



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
GLOBAL ACCESS STAFFING SERVICES
(SAIPAN), INC.

)
)
) APPEAL NO. BP-AO34
) DECISION ON APPEAL
) (Protest Decision No. 02-009A)
)
)

SUMMARY

This decision is on an appeal filed by Global Access Staffing Services (Saipan), Inc. (Global) 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 denies the appeal. The Office of the Public Auditor (OPA) finds that 1) Global is not a bidder “outside the Commonwealth” for purposes of the RFP and CNMI Procurement Regulations (CNMI-PR) §3-102(7); 2) upon receipt of a Notice of Intent to Propose, P&S is not required to provide an acknowledgment, nor is it required to provide certification of the status of the bidder for purposes of CNMI-PR §3-102(7); 3) regardless of any claimed benefit of the proposal to the Commonwealth, P&S does not have the authority to waive the submission deadline requirements of the RFP and CNMI-PR §3-102(7); 4) Global’s alleged “good faith” attempt to submit its proposal in compliance with the RFP and CNMI-PR §3-102(7)’s requirements does not excuse the late submission or provide grounds for P&S to waive the submission deadline requirement; and 5) P&S’s interactions and determinations with regard to Global in this matter did not exhibit a lack of “good faith and fairness”.

Furthermore, the Public Auditor denies P&S’s Request for Summary Decision. The Public Auditor further finds that 1) the action on appeal is the non-acceptance of the proposal submitted by Global in response to RFP 02-CHC-0092, and that Global had filed a timely appeal of such action and is not barred from arguing against P&S’s rejection of its proposal for failure to attend the mandatory pre-proposal conference; 2) P&S did not forfeit its ability to raise the issue of Global’s failure to attend the pre-proposal meeting when it did not raise the issue in its August 30, 2002 letter notifying Global of the non-acceptance of its proposal due to late submission; and 3) P&S acted within its authority in rejecting Global’s proposal for failure to attend the mandatory pre-proposal meeting.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

P&S Protest Decision 02-009A 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 3:00 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 that date. Offerors outside of the Commonwealth must notify the Director in writing of their intent to submit a proposal no later than 3:00 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 26, 2002, P&S received an e-mailed Notice of Intent to Propose from Global stating; “In accordance with your requirement on RFP for vendors outside of the Commonwealth, . . . we are submitting a proposal . . . sent through DHL . . . on Friday, August 23, 2002.” P&S responded to Global on the same date with a one word text e-mail -- “Acknowledged”.

On August 30, 2002, P&S notified Global by letter that its proposal was received on August 29, 2002 at 9:50 a.m., after the deadline for submissions, and was therefore not accepted for consideration. The letter acknowledged receipt of a Notice of Intent. However, P&S stated that CNMI-PR § 3-102(7), which permits extension of the submission deadline upon request, only applies to proposals submitted by proposers “outside the Commonwealth.” P&S noted that the Notice of Intent indicated that Global was licensed and incorporated in the CNMI, but that the proposal was prepared and finalized at the company’s head office in New Jersey. P&S indicated that “regardless of where your proposal was prepared, 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 the purposes of Procurement Regulation Section 3-102(7).”

On September 5, 2002, Global protested P&S’s decision not to accept its proposal. In its protest, Global argued that, despite information provided in its Notice of Intent that it was incorporated and licensed in the CNMI, P&S acknowledged receipt of such notice without

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.

informing it of the prejudicial effect of such facts to the filing deadline. Global suggests what it calls “preempted rule reversal” as a solution. Global contended that its proposal would be beneficial to the objectives of the Department of Public Health. Global also argued that Section 10 of the RFP and CNMI-PR §3-102(7) are contradictory, and it is universal practice to use “postmark dates” as the basis for good faith effort to deliver rather than actual delivery dates.

In a letter dated September 6, 2002, P&S advised interested parties of Global’s protest and of the opportunity to comment pursuant to CNMI-PR §6-101(1)(b). On September 9, 2002, P&S received comments from both Marianas Health Services, Incorporated and Health Professional Corporation. On September 13 and 16, 2002, P&S received comments from Sablan’s Topline Cleaning Agency and Saipan Employment Agency & Services, Inc., respectively. All parties submitted proposals on RFP 02-CHC-0092. On September 12, 2002, P&S received comments from U.S. Congressman Steven R. Rothman on behalf of Global.

