



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Address: <http://opacnmi.com>

2nd Floor J. E. Tenorio Building, Middle Road

Gualo Rai, Saipan, MP 96950

Mailing Address:  
P.O. Box 1399  
Saipan, MP 96950

E-mail Address:  
[mail@opacnmi.com](mailto:mail@opacnmi.com)

Phone: (670) 234-6481  
Fax: (670) 234-7812

IN RE APPEAL OF PACIFIC MARINE &  
INDUSTRIAL CORPORATION

)  
)  
) CUC RFP No. 97-0002  
) DECISION ON APPEAL  
) No. BP-A015  
)

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal filed by Pacific Marine & Industrial Corporation (PMIC), represented by its legal counsel, Klemm, Blair, Sterling & Johnson, from the failure of the Commonwealth Utilities Corporation (CUC) Executive Director (Director) to issue a decision on PMIC's December 19, 1997 protest pertaining to CUC's Request for Proposal (RFP) No. 97-0002. The Office of the Public Auditor (OPA) has jurisdiction on this appeal as provided in Section 5-102<sup>1</sup> of the CUC Procurement Regulations (CUC-PR). PMIC filed its appeal with OPA on January 28, 1998.

CUC RFP 97-0002 is a solicitation of competitive sealed proposals from independent power producers for the design, construction, and operation of a power generation facility on the island of Tinian. The project included the training of operators and the transfer of operation and/or ownership of the facility to CUC at a later time. The RFP called for a power generation facility that is capable of self-sustained operations under the following two options: (1) a 10 megawatt (MW) load which will initially house two 5 MW generating units with room for installing four additional units of the same size, and (2) a 30 MW load with financing schemes and a minimum repayment term of ten years. The facility will be tied to the island's existing electrical distribution system and shall be compatible at voltages of 13.8 kilovolts (kV) by means of step-up transformers. The RFP stated that the facility should include a fuel storage tank, a day tank, and structures for the support of equipment, materials/parts, and personnel. In addition, the building and structure must be able to endure wind force greater than 200 miles per hour, and the facility should comply with all applicable codes, regulations, procedures, and policies.

The RFP was advertised from October to November 1996 with an initial proposal submission deadline of 3:00 p.m. on November 29, 1996. In response to requests for time extension, CUC

---

<sup>1</sup> CUC's Procurement Regulations that were published in the Commonwealth Register on June 15, 1990 referred to "Appeals of Director's Decisions to the Public Auditor" as Section 54-192; however, this section should have been number 5-102 based on the sequence of the section numbers.

published RFP Addendum No. 1 on November 24, 1996 which extended the deadline for the submission of proposals to 3:00 p.m. on December 13, 1996. According to CUC, prior to the proposal submission deadline, the Chairman of the Selection Committee verbally notified potential offerors, including PMIC, that units do not have to be 5 MWs each as long as the initially installed units are capable of sustaining a 10 MW load, and the building structure is expandable to house units with a total of 30 MW load.

On December 13, 1996, CUC received six timely proposals from the following companies: PMIC, HEI Power Corporation (HEI), Shanghai Electric Corp. (SEC), Shanghai Machinery and Equipment Corporation (SMEC), Telesource CNMI, Inc. (Telesource), and Micronesia Power Systems (MPS). These proposals were opened on December 16, 1996 and on December 20, 1996, CUC confirmed receipt of the proposals to the respective proposers.

## **Evaluation of the Proposals**

A Selection Committee (Committee) chosen by the Director made the initial evaluations of the proposals. In late January 1997, the Committee issued written questions to each of the offerors requesting clarifications of their respective proposals. These written questions were responded to by the offerors on or before the February 10, 1997 deadline set by the Committee.

