



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

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

IN RE APPEAL OF
CASA DE FELIPE

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APPEAL NO. BP-A036
DECISION ON APPEAL
(Protest Decision No. 03-004)

SUMMARY

This is a decision on an appeal filed by Casa de Felipe (“Casa”) from the denial of its protest by the Director of the Division of Procurement and Supply (“Director”) pertaining to the solicitation of manpower services for the Commonwealth Health Center (“CHC”) under Request for Proposal No. RFP-02-CHC-0092 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 (“CNMI-PR”).

The Public Auditor denies the appeal.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

DPH issued Request for Proposal No. RFP-02-CHC-0092 (“RFP”), soliciting proposals from qualified manpower agencies to provide specific manpower services for CHC. Casa submitted its proposal in response to the RFP to the Division of Procurement and Supply (“P&S”) on August 22, 2002 (“Response”).

On January 31, 2003, the Director issued his Rejection of the Proposal submitted by Casa de Felipe (“Rejection”) notifying Felipe Q. Atalig (“Atalig”) that Casa’s proposal was rejected “as a bid from a non-responsible bidder pursuant to CNMI-PR Section 3-102(11)(d).” Pursuant to CNMI-PR Section 3-102(11)(d), a bid may be rejected if it is from “a nonresponsible bidder as defined in Section 3-301.” Pursuant to CNMI-PR 3-301(1)(d) in order to be determined responsible, a prospective contractor must “have a satisfactory record of integrity and business ethics.” The Rejection was based in part on Atalig’s separation from Government service, conviction of two counts of Assault and Battery, one count of Disturbing the Peace and two counts of Misconduct in Public Office in Criminal Case No. 99-00098 by the CNMI Superior Court, and a finding by the Equal Employment Opportunity Commission (EEOC) that there was evidence against him to support a charge of sexual discrimination. The Rejection also set forth the Director’s concern of the potential risk of liability to CHC and the CNMI Government under a manpower contract with Casa,

stating that “an employer other than the employer of record, or nominal employer, can be found responsible for the actions of a non-employee, such as a contractor” under Title VII of the 1964 Civil Rights Act or the Fair Labor Standards Act or both.

Casa’s Protest to the Director

On February 2, 2003, Casa filed its Official Written Protest of Bid Rejection (“Protest”). The Protest was supplemented by a letter, Addendum to Protest (“Addendum”), from the Law Office of Perry B. Inos dated February 10, 2003. The Director, in P&S Protest Decision 03-004 (“Decision”), summarized Casa’s complaints as follows:

In its protest, Casa:

1. Complains that RFP02-0092 did not indicate that proposers would be subject to an integrity and business ethics review under CNMI-PR Section 3-301(d) as a pre-requisite to being considered for award of a contract, nor was the applicability of the Section mentioned at the pre-proposal meeting held under this RFP. Casa does not explicitly state, but clearly implies that because this Section of the CNMI-PR was not specifically cited, it cannot be relied upon by Procurement & Supply (P&S) as a basis for rejection of Casa’s proposal.
2. States that the implication in P&S’ comments that [Atalig’s] conviction of an assault which involved sexual discrimination affects his ability to provide services, and will be detrimental to the CNMI and the Public’s interest, is unwarranted and uncalled for.
3. Alleges that Atalig’s personal background infractions cannot be used to reject Casa de Felipe, the business, because the person and the business are separate entities. Casa says that it has a contract with the Commonwealth Utilities Corporation to provide manpower services for generator maintenance which has just been renewed for three (3) more years, this because CUC does not impute Atalig’s personal mistake to his company, Casa de Felipe.
4. Points out that P&S has not looked into, and acted upon integrity and business ethics problems which two other proposers under this RFP have had, but has rejected its proposal.
5. Asks for a reversal of the P&S Director’s decision to reject Casa, alleging that this decision was made in bad faith, asks for reinstatement onto the competitive arena, and threatens the Director with a personal lawsuit in the event his decision on this protest is not favorable.
6. Requests that the P&S Director’s Executive Assistant be excluded from participation in Casa’s protest because he threatened Atalig with current and future repercussions should Atalig proceed with turning

in his protest on the RFP.

