

opinion that WECCO had “impressive technical understanding” on the installation and required maintenance of the project. The award to WECCO was concurred in by the P&S Director on May 17, 1996. Accordingly, the DPW Secretary notified the two proposers of his decision to award the contract for this RFP to WECCO by letter dated May 22, 1996.

After receiving the notice of award to WECCO, PSA filed a protest with the P&S Director on June 6, 1996. By letter dated June 10, 1996, PSA’s protest was initially rejected by P&S as untimely. However, by letter dated June 24, 1996, P&S reconsidered, and accepted PSA’s June 6, 1996 protest as timely. Thereafter, PSA amended and supplemented its protest by letters dated June 18 and June 21, 1996. Despite the ongoing protest, the P&S Director decided to continue processing WECCO’s contract. On July 3, 1996, the P&S Director certified that WECCO’s contract bore all required signatures, which then completed the contract processing. On July 17, 1996, however, the Acting P&S Director issued a decision on PSA’s protest which reversed the award to WECCO and awarded the contract to PSA. It appears, however, that P&S never pursued the action based on its July 17, 1996 decision to award the contract to PSA. WECCO’s contract remained in effect despite the Acting P&S Director’s July 17 decision to terminate WECCO’s contract. By letter dated August 15, 1996 to Woosung Construction Co. Ltd., EFC stated that it was informed by DPW that it had no intention of rescinding WECCO’s contract.

On July 30, 1996, WECCO filed a protest of the July 17 decision by P&S. WECCO’s protest was granted in part by P&S on September 27, 1996 which referred the matter back to DPW for a second evaluation of the proposals and a new determination of which proposer should get the contract on this RFP. This decision was appealed to OPA by PSA on October 4, 1996. PSA’s October 4, 1996 appeal was first filed with our office after the P&S Director issued his initial decision on WECCO’s protest that ordered a second evaluation of the proposals. The procedural process for this previous appeal did not go forward because P&S and DPW were pursuing a second evaluation of the proposals, which indicated that a definitive ruling on WECCO’s protest had yet to be made. Since the reevaluation was pursued, P&S did not take the next step in the appeal process; *i.e.*, providing OPA the needed documents on the appeal. Nevertheless, we now consider the October 4, 1996 appeal as prematurely filed because at the time of filing the appeal the P&S Director had not yet issued his final action on WECCO’s protest.

In response to the September 27, 1996 decision, the DPW Secretary formed a reevaluation committee (Committee) consisting of three DPW employees. In connection with the reevaluation of the proposals, the Committee met and asked for additional information from the two proposers. DPW also requested comments from EFC on certain questions raised by P&S in its July 17, 1996 decision. The Committee concluded its work by issuing a memorandum to the DPW Secretary on November 7, 1996. On November 8, 1996, DPW wrote to P&S that the reevaluation results showed that PSA had submitted the best proposal, but that the Committee recommended that the contract with WECCO be affirmed. The Committee justified its recommendation by stating that about 69 percent of WECCO’s equipment was already on Saipan, 10 percent was in shipment, the balance had

been submitted for review and approval, and therefore termination of WECCO's contract would not be in the best interest of the Government.

On December 5, 1996, the P&S Director issued his final decision on WECCO's protest by concurring with the result of DPW's reevaluation of the proposals. In his decision, the P&S Director intended to affirm and ratify WECCO's contract. Subsequently, on December 12, 1996, PSA filed its appeal with OPA on the P&S Director's December 5, 1996 decision. On December 18, 1996, PSA supplemented its appeal by providing additional information on its arguments. PSA's December 12, 1996 appeal referred to the arguments previously presented to OPA that were included in PSA's previous appeal on October 4, 1996.

Upon receipt of PSA's appeal on December 12, 1996, we requested the P&S Director to provide us with the required report on the appeal. We received the P&S Director's report on January 8, 1997. To date, we have not received any comment on the P&S Director's report from either the appellant or any other affected parties. Although no comment on the P&S Director's report was received, OPA is issuing its decision on this appeal pursuant to the CNMI Procurement Regulations which provide that the Public Auditor should issue a decision after all information necessary for the resolution of the appeal has been received.

ANALYSIS

The *denial of the award* to PSA of the contract under RFP No. DPW96-RFP-007 by the P&S Director is the issue of this appeal. We now discuss the arguments by P&S, DPW, PSA, and WECCO as they were presented in the protest process, including OPA's comments on the merits of the arguments.

Basis for Selection of WECCO's Proposal

In selecting the successful proposer on this RFP, the DPW Secretary concluded in his letter to the P&S Director dated May 8, 1996 that the project should be awarded to WECCO because of its *impressive technical understanding* on both the installation and required maintenance of the project even though its price was higher than PSA's price by about eight percent. In the same letter which was concurred by the P&S Director, the DPW Secretary stated that the five criteria stated in the RFP were used in the evaluation of the proposals. The following comments were made by the DPW Secretary as to each criterion:

1. Experience on similar projects. The DPW Secretary stated that EFC, the architectural and engineering firm tasked by the DPW Secretary to evaluate the proposals, was impressed by the responses and apparent technical understanding on the project by Phoenix Pacific (WECCO's subcontractor). As for PSA, the DPW Secretary stated that "we were not impressed at the intention of PSA to use Taro Sue for installation of these security and specialty electrical system."
2. Price. The revised prices submitted on this RFP showed that PSA's price was \$493,663, or eight percent lower than WECCO's price of \$535,048.

