



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Site: <http://opacnmi.com>

1236 Yap Drive

Capitol Hill, Saipan, MP 96950

Mailing Address:  
P.O. Box 501399  
Saipan, MP 96950

E-mail Address:  
[mail@opacnmi.com](mailto:mail@opacnmi.com)

Phone: (670) 322-6481  
Fax: (670) 322-7812

IN RE APPEAL OF

FABRICLEAN OF THE CNMI, INC.

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APPEAL NO. BP-A037

DECISION ON APPEAL

(Protest Decision No. 03-006)

## I. SUMMARY

This is a decision on an appeal filed by Fabriclean of the CNMI, Inc.<sup>1</sup> (“Fabriclean”) from the denial of its protest by the Acting Secretary of Finance (“Secretary”) pertaining to the solicitation of laundry services for the Commonwealth Health Center (“CHC”) under Request for Proposal No. RFP 03-CHC-0041 by the Department of Public Health (“DPH”). The Office of the Public Auditor (“OPA”) has jurisdiction of this appeal pursuant to Section 6-102 of the CNMI Procurement Regulations (Commonwealth Register Vol. 22, No. 8 (2000) and Vol. 23, No. 05 (2001)) (“CNMI-PR”).

The Public Auditor denies the appeal.

## II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

### A. RFP 03-CHC-0041

RFP 03-CHC-0041 (“RFP”) was processed through the Division of Procurement and Supply (“P&S”) and was issued on or about December 19, 2002, with a submission deadline of 3:00 p.m. on Monday, January 6, 2003. *See* RFP 03-CHC-0041. Two proposals were received in response to the RFP, one from Sablan Topline Cleaning Agency (“Topline”) and one from Fabriclean. An Evaluation Team formed by DPH ranked the two submissions and selected Topline for the project. Contract number 395994-OC was drafted to award Topline the laundry service contract under the RFP. The contract, however, was not awarded and the procurement process was halted pending the outcome of the protest by Fabriclean. *See* P&S Director’s Letter to Fabriclean dated February 26, 2003.

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<sup>1</sup> The name of the company is listed as “Fabriclean of CNMI, Inc. Marianas Cleaners” on the business licenses submitted with the proposal.

## **B. Fabriclean's Protest to the Director**

By letter dated February 19, 2003, to the Director of P&S ("Director"), Fabriclean expressed its concern with the "process of the award and evaluation of the RFP." This letter ("Protest") alleges that there "seems to be a violation of" Section VI of the RFP requiring that "the content of any proposal submitted by bidders shall be held in the strictest of confidence and no details of any proposal will be discussed outside the Evaluation Team created by the Department of Public Health." Protest at 1. This allegation was based on a conversation between John Guzman of Fabriclean and Lisa Sablan, owner of Topline, in which it is alleged that Ms. Sablan stated that "Top Line (sic) had been awarded the bid." *Id.* It is further alleged by Fabriclean that Ms. Sablan told Mr. Guzman that "she knew we had bid \$1.05 per pound." *Id.* Fabriclean further went on to question whether Topline met a list of technical criteria. The Protest further stated that Fabriclean meets "all of the requirements of the bid (sic)" and "are set to build a clean room" if it receives the award.

## **C. P&S Director's Acknowledgment and Recusal**

By letter dated February 26, 2003, the Director acknowledged receipt of Fabriclean's February 19, 2003 letter and stated that as its "protest has been filed prior to the award of a contract, award will be withheld pursuant to CNMI Procurement Regulations Section 6-101(2)(b) until this matter is resolved." The Director, also by letter dated February 26, 2003, notified Lisa Sablan of Topline that P&S had received a protest from Fabriclean and requested that any comments to the protest be filed with P&S by the close of business on March 6, 2003. By letter dated March 5, 2003, Topline submitted comments to the protest.

