



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
REACTION CO.

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APPEAL NO. BP-A051

DECISION

I. SUMMARY

This is the Office of the Public Auditor's Decision on the Appeal filed by Reaction Co. (Reaction) appealing the Director of the Division of Procurement and Supply's (Director) denial of Reaction's Protest regarding the cancellation of IFB 06-GOV-003, the procurement for the installation of 7,000 water meters, by the Water Task Force (WTF) and the subsequent solicitation for installation of 7,000 water meters through IFB 06-GOV-097.

The Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR), which are codified in subchapter 70-30.3 of the Northern Mariana Islands Administrative Code (NMIAC), are applicable to this Appeal. The Office of the Public Auditor (OPA) has jurisdiction over this Appeal as set forth in NMIAC § 70-30.3-305.

OPA finds that the cancellation of IFB 06-GOV-003 was allowable under the CNMI-PR. OPA further finds no compelling reason presented to justify OPA ordering the cancellation of IFB 06-GOV-097. Reaction's Appeal, therefore, is denied.

II. PROCEDURAL AND FACTUAL BACKGROUND

IFB 06-GOV-003 was originally announced in October, 2005, and re-announced in December, 2005. Bid submission, after re-announcement, was set for December 30, 2005. On that date, Reaction submitted a timely bid, as did several other vendors.

On January 27, 2006, Governor Benigno R. Fitial issued Governor's Directive No. 247, which repealed Directives 228 and 241. Directive 241, which set a minimum wage requirement for government service and CIP contracts at a higher rate than the minimum wage in the Commonwealth, was applicable to IFB 06-GOV-003 when issued.

By letter dated March 9, 2006, the Director informed the vendors that Governor's Directive No.

247 repealed Directive No. 241. The Director offered each vendor the opportunity to submit a revised sealed bid not later than 10:00 a.m. on Thursday, March 16, 2006. On March 15, 2006, the Director issued a Notice of Cancellation of Rebidding of ITB 06-GOV-003, which was delivered via facsimile to the bidders, including Reaction.

By letter dated March 20, 2006, the WTF informed Reaction that it was the lowest responsive and responsible bidder and that, as such, the government intended to award the contract to Reaction. The letter further informed Reaction that certain information and documents would be required prior to issuance of a contract.

Correspondence in late March, 2006, reflects an issue with the bonding company proposed by Reaction. A memorandum to the Director from the Acting Insurance Commissioner, dated March 29, 2006, stated that a certification of compliance could not be issued until a funding issue was addressed. The Director responded by a memorandum dated March 30, 2006, informing the Office of the Insurance Commissioner that major projects, including a WTF project, were on hold until the Commissioner reached a decision regarding the certificate of compliance. By letter dated March 31, 2006, WTF informed Reaction of the concern with the bonding capacity of Reaction's proposed bonding company and stated that it must be resolved by April 14, 2006. The information provided to OPA does not contain a resolution of this issue with regard to IFB 06-GOV-003. An Insurer Certification Clearance, however, was issued for IFB 06-GOV-097 for Reaction Company, dated August 10, 2006.

By letter dated April 11, 2006, WTF's Acting Program Manager (William Steyskal) requested that the Director of P&S approve the cancellation of IFB 06-GOV-010 and IFB 06-GOV-003. (Request for Cancellation Approval). The Request for Cancellation Approval requested the Director to approve the cancellations of the two solicitations pursuant to NMIAC § 70-30.3-240 (c) and (h).¹ The letter stated that the "WTF no longer requires the services being procured." As to IFB 06-GOV-003, one of the IFBs at issue in this appeal, the letter further stated that the WTF "determined that continuing the metering of water service should be delayed until CUC has registered and initiated billing of the meters recently installed by the WTF and identified and resolved any problems with the new type of meters used in the project." The Request for Cancellation Approval further provided that "[a]t some later time, both of these projects may be undertaken, but for now, with limited funds available to the WTF, priorities must be established and health, safety and adequate water supply must take a top priority." The Director approved the cancellation of both IFBs as indicated on page two of the Request for Cancellation Approval.

IFB 06-GOV-097 was advertised in July, 2006, with an original bid submission date of August 16, 2006. The Specification Pick-up Sheet indicates that Fred S. Mamitag of Reaction picked up a bid package/specifications on July 18, 2006.