3. Quality of Equipment. The DPW Secretary reiterated EFC's findings that WECCO offered better equipment on the master clock, intercom and metal detector while PSA's proposal had better equipment on the Closed Circuit Television (CCTV) systems, courtroom sound, and courtroom audio visual systems. On the access control and duress alarm, it was concluded that both WECCO and PSA offered equipment of equal quality.
4. Ability to provide long term maintenance. According to the DPW Secretary, both WECCO and PSA had the capability to provide this requirement. He opined, however, that the apparent technical understanding of the installation by WECCO's subcontractor would translate to better maintenance services.
5. Financial capability to execute the project. The DPW Secretary determined that both WECCO and PSA were capable of financing the project.

Records showed that EFC conducted a detailed evaluation of the proposals based on the DPW Secretary's instructions. By letter dated February 21, 1996, the DPW Secretary transmitted the proposals to EFC for evaluation and recommendation since EFC was the construction manager for the Saipan Judicial Complex. EFC, in its letter dated March 5, 1996, provided the result of its detailed evaluation which included a number of items in PSA's and WECCO's proposals that needed to be clarified by DPW. Thereafter, DPW asked the two proposers to clarify certain items in their proposals. The responses of the two proposers were forwarded to EFC which then finalized its evaluation. In its letter dated April 4, 1996, EFC recommended that the contract be *awarded to PSA* based on the following conclusions: (1) both bids appeared to be complete, (2) both contractors appeared to be capable of satisfactorily completing the project, (3) PSA's price was significantly lower than WECCO's. EFC added that price had been the most conclusive factor in its determination. EFC's conclusions and recommendations, however, were not significantly reflected in the DPW Secretary's findings and recommendations to the P&S Director.

PSA's Protest to the P&S Director

In its protest letter dated June 6, 1996, PSA specifically requested the P&S Director to make a redetermination of the two proposals and award the contract to PSA. To support its protest, PSA stated that it submitted the lowest bid and also excelled in the other four evaluation factors. PSA stated that it should have been awarded the contract because of its responsive and lowest cost proposal.

P&S Director's Basis for Sustaining PSA's Protest

By letter dated July 17, 1996, the Acting P&S Director decided to terminate WECCO's contract and award PSA the contract under the subject RFP. In the same decision, the Acting P&S Director stated that WECCO would be compensated for the actual expenses incurred under the contract, plus a reasonable profit, prior to termination. This decision was based on the Acting P&S Director's finding that there had been a violation of the

Procurement Regulations relating to the (1) bid process, and (2) evaluation and selection criteria. These were the two main issues discussed in PSA's protest.

Regarding the bid process, the Acting P&S Director stated that WECCO was awarded the contract for this RFP although an item in its proposal was left unresolved. The decision stated that there was nothing on file to indicate that WECCO had clarified its statement that its proposal did not include accessories that were not covered in the contract drawings. This statement in WECCO's proposal, according to EFC, contradicted the requirement that the proposal shall be to design, build, and install a complete and functional security and specialty electrical system. The decision concluded that WECCO's qualified proposal violated the intent of PR Section 3-106(6) which was to ensure that a proposal be fully responsive to the RFP. The decision further concluded that the earlier award to WECCO had been determined to be most advantageous to the Government despite the obvious fact that a critical question remained unanswered about whether the system provided by WECCO would be acceptable to the Government.

On the evaluation and selection criteria, the Acting P&S Director stated that the file did not provide confirmation or explain how WECCO's and its subcontractor's actual technical understanding would contribute to the success of the project. This was also pointed out by PSA in its protest when it mentioned that DPW allegedly gave impermissible weight to "impressive technical understanding" in awarding the contract to WECCO. The Acting P&S Director further stated that DPW changed and misused EFC's comment on the evaluation of the proposals and had created the phrase "impressive technical understanding." The result, according to the Acting P&S Director, was an unwarranted degree of advantage for WECCO. The decision concluded that PSA should have been awarded the contract for this RFP since the file did not convincingly support the conclusion that WECCO's apparent technical understanding was of such overwhelming and unique importance over PSA's price advantage.

WECCO's Protest on the P&S Director's Decision Sustaining PSA's Protest

After receiving the decision on PSA's protest, WECCO filed its July 30, 1996 protest, arguing that PSA's protest should have been denied or otherwise rejected by P&S because (1) WECCO had completely removed the alleged qualification of its proposal and accordingly had responded to the solicitation requirements, (2) the Acting P&S Director improperly relied upon the price quoted by PSA in making his decision, (3) the Acting P&S Director did not have the authority to terminate WECCO's contract, and (4) PSA most likely would not be able to comply with the requirement under the RFP with respect to experience on similar projects.

Regarding item (1) above, WECCO said that it had removed the alleged qualification of its proposal through its March 12, 1996 letter to the DPW Secretary which purportedly confirmed its willingness to abide by the conditions required by DPW for the contract. On item (2), WECCO believed that P&S violated PR Section 3-106(5) because the RFP did not state the relative importance of price and the other evaluation factors. Furthermore,

according to WECCO, it would be unfair to consider price as a compelling or conclusive factor in evaluating the proposals without first stating the relative importance of price and the other evaluation factors. As for item (3), the protester claimed that its contract should remain in full force and effect because PR Section 5-103 did not expressly provide P&S the authority to terminate any contract already entered into with a contractor, and the terms of WECCO's contract authorized only the DPW Secretary as contracting officer to terminate such contract. WECCO added that the DPW Secretary had not yet terminated any portion of its contract. Lastly, on item (4), WECCO explained that its technical understanding, including that of its subcontractor, was superior to PSA's under the circumstances because of WECCO's greater exposure to the type of facility required for the project. WECCO added that the Guam Judicial Center, whose operating systems were provided and maintained by WECCO's subcontractor, was the only similar project in this region (perhaps a reference to the Micronesian region).

