

of 24,000 BTU, sensible cooling capacity of 18,000 BTU, condenser air temperature of 95F, evaporator fan motor of 2.0 FLA, compressor motor of 10.9 RLA, condenser fan motor of 0.70 FLA and a power supply of 208/230V-1-60, among other requirements.

In addition to the technical specifications for PSS IFB 97-0019, PSS issued "Instruction to Bidders" which stated that the successful bidder must be the lowest responsive and responsible bidder. The "Instruction to Bidders" provided guidelines for determining a responsive and responsible bidder which were mostly a restatement of relevant PSSPR requirements. It also listed certain documents that the bidders should submit with their bids, such as financial statements, listing of customers, documentation of the company's satisfactory record, staff experience and skills, and business license, among other required documents.

The bids for PSS IFB 97-0019 were opened as scheduled at 10:00 a.m. on September 25, 1997 at the PSS Central Office, 3rd Floor, Nauru Building, Susupe. Four companies submitted bids on this IFB, namely: ALPZ Merchandising (ALPZ), Torres Refrigeration, Inc. (Torres), Pacific Technical Services Saipan, Inc. (PTS), and JWS Air Conditioning & Refrigeration (JWS).

Evaluation of the Proposals

Among the four bidders on IFB 97-0019, PTS submitted the lowest bid price, followed by JWS, ALPZ, and Torres. Although PTS's bid was the lowest, it was not selected for award because it was considered non-responsive and non-responsible. PTS was determined non-responsible because it did not submit the documents that were required to be submitted with the bid. PTS was considered non-responsive based on the technical evaluation of the brands of A/C units submitted by PTS and JWS which was done by an electrical engineer (Evaluator) selected by the Principal of MHS. In his undated memorandum to the MHS Principal, the Evaluator made a point-by-point comparison of PTS's and JWS's A/C units which showed JWS's A/C to be a better unit.

Based on the Evaluator's conclusion, the MHS Principal recommended to the PSS Procurement and Supply (P&S) Officer on September 27, 1997 that PSS IFB 97-0019 be awarded to JWS. On September 28, 1997, the PSS P&S Officer recommended to the Commissioner that JWS be awarded PSS IFB 97-0019 because it was both responsive to the technical specifications of the IFB and responsible based on the financial review conducted by the PSS Comptroller. The recommendation for award to JWS was concurred in by the Commissioner on September 30, 1997. On the same date, the Commissioner informed all bidders of the result of the bid evaluation. PSS awarded the contract covering all 118 A/Cs to JWS on September 30, 1997.

The Protest and Subsequent Appeal to OPA

On October 6, 1997, after receiving the actual notice of the award to JWS, Torres made a formal protest to the Commissioner. Torres claimed that (1) PSS failed to use the DPW-TSD engineer, who had prepared the technical specifications for PSS IFB 97-0019, in evaluating the bids, and (2) the MHS Principal may have had a conflict of interest involving the selected bidder.

On November 18, 1997, the Commissioner denied the protest of Torres. According to the Commissioner, even though the DPW-TSD engineer was not part of the selection committee, PSS had properly considered the technical qualifications and specifications of the bidders; in addition, the MHS Principal had no relationship with JWS that might constitute a conflict of interest.

After receiving the Commissioner's November 18, 1997 decision, Torres filed with the Public Auditor on November 25, 1997 a timely appeal of the Commissioner's adverse protest decision. On November 26, 1997, OPA notified the Commissioner of Torres' appeal, and requested him to submit a complete report on the appeal and instruct interested parties to communicate directly with OPA. On December 1, 1997, the Commissioner issued PSS's notification letters to interested parties on Torres' appeal.

On January 16, 1998, the Commissioner submitted to OPA his report on the appeal. OPA has not received any comment on the Commissioner's report from either the appellant or any other affected parties. OPA is therefore issuing its decision on this appeal pursuant to PSSPR 5-102 (8)(c)(i) which provides that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received. Although no comments on the Commissioner's report were received, we have gathered all the information necessary to render a decision on this appeal.