¹ The WTF correspondence cited to "Section 3-201, subsections (3) and (8) of the CNMI Procurement Regulations." As the CNMI-PR are codified in NMIAC Title 70, OPA will cite to the NMIAC in this decision.

The pre-bid conference on IFB 06-GOV-097 was held on August 2, 2006. The Pre-bid Conference Minutes indicate that both Fred Mametag and Noel Tolentino, representatives of Reaction, attended and participated in the pre-bid conference. The discussion at the pre-bid conference included discussion regarding changes in scope from the previous invitation for bid, including the concrete collars around each meter box, “bonding requirements, bid schedule items, and construction details.”

By memorandum to all prospective bidders dated August 11, 2006, the WTF addressed the issue of the re-bid, prior cancellation, and the scope of work change by stating, in part:

The scope of work has been changed somewhat, as well as specifications. The bid schedule of values has also been changed, and the installation details have also been changed. Per CNMI Procurement Regulations, Part B, Section 3-201² (Cancellation), all the bids were rejected as it was determined to be in the best interest of the government. (Footnote added).

In a letter dated August 13, 2006, addressed to the Director, Reaction requested clarification of IFB 06-GOV-003 and the re-bid of IFB 06-GOV-097. In this letter, Reaction acknowledged attendance at the pre-bid conference for IFB 06-GOV-097 and stated that it raised the question as to why the project was being re-bid prior to the start of that meeting. It further stated that it had acquired the Insurer Certification Clearance for the Office of the Insurance Commissioner for the “re-bid which is the same project.”

On August 17, 2006, facsimile transmission reports show that Addendum No. 1 to IFB 06-GOV-097 was delivered via facsimile to the prospective bidders, including Reaction. Addendum No. 1 extended the time for bid submissions, setting the new Bid Submission date for August 30, 2006.

Written notice of the cancellation of IFB 06-GOV-003 appears to have been faxed to the interested parties, including Reaction, on August 28, 2006. Reaction, in its letter to the Director dated August 29, 2006, acknowledged receipt of the bid cancellation notice letter dated August, 28, 2006. Reaction requested that its letter to the Director be considered an official protest as Reaction believed that P&S exercised “an unlawful procurement procedure for the IFB 06-GOV-097.” Reaction claimed that the bid cancellation notice for IFB 06-GOV-003 “should have been done prior to issuing another invitation for bids for basically the same project [IFB 06-GOV-097].”

As set forth in Addendum No. 1 to IFB 06-GOV-097, bids were due to be submitted on August 30, 2006. The bids related to IFB 06-GOV-097 were opened on August 31, 2006, at approximately 10 o'clock in the morning. Although the Sign-in Sheet for the bid opening reflects that Noel Tolentino, a representative from Reaction, attended the bid opening, the Summary of Bid Opening indicates that Reaction did not submit a bid for IFB 06-GOV-097.

² Codified at NMIAC § 70-30.3-240.

By letter dated December 19, 2006, the Director issued the P&S Protest Decision on IFB 06-GOV-097. By letter dated December 28, 2006, Reaction appealed the Director's Decision to OPA. Pursuant to the CNMI-PR, notice of the Appeal was given to the Director on the next government business day, January 3, 2007.

On January 18, 2007, OPA received the Director's Report on the Appeal. Reaction's Comments on the Appeal were received on January 23, 2007. In response to a request by OPA for additional information made on February 12, 2007, OPA received additional information from the Director on February 13, 2007. Further, in a letter dated February 21, 2007, but not received by OPA until March 2, 2007, the WTF submitted its comments and supporting documents regarding the Appeal. The WTF claimed that it had just learned that P&S had been asked to respond to questions regarding the protest.

III. ISSUES

Based upon Reaction's Appeal and the exhibits thereto, OPA will address the following two issues:

1. Was cancellation of IFB 06-GOV-003 allowed under CNMI-PR?
2. Do the circumstances require the cancellation of IFB 06-GOV-097?

