



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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	)	APPEAL NO. BP-A060
	)	
IN RE APPEAL OF	)	DPW 09-IFB-19
GPPC, INC.	)	
	)	PUERTO RICO DUMP
	)	FINAL CLOSURE

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## DECISION ON APPEAL

### I. SUMMARY

This is an appeal filed by GPPC, Inc. from the denial of its protest<sup>1</sup> by the Director of the Division of Procurement and Supply (P & S), Department of Finance, regarding DPW 09-IFB-19. The Office of the Public Auditor (OPA) has jurisdiction over this appeal as provided in Section 505(a) of the Department of Finance's Procurement Regulations, NMIAC 70-30.3-505(a).

### II. FACTUAL BACKGROUND

In May 2009, the Department of Public Works (DPW) issued an Invitation for Bid (DPW 09-IFB-19) on the Puerto Rico Dump Final Closure. On June 26, 2009, DPW amended the IFB for the third time (the Third Addendum).

According to Section 3 of the Third Addendum,

For bidders within the CNMI, an original and two copies of sealed bids

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<sup>1</sup> Since the Director did not issue his protest Decision in a timely fashion, GPPC appealed to OPA because of the Director's failure to issue the Decision. The day after GPPC filed its appeal with OPA, the Director formally denied GPPC's protest and OPA gave GPPC additional time to supplement its appeal.

must be submitted to the Director of Procurement and Supply, Lower Base, Saipan, no later than 10:00 am July 24, 2009. Bidders located outside of the CNMI may obtain an additional Seven (sic)(7) working days for receipt of their bids by submitting a Notice of Intent to bid. Notice of Intent to Bid must be received by the Director of Procurement and Supply no later than 9:00 am July 23, 2009, and must be transmitted via facsimile to (670) 664-1515, or via e-Mail (sic) to [procurement@pticom.com](mailto:procurement@pticom.com). For bidders located outside the CNMI, an original and two copies of sealed bids must be postmarked by the U.S. Postal Service or the official government postal service of a foreign country no later than July 24, 2009, and must be received no later than August 4, 2009. . . .

ITSI e-mailed its Notice of Intent July 22, 2009 at 7:02 am.

ITSI mailed its bid package from Ygnacio Valley, California at 4:04 pm, Pacific Daylight Time on July 24, 2009.

USPS tracking records confirm that the package “was delivered at 10:04 am on July 28, 2009 on Saipan. The item was signed for by R. Takai.” Mr. Takai works at the Procurement and Supply warehouse in Saipan.

There is also a receipt showing that the ITSI package was received at P & S on August 4, 2009 at 11:30 am.

The bid opening was originally scheduled for August 4, 2009. The bid opening was re-scheduled for August 5, 2009.

### **III. PROCEDURAL BACKGROUND**

GPPC protested the bid procedures and Director’s pending decision to award the contract to ITSI on August 13, 2009.

On September 22, 2009, not having received a Decision on the protest from the Director of Procurement and Supply, nor notice that the time would be extended,<sup>2</sup>

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<sup>2</sup> “The P&S Director shall decide the protest within twenty calendar days after all interested parties have submitted their views unless he certifies that the complexity of the matter requires a longer time, in which event he shall specify the appropriate longer time.” NMIAC 70-30.3-501(a)(3).

GPPC filed an appeal with OPA.

On September 23, 2009, the Director of Procurement and Supply issued a Decision on the protest.

By letter dated that same day, OPA gave GPPC additional time to re-file the appeal, addressing the issues raised in the Director's Decision, if it so desired.

On October 6, 2009, GPPC filed its Supplemental Appeal with OPA, though it contends that the Director's Decision should be accorded no weight due to its lateness.

#### **IV. ISSUE**

The issue on appeal is whether ITSI's bid was timely postmarked and received.

#### **IV. JURISDICTION**

OPA has jurisdiction over this appeal pursuant to Section 505(a) of the Department of Finance's Procurement Regulations, NMIAC § 70-30.3-505(a).

#### **V. STANDARD OF REVIEW**

GPPC timely protested the award to ITSI on August 13, 2009. After P & S failed to issue a Decision on the Protest within the time frame prescribed in the regulations (see footnote 2), GPPC appealed to OPA on September 22, 2009. On September 23, 2009, P & S issued its Decision. By letter dated September 23, 2009, OPA notified GPPC that it was giving GPPC additional time to supplement its appeal if GPPC wanted to respond to the issues addressed in P & S' Decision on the Protest. GPPC contends that because P & S Director's Decision was late, it should be accorded no deference and OPA should examine the matter *de novo*.

