7) working days of the date. *Offerors outside of the Commonwealth must notify the Director in writing of their intent to submit a proposal no later than 3 p.m. August 27, 2002 (Saipan time) in order to receive this additional seven (7) days for the receipt of the actual proposal documents.* This notice of intent may be in any mode of written communication including facsimile or e-mail to procurement@gtepacifica.net or fax number (670) 664-1515.

(Emphasis added). This provision reflects the requirements of CNMI-PR § 3-102(7).¹

On August 22, 2002, Rakesh Kamdar, the President of DB Healthcare (USA), sent an email to P&S stating that “DB Healthcare” would be sending its proposal postmarked by August 27, 2002, and requesting an acknowledgment via e-mail or fax. The same day, at 1:53 a.m., P&S e-mailed Rakesh Kamdar acknowledging receipt of the Notice of Intent to Propose.

At 3:10 p.m. on August 22, 2002, Rakesh Kamdar e-mailed the Vice-President of DB Healthcare (CNMI), Mr. Antony Glad, the following message:

Tony, Please fax the following letter on behalf of DB Healthcare (CNMI), Inc. to procurement office.

These e-mails are contained in Exhibit A to the protest letter from DB Healthcare (USA) and copies are contained in the P&S file that was submitted as part of the record in this matter.

On September 4, 2002, P&S sent a letter to DB Healthcare (USA) notifying it that its proposal was received via Express Mail on August 30, 2002 at 11:00 a.m., after the deadline for submissions, and was therefore not accepted for consideration. The letter acknowledges receipt of a Notice of Intent to Propose. However, P&S states that CNMI-PR § 3-102(7), which permits extension of the submission deadline upon request, only applies to proposals submitted by proposers “outside of the Commonwealth.” P&S indicates that the finding of vendor residency was based on the incorporation of DB Healthcare (CNMI) in the Commonwealth on May 7, 2002 and its possession of a CNMI business license issued on July 1, 2002. The P&S Director found that because “you are incorporated in and licensed to conduct business in the CNMI, you cannot be considered as a proposer outside the CNMI for the purposes of Procurement Regulation Section 3-102(7).”

¹ The RFP was issued under CNMI-PR §3-103 Competitive Sealed Proposals. The focus of this appeal is the language in the RFP which mirrors CNMI-PR§3-102(7). CNMI-PR§3-102 addresses the procedures for Competitive Sealed Bidding. However, the language in the RFP mirrors that of CNMI-PR §3-102(7).

On September 6, 2002, DB Healthcare (USA) filed a protest of P&S's decision not to accept its proposal due to late submission. In its protest, DB Healthcare (USA) argues that DB Healthcare (CNMI) is currently a shell corporation with no shares having been purchased and transacting no business to date. It also argues that the proposal was submitted by DB Healthcare (USA) and not DB Healthcare (CNMI). The protest notes that DB Healthcare (USA) received a response from P&S acknowledging its Notice of Intent to Propose which led it to believe that its late submission within the rule had been acknowledged.

On October 3, 2002, the P&S Director denied DB Healthcare (USA)'s protest.² On October 8, 2002, DB Healthcare (USA) appealed the P&S protest decision to OPA. On October 10, 2002, OPA informed the P&S Director of the filing of the appeal and requested a complete report pursuant to the CNMI Procurement Regulations. P&S submitted such report on October 15, 2002.

On November 18, 2002, OPA sent a letter to DB Healthcare (USA) requesting additional information relating to the corporate structure of DB Healthcare (USA) pursuant to CNMI-PR §6-102(7). On November 26, 2002, OPA received a response from DB Healthcare (USA) providing the requested information.

P&S notified DB Healthcare (USA) in its letter dated September 9, 2002 that it has withheld award due to filing of the protest prior to award of the contract pursuant to CNMI-PR §6-101(2)(b).

²On September 9, 2002, Notice of Opportunity to Comment pursuant to CNMI-PR §6-101(b) was sent to all proposers of RFP 02-CHC-0092. In a letter dated September 11, 2002, Sablan's Topline Cleaning Agency submitted comments to P&S supporting the decision not to accept the proposal of DB Healthcare. On September 16, 2002, Health Professional Corporation submitted comments to P&S suggesting a review of DB Healthcare's attendance at the mandatory pre-proposal conference at the CHC Continuing Education Room on August 2, 2002. On September 16, 2002, SEAS, Inc. submitted comments concurring with the original decision of P&S not to accept the submission of DB Healthcare (USA).