To date, the selected contractor on this project has already delivered all 118 A/Cs to MHS. However, payment for this contract has not yet been made because all A/Cs delivered are not yet operational. Completing the installation of these A/Cs in order to make them operational is dependent on the final completion of the upgrade of the electrical system of MHS. According to a member of the Board of Education, the 118 A/C units delivered to MHS will be operational in August or September 1998 when the next school year starts.

ANALYSIS

The Commissioner's denial of Torres' protest on the procurement of 118 air conditioners for MHS under PSS IFB 97-0019 is the issue of this appeal. Following is a discussion of the arguments of Torres and PSS as they were presented in the protest and appeal process, including OPA's comments on the merits of the arguments.

Torres' Arguments in its Protest to the Commissioner

In its protest letter to the Commissioner dated October 6, 1997, Torres specifically requested the Commissioner to review the bidding process again. As the basis for its protest, Torres presented the following arguments (for presentation purposes, we numbered the two main arguments as Grounds A and B):

Ground A: Torres argued that PSS failed to use the engineer from DPW-TSD who had prepared the technical specifications of PSS IFB 97-0019 in evaluating the bids. Torres claimed that the engineer should have been consulted and should have reviewed each bid to determine compliance with the technical specifications. According to Torres, this was

important because the determination of a responsive bidder requires compliance with the technical requirements, as well as the adequacy of technical qualifications and the facilities for the project.

Ground B: Torres claimed that there may have been a prior relationship between the MHS Principal and JWS management. Torres further argued that this prior relationship may constitute a conflict of interest or lack of objectivity on the part of the selection committee.

Decision on the Protest by the Commissioner

In his decision dated November 18, 1997, the Commissioner denied Torres' protest. In denying Torres' protest, the Commissioner concluded that PSS had properly considered the technical qualifications and specifications of the bidders, and that there was no conflict of interest on the part of the reviewing and selecting committee¹. The Commissioner presented the following comments on Torres' protest grounds:

Ground A: The Commissioner stated that while it was true that the DPW-TSD engineer was not included on the selection committee, it was not true that PSS failed to adequately assess the technical qualifications and specifications of the selected bidder. The Commissioner stated that an in-depth review of the technical information provided by responsible bidders was properly conducted by PSS. He further commented that although Torres may protest on the basis of whether or not a proper review was conducted, it was not entitled to choose who should review the bids.

Ground B: The Commissioner stated that the Principal of MHS had no relationship with the selected bidder which could constitute a conflict of interest, and ruled that the review of the bids was conducted thoroughly, professionally, and with no bias.

Torres' Arguments in its Appeal to the Public Auditor

On November 25, 1997, Torres filed an appeal with the Public Auditor. In its appeal, appellant Torres requested that the contract with the selected bidder be terminated and that a new IFB for the 118 split A/C for MHS be issued. Further, the appellant also requested that the Principal of MHS be disqualified from participating in a review or selection committee. The appellant reiterated the arguments it presented in its protest to the Commissioner. Specifically, the following appeal arguments were presented by the appellant (we supplied the titles of the arguments based on the substance of the arguments):

Alleged Improper Review and Selection Process on the Bid Award

The appellant argues that the review and selection process on this bid award was improper. Although the Commissioner asserts that an in-depth review of the bidder's technical information was conducted, the appellant claims that neither the Commissioner nor any

¹ Contrary to what has been stated by the appellant and the Commissioner regarding the review and selection committee, there was no review and selection committee for this IFB. The evaluation of the bids on this IFB was conducted by an individual selected by the MHS Principal.

member of the reviewing or selecting committee was more qualified to review bidders' compliance with the technical specifications than the DPW-TSD engineer. The appellant further argues that the reason technical specifications were required by OPA in its earlier appeal decision dated August 22, 1997 was to choose a bidder who could meet the technical requirements and had the qualifications to perform the project. According to the appellant, the Commissioner did not articulate (1) the manner or degree in which the reviewing committee considered each bidder, and (2) the qualifications of the committee members. In addition, the appellant asserts that the committee failed to consider each bid with respect to the technical specifications of PSS IFB 97-0019.