Through memorandum dated February 18, 1997, the Committee Chairman informed the CUC Deputy Director of Tinian that based on the information provided by the six offerors, the proposals submitted by Telesource, HEI, and PMIC had been "short listed" as the most qualified proposals. According to the Committee Chairman, Telesource was considered "overall best with emphasis on the financial options," HEI was rated second best because of its "sound technical background and related experience," and PMIC was ranked third best with a proposal that was "open ended subject to negotiation." The Committee Chairman further explained the basis of the selection of the three short listed proposals in his February 20, 1997 memorandum to the CUC Deputy Director of Tinian. Aside from citing the technical differences among the three short listed proposals, the Chairman expressed confidence that the three companies had established their credibility and were quite capable of meeting CUC's needs.

CUC stated that, in early March 1997, the Director, in consultation with the CUC Tinian Deputy Director, determined that further negotiations were unnecessary. Accordingly, it was decided that the contract be awarded to Telesource based on the Committee's evaluation. On March 6, 1997, CUC notified Telesource of its intent to award it the contract on this RFP. On the next day, March 7, 1997, CUC informed the remaining offerors that they had not been selected for award. On June 10, 1997, the contract with Telesource was fully executed except for the signature of the Commonwealth Development Authority (CDA) Chairman. Because of disagreement on the legal enforceability of the contract in the absence of the CDA Chairman's approval, the contract was not signed by the CDA Chairman until September 17, 1997. The processing of the contract was certified complete on September 18, 1997.

## The Protest and Subsequent Appeal to OPA

On November 24, 1997, PMIC requested a copy of the contract between CUC and Telesource. This was provided by CUC to PMIC on December 3, 1997. On December 19, 1997, PMIC filed its protest with the Director, claiming that (1) although the technical specifications of the RFP called for two 5 MW units, the contract executed between CUC and Telesource instead provided for four 2.5 MW units, (2) CUC never developed a short list of responsible offerors and never engaged in any meaningful negotiations with parties other than Telesource, and (3) PMIC's offer was financially more advantageous than Telesource's.

Since the Director did not issue any decision on the protest before the required due date, PMIC filed its appeal with OPA on January 28, 1998. On January 30, 1998, OPA notified the Director of PMIC's appeal and requested him to submit a complete report on the appeal and to instruct interested parties to communicate directly with OPA pursuant to CUC-PR Section 5-102(4)(a).

In response to OPA's request, the Director submitted his report on this appeal on February 23, 1998. In his report, the Director contended that PMIC's protest was untimely filed. On March 9, 1998, OPA received the comments of Telesource and PMIC on the Director's report. In its letter comment, PMIC stated that it had requested a copy of the Telesource proposal from CUC which had yet to be provided to PMIC. PMIC requested an additional ten days comment period after the delivery of Telesource's proposal by CUC. On March 16, 1998, Telesource, the selected proposer, submitted its rebuttal to PMIC's comments on the CUC report.

We were informed that a copy of the Telesource proposal was picked up by PMIC from CUC on March 13, 1998. To date, however, we have not received any additional comments from PMIC which had been due on March 30, 1998. Although PMIC did not submit additional comments on this appeal, OPA is issuing its decision on this appeal pursuant to CUC-PR Section 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.

## ANALYSIS

The Director's failure to decide PMIC's protest on the award of the design, construction, and operation of a power generation facility on the island of Tinian under CUC RFP 97-0002 and CUC's contention that the protest was not timely filed are the main issues of this appeal. Regarding the first issue, we informed CUC on January 30, 1998 that, based on initial information, OPA had jurisdiction to hear this appeal as it was filed within 10 days from the date that the Director should have decided the protest as required in CUC-PR Section 5-102(3). In the same letter, we also informed CUC that its decision on the subject protest should have been issued no later than January 25, 1998, one week<sup>2</sup> and 30 calendar days from

---

<sup>2</sup> One week was added from December 19, 1997 to include the normal time for filing comments to the protest as provided in CUC-PR Section 5-101(1)(b). The period for filing comments on the protest should be considered in determining the due date for the decision since CUC-PR Section 5-101(1)(c) provides, in pertinent part, that "the Director shall decide the protest within 30 calendar days after all interested parties have submitted their views . . ." [Emphasis added].

the protest date of December 19, 1997. CUC, in its comments to the appeal, did not take issue with OPA's position on jurisdiction. Accordingly, the remaining relevant issue that needs to be addressed in this appeal decision is the threshold issue of the timeliness of PMIC's protest with CUC. The following discusses the arguments of PMIC, CUC, and Telesource as they were presented in the protest and appeal processes, including OPA's comments on the relevant issues.