The doctrine of harmless error is applicable to review of administrative decisions. *In re San Nicolas*, 1 NMI 329, 335 (quoting C. Koch, Jr. Administrative Law and Practice § 9.8 (1985, 1987 supplement). The lateness of the Director's Decision is harmless error. It is always incumbent upon the aggrieved party to demonstrate the prejudicial effect of procedural irregularities in administrative proceedings. *Camacho v. NMIRF*, 1 N.M.I. 362, 376, (1990); *NLRB v. Health Tec Division/San Francisco*, 566 F.2d 1367 (9th Cir. 1978). Here, appellant has made no claim that it was prejudiced by the lateness of the Director's Decision, nor that the outcome of the Decision would have been any

different if it had been issued within the requisite 20 calendar days. Moreover, OPA gave appellant additional time to rebut any findings made by the Director in his Decision. Appellant merely asserted that the Director's Decision should be accorded no weight; it made no claim that it was prejudiced nor did it cite any case law to bolster its claim that the Decision not be considered.

OPA notes, however, that it would have reached the same conclusion had it considered the issues *de novo*, as the dates in the Third Addendum and the postal receipt are corroborated by the documents themselves.

## VI. ANALYSIS

### 1. The Postmark

GPPC argues that ITSI's bid was postmarked late and received late, and therefore should not be awarded the contract.

GPPC argues first that ITSI's bid package should have been postmarked by 10:00 am, July 24, 2009, Saipan time. To allow otherwise, GPPC argues, is to allow bidders in locations other than the CNMI additional time to work on their bids. According to GPPC, "the only fair and logical manner in which to interpret the required timing of the post-marking (bid submission) of off-island bidders' bid packages is to find that all bidders' bid packages, regardless of the bidders' location, must be submitted by the same date and time, in this case the time and date for bid submission first stated in Addendum 3 – 10:00 a.m. on July 24, 2009 Saipan time." Supplemental Appeal at pp. 2-3.

But, as the Director of Procurement and Supply found, and OPA concurs, the IFB did not include a reference to local Saipan time. In fact, what the IFB Third Addendum says is:

For bidders located outside the CNMI, an original and two copies of sealed bids must be postmarked by the U.S. Postal Service or the official government postal service of a foreign country no later than July 24, 2009, and must be received no later than August 4, 2009. . . .

The Procurement Regulations provide that "[b]ids submitted from vendors outside the Commonwealth must be postmarked by the date set in the invitation for bids and must be received within seven working days of that date." NMIAC §70-30.3-205(g)(1).

The date set in the IFB was July 24, 2009. ITSI submitted its bid at 4:04 pm in Ygnacio,

California that day. Is this inherently unfair? Possibly, but this is what the IFB stated and this is what the regulations required. To require an implied “local time” in the IFB solicitation, without any supporting case law and in contravention of the regulations, strains credibility.

## 2. Receipt of the Bid Package

GPPC further contends that ITSI’s bid was not timely received and that in order to accommodate ITSI’s late bid, P & S moved the date of the bid opening back a day until August 5, 2009.

According to NMIAC §70-30.3-205(g)(1), “[b]ids submitted from vendors outside the Commonwealth must be postmarked by the date set in the invitation for bids and must be received within seven working days of that date.”

P & S has two different dates that are recorded for receipt of ITSI’s bid. The first is July 28, 2009, which is corroborated by a USPS tracking receipt for that date by R. Takai, a P & S warehouse employee. P & S also received the package on August 4, 2009. It is not clear why the package was “received” twice but any number of explanations are plausible (e.g., first it was received at the P & S warehouse, then it was received at the main P & S office). Moreover, the July 28 receipt date is corroborated by the USPS.

## 3. The Bid Opening

Finally, GPPC contends that P & S moved the date of the bid opening back a day until August 5, 2009 in order to accommodate ITSI’s late bid.

The date set to open the bids in Addendum 3 was August 4, 2009. Off island bidders had to postmark their bids by July 24, 2009. ITSI’s bid was postmarked at 4:04 pm on July 24, 2009. To allow seven working days to elapse after July 24, 2009, P & S had to push the bid opening back a day as August 4, 2009 was still the seventh working day after July 24, 2009. Whether ITSI’s bid was received on July 28 or August 4, it was timely.

GPPC contends that P & S had to open the bids on August 4, 2009 as that was the date announced in the IFB. But if P & S had done that, it would have contravened the provision that seven working days be allowed to receive off island bids.

## VII. DECISION

Based on the foregoing, OPA finds:

1. Bid packages for off island bidders for the Third Addendum had to be mailed by or on July 24, 2009.
2. ITSI's bid was postmarked at 4:04 pm on July 24, 2009.
3. Off island bid packages had to be received within seven days of the bid closing on July 24, 2009.
4. ITSI's bid package was received at Procurement and Supply on July 28, 2009 and August 4, 2009, both of which were timely.
5. P & S did not err in moving the bid opening to August 5, 2009.

The Office of the Public Auditor, therefore, affirms the Decision of the Director of Procurement and Supply to deny GPPC's protest.

GPPC, 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. NMIAC §70-30.3-505(i)(1). 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. NMIAC §70-30.3-505(i)(2).

Dated this 18<sup>th</sup> day of November, 2009.



Michael Pai  
Public Auditor