P&S Director's Decision on WECCO's Protest

In his decision dated September 27, 1996, the P&S Director directed DPW to reevaluate both proposals after discussions with both proposers and after a new independent evaluation was conducted by EFC or by another independent architect/engineer expert. Based on this reevaluation, DPW was further directed to either affirm and ratify the contract with WECCO, or terminate the contract with WECCO and award a contract to PSA consistent with the standard form contract and the CNMI Procurement Regulations.

In conducting the reevaluation, P&S directed DPW to analyze whether (1) WECCO's failure to remove the qualification in its proposal made it less than fully responsive to the RFP and violated the purpose of PR Section 3-106(6), (2) the award to PSA should be upheld as the most advantageous to the government taking into consideration price and the other evaluation factors set forth in the RFP pursuant to PR Section 3-106(7), (3) the original award to WECCO gave inappropriate weight to "technical understanding" both within and beyond the context of the evaluation factor *experience on other projects*, (4) additional evaluation factors should have been considered before granting PSA's protest, and (5) defects in the procurement process, if any, violated a law or a provision of the CNMI Procurement Regulations which would afford a basis for civil and administrative remedies pursuant to PR Section 6-211.

Although the P&S Director did not make a final decision on WECCO's protest, his September 27, 1996 letter ruled on one of the four arguments raised in WECCO's protest, *i.e.*, the authority of P&S to terminate WECCO's contract. According to the P&S Director, it is clear that either he or the Public Auditor has the authority to terminate a contract under the conditions set forth in the Remedies Section under Bid Protests and Appeals Part of the Procurement Regulations. Specifically, PR Section 5-103(2), states in pertinent part:

- Remedies after an award.*** If after an award the Chief (P&S Director) or the Public Auditor determines that a solicitation or award of a contract is in violation of a 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 interest of the Commonwealth; 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;

The P&S Director added that the termination for convenience clause in Section 30.1 of WECCO's contract was not in compliance with the P&S standard form contract which provides that the P&S Director may terminate a contract for the convenience of the Government. Accordingly, the September 27, 1996 decision ordered DPW to conform its contract to the P&S standard form and the CNMI Procurement Regulations.

Result of the Second Evaluation of the Proposals

In response to the P&S Director's instruction, the DPW Secretary formed an evaluation committee (Committee) composed of three members who were all employees of DPW. The Committee was chaired by Mr. Richard Cody, then Acting Director of DPW's Technical Services Division. The Committee's report contained the following conclusions and recommendations:

- In its reevaluation of the proposals, the Committee concluded that PSA's proposal was the best, since PSA received a perfect score of 300 points against WECCO's score of 271 points. The Committee used a numeric point system in which a maximum of 60 points was assigned to each of the five evaluation factors, for a total of 300 maximum points.
- Although PSA scored higher in the reevaluation, the Committee recommended that it was in the best interest of the Government to ratify and affirm WECCO's contract primarily because, according to the Committee, about 69 percent of the equipment had already arrived on Saipan, 10 percent was in shipment and the balance had been submitted for review and approval. The Committee concluded that termination of WECCO's contract at that time would not be in the best interest of the CNMI Government.
- The Committee also found that the DPW contract form was apparently not in strict compliance with the CNMI Procurement Regulations. Accordingly, the Committee recommended that the contract for this project (and all future contracts) should conform to the CNMI Procurement Regulations, and that a "no cost" contract change order to include the appropriate modifications would be executed or a new contract complying with the regulations would be made.

The Committee mentioned that EFC, as the Government's construction manager for the project, supported the Committee's conclusions and recommendations. Specifically, in its report to the Committee, EFC maintained that both PSA and WECCO were capable of successfully completing the project and that price was the only significant difference between the two proposals. But EFC added that bringing in a new contractor

at such stage of the project would jeopardize the successful completion of the overall project, would result in delays, and could end up being very costly to the Government.

In addition to its conclusions and recommendations, the Committee included the following information in its report:

- A review of the Guam Judicial Center (GJC) procurement records as required in the September 27, 1996 decision from P&S was not considered as relevant by the Committee. The Committee concluded that the information from this undertaking would have no significant weight in making a final recommendation. Accordingly, the evaluation of the proposers' experience did not include information relating to GJC.
- The Committee stated that both offerors indicated that the project drawings and specifications (scope of work) were *inadequate* to provide the Government with a fully functional system. Nevertheless, the Committee found that both proposers did not take advantage of any omissions and that the proposals were responsive and complete.
- Regarding PSA's alleged proposal to use Taro Sue, the Committee mentioned that EFC had no knowledge or information of any Taro Sue involvement in the project.

P&S Director's Action on the Committee's Reevaluation of the Proposals

In his December 5, 1996 decision, the P&S Director restated the same conclusions and recommendations that were in the Committee's report, and concurred with the recommendations of the Committee and EFC to affirm and ratify WECCO's contract. Accordingly, the P&S Director decided to grant WECCO's protest.

