



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE REQUEST FOR)	APPEAL NO. BP-A063
RECONSIDERATION OF)	
DECISION ON ITSI, INC.'s)	DPW 09-IFB-19
APPEAL)	
_____)	PUERTO RICO DUMP
)	FINAL CLOSURE

DECISION ON REQUEST FOR RECONSIDERATION

I. SUMMARY

GPPC, Inc., (GPPC) filed this Request for Reconsideration after the Office of the Public Auditor (OPA) issued its Decision on the third appeal¹ of the above-referenced IFB on August 12, 2010. As an interested party within the definition of NMIAC §70-30.3-510(i)(1), GPPC has standing to request reconsideration of OPA's Decision. It has timely filed its Request for Reconsideration. NMIAC §70-30.3-510(i)(2).

II. FACTUAL AND PROCEDURAL HISTORY

GPPC previously filed two protests and then two appeals on this IFB. The Public Auditor issued his Decisions on those appeals on November 18, 2009 and April 1, 2010.² The first protest and appeal filed by GPPC had to do with the timeliness of ITSI, Inc.'s (ITSI) bid submission. The second GPPC protest and appeal alleged ITSI's bid was not responsive, though OPA determined the issue to be responsibility.

There is currently a case (Civil Action Number 10-015-CV) pending in the Superior Court for the Commonwealth of the Northern Mariana Islands regarding those protests and appeals. Judge David Wiseman has granted a Temporary Restraining Order precluding the award of a contract to ITSI, in effect until further order of the Court.

¹ The third appeal was filed by ITSI, Inc. on June 4, 2010.

² The OPA Decisions are available on our website, opacnmi.com.

ITSI filed an appeal – the third one on this IFB but ITSI’s first -- with the Office of the Public Auditor on June 4, 2010 from the denial of its protest regarding DPW 09-IFB-19 by the Director of the Division of Procurement and Supply (“The Director” or P & S), Department of Finance.

ITSI was protesting a Notice of Intent to Award it a contract for DPW 09-IFB-19 received from the Capital Improvements Projects (CIP) Office, Office of the Governor, on April 5, 2010. ITSI also received a subsequent April 14, 2010 letter from the Contracting Officer (CO) seeking assurances it intended to honor its August 2009 bid. If ITSI did not provide assurances or the necessary documents, the CNMI would consider it in breach of the bid, make alternate plans for completion of the project, and if there were increased contract costs due to the breach, the CNMI would make a claim against ITSI and its bid bond and possibly seek ITSI’s debarment from future CNMI government projects.

In response to ITSI’s protest, the Director found that ITSI had not timely raised the issue of the design flaw. He also found ITSI had both explicitly and implicitly extended its bid proposal, had not revoked the offer prior to the CNMI’s acceptance of it, and moreover, the ITSI offer was still viable because of the CNMI’s reliance upon it.

In its appeal to OPA, ITSI argued it timely raised the issue of a design flaw, maintaining it had “alerted the CNMI to design flaws early and often.” ITSI further argued its bid expired on February 4, 2010, 180 days after its submission and claimed there was no explicit or implicit extension of the bid, and the CNMI’s reliance on the bid’s continued validity was unreasonable since the CNMI did not seek bid extension in accordance with NMIAC §70 - 30.3 - 501(b)(2). Finally, ITSI claimed it revoked its bid prior to the CNMI’s acceptance of it.

In its August 12, 2010 Decision, the Public Auditor found that:

1. The design defect was not timely raised by ITSI;
2. ITSI’s bid acceptance period ha[d] expired and ITSI alone has the right to waive that expiration and it has refused to do so;
3. The solicitation DPW 09-IFB-19 is hereby canceled pursuant to NMIAC §70-30.3-510(a)(1).

III. The Request for Reconsideration

GPPC argues in its Request for Reconsideration that NMIAC §70-30.3-510(a), “Remedies Prior to Award,” does not require cancellation of the solicitation if the proposed award or solicitation could be revised to comply with law or regulation, GPPC “stands by its initial bid,” and OPA should award the contract to GPPC as the second lowest bidder.

GPPC further argues that disqualification or unavailability of the lowest bidder does not preclude an award to the second lowest bidder, canceling the solicitation requires the procuring authority to follow the bid cancellation procedures (NMIAC §70-30.3-240), and the Director should “insure the fair and equitable treatment of persons who deal with the procurement system” and “provide safeguards for the maintenance of . . . quality and integrity.” NMIAC §70-30.3-001(a)(4) and (7).