In a memorandum dated March 11, 2003, the Director requested that the Secretary assume the decision making responsibility in the Protest of the RFP. This request was made as the Director felt both he and his Executive Assistant had conflicts that precluded the Director, with his Executive Assistant's support, from determining the protest.<sup>2</sup>

## **D. Protest Decision 03-006**

On June 19, 2003, the Secretary issued P&S Protest Decision 03-006 ("Decision") on Fabriclean's protest concerning the RFP. The Secretary, in that Decision, affirmed the determination of the Evaluation Team. The Secretary further found that "Fabriclean has failed to establish any basis for a finding that the award of a contract pursuant to RFP 03-CHC-0041 was in violation of any

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<sup>2</sup> The recusal of the Director and the assumption of the decision making authority by the Secretary are not issues in this appeal. It is noteworthy, however, that the basis for the recusal of the Director and his Executive Assistant are based upon relationships with opposite parties.

law, Procurement and Supply Regulations or requirements set forth in the original RFP.” Specifically, the Secretary’s Decision was based on the following findings:

1. All of the criteria stated in the RFP were satisfied by Topline;
2. Fabriclean and Topline were fully and fairly evaluated on the basis of the proposals submitted and reviewed by the [E]valuation [T]eam and Topline’s is clearly most advantageous to CHC;
3. There is insufficient evidence to conclude that there was a breach of confidence by the [E]valuation [T]eam prior to the award of the contract, which would require a re-evaluation of proposals by a new committee.

See Decision p. 4.

#### **E. Fabriclean’s Appeal to the Public Auditor**

By letter dated June 27, 2003, to OPA, which was received on June 30, 2003, Fabriclean expressed its concerns about the Decision (“Appeal”) with OPA. The Appeal sets forth three (3) concerns:

1. That Topline does not meet the requirements of the bid;
2. That the [E]valuation [T]eam incorrectly evaluated the award criteria and failed to conduct the detailed due diligence required to insure Topline can meet the technical requirements of the bid;
3. That “inside information” apparently was being communicated to Topline regarding the bid and during the evaluation process to the degree that Topline knew it would be awarded the bid before it was awarded.

See Appeal pp. 1-2.

Fabriclean further stated that the details of its concerns and the basis for its protest can be found in its February 19<sup>th</sup> letter to CHC and its June 27<sup>th</sup> letter to the Secretary. *Id.* at 2. The June 27, 2003, letter to the Secretary included a request for reconsideration of the Decision. By letter dated July 1, 2003, the Secretary declined to reconsider the Decision, stating that the CNMI-PR do not include a procedure for reconsideration of a protest decision.

#### **F. Secretary’s Report on Appeal**

On or about July 16, 2003, the Secretary issued his Report on the Appeal (“Appeal Report”) in which he recommended that the Appeal be denied. The Appeal Report stated that the proposers had discussed their respective fees following the submission of their proposals and that “the Government cannot be blamed for the effects of proposers willingly sharing competitive information.” See Appeal Report at 2. The Appeal Report further claimed that the balance of the

appeal deals with issues within the purview of the Evaluation Committee.<sup>3</sup> *Id.* In conclusion, the Appeal Report stated “that absent evidence of error or misconduct, neither of which have been offered by Marianas Cleaners, that the decision of the Evaluation Committee is entitled to respect as an exercise of discretion and independent judgment and must be presumed valid.” *Id.*

### III. ANALYSIS

#### A. Issues Raised by Fabriclean

CNMI-PR § 6-102(1)(c) requires that the appeal “contain a concise, logically arranged, and direct statement of the grounds for appeal.” Fabriclean’s Appeal, however, simply lists three concerns. Although the Appeal gives limited information, Fabriclean cites two letters<sup>4</sup> that contain the details of its concerns and the basis for its protest.<sup>5</sup>

The first two issues raised by Fabriclean in its Appeal appear to be based upon Fabriclean’s belief that Topline should have been determined non-responsible as it failed to meet the requirements of the bid.<sup>6</sup> Both letters make a variety of assertions that question Topline’s responsibility.<sup>7</sup> As such, OPA will treat Fabriclean’s first and second concerns as an appeal of the Evaluation Team’s affirmative determination of Topline’s responsibility which was upheld by the first two findings in the Decision, as set forth in Section II(F) above, and will address those two concerns together.

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<sup>3</sup> The “Evaluation Committee” referenced in the Secretary’s Appeal Report is the same as the “Evaluation Team” referenced in the Secretary’s Decision and in Fabriclean’s Protest and Appeal. Thus, the terms “Evaluation Committee” and “Evaluation Team” may be used interchangeably throughout this report.

<sup>4</sup> “The details of our concerns and the basis for our protest can be found in our February letter to CHC and our June 27 letter to Secretary Schrack.” Appeal at 2.