PSA's Arguments in its Appeal with OPA

In its appeal dated December 12, 1996, PSA has requested that OPA rule on the following issues:

1. Jurisdiction. PSA claims that OPA has jurisdiction *nunc pro tunc* (now for then) as of June 21, 1996, the date of PSA's appeal that was referred back to P&S for administrative decision.
2. Whether WECCO's Contract was Void. PSA claims that any attempt to contract with WECCO was void because of OPA's assertion of jurisdiction on June 21, 1996 and as explained in PSA's previous submissions to OPA.

Based on the discussion in the appeal, we believe that the appellant meant to point out that the government procurement process does not allow any attempt to circumvent required procurement procedures, such as an attempt to award a contract not considered most advantageous to the Government. PSA emphasized in its appeal that the real issue is the integrity of the procurement process, and that there is a need to

enforce the objectives of the Procurement Regulations which are to ensure that the quality and integrity of the procurement system are maintained and to provide for increased public confidence in public procurement procedures, among other objectives.

3. Whether PSA Should be Awarded the Contract on this RFP. PSA asserts that it should be awarded the contract on this RFP. Also, OPA is requested in the appeal to “demonstrate that the procurement process does not contemplate any attempt to circumvent a lawful termination of a contract.”
4. Stay on WECCO’s Work. PSA requests that OPA order WECCO to stop further work on the project.

To support its requests in the appeal, particularly item no. 4 above, PSA explained that:

- If PSA had been awarded the contract and had been allowed to commence work, the security system could have been installed by March 1997. PSA emphasized there would have been no delay on the project had the award been made to the best qualified company whose bid was substantially lower (apparently referring to its proposal).
- Even if the security system were not completed by the time the Saipan Judicial Complex was finished, the building would still be usable and the installation of the security system could continue.
- WECCO received substantial advantage because of the flawed procurement. PSA stated that WECCO was allowed to start the project under questionable circumstances and was able to get most of its equipment on the island.
- The P&S Director failed to respond to OPA’s request to provide the required report on PSA’s October 4, 1996 appeal. According to PSA, this is sufficient ground for OPA to rule on PSA’s appeal at this time.

Additionally, in its December 12, 1996 appeal, PSA referred to previous documents supplied to OPA, of which the most relevant is PSA’s previous appeal on October 4, 1996. Following are the arguments contained in the earlier appeal that are relevant to the appellant’s request in this appeal:

- PSA stated that the P&S Director highlighted several procedural irregularities in his September 27, 1996 decision (initial decision on WECCO’s protest). For instance, the P&S Director stated that there was evidence that the original selection process was substantially flawed because of the consideration of inappropriate documents.
- According to PSA, the DPW Secretary entered into negotiations with WECCO without giving PSA the same opportunity.

- PSA claimed that the P&S Director ordered that work on the project be stopped; however, DPW indicated that it would not rescind WECCO's contract.
- PSA stated that its protest on June 6, 1996 should have stopped any attempt to process WECCO's contract. PSA added that PR Section 5-101(2)(c) does allow award of a contract during the pendency of a protest provided certain conditions are met which should be documented in a file. PSA claimed that at the time of contract award to WECCO, the required documentation had not been made.

The December 12, 1996 appeal was supplemented on December 18, 1996. In its supplement to the appeal, PSA commented on EFC's report to the Committee about the four potential problems that could be encountered if a new contractor is brought into the project, namely: (1) redoing familiarization, shop drawing production, equipment approval, shop drawing review and approval, and project scheduling, (2) restarting such coordination decisions as coordination of door hardware, coordination with the elevator supplier, and location of conduit as well as possible non-acceptability of the existing coordination decisions with a new contractor, (3) possible delay to Woosung's work while awaiting the supply and design information from a new contractor, and (4) possible non-usability of WECCO's equipment already ordered for the project by a new contractor. PSA suggested that EFC, in identifying problems (1) and (2) above, failed to consider that PSA had established a satisfactory working relationship with Woosung because of its existing involvement as a fire alarm contractor for the Saipan Judicial Complex. Regarding items (3) and (4), PSA stated that it could have shown the necessary accommodation had there been a satisfactory response to its previous request for a full disclosure of the current state of WECCO's work on the project.

OPA's Comments

We first discuss whether OPA has jurisdiction to hear PSA's appeal on December 12 and 18, 1996. We have determined that PSA filed a *timely* appeal with OPA because the ten-day period within which the appeal should be filed began on December 6, 1996, the day we believe the appellant received the P&S Director's December 5, 1996 decision. PR Section 5-102(3) provides that an appeal from the P&S Director's decision must be received by OPA not later than ten (10) days after the appellant receives the P&S Director's decision. In PR protest procedures, all "days" referred to are deemed to be working days and in determining the tenth working day, the day the appealable decision was rendered should be excluded. The tenth working day from December 6, 1996 was December 23, 1996; thus, the appeal was timely and OPA has jurisdiction over it.

The December 5, 1996 decision is the final action on WECCO's protest by P&S. The P&S Director's earlier decision dated September 27, 1996 was not one that could be appealed, since a definitive ruling was not issued until the result of the second evaluation was made known by letter dated December 5, 1996. While the December 5, 1996 decision specifically addressed WECCO's protest, the same decision also affected the P&S Director's earlier decision on PSA's protest. By affirming WECCO's contract in the December 5, 1996

decision, the P&S Director effectively superseded his earlier decision dated July 17, 1996 that granted PSA the award of the contract under the subject RFP. The July 17, 1996 decision is considered moot because P&S never implemented such decision until it was superseded by a subsequent decision by P&S on December 5, 1996. Therefore, the appealable action on this RFP is the P&S Director's final decision on December 5, 1996. PSA's appeal to OPA was from this final decision by P&S.