While comments were submitted to P&S as part of the protest, OPA did not receive comments from interested parties as part of the appeal process. OPA further notes that P&S did not address the comments of Health Professional Corporation in its protest decision. However, records from P&S submitted as part of the report indicate that pursuant to an inquiry from P&S, the legal counsel for DB Healthcare (USA) advised P&S on September 20, 2002 that Antony Glad was present at the meeting in his status as a representative of "DB Healthcare." Furthermore, Section 3.4.6 of the DB Healthcare (USA) proposal indicates that "Tony Glad" was listed as one of the authorized personnel for the company.

ANALYSIS

We now discuss the arguments submitted by DB Healthcare (USA) and P&S, including our comments on their merits.

P&S Director's Protest Decision No. 02-009B

On October 3, 2002, the P&S Director denied DB Healthcare (USA)'s September 6, 2002 protest concluding that:

1. DB Healthcare is not a proposer "outside the Commonwealth" for purposes of CNMI-PR §3-102(7).
2. DB's proposal was received after the due date for receipt of proposals set in RFP 02-CHC-0092, is therefore late, and will not be accepted.
3. DB's assertion that P&S's "acknowledgment" of its Notice of Intent constituted a finding that it was qualified as an outside proposer is rejected.
4. The Secretary of Health is advised by copy of this decision that he may not consider DB's proposal under RFP 02-CHC-0092.

DB Healthcare's Appeal to the Public Auditor

On October 8, 2002, DB Healthcare (USA) appealed the P&S protest decision to OPA. In its appeal, DB Healthcare (USA) made the following arguments: (1) that it was a reasonable interpretation from P&S's acknowledgment of the Notice of Intent to Propose that a seven-day extension would be granted; and (2) that DB Healthcare (USA) is the proposing entity and not DB Healthcare (CNMI) which is only a subsidiary. DB Healthcare (USA) requested that OPA overturn the decision of P&S not to accept its proposal, and that such proposal be made available for consideration by the hospital.

P&S Director's Report on the Appeal

On October 15, 2002, P&S submitted its report on the matter. In the report on the appeal, P&S recommended that the appeal be denied in its entirety. The P&S report states that:

[i]f DB, a U.S. based corporation, has formed “DB Healthcare (CNMI) Incorporated . . . for the specific purpose of being the local entity (Agent) to handle the affairs of DB. . .” in the CNMI, (see introductory paragraph of DB’s appeal) then one obvious bit of business the local entity would be expected to conduct as agent for its U.S. based headquarters is the submission of bids, and by the deadline for local entities!

OPA’s Comments

The issue under protest and appeal in this matter is whether P&S properly refused to accept the proposal submitted via Express Mail on August 30, 2002 at 11:00 a.m. because it found that it was submitted late. Analysis of this question requires OPA to review the following two questions:

1. What is the relationship between DB Healthcare (USA) and DB Healthcare (CNMI),
and
2. Which entity was the vendor that submitted the proposal.

The Deadline for Submission

The published due date for submission of proposals was Tuesday, August 27, 2002 at 3 p.m. However, pursuant to CNMI-PR § 3-102(7), the RFP contained the following provision:

Proposals submitted from vendors outside the Commonwealth must be postmarked by August 27, 2002, and received within seven (7) working days of the date. Offerors outside of the Commonwealth must notify the Director in writing of their intent to submit a proposal no later than 3 p.m. August 27, 2002 (Saipan time) in order to receive this additional seven (7) days for the receipt of the actual proposal documents. This notice of intent may be in any mode of written communication including facsimile or e-mail to procurement@gtepacifica.net or fax number (670) 664-1515.

Vendors with status within the Commonwealth had until 3 p.m. on August 27, 2002, to file a proposal. Vendors from outside of the Commonwealth had to physically get their proposals to P&S by September 6, 2002³, bearing a postmark no later than August 27, 2002. The proposal received by P&S that is the subject of this appeal was received on August 30, 2002 at 11:00 a.m. and had a postmark of August 27, 2002. An e-mail was received by P&S on August 22, 2002

³ Monday, September 2, 2002 was a CNMI Government holiday.

stating that “DB Healthcare” would be sending its proposal postmarked by August 27, 2002. Therefore, if the vendor submitting the proposal was from within the Commonwealth, the proposal would be three days late. If the submitting vendor’s status was outside of the Commonwealth, the submission of its proposal would have been within the extended time for vendors outside of the jurisdiction.