<sup>5</sup> A February letter from Fabriclean addressed to CHC was not provided to OPA, however, a letter dated February 19, 2003, from Fabriclean addressed to Herman Sablan, Director of Procurement and Supply, regarding RFP03-CHC-0041, was provided. That letter addresses Fabriclean’s concerns as to TopLine’s abilities and its concern regarding violations by the Evaluation Team which mirror Fabriclean’s issues in its Appeal.

<sup>6</sup> The Appeal states that : “We are concerned:

- 1) Our competitor does not meet the requirements of the bid;
- 2) The [E]valuation [T]eam incorrectly evaluated the award criteria and failed to conduct the detailed due diligence required to insure Topline can meet the technical requirements of the bid.”

Appeal at 1.

Although Fabriclean refers to the ‘requirements of the bid’ in its Appeal and there appears to be some confusion as several procurements were issued for CHC simultaneously, it was a request for proposal (RFP 03-CHC-0041 ) that was issued and advertised, not an invitation to bid.

<sup>7</sup> The February 19, 2003, letter to the Director and the June 27, 2003, letter to the Secretary include assertions that Fabriclean believes that Topline: 1) does not have a laundry; 2) does not have the ability to meet the manpower and equipment requirements of the RFP; 3) does not have the experience to perform; and 4) does not meet National Association of Healthcare Linen Management standards.

The third issue raised by Fabriclean appears to appeal the Secretary's third finding which stated that:

There is insufficient evidence to conclude that there was a breach of confidence by the [E]valuation [T]eam prior to the award of the contract, which would require a re-evaluation of proposals by a new committee.

See Decision p. 4.

## **B. Responsibility Determinations Pursuant to CNMI-PR § 3-301**

CNMI-PR § 3-301, Responsibility of Bidders and Offerors, mandates that awards shall be made only to responsible contractors. CNMI-PR § 3-301(1) sets forth mandatory responsibility requirements, as follows:

- (1) *Awards shall be made only to responsible contractors.* To be determined responsible, a prospective contractor must:
  - (a) have adequate financial resources to perform the contract, or the ability to obtain them;
  - (b) be able to comply with the required delivery or performance schedule;
  - (c) have a satisfactory performance record;
  - (d) have a satisfactory record of integrity and business ethics;
  - (e) have the necessary organization, experience and skills, (or the ability to obtain them), required to successfully perform the contract;
  - (f) have the necessary production, construction and technical equipment facilities, or the ability to obtain them; and
  - (g) be otherwise qualified and eligible to receive an award under applicable laws and rules.

See CNMI-PR § 3-301(1).

It must be noted that subsection (e) allows a prospective contractor to be determined responsible even if that prospective contractor does not have the necessary organization, experience or skills required to successfully perform the contract, if the contractor has the ability to obtain the organization, experience and skills necessary to perform. Likewise, subsection (f) allows a prospective contractor that does not have the necessary production, construction and technical equipment facilities to be determined responsible if that contractor has the ability to obtain them.

In the instant case, Topline could have been determined responsible under the CNMI-PR, even if the deficiencies that Fabriclean claims exist, actually did/do exist, if Topline had/has the ability to obtain the necessary organization, experience, skills, production, construction and technical equipment facilities necessary.

## C. Review of Responsibility Determinations

### 1. Discretion

It is well settled that contracting officers have a wide discretion in determining responsibility. See generally JOHN CIBINIC, JR. & RALPH C. NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 412 (3<sup>rd</sup> Ed. 1998); see also *Robert E. Dereckter of R.I., Inc. v. Goldschmidt*, 516 F. Supp 1085, 1096 (D.R.I. 1981) (internal citations omitted). The decision of responsibility is essentially a question of business judgment which any unsuccessful contractor may contest with consequent delay and cost to the Government, review of which should not be taken lightly and a contrary determination only made in the clearest case. *Id.*; see also *Dereckter*, 516 F. Supp. at 1096. Specifically, determinations as to types and degree of experience and the method of proving experience are solely within the discretion of the procuring agency. See CIBINIC & NASH, *supra*, at 412. Unlike the Federal Acquisition Regulations, the CNMI-PR do not address what evidence is necessary to be submitted to show the proposed contractor's ability to obtain equipment and facilities. CNMI-PR § 3-301(2) simply provides that information necessary to make a determination of responsibility using the factors set forth in CNMI-PR § 3-301(1) shall be obtained from the offeror. Although information sufficient to satisfy the criteria set forth in CNMI-PR § 3-301(1) must be obtained, the language of subsection (2) appears to leave the determination of what information is necessary to the discretion of P&S.