Decision at 1-2.

P&S Director's Decision No. 03-004

On March 21, 2003, the Director issued P&S Protest Decision 03-004 affirming his previous decision of non-responsibility set forth in the January 31st Rejection. The Director's Decision on the Protest found:

1. The integrity and business ethics of Casa de Felipe/Felipe Atalig are required to be reviewed pursuant [sic] Section 3-301 "Responsibility of Bidders and Offeror", regardless of whether such requirement was explicitly stated in the solicitation, or mentioned at a pre-proposal meeting.
2. Atalig's conviction of assault which involved sexual discrimination against a female subordinate during a business trip, is clear evidence of lack of integrity and business ethics which requires the rejection of the proposal submitted by Casa de Felipe/Felipe Atalig as proposal from a non-responsible proposer.
3. This lack of integrity and business ethics evidenced by the criminal conviction, and the particular circumstances involved therein, coupled with the significant financial and other risks which the Commonwealth Health Center would run if it were to contract with Casa de Felipe/Felipe Atalig to provide the services of mostly female, medical professionals, and Atalig were to repeat his behavior, is a serious and compelling related reason for concluding that Casa de Felipe/Felipe Atalig's proposal must be rejected as a proposal from a non-responsible proposer.
4. Atalig's personal criminal background can be used to reject Casa de Felipe, the business he operates as a sole proprietorship, because under this form of business organization, the integrity and business ethics of the sole proprietor are the same as the integrity of the business itself.
5. The integrity and business ethics of other proposers under RFP02-CHC-0092, are not relevant to the issue of Casa de Felipe/Felipe Atalig's integrity and business ethics.
6. My decision to reject Casa's proposal as a proposal from a non-responsible proposer was a considered decision, made honestly and lawfully, and will not be reversed.
7. Atalig was not "threatened" with "current and future repercussions" while submitting his protest.
8. I have not excluded my Executive Assistant from participation in this

protest decision.

Decision at 5-6.

Casa's Appeal to the Public Auditor

On April 7, 2003, Casa filed its Appeal from the Final Decision of the Director ("Appeal") with the Public Auditor. The Appeal sets forth four (4) issues for determination¹ as follows:

- 1) Whether the summary rejection of Casa's proposal on the basis of some purported deficiency in business ethics and/or integrity lacked a reasonable basis, was made in bad faith, and was erroneous;
- 2) Whether the Director wrongly disqualified Casa from consideration based upon Mr. Atalig's misdemeanor conviction while serving as a government employee;
- 3) Whether the Director's insistence upon overlooking the integrity of other proposers is relevant and material to this bid protest; and,
- 4) Whether the Director's failure to exclude Florian² from a decision-making role in the bid procurement process in the face of his threats to Atalig violates due process.

P&S Director's Report on Appeal

On April 15, 2003, the Director filed his report on the appeal ("Report") with OPA. In the Report, the Director recommended that Casa not be awarded the contract as it is a non-responsible contractor in this procurement, RFP-02-CHC-0092. In addition, the Director stated that there are no provisions in the CNMI-PR, or elsewhere in CNMI law, permitting the protestor to recover costs or attorney fees.

In addressing the two issues raised by Casa concerning the Director's basis for his determination that Casa is not a responsible contractor in this procurement³, the Director argued that the procurement at question "would involve circumstances not unlike those giving rise to [Atalig's] sexual assault conviction, and 'would obviously carry with it the risk that his previous behavior with respect to a women [sic] subordinate could be repeated, with serious consequences for all involved.'" Report at 2. The Director also stated that it is "entirely possible for a contractor to be found "responsible" to perform a particular type of contract, and "not responsible" to perform another." *Id.* Pointing out that although Casa argued that it is a responsible contractor for the purpose of renting staff housing

to CHC, "because Atalig has no direct business relationship with, or personal control over" the staff

¹ See Casa's Appeal from the Final Decision of the Director at 4.