In a letter dated September 19, 2002, P&S informed Global that the attendance records for the mandatory pre-proposal meeting reflected that Global was not in attendance. P&S requested Global to advise it why the proposal should not be rejected for failure to attend the meeting. On September 20, 2002, Global responded, providing an explanation as to the absence of their representative.

On October 1, 2002, P&S denied Global’s protest. On October 8, 2002, OPA received the appeal filed by Global of the P&S Protest Decision.² In a letter dated October 15, 2002, OPA informed P&S of the filing of the appeal and requested a complete report pursuant to the CNMI-PR §6-101(1)(d).

In a letter dated October 22, 2002, P&S informed Global that it must reject Global’s proposal for failure to attend the mandatory pre-proposal meeting pursuant to CNMI-PR §3-102(11)(a) and the requirements of the RFP. P&S submitted its report to OPA on October 23, 2002, with an attached copy of its October 22, 2002 letter to Global.

On October 31, 2002, OPA received comments from Global in response to P&S’s report. On November 5, 2002, OPA received comments from Paras Enterprises Saipan, Inc.

On November 7, 2002, P&S filed a Request for Summary Decision based on Global’s failure to first protest to P&S the supplemental matters raised in its comments on the P&S report

² The appeal Global initially submitted to OPA on October 8, 2002 did not contain an original signature. Global subsequently provided OPA with copies of the documents with original signature on October 15, 2002. These documents were received within the time set by CNMI-PR §6-102(3). As such, Global’s appeal was timely filed.

pursuant to CNMI-PR §6-102(1). On November 12, 2002, Global filed a Request to Quash the P&S Request for Summary Decision.

P&S notified Global in its letter dated September 6, 2002 that it has withheld award of a contract for RFP 02-CHC-0092 pursuant to CNMI-PR §6-101(2)(b) .

ANALYSIS

We now discuss the arguments submitted by Global and P&S, the comments submitted by interested parties, and our comments on their merits.

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

In his protest decision dated October 1, 2002, the P&S Director denied Global's September 5, 2002 protest concluding that:

1. Global is not a proposer "outside the Commonwealth" for purposes of CNMI-PR §3-102(7).
2. Global's proposal was received after the due date for receipt of proposals set in RFP 02-CHC-0092, was therefore late, and would not be accepted.
3. Global'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. P&S contended that the Notice of Intent was provided "as a normal business courtesy," and that P&S was not in a position to determine whether Global qualified for the extended submission time until after receipt of the proposal. After receipt of the proposal, P&S noted that Global's proposal was submitted by "Global Staffing Services (Saipan), Inc." According to P&S, the facts indicated that such company was incorporated and licensed to do business in the CNMI, had been so for more than ten years, and the same company had previously submitted a proposal to the Commonwealth under another RFP without claiming outside bidder status.
4. Global's assertion that the "postmark rules" of other jurisdictions be considered applicable to its proposal is rejected. P&S pointed to CNMI-PR §3-102(7) stating that the section set out explicit and exclusive rules on the receipt of bids. P&S continued by stating that this regulation only references postmark in the case of bids submitted by bidders who are truly "outside" the Commonwealth. According to P&S, "good faith" efforts do not satisfy the regulations. P&S further stated that, contrary to Global's assertions, P&S was not aware of any

precedent or rules and regulations which provided it the ability to preempt rules when beneficial to the Commonwealth.

5. The Secretary of Health is advised by copy of this decision that he may not consider Global's proposal under RFP 02-CHC-0092.