The appellant has complied with the requirements of PR Section 5-102(1) which provides that a written appeal to OPA from a decision by the P&S Director may be taken, provided the party taking the appeal has first submitted a written protest to the Chief (P&S Director). PSA filed a written protest with the P&S Director on June 6, 1996. Although PSA's protest was granted on July 17, 1996, PSA was eventually denied the contract on this RFP through the P&S Director's December 5, 1996 decision. PSA is appealing the P&S Director's decision denying it the award for RFP No. DPW96-RFP-007 -- a decision which had been protested but which was eventually denied by P&S on December 5, 1996. Accordingly, OPA *has jurisdiction* to consider pertinent arguments on the appeal. Following is our discussion of the merits of each argument in the order they were presented in PSA's appeal.

Whether WECCO's Contract was Void

PSA claims that any attempt to contract with WECCO was void because of OPA's assertion of jurisdiction on June 21, 1996. We would like to point out that our jurisdiction on PSA's appeal of June 21, 1996 covered only the procedural issues which had already been resolved. The June 21, 1996 appeal was from the denial of PSA's protest by the P&S Director on a procedural issue; *i.e.*, filing of a protest beyond the official work hours on the last day of filing a protest to the P&S Director. In our letter dated June 26, 1996, we stated that unless the meaning of the word "day" is in some way restricted, when used in a statute or contract it includes the entire 24 hours, and where one is given a stated number of days in which to perform an act, he may perform at any time up to midnight on the last day. We concluded that PSA's protest was timely as it was filed at 4:44 p.m. on the last day. We considered this matter resolved because P&S thereafter changed its position on the issue and considered the protest as timely. Since a timely protest was filed by PSA, P&S then had jurisdiction to decide on the substantive issues of the protest. OPA's simple assertion of jurisdiction does not cause a contract or an attempted award of a contract to be void. There is no provision in the Procurement Regulations that totally prohibits award of a contract during appeal to OPA of a protest decision by the P&S Director.

In its appeal, PSA questioned the validity of a contract award to WECCO that was made after the appellant's protest was considered by P&S. PSA alleges that the required justification and notices for making an award while a protest was ongoing were not made when the contract was awarded to WECCO. Our review of P&S files showed that such justification was issued by P&S on July 11, 1996 in which P&S stated that: (1) the materials and services that were to be contracted for are urgently required, (2) delivery or performance will be unduly delayed by failure to make an award promptly, and (3) a prompt

award will otherwise be advantageous to the Commonwealth. PSA, WECCO, and DPW were furnished a copy of this justification.

The justification for an award during an ongoing protest was made eight days after the processing of WECCO's contract was completed. We believe that this deficiency was essentially a documentation issue and does not constitute a significant violation of the Procurement Regulations. In an interview, the P&S Director said that the failure to document the justification before the contract award with WECCO was an oversight. The P&S Director confirmed that the reasons stated in the justification were the basis for making the award except that the documentation was done only after contract award. There is no evidence to show that the delayed documentation of the justification was arbitrary on the part of P&S.

Whether PSA Should Get the Contract on this RFP

In a letter dated May 8, 1996 which was concurred by the P&S Director, the DPW Secretary stated his opinion that the project should be awarded to WECCO due to its "impressive technical understanding" on both the installation and required maintenance of the project. In the same letter, the DPW Secretary compared the two proposals on each of the five evaluation criteria, as follows:

Criteria	DPW Secretary's Comments	Advantage
1. <i>Experience of the firm on similar projects</i>	We were not impressed at the intention of PSA to use Taro Sue for the installation of security and specialty electrical system and we have serious doubts regarding their experience with this kind of installation. The DPW Secretary stated that EFC was impressed by the responses and "apparent technical understanding" of the project by WECCO's subcontractor.	WECCO
2. <i>Price</i>	PSA's price is lower by about 8 percent.	PSA
3. <i>Quality of equipment</i>	On the courtroom sound system, both proposers offered a Lanier sound system of the same quality. The DPW Secretary reiterated EFC's conclusion that there were items in the scope of work for which either PSA or WECCO has offered a better equipment.	Both PSA and WECCO
4. <i>Ability to provide long term maintenance</i>	PSA and WECCO have the capability to provide this requirement but the "apparent better technical understanding" of the installation by WECCO's subcontractor would translate to better maintenance services.	WECCO
5. <i>Financial capability to execute the project</i>	Both PSA and WECCO are capable of financing the project	Both PSA and WECCO

As shown in the above table, the DPW Secretary favored WECCO over PSA in criteria 1 and 4 but admitted the obvious fact that PSA had an advantage over WECCO on criterion 2. In recommending the award to WECCO, the DPW Secretary used an invalid factor called

“impressive technical understanding.” It appears that this factor was based on EFC’s comment that “we have been impressed with the responses and apparent technical understanding displayed by WECCO’s subcontractor on this project.” On EFC’s evaluation of the proposals, however, it was clear that PSA’s proposal was better than WECCO’s taking into consideration price and the other evaluation factors mentioned in the RFP. EFC wrote DPW on April 4, 1996 about the result of its evaluation and its recommendation that *PSA should be awarded the contract* because of its lower price. EFC added that price has been the most conclusive factor for determining the award and that both contractors appeared to be capable of satisfactorily completing the project. During the reevaluation of the proposals, EFC explained by letter dated October 23, 1996 that it was more impressed with WECCO’s subcontractor as it responded quickly and thoroughly to the technical questions; however, EFC felt that this was not a sufficient reason for awarding the contract to WECCO given the difference in price between PSA and WECCO.