² Robert Florian, the Director's Executive Assistant.

³ Appeal at 4, Issues 1 and 2.

in those circumstances, there is “minimal” risk to CHC under the rental contract *Id.*

In addressing the unequal treatment of bidders by P&S⁴ and the argument that such treatment is arbitrary and capricious and violated Casa’s right to due process⁵, the Director argued that if the alleged unequal treatment claimed by Casa involved CHC and/or P&S ignoring responsibility issues of other proposers under this RFP, “then this allegation is not only untrue, but premature.” Report at 3. The Director claims that “[a]ll proposers who have a reasonable possibility of being awarded a contract under this RFP, have, or are in the process of, being reviewed equally under CNMI-PR Section 3-301 ‘Responsibility of Bidders and Offerors.’” *Id.*

Lastly, when addressing the issue raised by Casa concerning the decision of the Director being tainted by bias⁶, the Director points out that a protest requires that the “officials making the original decision, fairly and objectively re-examine and re-evaluate that decision in the light of the challenge presented.” Report at 4. The Director argued that the “protest process does not envision that an entirely new and different cast of characters be involved in considering a protest...”. *Id.*

ANALYSIS

I. CNMI-PR Responsibility Determination Procedure

In the event a proposal is rejected based upon a finding that the proposer is not responsible, the Director shall make a written determination, stating the basis for the finding of non-responsibility.⁷ On January 31, 2003, the Director issued a written Rejection of Casa’s proposal “as a bid from a non-responsible bidder pursuant to CNMI-PR Section 3-102(11)(d).” Rejection at 2. The Rejection included the basis for the Director’s finding of non-responsibility as required under the CNMI-PR.

II. Order of OPA’s Comments and Analysis of Casa’s Protest Issues

⁴ Appeal at 4, Issue 3.

⁵ Appeal at 6.

⁶ Appeal at 4, Issue 4.

⁷ CNMI PR 3-301 (4) reads: “*Nonresponsibility determination.* When a bid or proposal on which a contract award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, a written determination shall be signed by the P&S Director stating the basis for the determination and this shall be placed in the contract file.

OPA will address the four issues raised by Casa in its Protest in the following order:

- 1) Whether the Director's insistence upon overlooking the integrity of other proposers is relevant and material to this bid protest?
- 2) Whether the Director's failure to exclude Florian from a decision-making role in the bid procurement process in the face of his threats to Atalig violates due process?
- 3) Whether the summary rejection of Casa's proposal on the basis of some purported deficiency in business ethics and/or integrity lacked a reasonable basis, was made in bad faith, and was erroneous?
- 4) Whether the Director wrongly disqualified Casa from consideration based upon Mr. Atalig's misdemeanor conviction while serving as a government employee?

III. Whether the Director's insistence upon overlooking the integrity of other proposers is relevant and material to this bid protest?

As this is not a protest of an award to another proposer, but is a protest of the Director's issuance of a nonresponsibility determination for Casa, OPA will not address the issue of responsibility determinations of other contractors or proposers under this RFP at this time, as such an issue is not ripe for review. In addition, the Director stated in the Report that "proposers who have a reasonable possibility of being awarded a contract under this RFP, have [been], or are in the process of being reviewed equally under the CNMI-PR Section 3-301 'Responsibility of Bidders and Offerors.'" Report at 3. No evidence to contradict that statement was presented by Casa. Further, it must be noted that, even if such a responsibility determination is made, "the Comptroller General will not normally review protest of favorable determinations of responsibility ...". JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 419 (3rd ed. 1998).

IV. Whether the Director's Failure to Exclude Florian from a Decision-making Role in the Bid Procurement Process in the Face of His Threats to Atalig Violates Due Process?

