



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF

BOLIS-R-US CATERING

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APPEAL NO. BP-A054

DECISION

I. SUMMARY

This is the Office of the Public Auditor’s Decision on the Appeal filed by Bolis-R-U’s Catering (Bolis). The Appeal was based on the Decision issued by the Secretary of Finance (Secretary) on a protest filed by Bolis regarding ITB 07-DOC-112.

The Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR), 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 the CNMI-PR at NMIAC § 70-30.3-505.

OPA finds that the Appeal filed by Bolis was not filed timely as required by § 70-30.3-505(c). OPA further finds that the conditions set forth in § 70-30.3-505(c) that would allow consideration of an appeal that has not been filed timely do not exist. As such, the Appeal is dismissed.

II. PROCEDURAL AND FACTUAL BACKGROUND

By letter dated October 24, 2007, and received by the Division of Procurement and Supply (P&S) on October 25, 2007, Bolis filed its Protest¹ with P&S regarding ITB 07-DOC-112. Bolis delivered a copy² of its Protest to OPA.³ In a letter dated October 26, 2007, P&S

¹ Although the letter states that it was “to submit an official appeal” it was filed with and taken by P&S to be Bolis’ Protest.

² The Protest included the “CNMI Public Auditor” and others on the cc: list.

³ The copy of the Protest was not delivered to or received by OPA at its main/administrative building at 1236 Yap Drive, where its front desk and administrative personnel are located. It was dropped off at one of OPA’s other buildings.

acknowledged the receipt of the Protest. On October 29, 2007, OPA received a facsimile copy of the P&S letter acknowledging receipt of the Protest. In a letter dated November 1, 2007, OPA advised Bolis that it did not have jurisdiction under the CNMI-PR over an appeal at that time as a decision on the Protest had not been issued and the time for issuance of a decision had not run. OPA stated that it would be taking no action on its request and that Bolis may choose to file an appeal request with OPA after a decision is issued, or if P&S fails to issue a decision under the CNMI-PR. OPA further advised Bolis that in the event Bolis chose to appeal the decision when issued “a new and separate appeal request complying with the CNMI-PR must be filed with OPA.” Bolis was also instructed that if Bolis filed any further documents with OPA by hand delivery, those documents should be delivered to 1236 Yap Drive, the building in which OPA’s administrative services and front desk are located.

P&S issued its Decision denying the Protest in a letter signed by the Secretary dated November 19, 2007. The letter was issued on P&S stationary and clearly indicated that the letter was “ITB07-DOC-112 – ‘Food Catering for the Department of Corrections Food Service’ – P&S Protest 08-002 – DECISION” in the reference/subject line. In addition, the first paragraph of that letter clearly informed Bolis that P&S was denying its Protest.⁴ Further, the last paragraph of the Decision informed Bolis that its protest was “denied in its entirety.”

In a letter dated November 27, 2007, addressed to P&S,⁵ Bolis confirmed that it received the Decision.⁶ Although the CNMI Public Auditor was again included on the cc: list, OPA did not receive a copy of the November 27th letter until December 12, 2007, and then again on December 20, 2007.

On December 12, 2007, OPA received via hand delivery, a letter dated December 10th from Bolis (the Appeal), appealing the ITB. The Appeal referenced the November 27th letter, a copy of which was attached. On the date the Appeal was received, OPA provided written notice to P&S as set forth in the CNMI-PR.

P&S filed its Report, dated December 19, 2007, recommending that the Appeal “should be rejected as untimely filed” with OPA. On December 20, 2007, Bolis filed a response to the P&S Report, in which Bolis claimed that a copy of the November 27th letter, which was filed with the Secretary on November 29, 2007, was a timely appeal of the Decision.⁷ Bolis further

⁴ The first paragraph of the November 19th letter reads: “This letter conveys the decision we have made on the protest you filed in response to the selection of MJ Kitchenette as contractor of the DOC Food Catering Service. No comments were received on the merits of your protest. We deny your protest in its entirety.”

⁵ The salutation was “Dear Secretary Inos” as the issuer of the November 19th Decision.

⁶ The first paragraph of the November 27th letter reads: “I am in receipt of your November 19, 2007 response letter to my bid appeal, which I only received late last week.”

⁷ The second paragraph of the December 20th response reads: “Perhaps Mr. Herman Sablan ought to have been immediately apprised (sic) and advised by DOF Secretary Eloy Inos that *Bolis-R-U*s in fact timely appealed on November 29, 2007, their original decision to prematurely, erroneously, and mischievously award the referenced

stated that “[a] copy of said appeal was in fact also timely forwarded to and received by OPA.” Bolis provided no evidence that the Appeal or a copy of its November 27th letter to the Secretary was filed with OPA prior to December 12, 2007.

OPA, in a letter dated January 4, 2008, requested additional information regarding the timeliness of the Appeal, including any information that would support that the Appeal was indeed timely filed or that would support OPA proceeding on the matter if it was not timely filed.⁸ Bolis responded to OPA in a letter dated January 8, 2008, and filed with OPA on January 9th. That response included a time line recapping events, but did not present any evidence that either the November 27th letter or the Appeal was filed with OPA prior to December 12, 2007. P&S also responded to OPA in writing by letter dated and filed on January 9, 2008. P&S pointed out that OPA had previously informed Bolis that it could at a later date choose to file another appeal request with OPA when the Director issued a decision or failed to do so. P&S explained that the Director had recused himself from the Protest on November 9, 2007, and that the Secretary issued the Decision on November 19th. P&S further stated that “Bolis was not the lowest responsible and responsive bidder in this competition” and it again recommended that the Appeal be rejected as untimely filed.

