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)	APPEAL NO. BP-A043
IN RE APPEAL OF)	DECISION
<u>J&A ENTERPRISES</u>)	CUC-IFB-04-003

I. SUMMARY

This is an appeal filed by J&A Enterprises (J&A), through the Law Offices of O'Connor Berman Dotts & Banes, from the denial of J&A's protest by the Executive Director of the Commonwealth Utilities Corporation (CUC) regarding CUC-IFB-04-003. The Office of the Public Auditor (OPA) has jurisdiction of this Appeal as provided in Section 5-102 of Commonwealth Utilities Corporation's Procurement Regulations (CUC-PR)(Commonwealth Register Vol. 12, No. 6 (1990), adopted in Vol. 13, No. 8 (1991)).

OPA finds that the Decision of the Executive Director was erroneous in its denial of J&A's protest based on its finding that J&A's protest was untimely pursuant to CUC-PR 5-101(1)(a). OPA further finds that it is now uncontested that JMI did not fully meet the bid specification. As the contract awarded to JMI has been cancelled, however, no further remedy is available under the CUC-PR in this matter.

II. APPLICABLE REGULATIONS

The CUC-PR "are promulgated under the authority of 4 CMC 8122 and 8123, which gives (sic) CUC the duties and powers to be in control of and be responsible for procurement and supply for utility services in the Commonwealth; and 4 CMC 8157, which empowers the Board to issue regulations." CUC-PR § 1-102. The CNMI Procurement Regulations (CNMI-PR)(Commonwealth Register Vol. 22, No. 8 (2000) adopted in Vol. 23, No. 05 (2001)) provide that CNMI-PR do not "apply to a public corporation or autonomous agency for the Commonwealth which has been authorized to conduct its own procurement by enabling statute or other law." CNMI-PR § 1-105. The CUC-PR do not mirror CNMI-PR.

On October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-13 (Opinion 03-13) regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Opinion 03-13 concluded, inter alia, that "both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or

regulations that are in conflict with this authority would be invalid.” Opinion 03-13 at 7-8.

At this time, however, as the validity of CUC-PR, as questioned in Opinion 03-13, has not been ruled on by a court of competent jurisdiction, nor have CUC-PR or relevant CNMI statutes been revised, OPA will apply CUC-PR in interpreting this Appeal.

III. PROCEDURAL AND FACTUAL BACKGROUND

The Invitation for Bid, CUC-IFB-04-003 (the IFB) was a solicitation for submersible pumps. The bids for the IFB were opened on January 8, 2004. On or about March 26, 2004, Contract No. CUC-WD-04-C008, related to the IFB, with JMI Industrial Systems, Inc. (JMI), was certified as complete.

By letter dated March 29, 2004, faxed from CUC Procurement and Supply on March 30, 2004, J&A was notified that:

The Bid Review Committee has finalized its review. Unfortunately, your firm was not selected and CUC intends to award this project to another firm.

According to the CUC’s received stamp, CUC received J&A’s Notice of Protest (Protest), dated April 2, 2004, on April 5, 2004. According to CUC, notification of J&A’s protest was sent to all bidders on April 8, 2004, and no comments were received. CUC received J&A’s Submission of Detailed Information (Supplement), dated April 22, 2004, on April 22, 2004.

The Decision of the Executive Director (Decision) was issued on May 6, 2004. The Summary of the Decision stated that “J&A Enterprises protest is denied as untimely pursuant to CUC PR 5-101(1)(a).” In the Decision, CUC reasoned that:

J&A enterprises knew or should have known on January 8, 2004 the facts pertaining to the pumps to be supplied by JMI as that material was contained in its bid package. JMI submitted the manufacturer’s specification for Grundfos submersible pumps including information as to performance curves, pump and motor specification, as well as features and benefits, etc.

J&A Enterprises did not submit its protest until after CUC had awarded the contract, despite the fact that the information the protest is based on was available on January 8, 2004.

I find the protest that was submitted on April 5 to be untimely. I further find that the untimeliness of the protest as sufficient and independent reason to deny the protest.

Decision at 2.

On May 20, 2004, within 10 working days of the issuance of the Decision, J&A filed its Appeal of CUC's Decision on J&A's Protest (Appeal) with OPA.

On May 21, 2004, pursuant to CUC-PR, OPA notified CUC Executive Director (Director) by telephone and by letter that J&A had filed its Appeal with OPA. In the same letter, OPA requested that CUC provide notice of the Appeal and copies of the protest and Appeal documents to the required parties. OPA further requested that CUC submit a complete report on the Appeal, including a statement fully responding to the allegations in the Appeal, to OPA and affected parties.