IV. ANALYSIS

A. Cancellation of IFB 06-GOV-003 Pursuant to CNMI-PR

Cancellation of a procurement after bid opening is a serious matter, as bidders, with knowledge of the prior bids, could potentially have an unfair advantage if later permitted to compete again for the same procurement. Instances, however, do exist when cancellation is appropriate and allowable. Pursuant to the CNMI-PR, NMIAC § 70-30.3-240, "[a]n invitation for bids or request for proposals may be canceled, and any and all bids or proposals may be rejected, when such action is determined in writing by the official with expenditure authority and approved by the P&S Director to be in the best interest of the government" for any of a variety of reasons, including:

- (a) Inadequate or ambiguous specifications contained in the solicitation;
- (b) Specifications which have been revised;
- (c) Goods or services being procured which are no longer required;
- (d) Inadequate consideration given to all factors of cost to the government in the solicitation;
- (e) Bids or proposals received indicate that the needs of the government can be satisfied by a less expensive good or service;
- (f) All offers with acceptable bids or proposals received are at unreasonable prices;

- (g) Bids were collusive; or
- (h) Cancellation is determined to be in the best interest of the government.

NMIAC § 70-30.3-240³

The CNMI-PR⁴ allow for cancellation and rejection of all bids, after opening, prior to award, under certain conditions. Those conditions include both instances when there is a determination that services are no longer required and instances when cancellation is in the best interest of the government.

The written determination made by the WTF contained in the April 11, 2006 Request for Cancellation Approval, which was signed and approved by the Director, cited that the services were no longer required and cancellation was determined to be in the best interest of the government. The WTF further stated that at some later time the “projects may be undertaken, but for now, with limited funds available to the WTF, priorities must be established and health, safety and adequate water supply must take top priority.” The written notice of bid cancellation given on August 28, 2006, also cited to the same provisions set forth in the WTF’s Request for Cancellation Approval.

OPA is not aware of any information that would support or justify second-guessing the WTF and the Director regarding the basis for cancellation of IFB 06-GOV-003 as set forth in the Request for Cancellation Approval signed by the Director. It is also evident that when the solicitation for the installation of the 7,000 water meters was later issued, in the form of IFB 06-GOV-097, that the scope and specifications included changes from those of IFB 06-GOV-003. Further, as Directive 241, which was incorporated into IFB 06-GOV-003’s requirements, had been repealed, the minimum wage requirement was not incorporated into or applicable to IFB 06-GOV-097.

Reaction appears to contend that the delay in providing a written notice of cancellation of IFB 06-GOV-003 in some way vitiated the cancellation. The CNMI-PR, however, are silent on the

³ Previously CNMI-PR § 3-201.

⁴ In its Comment to the Director’s Report, Reaction sets forth an argument that the FAR should apply to this procurement and cancellation is not proper as there simply was an increase in requirements. The section of the FAR cited and relied on by Reaction, FAR 14.404-1(a)(3), states:

As a general rule, after the opening of bids, an invitation should not be cancelled and resolicited due solely to increased requirements for the items being acquired. Award should be made on the initial invitation for bids and the additional quantity should be treated as a new acquisition.

This section, however, applies to instances when the government’s requirement, or need, for a certain quantity of an item increases. In the procurement in question, it is not the quantity or number of items that changed, but the specifications/scope, etc., that appear to have been modified. As such, FAR 14.404-1(a)(3) does not apply to the facts as presented and would not have prohibited cancellation.

requirement of written notice in the instance of cancellation. OPA cannot construe that a delay in giving such a notice was a violation of the CNMI-PR or an action that would void a cancellation otherwise in accordance with NMIAC § 70-30.3-240.

Reaction argues that it “does not agree” with the WTF’s contention that the “project was legitimately changed.” OPA will not engage in second-guessing the WTF and P&S regarding the necessity of the changes made to the specifications or scope. It is apparent that the scope and specifications of IFB 06-GOV-097 vary from the scope and specifications of IFB 06-GOV-003. In addition, the changes were admittedly discussed at the pre-bid conference, which was attended by Reaction, and were also addressed in correspondence to all potential bidders on IFB 06-GOV-097, including Reaction.

Based on the foregoing, OPA finds that there was a written determination by the WTF, which was approved by the Director of P&S, that the services under IFB 06-GOV-003 were no longer required and that cancellation of IFB 06-GOV-003 was in the best interest of the government. As such, it appears that the cancellation of IFB 06-GOV-003 was in accordance with NMIAC § 70-30.3-240.