More than six months after concluding that award with PSA should be made, EFC again concluded in its October 23, 1996 letter that, in its opinion, PSA and WECCO were capable of satisfactorily completing the project and that PSA should have been awarded the contract because of the significant difference in price.

The reasonableness and validity of the basis for the award made to WECCO were not established by our review of the documents on this RFP. **First**, the DPW Secretary awarded the contract to WECCO although EFC had already concluded that both proposers were capable of satisfactorily completing the project and that price was the most conclusive factor in this case. Even in the second evaluation of the proposals, EFC still maintained that PSA should have been awarded the contract. **Second**, the overriding factor of “impressive technical understanding” used by the DPW Secretary in justifying the award to WECCO does not directly relate to the evaluation factors stated in the RFP, which are: (1) experience of the firm on similar projects, (2) price, (3) quality of equipment, (4) ability to provide long term maintenance, and (5) financial capability to execute the project. The “impressive technical understanding” of the proposers could ordinarily be considered relevant to criterion 4, the ability to provide long term maintenance; however, the addendum to the RFP specifically stated that this criterion was revised to “company’s track record of providing warranty service.” **Third**, as to the DPW Secretary’s reservations regarding Taro’s Sue’s involvement in PSA’s proposal, EFC stated that it had no information or knowledge concerning Taro Sue and would therefore not comment on that company’s suitability for the project. Our review of the pertinent documents in the appeal does not disclose that Taro Sue would be providing any of the items included in PSA’s proposal.

We have determined that the selection of WECCO over PSA on this RFP was made in violation of PR Section 3-106(7) which states that:

Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the government *taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation* and the contract file shall contain the basis on which the award is made. [Emphasis added.]

We have made a determination that the award made to WECCO violated PR Section 3-106(7) because WECCO's proposal which was selected by the DPW Secretary for award was *not* the most advantageous to the government taking into consideration price and the evaluation factors set forth in the request for proposals. On price alone, WECCO's proposal was not the most advantageous as its price exceeded PSA's by \$41,385. On the technical side, we agree with the Acting P&S Director's conclusion in his decision dated July 17, 1996 that the file does not convincingly support the notion that WECCO's apparent technical understanding is of such overwhelming and unique importance over PSA's price advantage. The Acting P&S Director also stated that DPW had changed and misused EFC's comments on the evaluation of the proposals and had created the phrase "impressive technical understanding." Our review of pertinent P&S files does not provide confirmation of WECCO's and its subcontractor's actual technical understanding and its payoff in the success of the project. Instead, it was clear from EFC's evaluation that both PSA and WECCO were capable of satisfactorily completing the project. Furthermore, the award with WECCO was not based on the selection criteria stated in the RFP. As mentioned earlier, the "impressive technical understanding" used by the DPW Secretary in justifying the award to WECCO does not directly relate to the evaluation factors stated in the RFP. Nowhere in this RFP was "technical understanding" stated as a basis for award.

The agencies involved in this procurement, particularly DPW and P&S, dragged their feet on this protest by failing to correct the wrongful award to WECCO while it was still feasible. P&S took one-half year to issue a final decision on PSA's protest from the time PSA's protest on this RFP was filed on June 6, 1996. Following are the instances which we believe were some of the factors that delayed the resolution of PSA's protest:

- PSA's first protest to P&S at 4:44 p.m. on June 6, 1996 was denied because it was purportedly filed after official work hours on the day determined to be the deadline for filing the protest. P&S later changed this decision on June 24, 1996 and formally considered the protest to be timely as of 7:30 a.m. on June 7, 1996.
- P&S issued a decision on PSA's protest on July 17, 1996 which acknowledged the wrongful award to WECCO and ordered award of the contract on this RFP to PSA. However, WECCO was allowed to proceed under its contract, which had earlier been processed on July 3, 1996, despite the decision to award the contract to PSA. EFC, in its letter to Woosung dated August 15, 1996, stated that it had been informed by DPW that the latter (DPW) had no intention of rescinding WECCO's contract. WECCO was ordered by DPW to temporarily stop its work only on October 11, 1996. Through a "resume work order" by DPW on December 16, 1996, however, WECCO has continued its work on the project and according to EFC's Project Engineer, WECCO has already accomplished about 35 to 40 percent of the work based on the effort done as of February 26, 1997.
- WECCO's subsequent protest on July 30, 1996 did not provide new information that we believe would question the basis for the July 17, 1996 decision, except for some

information on the Guam Judicial Complex which is related to one of the evaluation criteria -- the proposer's experience on similar projects. This information was later considered to be irrelevant by the Committee which issued the results of its reevaluation of the proposals on November 7, 1996 without consideration of such information. We believe that DPW and P&S at this time should have addressed the relevant issue of the feasibility of an award to PSA despite the work already done by WECCO.