Global's Appeal to the Public Auditor

On October 8, 2002, Global filed an appeal of the P&S protest decision with OPA. In its appeal, Global makes the following arguments:

- (1) The P&S Director's determination that Global is not a proposer "outside the Commonwealth" is arbitrary because the CNMI-PR lack a definition of what constitutes a vendor "outside of the Commonwealth."
- (2) P&S failed to adequately respond to the points raised by Global in that:
 - (a) P&S did not adequately explain why it failed to advise Global that it was not being considered an "outside proposer" in sufficient time for Global to make alternative delivery arrangements.
 - (b) No attempt was made to consider circumstances where government officials could waive any or all requirements of the CNMI-PR. Global cited Public Law 11-78 in support of such position.
 - (c) P&S dismissed Global's claim that its proposal would have been beneficial to the Commonwealth.
- (3) P&S exhibited a lack of good faith in its dealing with Global by:
 - (a) Not explaining why it failed to advise Global that it would not be considered a bidder "outside of the Commonwealth" when it sent an acknowledgment of the receipt of the Notice of Intent,
 - (b) Failing to consider Global's alleged "good faith" efforts at compliance, and
 - (c) Its interaction with Global following notice of the inability to accept the proposal.

P&S Director's Report on the Appeal

On October 23, 2002, P&S submitted its report on the appeal. In the report, P&S recommends that the appeal be declared moot because, in addition to the issue of the late submission of the proposal, P&S had also rejected the proposal due to Global's failure to attend the mandatory pre-proposal meeting. Should OPA decide to entertain the appeal, P&S

recommends that it should be denied in its entirety for failure to deal with the basic issue of whether or not Global is a bidder “outside the Commonwealth.”

The P&S report recognizes that a definition is not provided in the CNMI-PR for “bidder outside the Commonwealth” but states:

we believe that any *reasonable person* reading CNMI-PR Section 3-103(7) [sic] would understand it to mean that a “bidder outside the Commonwealth” is a bidder who is not (also/simultaneously) inside (within) the Commonwealth. And we further believe that any *reasonable person* would conclude that a company such as Global, which is incorporated in the CNMI, has a business license in the CNMI, employees in the CNMI and which recites in its proposal that it is doing business in the CNMI, is not “a bidder outside the Commonwealth”, and is therefore not entitled to the time extension available to firms that are not doing business in the CNMI, i.e., is not a vendor outside the CNMI as contemplated by CNMI-PR Section 3-102(7).

(Emphasis added). P&S responds to Global’s allegations of unfair and inequitable treatment by stating that, if P&S granted Global outside bidder status, the other local companies who met the submission deadlines would complain of unfair and inequitable treatment.

Global’s Comments to the P&S Report

On October 31, 2002, Global submitted comments on the P&S report. In its comments, Global argues the following points:

1. With respect to the definition of “bidder outside the Commonwealth”, it is unjust and unreasonable to allow the P&S Director to impose his personal beliefs as to the meaning of this phrase as having the force and effect of law. Global also disagrees on the use of the “reasonable person” standard by P&S in its report to interpret the meaning of such phrase, and argues that there is nothing reasonable about the procurement process which is the subject of the appeal.
- (2) It is a violation of Global’s due process rights for P&S to amend its October 1, 2002 protest decision by adding another purported technical deficiency – Global’s failure to attend the mandatory pre-proposal meeting. Global states that:

[it] does not seek acceptance as an outsider bidder. It is simply asking to be treated fairly, and to receive a favorable decision from OPA, allowing it to compete on a level playing field, based upon the confusion created by the lack of the P&S

regulations definitions regarding 'outside or inside the Commonwealth' bidders.

- (3) The actions of P&S violate the August 13, 1999 memorandum on procurement practices issued by the Secretary of Finance.

Comments of Paras Enterprises Saipan, Inc.

Paras Enterprises Saipan, Inc. (Paras) is one of the bidders on RFP 02-CHC-0092 and is therefore an "interested party" pursuant to CNMI-PR §6-102(4)(d). On November 5, 2002, OPA received comments from Paras. In its comments, Paras argues in support of the P&S's decision not to accept Global's proposal. Paras identifies the arguments of Global as 1) that the regulations should be interpreted in a way to permit Global to have outside vendor status despite having a local office, and 2) that the interpretation of the CNMI-PR by the P&S Director is arbitrary and capricious.