GPPC then presents numerous arguments as to why it is not in the best interests of the Commonwealth nor fair to GPPC as the only other bidder to cancel the solicitation and start afresh.

IV. Responses to the Request for Reconsideration

Though the CNMI’s Procurement Regulations do not prescribe a specific procedure for OPA to follow when presented with a Request for Reconsideration (see NMIAC §70-30.3-510(i)), OPA solicited comments from all interested parties, including the Director of Procurement and Supply.

On August 30, 2010, the Director responded that the IFB should be cancelled due to “deficiencies” and be re-bid with a “revised / corrected” IFB.

ITSI also provided comments on GPPC’s Request for Reconsideration, though it addresses the cancellation by the Director, not OPA, and mischaracterizes the Director’s actions. OPA released its Decision on ITSI’s Appeal on August 12, 2010.³ On August 16, 2010, the Director sent notices to both GPPC and ITSI he it was canceling the solicitation based on OPA’s “recommendation.” GPPC then requested reconsideration in a letter dated August 24, 2010, after which the Director provided his comments, on August 30, 2010.

³ In its comments, ITSI erroneously states the Decision was released on August 24, 2010.

ITSI argues the Director canceled the solicitation due to its deficiencies.⁴ ITSI further argues the Director has broad authority to cancel the solicitation pursuant to NMIAC §70-30.3-240 and contends it is particularly appropriate in this case because the solicitation and bids are stale, GPPC has repeatedly been heard in court, and there was a large gap between ITSI's and GPPC's bids. In addition, ITSI argues a new solicitation will provide a "clean start" likely to lead to a reduced project price compared to GPPC's bid, allow for greater competition, and permit the "design defect" to "[f]inally be [a]ddressed."

V. ANALYSIS AND DECISION

NMIAC §70-30.3-510(a) provides:

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.

OPA agrees the appropriate course of action here is reconsider its previous decision to cancel both the Notice of Proposed Award and the IFB. OPA is canceling the Notice of Proposed Award to ITSI, for the reasons outlined in its previous Decision, that is, that the bid acceptance period had expired and the right to waive that expiration belonged to ITSI alone, either explicitly or by its conduct, and it had not done so.

In so doing, OPA again notes it is not accepting ITSI's argument that it has "repeatedly stated on the record that there is a significant design defect" that needs to be addressed. OPA found ITSI had not raised any alleged design defect issues since August 2009, after which it submitted a responsive bid and participated in a teleconference wherein it declared its intent and ability to perform the project in accordance with the original solicitation and its five addendums. ITSI has provided no evidence from the record to contradict OPA's finding.

⁴ The Director's comment about deficiencies was in response to OPA's solicitation of comments on the Request for Reconsideration. After the issuance of OPA's Decision on August 12, the Director canceled the solicitation based on OPA's "recommendation."

Furthermore, ITSI seems to suggest that only the Director can cancel the solicitation (pursuant to NMIAC §70-30.3-240). While OPA cannot cancel the solicitation pursuant to NMIAC §70-30.3-240, it does have the authority to do so pursuant to NMIAC §70-30.3-510(a)(1), when the solicitation itself is contrary to law or regulation.⁵ In the instant case, OPA is canceling only the Notice of Proposed Award, which is contrary to an express contract provision as well as to the general principles of procurement law. OPA is not canceling the solicitation.

OPA, however, cannot award the contract to GPPC; it cannot substitute its judgment for that of the Contracting Officer. Moreover, OPA cannot determine whether GPPC is a responsible bidder, whether its bid price was reasonable, or whether awarding the contract to GPPC is in the best interests of the Commonwealth.⁶ OPA leaves those determinations to the Director.

Thus, OPA remands this solicitation to the Director of Procurement and Supply for whatever action he deems appropriate.

Dated this 8th day of September, 2010.



Michael Pai, CPA
Public Auditor

⁵ The Director's August 16, 2010 cancellation notices to the parties may also indicate the Director's belief that OPA cannot cancel the solicitation.

⁶ From his August 30, 2010 comments, it appears the Director may have determined the cancellation of the solicitation to be in the best interests of the Commonwealth. The Director does not, however, cite to NMIAC §70-30.3-240 or state explicitly that cancellation is in the best interests of the Commonwealth.