On May 26, 2004, OPA sent a letter to the Director, with a copy to the appellant's counsel, requesting additional information,. The letter stated in part:

OPA requests a copy of the executed contract be provided at your earliest convenience. In addition, please advise OPA whether or not you have sought "a mutual agreement with the contract (sic) to suspend performance on a no-cost basis" as provided for in CUC-PR 5-101(3), the status of any such agreement, and/or the status of the contract in the event you have not sought such agreement.

On June 3, 2004, OPA received a letter from CUC's Legal Counsel transmitting a copy of the contract with JMI.

Although OPA has received additional correspondence indicating that discussions were occurring between the parties, OPA has not, as of the date of this Decision, received the Director's report on the Appeal. On July 26, 2004, OPA received a letter from CUC's Executive Director advising OPA of the termination of CUC Contract CUC-WD-04-C008.

IV. ISSUES

J&A sets forth the following two issues in its Appeal:

- a. Is a losing bidder an aggrieved party when all bids are publicly opened, but no announcement of an intention to award is made, or does he or she only become an aggrieved party when he learns later that CUC after careful review of the bids has decided to award the contract to another company whose bid does not comply with the bid specification?
- b. What should the OPA do in a case like this when the undisputed facts are that the protest was timely and that in the meantime the CUC has apparently awarded the contract to a non-conforming bid?

Appeal at 4.

OPA for clarity, however, will address the following issues:

1. Was the finding that J&A's protest was untimely pursuant to CUC PR § 5-101(1)(a) proper?
2. Was the award to JMI in violation of law or the CUC-PR?

V. ANALYSIS

A. J&A's Protest Was Not Untimely

The Decision states in summary that: "J&A Enterprises protest is denied as untimely pursuant to CUC PR 5-101(1)(a)." CUC-PR §5-101(1)(a) reads:

Section 5-101 Protests to the Director.

(1) General.

- (a) Any actual or prospective bidder, offeror, or contractor, *who is aggrieved in connection with the solicitation or award of a contract* may protest to the Director. The protest shall be received by the Director in writing *within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto.* The Director shall consider all protests or objections to the award of a contract, whether submitted or before after (sic) award.

CUC-PR § 5-101(1)(a) (emphasis added).

In the instant case, there is no indication that J&A is challenging a defect or impropriety in the solicitation or procurement process that occurred at or before bid opening. J&A is clearly challenging that the award to JMI was improper as "JMI failed to meet the bid specifications." J&A's protest is then based upon the fact that the contract was awarded to JMI, a company J&A believes submitted a non-conforming bid, which should have prevented JMI from receiving the contract. If JMI's bid was not responsive to the IFB, then, J&A believes that it, the second lowest bidder, should have been awarded the contract at the conclusion of the bid review process. It is J&A's contention that it was aggrieved at the point of award of the contract to JMI.

The Director in her Decision found that J&A "knew or should have known on January 8, 2004 the facts pertaining to the pumps to be supplied by JMI as that material was contained in its bid package." *Decision* at 2. Although it is possible that J&A knew that the lower bidder did not comply with the specifications of the IFB at the time of bid opening, as the bids were available to the public for review, such knowledge did not require the filing of a protest within ten days as found by the Director. Filing of a protest at that time would have been based upon an anticipation that CUC's evaluation of the bids would be erroneous; as such, the protest would have been

purely defensive in nature. At the time of bid opening, J&A had no way to know that CUC would award the contract to JMI. At that time, CUC had not yet completed its evaluation nor had it made known any intent to award the contract to JMI. The timeliness of the filing of the protest is not measured from the bid opening, as OPA believes grounds for protest do not arise until the protester has learned of the agency action or intended action that is inconsistent with what the protester believes to be incorrect or adverse to its interest. J&A cannot, therefore, be charged with the knowledge of the basis for its protest until CUC took a position adverse to J&A. In this case, the action that was adverse to J&A's interest was the award to JMI. If, however, prior notice had been given to J&A that CUC intended to award the contract in the future to JMI, a calculation from the time of the notice may have been appropriate. Although CUC's letter was phrased in that manner, the facts show that CUC did not notify J&A until after the contract with JMI was executed. The timeliness of the filing of J&A's protest with CUC is then properly measured from the time J&A knew or should have known that CUC considered JMI's bid acceptable, not from the date of the bid opening. There does not appear to be a question that J&A did not learn of CUC's position on the bids prior to the letter addressed to J&A on March 29, 2004, giving notice of the intent to award to another bidder.