The Relationship Between DB Healthcare (USA) and DB Healthcare (CNMI)

According to documents submitted with the proposal, DB Healthcare (USA) is a Delaware Corporation. Its directors are Rakesh Kamdar, Samir Desai and Deval Kamdar. The president, secretary, and treasurer are all Rakesh Kamdar. Pursuant to documents submitted to OPA by DB Healthcare (USA) in response to OPA’s request for additional information, DB Healthcare (USA)’s shareholders are Rakesh Kamdar and Deval Kamdar.

DB Healthcare (CNMI) is a Commonwealth corporation. According to public documents available at the Commonwealth Registrar of Corporations, the shareholders of DB Healthcare (CNMI) are Rakesh Kamdar with 7,500 shares and Antony Glad with 2,500 of the 10,000 outstanding shares. The directors are Rakesh Kamdar, Mayur Kamdar and Antony Glad. The president is Rakesh Kamdar, the vice president and secretary is Antony Glad, and the treasurer is Mayur Kamdar.

Section 3.1 of the proposal indicates that “DB Healthcare has a subsidiary on Saipan, DB Healthcare (CNMI) Inc., incorporated on May 7, 2002.” Black’s Law Dictionary defines subsidiary corporation as:

[o]ne in which another corporation (i.e. parent corporation) owns at least a majority of the shares, and thus has control. Said of a company more than 50 percent of whose voting stock is owned by another.

BLACK’S LAW DICTIONARY 1428 (6th ed. 1990). According to this definition, DB Healthcare (CNMI) does not rise to the level of subsidiary. None of the shares of DB Healthcare (CNMI) are held by DB Healthcare (USA). DB Healthcare (USA), as a legal entity, has no control over DB Healthcare (CNMI). As such, DB Healthcare can not be defined as the parent corporation of DB Healthcare (CNMI). Total control of DB Healthcare (CNMI) is held by Rakesh Kamdar and Antony Glad. While Mr. Kamdar plays a role with DB Healthcare (USA), the makeup of DB Healthcare (USA)’s shareholders, board of directors and officers, the groups that exert control over the corporation, differ from that of DB Healthcare (CNMI).

Corporations are treated as distinct legal entities. Commonwealth law provides rules for the existence and operation of domestic and foreign corporations within the CNMI. Pursuant to 4 CMC §4641, a corporation that is not incorporated within the CNMI, such as DB Healthcare

(USA), is not permitted to transact business in the Commonwealth until it obtains a certificate of authority as a foreign corporation from the Registrar of Corporations. DB Healthcare (USA) has not incorporated in the CNMI. As such, it is a foreign corporation.

DB Healthcare (USA) does not own DB Healthcare (CNMI), and accordingly does not exert control over DB Healthcare (CNMI). Some of the players involved in DB Healthcare (USA) are involved in DB Healthcare (CNMI), but the ownership, board of directors and officer structures differ so much that it cannot be said that either company is the mirror image of the other. Each corporation is a distinct and unique entity with controlling entities that are separate and dissimilar. Therefore, legally and logically, it is difficult to impute the on-island status of one company to the other.

Furthermore, the CNMI-PR states that an extension can be granted for “vendors outside of the Commonwealth.” This language addresses the regional status of the vendor itself and does not reference relationships that outside vendors may have with separate and distinct local entities. DB Healthcare (USA) is outside of the Commonwealth. DB Healthcare (CNMI) is within the Commonwealth. While there are commonalities between some of the directors, officers and individuals who own DB Healthcare (USA) and DB Healthcare (CNMI) these commonalities do not create legal ties between the two distinct corporate entities sufficient to destroy the outside vendor status of DB Healthcare (USA).

The Identity of the Proposer

The remaining question is which of the two separate legal entities submitted the proposal that was received by P&S on August 30, 2002 at 11:00 a.m. -- DB Healthcare (USA) or DB Healthcare (CNMI). The e-mailed Notice of Intent to Propose received by P&S on August 22, 2002 stated that “DB Healthcare [would] be sending its proposal postmarked by August 27, 2002.” The notice was signed by Rakesh Kamdar, President and CEO of “DB Healthcare, Inc., 25 Burlington Mall Rd Suite 300, Burlington, MA 01803.”