As the nonresponsibility decision was made on or before January 31, 2003, the date of the Director's Rejection, and the alleged incident between Atalig and Florian occurred on the date of the filing of the Protest, February 2, 2003, it is illogical to find that such incident was the basis for the original finding of nonresponsibility. According to the Director's Decision, Florian is his executive assistant. As an executive assistant, Florian has no power in that position to issue or decide protest decisions. The Rejection was issued by the Director, as was P&S Protest Decision No. 03-004, as required by the CNMI-PR. No other evidence or allegations were presented by Casa supporting its claim of violation of its due process rights. Casa filed a protest and eventually this appeal of the Director's determination of nonresponsibility. OPA, therefore, does not find that the February 3, 2003, incident involving Florian, an employee of P&S, violated Casa's due process rights.

V. Whether the summary rejection of Casa's proposal on the basis of some purported deficiency in business ethics and/or integrity lacked a reasonable basis, was made in bad faith, and was erroneous?

A. Integrity

CNMI-PR 3-301(1) requires that awards be made only to responsible contractors. To be determined responsible, “a prospective contractor must have a satisfactory record of integrity and business ethics.” See CNMI-PR3-301(1)(d). CNMI-PR3-301(1)(d) mirrors section 9.104-1(d) of the Federal Acquisition Regulations (FAR) requiring that a prospective contractor “have a satisfactory record of integrity and business ethics.” Integrity, however, is not defined in either the CNMI-PR or the FAR. As such, “the term has been given its generally accepted connotation of probity, honesty, and uprightness.”⁸ *CIBINIC, supra* at 420, citations omitted. As this standard is mandated by the CNMI-PR, it is a general standard, applicable “to all prospective contractors regardless of whether there is any mention of responsibility” in the RFP. See *CIBINIC supra* at 406. Even if a proposer possesses the ability to perform the work, a determination must still be made as to “whether the contractor has sufficient integrity to justify reliance on its agreement to perform.” *Id* at 407. Therefore, the Director’s examination of Casa’s record of integrity and business ethics was required under the CNMI-PR.

B. Discretion in Responsibility Determination

Casa agrees that a determination of responsibility “rests principally within the broad discretion of the contracting officer...”. Appeal at 4. Casa also agrees that “contracting officials are presumed to act in good faith...”. *Id.* Although Casa claims that bad faith exists when there is evidence suggesting an intent to harm the protester and asserts that OPA will review a responsibility determination when it is made fraudulently or in bad faith, Casa failed to supply any evidence of the Director’s intent to harm Casa by issuing his determination of nonresponsibility in this procurement. A finding of nonresponsibility alone does not make a case of bad faith.

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.” *Automated Datatron, Inc.*, 68 Comp. Gen. 89 (B-232048) 1988, Lexis 1311 *4 (internal citations omitted); see generally

CIBINIC, supra, Third Edition, Cibinic and Nash, at 443. As Casa suggested in its Appeal at 4, “contracting officials are presumed to act in good faith.” “Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof

⁸ Integrity as defined by Merriam Webster’s Collegiate Dictionary, Tenth Edition, page 608, includes a “firm adherence to a code of especially moral or artistic values: INCORRUPTIBILITY.” Black’s Law Dictionary, Fifth Edition, page 727, defines integrity as: “used in statutes prescribing the qualification of public officers, trustees, etc., this term means soundness or moral principle and character, as shown by one person dealing with others in the making of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with ‘probity,’ ‘honesty,’ and ‘uprightness.’”

that they had a specific and malicious intent to harm the protestor.” *Automated Datatron* at *6 (internal citations omitted).

Casa made two allegations regarding the Director’s bad faith: 1) that “the Director is turning a blind eye and refuses even to acknowledge the ongoing and extremely serious labor problems of other proposers” and, 2) that the Director sanctioning “the attempted intimidation of Mr. Atalig in connection with the filing of this bid protest...” which it feels should “compel a review of the responsibility determination” made by the Director.⁹

The first allegation regarding the responsibility determinations of other proposers is not ripe for review as discussed above in this Analysis, Section III. The second allegation concerns an incident that occurred after the initial responsibility determination was made by the Director and is also not considered as a basis for bad faith on the part of the Director in making his Decision as set forth above in this Analysis, Section IV. Therefore, although Casa asserts that OPA will review a responsibility determination when it is made fraudulently or in bad faith¹⁰, Casa did not present sufficient evidence of fraud or bad faith.