### 2. Review Generally

A determination of nonresponsibility will not be disturbed “unless the protestor demonstrates bad faith by the agency or the lack of any reasonable basis for the determination.” *Matter of Automated Datatron, Inc.*, 68 Comp. Gen. 89 (B-232048) (November 16, 1988), 1988 U.S. Comp. Gen. Lexis 1311 \*4 (internal citations omitted); see generally CIBINIC & NASH, *supra*, at 443. Similarly, “[p]rocurement officials are presumed to act in good faith, and in order to show otherwise, a protestor must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protestor.” *Automated Datatron*, 1988 Lexis 1311 at \*6 (internal citations omitted). It must be noted that “the Comptroller General will not normally review protests of favorable determinations of responsibility ...”. CIBINIC & NASH, *supra*, at 419 (citations omitted). This refusal to review favorable responsibility determinations is true even if the successful offeror has had a previous contract terminated for default or has not met obligations on prior contracts. *Id.* In addition, as “the criteria for determining responsibility are not readily susceptible to reasoned review and because they essentially involve business judgment, affirmative determination of responsibility are generally not overturned absent fraud or bad faith.” CIBINIC & NASH, *supra*, at 443 (citations omitted).

### **3. Topline's Favorable Determination**

The Evaluation Committee determined, in its Evaluation and Selection Report dated January 14, 2003, that Topline was responsible by finding that it was both "capable and qualified to perform the requirements as specified in the RFP" and that it "submitted a comprehensive and descriptive proposal with sound financial resources and indicators of well organized and positive approach addressing the requirements specified in the RFP." As P&S began the contract process, it is assumed that the responsibility determination made by the Evaluation Committee and the substantiation submitted was acceptable to P&S.

### **4. No Fraud, Bad Faith or Lack of Basis for the Determination Shown**

In the instant case, although Fabriclean claims "inside information" was given to Topline, which is addressed below, no evidence of fraud, bad faith, or lack of basis for the determination was shown. In addition, the responsibility determination was revisited by the Secretary in an investigation prior to issuing the Decision. In the Decision the Secretary found that "[a]ll of the criteria stated in the RFP were satisfied by Topline."

### **C. "Inside Information" Issue**

Fabriclean claims that "'inside information' apparently was being communicated to Topline regarding the bid and during the evaluation process to the degree that Topline knew it would be awarded the bid before it was awarded." The Secretary, however, found that "[t]here is insufficient evidence to conclude that there was a breach of confidence by the evaluation team prior to the award of the contract, which would require a re-evaluation of proposals by a new committee." Topline's owner Ms. Sablan claims in her response to Fabriclean's Protest dated March 5, 2003, that:

1. she has considered Mr. Guzman of Fabriclean "a close friend";
2. she did tell Mr. Guzman that she "got the Laundry but that was a friendly joke";
3. she did not know who got the CHC contract; and,
4. they "openly discuss about our bids at CHC particularly the price".

No other evidence was supplied that supports Fabriclean's assertions that "inside information" was wrongfully disclosed or that such information affected this procurement or prejudiced Fabriclean.

## DECISION

Based on the foregoing, OPA finds:

1. The favorable responsibility determination of a proposer will not be reviewed absent a showing of subjective bad faith, fraud, or lack of a reasonable or rational basis for the determination;
2. Good faith is presumed and no showing of bad faith or fraud was made;
3. No subjective bad faith, fraud, or lack of a reasonable or rational basis for the determination was shown;
4. There is insufficient evidence to support that “inside information” was divulged to Topline;
5. There is no evidence that any alleged divulgence of “inside information” compromised the integrity of the procurement process or resulted in prejudice to Fabriclean.

The Office of the Public Auditor, therefore, denies the appeal.

Section 6-102(9) of the revised CNMI-PR provides that Fabriclean, 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 date of this decision.



Michael S. Sablan, CPA  
Public Auditor

October 9, 2003