In response to Global's arguments, Paras makes the following points:

1. It is a well recognized concept that an administrative agency's interpretation of its own legal standards is entitled to great weight. In support of this argument, Paras cites *Okoda Trucking Co., Ltd. v. Board of Water Supply*, 40 P.3d 73 (Hawaii 2002) and *Akootchook v. U.S.*, 271 F.3d 1160 C.A.9 (9th Cir. 2001).
2. Based on the evidence in the record as to Global's operations, the P&S Director's decision was well within the deference accorded to administrative decisions.
3. To excuse Global on both grounds, lateness and non-attendance at the pre-proposal meeting, would tip the balance of any equitable considerations against other bidders who had complied with all requirements.

P&S Request for Summary Decision

On November 7, 2002, P&S filed a Request for Summary Decision requesting OPA to deny Global's October 8, 2002 appeal as having been rendered moot. P&S argues that on October 29, 2002, Global filed an "Addendum" with OPA seeking to add to the original appeal the issue of P&S's decision not to accept the proposal for failure to attend the pre-proposal conference. P&S quotes CNMI-PR §6-102(1) as follows:

'A written appeal to the Public Auditor from a decision by the P&S Director may be taken *provided that the party taking the appeal has first submitted a written protest to the P&S*

Director . . . , and the P&S Director has denied the protest or had failed to act on the protest . . . (Emphasis ours)

P&S argues that CNMI-PR §6-102(1) bars Global from raising on appeal the rejection of its proposal for failure to attend the pre-proposal conference because it failed to first protest that issue with P&S within 10 days of P&S's rejection of its proposal on October 22, 2002. P&S further argues that its non-acceptance of Global's proposal is decisive on the non-appealable ground of Global's failure to attend the pre-proposal meeting, which renders moot any decision on the issue of the late receipt of the proposal.

Global's rebuttal to P&S's Request for Summary Decision

On November 12, 2002, Global submitted comments on P&S's Request for Summary Decision. Global argues that P&S "technically made [the issue of the pre-proposal conference] part of the appeal process now in OPA's hands" when it incorporated its October 22, 2002 letter to Global into its report to OPA. Global reiterates the argument it made in its October 29, 2002 comments that it is unfair to permit P&S to amend its protest decision on a subsequently reported deficiency. Finally, Global argues against summary judgment, stating that there are substantive issues of fact in dispute.

OPA's Comments

The issues under appeal in this matter are whether P&S properly refused to accept the proposal submitted by Global on August 29, 2002 at 9:50 a.m. because, 1) it was submitted late, and 2) Global did not attend the mandatory pre-proposal meeting scheduled on August 20, 2002.

Late Submission of the Proposal

While Global raised various issues at the protest level regarding P&S's refusal to accept the proposal on the basis that it was late, as stated above, the issues raised by Global on appeal are:

- (1) The P&S Director's determination that Global is not a proposer "outside the Commonwealth" is arbitrary because the CNMI-PR lack a definition of what constitutes a vendor "outside of the Commonwealth."
- (2) P&S failed to adequately respond to the points raised by Global in that:
 - (a) P&S did not adequately explain why it failed to advise Global that it was not being considered an "outside proposer" in sufficient time for Global to make alternative delivery arrangements.

- (b) No attempt was made to consider circumstances where government officials could waive any or all requirements of the CNMI-PR. Global cited Public Law 11-78 in support of such position.
 - (c) P&S dismissed Global's claim that its proposal would have been beneficial to the Commonwealth.
- (3) P&S exhibited a lack of good faith in its dealing with Global by:
- (a) Not explaining why it failed to advise Global that it would not be considered a bidder "outside of the Commonwealth" when it sent an acknowledgment of the receipt of the Notice of Intent,
 - (b) Failing to consider Global's alleged "good faith" efforts at compliance, and
 - (c) Its interaction with Global following notice of the inability to accept the proposal.

Pursuant to both RFP 02-CHC-0092 and CNMI-PR §3-102(7), an entity considered an offeror "outside of the Commonwealth" may receive seven extra days to submit a proposal past the initial August 27, 2002 3:00 p.m. deadline, provided it furnishes notice to the P&S Director by the initial deadline that it intends to submit a proposal and its proposal is postmarked by the initial submission deadline. The facts are uncontested that Global submitted a Notice of Intent prior to 3:00 p.m. on August 27, 2002, that P&S acknowledged receipt of such notice, and that Global's proposal was received after the deadline for bidders within the Commonwealth but within the seven-day extended time for bidders outside the Commonwealth. It is therefore necessary to determine if Global is a offeror outside of the Commonwealth.