Casa has not submitted proof to support a finding by OPA of bad faith or lack of a reasonable basis for the Director’s responsibility determination and Decision. Despite the lack of presentation of evidence of bad faith or fraud, OPA will briefly address the other concerns raised by Casa relevant to the integrity determination in Section VII below.

VI. Whether the Director wrongly disqualified Casa from consideration based upon Mr. Atalig’s misdemeanor conviction while serving as a government employee?

A. Consideration of Integrity of Sole Proprietor in Responsibility Determination of the Sole Proprietorship

Determinations of non-responsibility may be based on the lack of integrity of those having close relationships with the offeror. *CIBINIC, supra*, at 421. In addition, the Comptroller General has held that those having a close relationship may include key employees of the proposer or bidder when the key employee might exercise significant influence in performance of the contract. *Id. See also Americana de Comestibles S.A.*, Comp Gen. Dec. B-210390, 84-1 CPD 289, Lexis 1448 *4, where the unsatisfactory record of integrity of the company’s president was deemed sufficient in itself to justify the contracting officer’s finding that the firm was not responsible.

In this matter, Atalig is not just a key employee, officer, or shareholder, he is the sole proprietor of Casa as is evidenced by documents submitted with Casa’s proposal and on file with the CNMI

⁹ See Appeal at 5.

¹⁰ See Appeal at 4.

Government, including Casa's business license.¹¹ In a sole proprietorship, the owner owns all of the assets of the business and is, likewise, solely liable for all the debts of the business.¹² A sole proprietorship, unlike a corporation, has only one owner, is not a separate legal entity, and has no legal existence apart from its owner. *See, e.g., Credit Assoc. of Maui, Ltd., v. Carlbom*, 50 P.3d 431 (Haw.Ct.App 2002). If the proposer is a sole proprietorship, as Casa is in this case, the determination of the responsibility or non-responsibility of the proposer may be based on integrity or business ethics of the proprietor. Therefore, the actions of Atalig, especially those actions occurring in a business environment, as the sole proprietor of Casa, are clearly relevant to a responsibility determination of his sole proprietorship, Casa, under CNMI-PR 3-301(1)(d).

B. Atalig's Actions as Basis for Director's Integrity Determination

The Rejection of Casa as a nonresponsible proposer was based in part on Atalig's conviction¹³ and a finding by the EEOC that there was evidence against him to support a charge of sexual discrimination. The Rejection also set forth the Director's concern of the potential risk of liability to CHC and the Government under a manpower contract with Casa, stating that "an employer other than the employer of record, or nominal employer, can be found responsible for the actions of a non-employee, such as a contractor" under Title VII of the 1964 Civil Rights Act or the Fair Labor Standards Act or both.

Casa claimed that the "conviction occurred as a result of an indiscretion with a female subordinate" and as such is "entirely unrelated to business integrity or business honesty".¹⁴ The Director, however, argued that because the "victim was a female subordinate who reported directly to him, and over whom he had some degree of influence because he was her boss" Atalig's actions can be considered in the determination of his integrity and business ethics. The Director expressed his concern that contracting with Casa creates too great a risk for CHC to take. Report at 2. The Director's concern over potentially being brought into a legal action under certain federal statutes, coupled with the reality that as a sole proprietorship Casa may not be able to successfully complete a contract under this RFP if such "indiscretions" are raised by one of the female staff provided under

such contract, provide a reasonable basis for the decision made by the Director. It was not unreasonable for the Director to consider Atalig's actions toward a subordinate, over which he had supervision and control, as a factor in determining whether Casa has a satisfactory record of integrity

¹¹See Casa De Felipe's proposal in response to RFP 02-CHC-0092, Profile of Casa at 4, and Business License and Application at 11. These documents indicate that Casa de Felipe is a sole proprietorship of Atalig and/or that Atalig is doing business as Casa de Felipe.