Alleged Failure to Investigate Conflict of Interest

The appellant claims that the Commissioner failed to properly investigate a possible conflict of interest in this IFB, and that the Commissioner failed to disclose the names of the members of the reviewing and selecting panel. The appellant further asserts that the memorandum of the Evaluator (the person who compared JWS's and PTS's A/C units) to the MHS Principal substantiates the possible conflict of interest and/or the appearance of impropriety. The appellant questions (1) whether the comparison made by the Evaluator was submitted at the request of the MHS Principal, (2) whether such comparison was made a factor in the selection committee's recommendation to award the bid to the selected bidder, and (3) who the Evaluator is and what is his relationship to the MHS Principal or to the selected bidder. The appellant further contends that although the Commissioner stated that the MHS Principal had no relationship with the selected bidder, the Commissioner failed to make any findings of fact to support this conclusion. According to the appellant, the Commissioner did not indicate the extent of his investigation, and did not disclose any statements made by interested parties.

The Commissioner's Comments in his Report to the Public Auditor

In the report of the Commissioner to the Public Auditor filed on January 16, 1998, the Commissioner reiterated his comments in the protest decision. The Commissioner contends that although the DPW-TSD engineer was not included in the selection committee, the review was thorough and was performed by unbiased persons. The Commissioner maintains that PSS investigated the alleged conflict of interest between JWS management and the MHS Principal and found no improper relationship.

OPA's Comments

Section 5-102(1) of the PSSPR provides that a written appeal to OPA from a decision by the Commissioner may be taken provided that *the party taking the appeal has first submitted a written protest to the Commissioner*. [Emphasis added]. OPA has jurisdiction to hear this appeal as the appellant has complied with the requirements of PSSPR Section 5-102(1) and has filed the appeal within ten working days as required in PSSPR Section 5-102(3). We therefore now discuss the merit of the substantive issues of Torres' appeal.

Alleged Improper Review and Selection Process on the Bid Award

The appeal presented two points under this argument, namely, that PSS failed to: (1) include the DPW-TSD engineer in the evaluation, and (2) assess bidders' compliance with the technical specifications. Following are OPA's comments on these two issues:

Failure to Include the DPW-TSD Engineer in the Evaluation

Appellant questions why the DPW-TSD engineer who developed the bid specifications was not given the chance to review bidders' compliance with the technical specifications. In its appeal decision on the original solicitation, OPA recommended only that PSS should engage a qualified person, perhaps a DPW engineer, to assist in determining the minimum air conditioning needs of MHS. There was no mention in that appeal decision of any specific person who should conduct the evaluation of the bids.

In an earlier unrelated appeal decision, we stated that proposal evaluators should be selected based on their background and experience. Such evaluators are not necessarily those persons who participated in the development of the bid specifications. We believe that, at a minimum, any person can be a bid evaluator if he (she) has no conflict of interest as to the procurement and has the necessary background and experience in relation to the subject matter of the procurement. It may be preferable that individuals who were involved in the preparation of the specifications be the same persons evaluating the bids in order to expedite the review; however, there is no specific requirement in the PSSPR to this effect.

Failure to Assess Bidders' Compliance with the Technical Specifications

The technical specifications were prepared by an engineer from DPW-TSD. At the time the technical specifications were released, various clarifications and questions were raised by two interested bidders. According to the bidders, some of the specifications were features of a ducted, central air conditioning systems which is different from the non-ducted split-type systems required in the IFB. The DPW-TSD engineer answered the technical queries of two interested bidders. As a result, changes were incorporated into the original technical specifications prepared by the engineer. In the absence of any other changes to the original technical specifications, that portion of the specifications which was not subsequently changed should still be in effect and remain as criteria to be used in determining responsiveness of the bids.

Based on the undated memorandum of the Evaluator to the MHS Principal, the technical criteria used in the selection of the winning bidder were (1) agency approvals obtained by the A/C units of PTS and JWS, (2) heavy duty construction, (3) heavy duty compressor, and (4) superior condenser coil. According to the Evaluator, he was presented with the brochures of the A/C units of PTS and JWS, and was instructed to compare them and determine which was the better air conditioner. In his evaluation report², the Evaluator stated that compared with

² This report compared PTS's A/C against that of JWS to determine the better A/C. In an IFB, such comparison is not necessary. Instead, the bid of the lowest bidder is first evaluated for compliance with the technical specifications. If the bid does not comply with the technical specifications, then the next lowest bid is evaluated, and so on.