Global's first contention is that the CNMI-PR do not provide a definition of what constitutes a "bidder" or "vendor outside of the Commonwealth." OPA acknowledges, as did P&S in its report, the lack of a definition in either the RFP or CNMI-PR §3-102(7). P&S responds by outlining what would be excluded from being considered "bidder outside the Commonwealth," stating that a reasonable person would not interpret that phrase to include a company that is incorporated and licensed in the CNMI, with employees presently conducting business in the CNMI.

OPA also took into consideration the comments of Paras regarding the weight to be accorded to P&S's interpretation. In addition to the two cases cited by Paras in support of the proposition that appellate courts must give substantial deference to an agency's interpretation of its own regulations, OPA's independent research found well established support for this principle. See *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12, 96 S.Ct. 172, 173 (1975) (Lower court erred in not accepting agency's interpretation of its own regulations when, even if the meaning of the language interpreted is not free from doubt, the agency's interpretation sensibly conforms to the purpose and wording of the regulations.); *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 111 S.Ct. 1171 (1991)(With respect to the Occupational Safety and

Health Act, court held that reviewing court should defer to the Secretary over the Commission when both furnish reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary.)

A corporation, unlike an individual, does not have definitive substance that permits obvious determination of its location. Corporations can be in many different places at one time conducting business in different jurisdictions. However, CNMI law does provide guidance on this issue. Pursuant to 4 CMC §4641, a corporation that is not incorporated within the CNMI cannot transact business in the Commonwealth until it obtains a certificate of authority as a foreign corporation from the Registrar of Corporations. Therefore, a corporation that desires to conduct business in the CNMI must either incorporate locally or obtain a certificate of foreign incorporation. In addition, it must obtain a CNMI business license. Having done so, a corporation has legally established its presence in the CNMI and at that point is able to offer services or goods.

Global is incorporated in the Commonwealth and has a business license. It is not a foreign corporation but a domestic corporation. While Global may have been preparing its proposal outside of the CNMI, the CNMI-PR do not reference the location of the preparation of the proposal but rather the location of the bidder. It is undisputed that Global is present in the CNMI for the purposes of incorporation, licensing, and doing business. Furthermore, the fact that it argues in its appeal that it could have made local arrangements for the delivery of the proposal within the initial deadline had it known it was not qualified as a bidder outside of the Commonwealth indicates that it had a local presence which would permit it to make the initial deadline. As such, OPA finds that the interpretation of P&S as to the meaning of the phrase “offerors” or “bidders outside the Commonwealth” is reasonably consistent with the intention of the regulations, and therefore defers to P&S’s determination of Global’s status for purposes of submission of the proposal.

Furthermore, OPA notes that the position of Global in this matter is confusing and somewhat inconsistent given that it appears to initially argue against the interpretation of the P&S as to its status in its appeal, but then in its October 29, 2002 comments, Global states on page 5 that “[it] does not seek acceptance as an outside bidder.”

Effect of the Acknowledgment of the Notice of Intent

The next question raised by Global concerns the effect of the P&S’s acknowledgment of the Notice of Intent. Upon receipt of the Notice of Intent from Global on August 26, 2002, P&S sent a one word e-mailed response -- “Acknowledged”. The e-mail from Global did state that it is incorporated and licensed in the CNMI, but that the proposal was being prepared outside of the CNMI. Global expresses complaint regarding the fact that P&S did not notify it upon receipt of the Notice of Intent of its failure to qualify as an outside bidder.

The CNMI-PR do not require P&S to provide acknowledgment of receipt of Notice of Intent. Nor do they require P&S to make a determination or certification at the time of receipt of the Notice of Intent regarding the status of the bidder as being within or “outside of the Commonwealth.” To find in this instance that P&S should have informed Global of their failure to qualify upon receipt of the Notice of Intent would be to essentially impose a requirement that is not present in the CNMI-PR.