¹² Sole Proprietorship is defined as: A form of business in which one person owns all the assets of the business in contrast to a partnership and corporation. The sole proprietor is solely liable for all the debts of the business. Black's Law Dictionary, Fifth Edition, p. 1248.

¹³ See Rejection at 3 and Criminal Case No. 99-0098, Superior Court of the CNMI.

¹⁴ See Appeal at 6.

and business ethics. It was further not unreasonable for the Director to consider what the repercussions, including disruption of services, to the Government or CHC might be in the event similar allegations were brought against Atalig, as the sole proprietor of Casa, in the future.

VII. Other Issues

A. Casa Has Been Deemed Responsible in Other Contracts

Casa claimed in its protest that it provides manpower services to CUC. Protest at 3-4. In addition, “[f]or five (5) years, Casa has housed and accommodated female nurses without a single complaint.” Appeal at 5. Although a protestor is found responsible for other procurements, such determinations have no bearing upon another responsibility determination, as responsibility determinations are inherently judgmental and different contracting officers can easily disagree on responsibility issues and can reach opposite conclusions on the same facts, without either determination being unreasonable or the result of bad faith. *S.A.F.E. Export Corporation*, Comp. Gen. Dec. B-208744, 1983 U.S. Comp. Gen. Lexis 752, * 5-6 (internal citations omitted), *see generally CIBINIC, Supra* at 442; *see also MCI Constructors, Inc.*, Comp. Gen. Dec. B-240655, 1990 U.S. Comp. Gen. Lexis 1242 *13.

It must be noted that CUC has a different procurement officer and the manpower services contract with CUC involved all male employees as opposed to the response to the RFP in question, in which Casa proposed 12 of 14 female employees.¹⁵ Control over female subordinates was the basis for the concerns of the Director in his Decision. Decision at 3, *see also* Report at 2. It further must be noted that a contract for rental of an apartment by CHC is not a contract for provision of female employees under the direction and control of Casa and Atalig and is, therefore, likewise distinguishable from a contract for provision of a predominately female manpower staff. Report at 2. Therefore, although Casa has been deemed responsible in other contracts, that is not evidence that the Director erred or made his decision in bad faith.

B. Director’s Responsibility Determination is Not at Level of Debarment

Casa asserted that the CNMI-PR 8-212(2) enumerates the nature of those criminal offenses warranting debarment and that Atalig’s actions were not sufficient to disqualify Casa under CNMI-PR § 8-212(2)(b).¹⁶ The Director, in both the Rejection and Decision, clearly expressed the

seriousness and significance of the offenses and their potential effect on Casa’s responsibility as a contractor in this RFP. The finding by the Director of nonresponsibility in this RFP does not reach

¹⁵ See Response 7, which shows the Casa employees under the CUC manpower contract and Response at 3, which shows the proposed employees to be provided under this RFP.

¹⁶ Protest at 5-6.

the level of debarment. As such, the Director was not bound by the criteria of CNMI-PR 8-212(2) and the Director could have reasonably made his determination based upon the generally accepted connotation of the term integrity, without reaching the causes for suspension or debarment.

DECISION

Based on the foregoing, OPA finds:

1. The responsibility determinations of other proposers under the RFP are not relevant to this Protest;
2. Casa's due process rights were not violated by the February 3, 2003 incident;
3. The Rejection of Casa's proposal was not made in bad faith and was not erroneous;
4. As Atalig is the sole proprietor of Casa, the Director's consideration of Atalig's record of integrity and business ethics, including Atalig's past dealings with a female subordinate, in making a responsibility determination of Casa, pursuant to the requirements of the CNMI-PR, was not unreasonable.

The Office of the Public Auditor denies Casa's appeal of the Director's Protest Decision 03-004. Section 6-102(9) of the revised CNMI-PR provides that Casa de Felipe, 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

May 23, 2003