- In deciding WECCO's protest, P&S ordered the reevaluation of the proposals on September 27, 1996 without determining if the reevaluation of the proposals would still make a difference in resolving the protest. As it turned out, the Committee found that PSA's proposal was the best but recommended continuing the award to WECCO only because doing otherwise would jeopardize the project and result in higher costs. Accordingly, the reevaluation of the proposals did not bear on the Committee's recommendations. More than two months elapsed from the time P&S ordered the reevaluation of the proposals until the final decision was issued on December 5, 1996.
- In conducting the reevaluation, the Committee asked for additional information from the proposers, such as best and final offers and the number of days required to complete the project, and conducted separate meetings with the proposers. These procedures were carried out although the overriding factor in the Committee's decision was its finding that termination of WECCO's contract was not in the best interest of the CNMI Government. Early in the reevaluation process, PSA requested that the status of WECCO's work be made known so that PSA could properly respond to the Committee; however, the Committee denied this request. We believe that the Committee should have first analyzed the extent of WECCO's work and then determined whether to continue with the reevaluation of the proposals or simply decide on the basis of the work already done on the project.

Because of the protracted actions by P&S and DPW on this protest, the appeal that was subsequently filed with us by PSA gives us *no other choice but to ratify WECCO's contract*. Even during the reevaluation of the proposals, EFC determined that it was already too late to turn back from DPW's earlier decision, and recommended that DPW allow WECCO to complete the project and reach an agreement with PSA acknowledging the mistaken award. As stated in the P&S Director's final decision, at the project's stage on December 5, 1996, canceling WECCO's ongoing contract would jeopardize the successful completion of the project and would be more costly to the government. It was not indicated to what extent award to PSA and termination of WECCO's contract would cost more and jeopardize the completion of the project as no comparative cost or time analysis was presented in the decision. However, EFC's report to DPW which supported continuing WECCO's contract stated four potential areas in which an award to PSA could result in additional costs and delays, namely: (1) redoing familiarization, shop drawing production, equipment approval, shop drawing review and approval, and project scheduling, (2) restarting such coordination decisions as coordination of door hardware, coordination with the elevator supplier, and location of conduit as well as possible non-acceptability of the existing coordination

decisions with a new contractor, (3) possible delay in Woosung’s work while awaiting the supply and design information from a new contractor, and (4) possible non-usability by a new contractor of WECCO’s equipment already ordered for the project.

Although we agree that PSA should have been awarded the contract for this RFP, we believe that the current situation is not one that would permit us to make an award even though it would be called for under normal circumstances. We have determined that the CNMI Government has no other option than to ratify WECCO’s contract because the subject protest has now reached a point where an award to PSA is no longer feasible. An award to PSA at this point would be warranted if termination of WECCO’s contract could still be accomplished without sacrificing the satisfactory completion of the Saipan Judicial Complex. PSA’s contract cost is certainly lower than WECCO by \$41,385 but cost estimates showed that terminating WECCO’s contract and awarding one to PSA would result in a higher cost to the CNMI Government. The following table shows a rough cost estimate if WECCO’s contract is continued as well as estimates if PSA were to be awarded the contract at this time:

Particulars	Award to PSA	Ratification of WECCO’s Contract
Contract Amount	\$493,663	\$535,048
Woosung’s Cost to Revise Existing Conduits (1)	150,000	100,000
EFC’s Additional Cost for Construction Management (2)	50,000	0
Woosung’s Claims for Delays that may Result from Changing the Specialty Electrical System Contractor (3)	0	0
Payment of Work Done to Date by WECCO, if Award is Made to PSA (4)	254,225	0
Settlement with PSA, if WECCO’s Contract is Ratified (5)	0	0
Total Cost	\$947,888	\$635,048

Notes on the Above Table:

- (1) Rough estimate provided by Mr. Robert W. Neville, EFC’s Project Engineer on the Saipan Judicial Complex. The cost with PSA is higher because more conduit revisions would be made compared to WECCO where some of its drawings had been used in the existing conduits.
- (2) Rough cost estimate provided by Mr. Neville.
- (3) Changing the specialty system contractor from WECCO to PSA could create delay on Woosung’s completion of the building. The cost of such delay would increase the cost of an award to PSA. This item was not included in the above computation as a rough cost estimate was not available.
- (4) Terminating WECCO’s contract in case award is made with PSA could result to claims by WECCO for stored materials and work done to date. Subsequent verification with WECCO showed that it was paid a total of \$254,225 out of its total billings of \$333,006.48. The total of \$333,006.48 represents materials stored on Saipan but not yet installed in the project. Although WECCO may not be entitled to such claim because its contract provides for payment based on installed materials, it may be hard for the government to recover the payment of \$254,225 especially when WECCO purchased these materials for installation in good faith after its contract was completely processed.
- (5) If WECCO’s contract is continued, an award to PSA must be denied although its proposal received higher points than WECCO’s in the reevaluation. As a matter of fairness, however, PSA may be entitled to reimbursement for the cost of preparing its proposal

and pursuing its protest and appeal. Such cost was not included in the above computation because the nature and extent of the CNMI Government's liability must be judicially determined.

As shown in the above table, continuing WECCO's contract would probably cost the CNMI Government about \$635,000, while awarding the contract to PSA would likely result in a higher figure of about \$948,000, or a cost difference of about \$313,000. The cost difference would still be higher if other additional costs were considered -- such as amounts that might have to be paid to WECCO for work done to date and to Woosung for delays that could result from changing the specialty contractor.