Request for Waiver of the CNMI-PR by Appellant

Global contends that it was unfair for P&S not to waive the requirements of the RFP and CNMI-PR §3-102(7). The P&S Director responded in his protest decision that he was “unaware of the existence of any precedents in the CNMI applicable to P&S, and the CNMI Procurement Regulations which might allow governmental officials to preempt rules such as those applicable to outside bidders ‘consistent [sic] with the potential benefits to the departments involved.’”

In its appeal, Global cites Public Law 11-78 in support of the proposition that requirements of the CNMI-PR could have been waived. Public Law 11-78 is the Capital Improvement Projects Appropriations Act of 1999. Section 10 of Public Law 11-78 does provide waiver ability to the Governor limited to the CNMI prison facilities. The waiver authority does not apply to an RFP for manpower services for the hospital. OPA agrees with P&S that it does not have the authority to waive the submission deadline requirements of the RFP and CNMI-PR §3-102(7). Furthermore, CNMI-PR §1-107 states that “[n]o government contract shall be valid unless it complies with these regulations.” CNMI-PR §1-108 states that action of government employees in violation of the regulations is outside of the scope of his or her employment, and that such employee could be subject to individual liability for failure to follow the regulations. As such, the P&S Director does not have authority to waive the requirements of the RFP and CNMI-PR §3-102(7) and to do so would have constituted an act of bad faith against the remaining bidders rather than good faith in favor of the appellant Global.

Effect of Benefit of the Proposal to the CNMI

Global further contends that P&S did not adequately respond to its argument that its proposal would have been beneficial to the CNMI, and expresses dissatisfaction that P&S opened its sealed bid to determine that it was outside of the Commonwealth. As stated above, the P&S Director does not have the authority to waive the submission deadline requirement, regardless of the benefit of the proposal to the CNMI. Furthermore, OPA cannot find fault in P&S’s opening the bid as it was addressed to P&S, and nothing in the CNMI-PR prohibits P&S from examining a proposal even if it suspects that it may not be qualified for acceptance.

Allegations of a Lack of Good Faith Dealings

Global's final argument regarding the timeliness of its submission focuses on its "good faith" attempt to submit its proposal in accordance with the CNMI-PR and the alleged "lack of good faith and fairness" treatment by P&S with regards to its submission and its subsequent interaction following notice of non-acceptance. Global again contends that "[t]he Director could have exercised his sound discretion and judgment by amending the procurement solicitation and extending the due date. Had he considered Global's good faith efforts, he might have issued an amendment extending the due date for compliance, given that he know the proposals were on their way." OPA reiterates its statements in the preceding two paragraphs. The P&S Director acted in accordance with the CNMI-PR. The burden of meeting the requirements for submission on a timely basis falls upon the bidder. It is the bidder's responsibility to properly ascertain its status for the purposes of determining the filing deadline. P&S has no obligation to make such determination for the bidder prior to receipt of the proposals.

Global's Failure to Attend the Pre-proposal Conference

The second reason cited by P&S for not accepting Global's proposal is Global's failure to attend the August 20, 2002 pre-proposal meeting. This issue was not included in the October 1, 2002 P&S protest decision or Global's October 15, 2002 appeal. It arose in the context of this appeal in the agency report provided to OPA on October 23, 2002 wherein P&S recommended that the appeal should be declared moot because Global's proposal had been rejected on the independent ground of failure to attend the mandatory pre-proposal meeting. P&S attached to its report a letter issued to Global the preceding day notifying it of that determination.

Global has filed a response to such claim raising both procedural and substantive arguments. Procedurally, Global argues that it is a due process violation for P&S to raise this issue at this time because P&S "forfeited" the point when it failed to incorporate it in its "first denial, which is the subject of this appeal." P&S responds by raising a countering procedural argument that Global is barred from appealing the issue to OPA because it failed to protest it to P&S within ten days following receipt of the October 22, 2002 notice of non-acceptance for failure to attend the pre-proposal conference pursuant to CNMI-PR §§6-101(1) and 6-102(1). The ten days had passed on November 6, 2002.