B. No Evidence IFB 06-GOV-097 is in Violation of Law or Regulation

The CNMI-PR provide for the remedies prior to award in NMIAC § 70-30.3-510(a), which reads:

§ 70-30.3-510 Remedies

- (a) Remedies Prior to Award. If prior to award the P&S Director or the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor shall have the solicitation or proposed award:
 - (1) Canceled; or
 - (2) Revised to comply with law or regulation.

In the instant case, based on the information and claims submitted to OPA, a determination that the solicitation of IFB 06-GOV-097 was in violation of law or regulation cannot be made.

As discussed above, the CNMI-PR do not specifically address the requirement of written notice of cancellation. OPA cannot infer, therefore, that a delay in giving written notice of cancellation of IFB 06-GOV-003 is a violation of the CNMI-PR impacting either the cancellation of IFB 06-GOV-003 or the solicitation of IFB 06-GOV-097. As such, Reaction’s assertion that failure to give notice of the cancellation of IFB 06-GOV-003 prior to announcement of IFB 06-GOV-097 requires cancellation of IFB 06-GOV-097 cannot be sustained. Further, the CNMI-PR are also silent on the requirements of a re-bid, as Reaction calls IFB 06-GOV-097. The Request for Cancellation Approval evidences that IFB 06-GOV-003 was cancelled as it was “determined in

writing by the official with expenditure authority and approved by the P&S Director to be in the best interest of the government” based upon the change in the current needs of the government. Subsequently, the solicitation for the installation of the 7,000 water meters, was issued with several noted changes in place in the form of IFB 06-GOV-097. Absent other factors currently unknown to OPA that would evidence foul-play, violation of law or regulation, or other compelling reason for cancellation, it does not appear that cancellation of IFB 06-GOV-097 at this time would meet any of the requirements of NMIAC § 70-30.3-240, including that it does not appear that cancellation of IFB 06-GOV-097 would be in the best interest of the government.

As such, based on the information presented to OPA, a determination that IFB 06-GOV-097 is in violation of law or regulation cannot be made and ordering the cancellation of IFB 06-GOV-097 cannot be justified.

V. OTHER MATTERS

Reaction admittedly knew that IFB 06-GOV-097 was a new solicitation for the installation of the 7,000 water meters previously solicited for under IFB 06-GOV-003, with some changes. Reaction actively participated in the procurement involving IFB 06-GOV-097 and was considered a potential bidder throughout the process. Specifically, Reaction picked up the bid package/specification for IFB 06-GOV-097, attended and participated in the pre-bid conference, where the scope and specification changes from IFB 06-GOV-003 were discussed, and was provided notices related to the solicitation as a potential bidders. Reaction admitted receiving written notice of the cancellation of IFB 06-GOV-003 on August 28, 2006, but failed to submit a bid on IFB 06-GOV-097 prior to the submission deadline for IFB 06-GOV-097 on August 30, 2006, despite having obtained an Insurer Certificate Clearance for IFB 06-GOV-097, not for IFB 06-GOV-003. Unfortunately, although Reaction’s Appeal can be addressed, as Reaction did not submit a bid, it cannot, therefore, be considered for award of IFB 06-GOV-097.

VI. CONCLUSION

Based on the foregoing, OPA finds:

1. In accordance with NMIAC § 70-30.3-240, a written determination by the WTF, which was approved by the Director of P&S, that the services under IFB 06-GOV-003 were no longer required and that cancellation of IFB 06-GOV-003 was in the best interest of the government was made in April, 2006;
2. IFB 06-GOV-097, although for the installation of 7,000 water meters similar to IFB 06-GOV-003, contained changes to the scope, specifications, and other requirements;
3. The CNMI-PR are silent on the requirement of written notice of cancellation and delay in giving such notice cannot be construed to be a violation of the CNMI-PR as to either

IFB 06-GOV-003 or IFB 06-GOV-097; and,

4. No evidence of violation of the CNMI-PR regarding IFB 06-GOV-097 was presented and, as such, cancellation of IFB 06-GOV-097 will not be ordered by OPA.

Based on the foregoing, Reaction's Appeal is hereby denied.

NMIAC § 70-30.3-505(i) provides that Reaction, Co., 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.

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

Michael S. Sablan, CPA
Public Auditor
April 2, 2007