The proposal documents indicate that they were prepared by “DB Healthcare, Inc.” The cover letter to the proposal is on DB Healthcare (USA) letterhead with no CNMI mailing address reflected on the regional office section of the letterhead. As stated above, Section 3.1 of the proposal indicates that DB Healthcare (CNMI) is a subsidiary of DB Healthcare (USA). These facts seem to support a finding that DB Healthcare (USA) was the intended proposer.

On the other hand, P&S also received a fax copy of the Notice of Intent to Propose with an internal e-mail from Rakesh Kamdar to Antony Glad containing Mr. Kamdar’s instructions to Mr. Glad to forward the letter to P&S “on behalf of DB Healthcare (CNMI), Inc.” In addition, included in the proposal package was the Certificate of Incorporation for DB Healthcare

(CNMI) Incorporated and a CNMI business license for “DB Healthcare (CNMI) Incorporated.” The RFP required, among other documents:

a copy of a CNMI business license and articles of incorporation or other proof of organization for entities other than a corporation , i.e. proprietorship or partnership. If not currently incorporated or licensed in the CNMI, the successful bidder must establish its existence in the CNMI and obtain a CNMI business license prior to the execution of the contract.

The proposal did submit articles of incorporation for DB Healthcare (USA), filed in Delaware but did not submit a CNMI business license.

While these facts somewhat cloud the identify of the intended proposer, they are not sufficient to support a finding that DB Healthcare (CNMI) and not DB Healthcare (USA) was the proposer. The language in the e-mail was part of an internal e-mail communication between Mr. Kamdar to Mr. Glad and not the text of the direct communication to P&S. With respect to the local business license, failure to submit a local business license for DB Healthcare (USA) is not fatal given that the RFP states that such documentation can be provided prior to execution of a contract.

Furthermore, the September 4, 2002 letter from P&S notifying Mr. Kamdar that the proposal could not be accepted was sent to the President and CEO of DB Healthcare, Inc. at the Burlington, Massachusetts address and not the CNMI corporation’s address. In addition, the text of the letter repeatedly uses the phrases “you” and “your” in discussing the documents that were submitted to P&S, referring to the addressee of the letter, Mr. Kamdar as the President and CEO of DB Healthcare (USA).

The September 4, 2002 notice of non-acceptance of proposal further states that “because you are incorporated in, and licensed to do business in the CNMI, you cannot be considered as a proposer outside of the CNMI for purposes of Procurement Regulations Section 3-102(7).” As stated above, pursuant to CNMI corporate law, DB Healthcare (USA) is not incorporated and is not licensed to do business in the CNMI.

It appears that the proposal was submitted by DB Healthcare (USA). P&S seems to acknowledge this fact in as much as it addressed its notice of non-acceptance to DB Healthcare (USA). The two companies are distinct and separate legal entities and the resident status of one company cannot be imputed to another. Furthermore, P&S’s basis for finding that DB Healthcare (USA) was not “outside of the Commonwealth” was that it was incorporated and licensed within the Commonwealth. This is not the case. DB Healthcare (USA) is therefore entitled to outside vendor status, and its bid was submitted within the extended period for outside vendors and should be accepted for consideration.

However, it must be noted that the legal distinction between the companies must be maintained for all purposes. Therefore, DB Healthcare (USA)'s foreign corporation status is what exists for all purposes, including taxes and licensing.

DECISION

The Office of the Public Auditor (OPA) finds that (1) DB Healthcare (USA) and DB Healthcare (CNMI), Inc. (DB Healthcare (CNMI)) are distinct and separate legal entities; (2) DB Healthcare (CNMI) is within the Commonwealth and DB Healthcare (USA) is outside of the Commonwealth for purposes of RFP 02-CHC-0092 and CNMI-PR §3-102(7); (3) the proposal received by P&S via Express Mail on August 30, 2002 at 11:00 a.m. was submitted by DB Healthcare (USA); (4) DB Healthcare (USA) had provided Notice of Intent to Propose within the required time set forth in RFP 02-CHC-0092 and CNMI-PR § 3-102(7); and (5) the proposal DB Healthcare (USA) submitted on August 30, 2002, was within the additional 7 working days beyond the due date provided by RFP 02-CHC-0092 and CNMI-PR §3-102(7) and was therefore acceptable.

Section 6-102(9) of the revised CNMI-PR provides that DB Healthcare (USA), any interested party who submitted comments during consideration of the protest, the P&S 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 10 days after the date of this decision.



Michael S. Sablan, CPA
Public Auditor

December 17, 2002