PTS's A/C, JWS's A/C has obtained various United States agency approvals. The reason, he suggested, might be because PTS's A/C is manufactured outside the United States. The Evaluator also stated that compared with PTS's A/C, JWS's A/C has a heavy duty construction because it uses a heavier gauge steel cabinet with a baked-on outdoor enamel paint finish which allows for better rust corrosion resistance. The Evaluator added that PTS's A/C does not use a heavy steel and is only powder coated. The Evaluator further stated that JWS's A/C has a more dependable and efficient compressor compared to PTS's A/C, and that the condenser of JWS's A/C incorporates lanced fin condenser coils that provide for excellent heat transfer. The Evaluator concluded that PTS's A/C has a compact design and therefore a much smaller coil area which limits air contact and heat transfer.

PSSPR Section 3-102(6) states, in pertinent part, that "*bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria as is necessary to reasonably permit a determination as to the acceptability of the bid for the particular purpose intended.*" PSSPR Section 3-102(9) also states that "the contract must be awarded with reasonable promptness by written notice to the lowest responsive bid by a responsible bidder *whose bid fully meets the requirements of the invitation for bids and these regulations.*" [Emphasis added.] Our review of the technical evaluation conducted showed that the actual criteria used were different from those set forth in the IFB, in violation of PSSPR Sections 3-102(6) and (9). Although the technical specifications prepared by the DPW-TSD engineer called for an air conditioner that was encased in baked enamel finish steel casings, the other three criteria used in the comparison mentioned above (agency approvals, heavy duty compressor, and superior condenser coil) were not specified in the technical specifications.

Additionally, because the evaluation only considered the four factors mentioned above, and because of the absence of any other documented evaluation, there was no evidence that an evaluation was conducted to determine whether the technical requirements set forth in the bid specifications were met by the selected bidder. Contrary to the Commissioner's protest decision, we find that PSS failed to adequately assess the technical qualifications and specifications of the bids in accordance with the bid evaluation requirements set forth in the PSSPR. The bids should have been evaluated based on only the requirements set forth in the technical specifications.

As stated earlier, PSSPR Section 3-102(9) requires that a contract be awarded to the lowest responsive bid by a responsible bidder whose bid *fully meets the requirements of the invitation for bids and these regulations.* Our limited review of the selected bidder's compliance with the bid specifications showed that at least one of the required equipment ratings was not met by the selected bidder. The bid specifications required a supply airflow of 800 cubic feet per minute (CFM); however, JWS's brochure stated that its proposed A/C only has an airflow of 540 CFM. It appears, therefore, that the selected bidder did not fully meet the requirements of the IFB, in violation of PSSPR Section 3-102(9).

The two other bidders that submitted information about their A/C's airflow (PTS and ALPZ) also failed to meet the required 800 CFM airflow. This indicates that the airflow requirement may not be met by commercially available A/C units, in which case the 800 CFM airflow requirement would have to be lowered. However, if the bid specifications are to be changed

at this point, a re-solicitation covering the revised requirement is the appropriate course of action.

Alleged Failure to Investigate Conflict of Interest

PSSPR Section 6-204(1) provides that it is a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that: (a) the employee or any member of the employee's immediate family has a financial interest pertaining to the procurement, (b) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement, or (c) any other person, business or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

The appellant did not explain the nature of the alleged conflict of interest involving the JWS management and the MHS Principal. Is the MHS Principal related to the management of JWS? Is he an immediate family member³ of the management of JWS? Or does he have a financial interest in JWS? Under PSSPR Sections 6-101(3)(a) and (b), financial interest may be reflected through (1) ownership of any interest or involvement in any relationship from which or as a result of which a person within the past year has received, or is presently or in the future entitled to receive, compensation; or (2) holding a position in a business such as officer, director, trustee, partner, employee, or any position of management.

