

2. Pacific Cooperation failed to list the nature and scope of the work to be performed by the sub-contractors and suppliers for the construction of the additional classrooms.

The Director of Procurement and Supply denied DK Bothers protest on April 7, 2006, finding that Pacific Cooperation did submit a list of intended material suppliers and did complete the "List of Sub-Contractors" form by writing "N / A" (not applicable) on it.

By letter dated April 7, 2006, Pedro Q. Dela Cruz, on behalf of DK Brothers, filed an appeal of the Protest Decision with the Director of Procurement and Supply.

By letter dated April 10, 2006, the Director of Procurement and Supply informed Mr. Dela Cruz that the appropriate venue for the appeal is the Office of the Public Auditor and he should direct his appeal to OPA.

DK Brothers, through its attorney Brien Sers Nicholas appealed the Director of P & S' Decision to OPA on April 24, 2006.

OPA provided Notice of the Appeal to the Director of P & S on April 24, 2006.

The Director of P & S provided OPA with a Report on the Decision as well as the case file on May 2, 2006.¹

DK Brothers, through its attorney Brien Sers Nicholas responded with comments on May 4, 2006.

III. ISSUES RAISED BY APPELLANT

The Procurement and Supply Director's Report and DK Brothers' Notice of Appeal and Comments on the Procurement and Supply Director's Report raise two grounds for appeal:

1. Was the appeal timely?
2. Did the Director of Procurement and Supply improperly fail to exclude Pacific Cooperation's Bid as non-responsive and responsible?

¹ The report was received by OPA by facsimile on May 2, 2006; on the face of the report it is dated April 26, 2006.

IV. ANALYSIS

A. Timeliness

The bids were opened on March 31, 2006 at 2:00 pm. The protest was filed with the Director of Procurement and Supply (P & S) on April 3, 2006 by Pedro Q. Dela Cruz, on behalf of DK Brothers. The Director of Procurement and Supply denied DK Brothers protest on April 7, 2006. By letter dated April 7, 2006, Pedro Q. Dela Cruz, on behalf of DK Brothers, filed an appeal of the Protest Decision with the Director of Procurement and Supply. By letter dated April 10, 2006, the Director of Procurement and Supply informed Mr. Dela Cruz that the appropriate venue for the appeal is the Office of the Public Auditor and he should direct his appeal to OPA. DK Brothers, through its attorney Brien Sers Nicholas did appeal the Director of P & S' Decision to OPA on April 24, 2006. OPA provided Notice of the Appeal to the Director of P & S on April 24, 2006. The Director of P & S provided OPA with a Report on the Decision as well as the case file on May 2, 2006. DK Brothers, through its attorney Brien Sers Nicholas responded with comments on May 4, 2006.

The Director of Procurement and Supply urges OPA to reject DK Brothers' appeal as untimely since the Denial of the Protest was issued on April 7, 2006 and DK Brothers' appeal to OPA was not filed until April 24, 2006.

CNMI-PR Section 505(c) requires that an appeal be filed with OPA not later than ten (10) days after the appellant receives the decision of the Director of P & S (or should have received the decision if one has not been rendered). NMIAC 70-30.3-505(c). CNMI-PR Section 501(d)(1) provides that, "[e]xcept as otherwise specified, all 'days' referred to in this part are deemed to be working days of the Commonwealth Government. . . ." NMIAC 70-30.3-501(d)(1). CNMI-PR 505(c) and CNMI-PR 501(d) are both part of "Subpart A - Bid Protests and Appeals" in Article 6, "Protests and Disputes." According to CNMI-PR 501(d)(2), "[i]n computing any period of time prescribed or allowed by these procedures, the day of the act or event from which the designated period of time begins to run shall not be included." NMIAC 70-30.3-501(d)(2). Thus, the day the Decision was issued, April 7, is not to be counted. April 14, Good Friday, was an official CNMI Government holiday. Therefore, April 24, the day OPA received the appeal, was the tenth(10th) working day after the issuance of the P & S Director's Decision. OPA, therefore, finds the appeal to have been timely filed.

B. Whether the P & S Director Improperly Failed to Exclude Pacific Cooperation's Bid

DK Brothers sole argument on appeal is that the P & S Director should have excluded Pacific Cooperation's bid as non-responsive and responsible because it did not use a supplied form to list its sub-contractors and materials suppliers. Pacific Cooperation had the lowest bid. The P & S Director did not exclude it.

Pacific Cooperation did provide lists of its sub-contractors and materials suppliers on its own forms. It listed four materials suppliers on one sheet and on the other, it listed "N/A" for the sub-contractors. "N/A" means "not applicable." The P & S Director found, and OPA agrees, that the "N/A" on the sub-contractor list means that it does not intend to use any sub-contractors.

While DK Brothers concedes that Pacific Cooperation did provide lists of its sub-contractors and materials suppliers on its own forms, it contends that those forms were insufficient because they did not list the "Nature and Scope of the Work" as directed on the supplied form.

In the "Instructions to Bidder" for DPW 06-IFB-012, Item 3(c) listed, in relevant part:

10. List of Subcontractors (no form included)
11. List of Materials Suppliers (no form included)

Also included in the packet was the "LIST OF SUBCONTRACTORS / SUPPLIERS."

OPA finds that the inclusion of this list was inadvertent, since the instructions clearly indicated that no form was supplied. Since the instructions indicated that no form was supplied, it was appropriate and proper that Pacific Cooperation use its own form. Had the P & S Director excluded Pacific Cooperation as non-responsive and responsible for not using the form, he would have done so in contravention of the instructions included in the instruction packet.²

² Even if the form with the "Nature and Scope of the Work" column had been required, when data or information is required to be submitted with the bid, the decision-maker will consider the purpose for which the data or information is to be used when determining whether it is a matter of responsiveness or responsibility. See Cibinic & Nash, *Formation of Government Contracts*, Third Edition (1998) at p. 553, "4. Information or Data to Be Submitted." Thus, if descriptive data is to be used to determine a bidder's ability or capacity to perform, the matter will be one of responsibility and failure to submit the information with the bid will not cause its rejection. See e.g., *Seacoast Trucking and Moving Co.*, Comp. Gen. Dec. B-200315, 80-2 CPD ¶ 235 (failure to submit description of equipment to be used in

DECISION

Based on the foregoing, OPA finds:

1. DK Brothers' Appeal was timely filed.
2. The P & S Director did not improperly fail to exclude Pacific Cooperation as a non-responsive and responsible bidder.

The Office of the Public Auditor, therefore, affirms the Decision of the Director of Procurement and Supply to deny DK Brothers' Protest.

Section 505(i) of the CNMI-PR provides that DK Brothers, 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. NMIAC 70-30.3-505(i)(1).

Such a request must be received by the Public Auditor not later than (ten) 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. NMIAC 70-30.3-505(i)(2).



Michael S. Sablan, CPA
Public Auditor

June 1, 2006

performing refuse services did not render bid non-responsive because equipment was a matter of capability to perform); *Savin Business Machines Corp.*, Comp. Gen. Dec. B-1191163, 78-1 CPD ¶ 447 (failure to furnish preventative maintenance plan, key operation instruction plan, and samples of paper to be used with photocopying equipment did not render bid non-responsive).