III. DISCUSSION

A. The Appeal was Untimely

The November 27th letter from Bolis stated that Bolis received the Decision “late last week.” The exact date that the Decision was received was not stated in the November 27th letter. The copy of the Decision that was provided to OPA as an attachment to the P&S Report, however, had a handwritten receipt acknowledgment dated November 23, 2007. Bolis’ deadline to file its Appeal with OPA was December 10, 2007, ten government working days after receipt of the Decision by Bolis.⁹ Although the Appeal received by OPA was dated December 10th, it was not delivered to OPA until December 12, 2007. In addition, no evidence that the Appeal or the November 27th letter was filed with OPA prior to December 12, 2007, was provided by Bolis.¹⁰

catering contract. I properly and timely filed my appeal directly with Mr. Eloy Inos, as he was the official signatory of the original contract award decision of referenced ITB, not Mr. Herman Sablan, and which copy was also furnished to Corrections Commissioner.”

⁸ The request for additional information set forth the claim made by P&S regarding the timeliness of the Appeal and NMIAC § 70-30.3-505(c), the CNMI-PR provision that addresses the deadline, consequences of late filing, and the possible exceptions. OPA stated that “prior to finalizing this determination, OPA requests that you provide any additional information or evidence from you showing that your Appeal was indeed timely filed or supporting a position that the Public Auditor should consider the Appeal even though not timely filed.”

⁹ Constitution Day was observed on Friday, December 7, 2007, and was not a working day of the government and was not included in the calculation of time. The due date for Bolis to file its Appeal would be December 10th whether the Decision was received by Bolis on Friday the 23rd, Saturday the 24th, or Sunday the 25th.

¹⁰ The only claim Bolis made to the contrary was set forth in its December 20th response: “A copy of said appeal was in fact also timely forwarded to and received by OPA.” However, no further evidence of receipt/delivery

Bolis claimed that it “timely appealed [the Decision] on November 29, 2007,” in its December 20th response to the P&S Report. The December 20th response further stated that Bolis “properly and timely filed [its] appeal directly with Mr. Eloy Inos, as he was the official signatory of the original contract award decision of referenced ITB, not Mr. Herman Sablan, and which copy was also furnished to Corrections Commissioner.”

The Decision was issued on November 19, 2007. Bolis admitted that it received the Decision late that week. The receipt acknowledgment on the copy of the Decision provided to OPA by P&S shows the Decision was received on November 23, 2007. In 2007, Constitution Day was celebrated as a government holiday on Friday, December 7th. As such, ten working days from receipt of the Decision was December 10, 2007. The Appeal, however, was not filed with OPA until December 12, 2007. The CNMI-PR require that the Appeal “must be received by the [O]ffice of the Public Auditor not later than ten days after the appellant receives the decision” or, in this case, December 10, 2007. Bolis did not file its Appeal timely with OPA.

B. Requirements to Override Late Filing Not Found

The CNMI-PR provide for the time for filing an appeal in NMIAC § 70-30.3-505(c), which states, in relevant part:

(c) Time for Filing Appeal. An appeal from the P&S Director’s decision must be received by the office of the Public Auditor not later than ten days after the appellant receives the decision of the P&S Director Any appeal received after these time limits shall not be considered by the Public Auditor unless good cause is shown or unless the Public Auditor determines that the appeal presents issues significant to procurement practices that are not outweighed by the detriment to the Commonwealth should the appeal be considered.

OPA included the above section in its request for additional information to Bolis. OPA specifically asked for any information to support a position that OPA should consider the Appeal even though it was not timely filed. OPA did not receive any information to support such consideration. The procurement was an invitation for bid and, as such, the resulting contract “must be awarded with reasonable promptness by written notice to the lowest responsible bidder whose bid fully meets the requirements of the invitation and the regulations” set forth in NMIAC Subchapter 70-30.3. *See* NMIAC § 70-30.3-205(m). Bolis did not show that the award violated this provision. Further, it is OPA’s understanding that Bolis was the fourth lowest bidder and would not be considered for award unless the three

of the November 27th letter was presented. In addition, Bolis never claimed administrative error or provided any evidence of same. As OPA did not receive a copy of the November 27th letter prior to its receipt of the Appeal on December 12, 2007, OPA will not address the potential argument presented by P&S that OPA’s receipt of Bolis’ November 27th letter to the Secretary may not have met the requirements of the CNMI-PR regarding filing an appeal with OPA.

lower bidders were determined to be non-responsive and/or not responsible, or otherwise dropped out of the procurement. Bolis also did not present any issues that were significant to the procurement process, as discussed in NMIAC § 70-30.3-505(c), for OPA to consider.

OPA finds that good cause was not shown and that issues significant to the procurement process do not exist in this Appeal to justify OPA proceeding with considering the Appeal as it was found to be received after the time limit set forth in NMIAC § 70-30.3-505(c).

IV. CONCLUSION

Based on the foregoing, the Appeal is hereby dismissed.

The CNMI-PR § 70-30.3-505(i) provides that Bolis-R-Us Catering or any interested party that 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.

Signed

Michael S. Sablan, CPA

Public Auditor

February 15, 2008