CNMI-PR 6-101(1)(a) states that a bidder "who is aggrieved in connection with the solicitation or award of a contract may protest to the P&S Director" and that "[t]he protest shall be received by the P&S Director within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto." The action taken by the P&S Director protested by Global in this appeal is the non-acceptance of its proposal. Following the initial notice of non-acceptance of its proposal due to it being untimely filed, Global timely filed its protest and appeal. The basis for the appeal was the denial of acceptance. The issues of timeliness of submission and failure to attend the pre-proposal meeting are reasons for the underlying action taken by the Director that has aggrieved the appellant. Similar to arguments

made in a case under litigation in defense of a position taken, they are not the actions that start the clock running. The agency action is the non-acceptance. OPA, therefore does not find that Global is barred from arguing against the request for summary judgment and against the finding that its proposal is rejected for failure to attend the pre-proposal meeting.

Along the same lines, OPA does not find that P&S is prohibited or has “forfeited” its ability to raise the issue of failure to attend the pre-proposal conference in its report to OPA or has violated Global’s due process right to do so. As stated above, it is merely support for the action taken. The action taken which is the subject of the appeal was the non-acceptance of the proposal on August 30, 2002. The CNMI-PR do not prohibit or bar P&S from subsequently finding additional support for the initial action taken. In addition, there is no deadline set in the CNMI-PR for determining acceptability of the bid. If P&S had not denied acceptance of the bid on August 30, 2002 for failure to timely submit and had subsequently discovered that Global did not attend the pre-proposal meeting on October 22, 2002, it still could have made a decision not to accept the bid at the later date. Therefore, OPA will review the substantive arguments made regarding the failure to attend the pre-proposal conference.

The RFP published in the newspaper stated that “[a] mandatory pre-proposal meeting will be held at CHC on Tuesday, August 20, 2002.” The specifications and proposal guidelines reiterated that same sentence in bold type in Section V and further stated in bold letters “[f]ailure to attend the mandatory pre-proposal meeting will result in rejection of the proposal.” It is undisputed that Global did not have a representative present at the August 20, 2002 pre-proposal meeting. OPA acknowledges the seriousness of the circumstances presented by Global in explaining its failure to attend the pre-proposal meeting. However, the RFP was patently clear that failure to attend would result in rejection of the proposal and does not contain language that indicates that it is subject to the urgency of a reason presented for failure to comply. As such, it appears that P&S acted within its authority in rejecting Global’s proposal for failure to attend the mandatory pre-proposal meeting.

DECISION

The Public Auditor denies the appeal. The Office of the Public Auditor (OPA) finds that 1) Global is not a bidder “outside the Commonwealth” for purposes of the RFP and CNMI Procurement Regulations (CNMI-PR) §3-102(7); 2) upon receipt of a Notice of Intent to Propose, P&S is not required to provide an acknowledgment, nor is it required to provide certification of the status of the bidder for purposes of CNMI-PR §3-102(7); 3) regardless of any claimed benefit of the proposal to the Commonwealth, P&S does not have the authority to waive the submission deadline requirements of the RFP and CNMI-PR §3-102(7); 4) Global’s alleged “good faith” attempt to submit its proposal in compliance with the RFP and CNMI-PR §3-102(7)’s requirements does not excuse the late submission or provide grounds for P&S to waive the submission deadline requirement; and 5) P&S’s interactions and determinations with regard to Global in this matter did not exhibit a lack of “good faith and fairness”.

Furthermore, the Public Auditor denies P&S's Request for Summary Decision. The Public Auditor further finds that 1) the action on appeal is the non-acceptance of the proposal submitted by Global in response to RFP 02-CHC-0092, and that Global had filed a timely appeal of such action and is not barred from arguing against P&S's rejection of its proposal for failure to attend the mandatory pre-proposal conference; 2) P&S did not forfeit its ability to raise the issue of Global's failure to attend the pre-proposal meeting when it did not raise the issue in its August 30, 2002 letter notifying Global of the non-acceptance of its proposal due to late submission; and 3) P&S acted within its authority in rejecting Global's proposal for failure to attend the mandatory pre-proposal meeting.

Section 6-102(9) of the revised CNMI-PR provides that Global, 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.

A handwritten signature in blue ink, appearing to read "MS Sablan", is positioned above the typed name of the Public Auditor.

Michael S. Sablan, CPA
Public Auditor

December 17, 2002