The appellant did not provide any proof showing that the MHS Principal is related to the owner or any manager of JWS by consanguinity or marriage. Our interview with the MHS Principal also did not reveal such relationship, and the MHS Principal specifically denied any relationship whatsoever between himself, the Evaluator, and the management of JWS. In the absence of evidence, we cannot conclude that the procurement was tainted by conflict of interest.

Other Matters

In its appeal, Torres also pointed out the following issues: submission of a different product brand in the re-solicitation, failure to evaluate the bids of the other bidders, and the purchase of 24 window type A/C by MHS from JWS. On the other hand, concerned PSS officials commented that PSS will lose funding for this project if the current contract is terminated. These issues are not specifically related to the appeal grounds; however, we believe that they bear on the procurement process. Accordingly, we present the following additional comments addressing those points:

Submission of a Different Product Brand in a Re-Solicitation

Although the appellant did not expand on this issue, it did comment that JWS changed the brand of its proposed A/C in the original solicitation to a different brand in the current

³ Spouse, children, parents, brothers, sisters, step parents, step brothers, step sisters, and grandparents, as set forth in PSSPR Section 6-101(5).

solicitation. In OPA's appeal decision on PSS IFB 97-0005, OPA instructed PSS to cancel the portion of the procurement pertaining to the 118 A/Cs, and directed PSS to re-advertise, re-solicit, and evaluate bids in compliance with the PSSPR. In so doing, all bids submitted under the original solicitation were canceled and no longer in effect. Thus, any interested bidder under the re-solicitation in PSS IFB 97-0019 could propose any kind of A/C in response to the new bid specifications.

In addition, nothing in the PSSPR specifically prohibits the submission of a different unit in a bid re-solicitation. In competitive sealed bidding, bidders have the prerogative to submit any type or brand in response to a solicitation - whether a first solicitation or a re-solicitation as in this case. It is the responsibility of the procuring agency to determine whether the equipment proposed by the bidder meets the specifications or minimum requirements set forth in the solicitation.

Failure to Evaluate the Bids of the Other Bidders

The appellant questions whether any technical review was done on its bid and those of Carrier and PTS. In an IFB, the contract must be awarded with reasonable promptness to the lowest responsive bid by a responsible bidder whose bid fully meets the requirements of the invitation for bids and the PSSPR. Simply stated, contract award in an IFB is made to the lowest responsive and responsible bidder. This process allows the procuring agency to first determine if the lowest bidder is responsive and responsible. If so, the contract is awarded to that bidder, otherwise the agency evaluates the next low bidder, and so on. Unlike an RFP where all proposals are evaluated and compared, an IFB does not require a comparative evaluation of all the bids submitted.

Although the lowest bidder in PSS IFB 97-0019, PTS was determined non-responsive based on the comparison made by the Evaluator between the brand of A/Cs submitted by PTS and JWS. As such, JWS, the next lowest bidder whose brand of A/Cs was evaluated to be better than PTS's was selected for award⁴. As a result, it was not necessary to evaluate the bids submitted by ALPZ and the appellant, the third and fourth lowest bidders, respectively. As for Carrier, it did not submit a bid and so there was no bid to evaluate.

Purchase of 24 Units of Window-Type Air Conditioners from JWS

The appellant also questions whether another procurement involving 24 window-type A/C units with 8,000 BTU that were delivered to MHS by JWS complied with the procurement regulations. Our review of this transaction revealed that the A/C units were procured in accordance with PSSPR Section 3-103(2) which states that bidding is not required for small purchase procurements under \$10,001. The official with expenditure authority may obtain price quotations from at least three vendors and base the selection on competitive price and quality for a procurement valued up to \$10,000.99.

⁴ Previously, we mentioned that such comparison was not called for.

The total cost of the 24 A/C units with 8,000 BTU delivered to MHS amounted to \$9,000 and therefore this procurement was appropriate as a small purchase under \$10,001. PSS obtained quotations from the following vendors: Carrier, Pacific Home Appliances Corporation, and JWS, and the latter was chosen from among the three vendors.