Regarding PSA's claim that installation of the specialty electrical system could be done even after completion of the Saipan Judicial Complex, EFC's Project Engineer said that it is possible but not desirable for a number of reasons:

- First, doing the installation after completion of the Saipan Judicial Complex would damage some of the interior work such as wall and ceiling finishes, since there are finishes that cannot be removed or reworked without creating damage.
- Second, it would be problematic to design the installation because there would be areas where access for conduits would require chipping of concrete. In addition, failure to install necessary conduits during the construction period may render the design not practicable because some areas may not have the necessary conduits.
- Third, it would be costly for the CNMI Government because it has to pay the cost of reworking existing conduits or installing needed conduits, whereas such cost can be minimized by installing the system during the construction period. In addition, the CNMI Government would incur repair costs for any damage to the finished building during the installation.

We asked EFC's Project Engineer if there were general standards used in the design of the existing conduits which could make installation of the specialty equipment easier even after completion of the building. EFC's Project Engineer stated that general standards do not apply in this situation because the specialty electrical system was not developed from a general design, but instead it was customized, since every specialty system is unique. As for PSA's claim that the Saipan Judicial Complex building could be used even if the specialty system is not installed, EFC's Project Engineer told us that the Saipan Judicial Complex building to be functional needs to have at least a security and access control and a public address system. If the specialty contract is to be discarded, the CNMI Government needs to install keyed doors and public address equipment to make the Saipan Judicial Complex functional. However, EFC's Project Engineer concluded that it is still not practicable to go with this option because money would be wasted on temporary doors and public address system when the Court's goal is to have the Saipan Judicial Complex equipped with the specialty security and electrical system, such as card reader access, courtroom sound and public address system.

On the issue of whether WECCO had removed the alleged qualification in its proposal, our review of the documents on this RFP showed that WECCO clarified this issue in its letter dated March 12, 1996 in which WECCO confirmed that its proposal was to provide the design-build, ready-to-use specialty system for the Saipan Judicial Complex based on the drawings and specifications issued with the RFP. In an interview, WECCO said that the system it proposed was complete and fully functional. WECCO explained that the accessories which were excluded from the system were only optional items and were not part of the scope of work.

Stay on WECCO's Work

Records showed that on October 11, 1996, the DPW Secretary temporarily suspended the work under WECCO's contract for 30 days due to the ongoing protest. However, on December 16, 1996, the DPW Secretary directed WECCO to resume work on the project since a final decision on WECCO's protest had already been issued by P&S. At present, we were told that WECCO is still working on the project whose target completion date was set for June 1997.

As for the appellant's request that we order WECCO to stop further work on the project, our office cannot issue such an order because in the protest and appeals process, there is no specific authority either by statute or regulation for OPA to order the stay of a contract implementation. Specifically, while CNMI Procurement Regulations provide that OPA is to adjudicate appeals, there is no authority provided to OPA to issue a "stop work order" pending resolution of an appeal. Nevertheless, in the P&S standard contract form, the P&S Director may, by written notice, require the contractor to stop all or any part of the work called for by a contract for a period up to 90 days. If appropriate, OPA could recommend issuance of a stop work order to the P&S Director. In this instance, however, such action is not appropriate, as we have already determined that the contract with WECCO should be continued because termination at this point is no longer feasible for the CNMI Government.

DECISION

The Office of the Public Auditor has determined that the CNMI Government has no other option than to ratify WECCO's contract because the subject protest is now at a point where an award to PSA is no longer feasible. Therefore, it is necessary that we deny PSA's appeal on DPW96-RFP-007.

As a matter of fairness, however, PSA may be entitled to reimbursement for the cost of preparing its proposal and pursuing its protest and appeal, possibly including reasonable attorney fees. We believe, however, that if the CNMI Government is determined by a court to be liable for these costs, the DPW Secretary may be personally liable for having made the award to WECCO in violation of PR Section 3-106(7). As provided in PR Section 1-108:

Any procurement action of an employee of the government or its agencies or political subdivisions in violation of the Procurement Regulations is an *action outside the scope of his or her employment*. The government will seek to have any liability asserted against it by a contractor which directly results from improper acts to be determined judicially to be the *individual liability of the employee who committed the wrongful act*. [Emphasis added.]

If PSA wants to be compensated for its proposal, protest, and other costs, it may submit its claim in a judicial setting which would determine the nature and extent of the CNMI Government's liability. In the event a case against the CNMI Government is pursued by PSA, we recommend that the CNMI Attorney General's Office file a cross claim against any employee(s) who caused the wrongful award of the contract on this RFP. For this purpose, we believe that the wrongful award to WECCO resulted primarily from the improper action of the DPW Secretary in selecting WECCO over PSA based on an invalid consideration labeled "impressive technical understanding." Our decision on this appeal covered the findings of facts on the arguments presented in the appeal and does not provide for award of financial claims. In the administrative adjudication of appeals, the CNMI Procurement Regulations provide for certain remedies in cases where the Public Auditor determines that a solicitation or proposed award of a contract was in violation of law or regulation; however, no authority was given to the Public Auditor to award claims that may result in such cases.

Section 5-102(9) of the CNMI Procurement Regulations provides that the appellant, any interested party who submitted comments during consideration of the protest, the P&S 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 upon 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.

ORIGINAL SIGNED

Leo L. LaMotte
Public Auditor, CNMI

April 10, 1997