The Decision of the Director, therefore, appears to have been based on consideration of the wrong factors. OPA agrees that the fact that JMI's bid was non-responsive could have been known on the day of bid opening, January 8, 2004. The submission of a non-responsive bid from a bidder, however, does not make all of the other bidders aggrieved on the date of opening, absent an action on the part of the agency. The basis of J&A's protest, that the contract was awarded to JMI, implies a finding that CUC determined JMI's bid to be responsive, was not known until much later. Prior to the award, or intent to award, to JMI, J&A was not an aggrieved party.

Although J&A could have possibly known of the award prior to the time it was notified by CUC, as the contract was signed by all of the parties on, or before, March 26, 2004, there has been no evidence to support that possibility and the Decision does not address this as a reason for the conclusion that the protest was not timely. J&A was notified by letter from CUC dated March 29, 2004, with a facsimile line across the top of the page showing the fax was sent from CUC Procurement's fax on March 30, 2004. The contract with JMI was not fully executed until March 26, 2004. There appears to be no ambiguity as to the date that J&A knew or should have known that the contract was awarded to JMI, the lowest bidder, that would change the determination that J&A's protest was timely.¹ J&A's Protest was filed well within ten (10) days after J&A knew or should have known of the facts giving rise to its protest as required by CUC-PR § 5-101(1)(a).

B. Award to JMI was Not Proper

¹ According to the Decision of the Director the contract was fully executed on March 26, 2004. The letter notifying J&A that CUC intended to award the contract to another bidder was dated March 29, 2004. That letter appears to have been faxed from CUC Procurement on March 30, 2004. J&A's Protest, although dated April 2, 2004, is marked as received on April 5, 2004. It does not matter, however, which of the three dates, March 26, March 29, March 30, 2004, is used to calculate the ten business days, as J&A's protest, if received on April 5th, would still have been timely.

CUC-PR 3-102(9) requires that a contract must be awarded with reasonable promptness by written notice to the lowest responsive bidder whose bid fully meets the requirements of the invitation for bids and the CUC-PR. A bid may be rejected for failure to conform to essential requirements of the invitation for bids. CUC-PR § 3-102(7). A bid that does not materially conform to the solicitation is not responsive and is ineligible for award.

In the letter from the Executive Director addressed to the Public Auditor dated July 23, 2004, and received via facsimile on July 26, 2004, CUC informed OPA that it had terminated the contract with JMI on July 16, 2004. The basis for the termination was that the pumps were not constructed of the material set out in the specifications and CUC, therefore, rejected the goods received from JMI as non-conforming. JMI declined to replace the non-conforming goods.

Based upon the July 23rd letter regarding the termination and the attachments thereto, it is clear that JMI did not fully meet the bid specification. As such, the award to JMI was contrary to the CUC-PR.

C. Remedies After Award

The CUC-PR address remedies in CUC-PR § 5-103. CUC-PR § 5-103(2) specifically addresses remedies after award, which is applicable in this Appeal, and provides in part:

- (2) Remedies After an Award. If after an award the Director or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then:
 - (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of CUC; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination;

CUC-PR § 5-103(2)(a).

In this Appeal, there has been no presentation of evidence supporting bad faith on the part of JMI or evidence that JMI has acted fraudulently. As such, OPA will only address the remedies set forth in CUC-PR § 5-103(2)(a).

The CUC-PR state that the contract may either be ratified and affirmed, if a determination is made that it is in the best interests of CUC, or may be terminated. As the contract has been terminated by CUC prior to the issuance of this decision, and no argument or determination has been presented that the contract should be affirmed, a decision or recommendation by OPA to terminate the contract would be redundant and is, therefore, unnecessary.

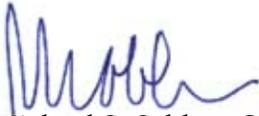
DECISION

Based on the foregoing, OPA finds that:

1. J&A's protest filed with CUC on April 5, 2004, was timely;
2. The Decision of the Director that J&A's protest was untimely appears to have been based on consideration of the wrong factors and was erroneous;
3. JMI did not fully meet the bid specification;
4. The award to JMI was contrary to the CUC-PR;
5. The contract awarded to JMI has been cancelled; and,
6. Cancellation of the award is allowable under the CUC-PR as a remedy after an award.

OPA, therefore reverses the Executive Director's Decision that J&A's Protest was untimely. OPA further finds that, as the contract has been cancelled, no other remedies are available under the CUC-PR in this matter.

Section 5-102(9) of the CUC-PR provides that J&A, 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 basis for reconsideration is known or should have been known, whichever is earlier.



Michael S. Sablan, CPA
Public Auditor

August 5, 2004