Whether PSS Will Lose Funding for This Project If JWS's Contract is Terminated

As to whether the funds are still available for this project in case JWS's contract is terminated, the Acting Fiscal and Budget Officer of PSS stated that the funds appropriated for the MHS air conditioners are part of the regular appropriation, and as such PSS feels that the termination of the contract with the current vendor would result in the lapse of funds. Although fiscal year 1997 funds have lapsed, we believe, however, that PSS may use funds appropriated for Building and Improvements under the current continuing resolution in case it proceeds with a re-solicitation for this project. 1 CMC § 7204(d) provides that "funds for operations of the Commonwealth shall be appropriated pursuant to annual appropriations acts. If the annual appropriation acts *are not enacted into law prior to the beginning of the budget year, the appropriations levels, and such of the criminal penalties, and administrative provisions for government operations and obligations as are not inconsistent with the provisions of this part, shall continue as provided in the annual appropriation acts of the current year.*" [Emphasis added.] In addition, the PSS Appropriation Act for fiscal year 1997 (P.L. 10-34) did not contain any prohibition against capital expenditures under a continuing resolution in the event the annual appropriation of PSS for FY 1998 was not enacted.

Accordingly, PSS's concern about losing funding for this project (in the event the current contract is terminated) is not an issue in this appeal decision. We would like to emphasize that the lapse of public funds at the end of a fiscal year does not justify any short-cut in the requirements of the PSSPR and other applicable laws and regulations. In other jurisdictions, such as the U.S. Government with its Competition in Contracting Act (CICA) of 1984, competition is required to the maximum extent possible, and the Government is not allowed to justify contracting without providing for full and open competition on the basis of either (1) lack of advance planning, or (2) the fact that *funds will expire*.

DECISION

The Office of the Public Auditor **grants** this appeal. Our review showed that there was a violation of PSSPR Sections 3-102(6) and (9) in that: (1) the evaluation conducted did not adequately consider the selected bidder's compliance with the technical specifications of the IFB, (2) said evaluation considered certain factors not set forth in the bid specifications, and (3) the selected bidder did not fully meet the requirements set forth in the bid specifications. PSSPR Section 1-107 provides that no PSS contract shall be valid unless it complies with the PSSPR. Because of non-compliance with the PSSPR, the contract entered into between PSS and JWS for the delivery and installation of 118 A/Cs for MHS is invalid and should be terminated. In addition, the air conditioners installed at MHS should be removed, and JWS should be compensated for the actual expenses reasonably incurred under the contract prior to termination, plus a reasonable profit, as provided in PSSPR Section 5-103(2)(ii).

In the event of another solicitation for the MHS air conditioners, we trust that this time around, the process would be in compliance with the PSSPR. To help ensure that the next solicitation complies with applicable laws and regulations, we strongly recommend that PSS and MHS take into consideration our findings and comments presented in this appeal decision. Also, consideration should be given to the final completion of the upgrade of the electrical system of MHS in case re-solicitation is pursued, to ensure that the time frame for the delivery and installation of the A/C units is met. In addition, PSS should revise the bid specifications to include only those items that are required to meet the needs of MHS for air conditioners.

Furthermore, certain PSS and MHS officials may be personally liable for allowing the award of the 118 A/Cs in violation of the provisions of the PSSPR. As provided in PSSPR Section 1-108:

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

In the event the CNMI Government sustains any liability arising out of issues in this appeal, we recommend that the CNMI Attorney General's Office consider filing a crossclaim for reimbursement against any officials and employee(s) who were responsible for the violations presented in this decision.

With respect to the contention that the DPW-TSD engineer must do the evaluation, we find this to be without merit. It may be preferable that individuals who were involved in the preparation of the specifications be the same persons evaluating the bids so as to expedite the review of the bids; however, there is no specific requirement in the PSSPR to this effect. As to the claim of conflict of interest, we find this allegation of the appellant to be unsubstantiated.

PSSPR Section 5-102(9) provides that the appellant, any interested party who submitted comments during the consideration of the protest, the Commissioner of Education, 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

March 31, 1998