### **PMIC's Arguments in its Protest to the Executive Director**

In its protest letter to the Director dated December 19, 1997, PMIC stated that the contract entered into by CUC and Telesource was not the most advantageous to CUC taking into consideration price and the evaluation factors set forth in the RFP. PMIC added that the contract should be invalidated immediately because the procurement was in violation of the regulations. PMIC specifically requested the Director to invalidate the contract with Telesource and declare it to have no force and effect. As grounds for its protest, PMIC made the following three arguments:

- PMIC argued that the technical requirements of the RFP designated 5 MW units; however, the contract entered with Telesource provided for 2.5 MW units. According to PMIC, the contracted units are substantially cheaper than those specified in the RFP, and, CUC materially deviated from the technical specifications of the RFP in awarding the project to Telesource. PMIC concluded that there was a violation of CUC-PR Section 3-106(5) because the contract was awarded based on evaluation criteria not set forth in the RFP.
- According to PMIC, under CUC-PR Section 3-106(6), CUC has to determine the identity of responsible offerors and negotiate with them to obtain their best and final offers. PMIC argued that CUC failed to develop a short list of responsible offerors and failed to engage in meaningful negotiations with parties other than Telesource. PMIC claimed that this appeared to be an illegal sole source procurement disguised as a competitive sealed proposal procurement.
- PMIC claimed that based on its evaluation of the financial aspects of the contract with Telesource, it appeared that CUC ultimately got less and paid more than it should have in connection with this procurement. PMIC concluded that the contract with Telesource cost CUC more than what it would have spent had it accepted PMIC's initial offer.

### **The Director's Inaction on PMIC's Protest**

CUC did not issue a decision on the protest filed by PMIC by the required due date of January 25, 1998.

### **PMIC's Arguments in its Appeal to the Public Auditor**

On January 28, 1998, PMIC filed an appeal with the Public Auditor. In its appeal, appellant PMIC specifically requested the Public Auditor to issue a ruling that the contract that was

executed between Telesource and CUC is invalid and has no force and effect. PMIC reiterated the three arguments earlier presented in its protest with CUC.

### **The Director's Comments in his Report to the Public Auditor**

In his agency report dated February 23, 1998, the Director stated that PMIC failed to file its protest within the time specified in CUC-PR Section 5-101(1)(a), that is, within ten days after such aggrieved person knew or should have known of the facts giving rise thereto. CUC argued that PMIC filed its protest only on December 19, 1997 although it had long been informed of the bases for its protest in the following three instances:

1. The Director stated that "PMIC has actual knowledge of the Telesource plant configuration and the offer to install four 2.5 MW units as early as March 1997, four months prior to the completion of the contract in June. This knowledge is constant(sic) with the Chairman of the Selection Committee's verbal notice to PMIC that CUC was not requiring 5 MW units but a total of 10 MW installed with expansion capabilities to 30 MW."
2. The Director claimed that on March 7, 1997, PMIC had actual knowledge that no further negotiations would be conducted and that a selection for award had been made.
3. The Director also argued that PMIC should have had actual knowledge of the contract award no later than October 1, 1997 when CDA approved the contract and an announcement was placed in the Saipan Tribune that the contract had been awarded. However, PMIC waited until November 24, 1997 to request a copy of the contract. Even after the delivery of the contract on December 3, 1997, PMIC waited until December 19, 1997 (eleven Commonwealth working days) to file its protest.

### **Telesource's Comments on the Timeliness of PMIC's Protest**

In its comments on the Director's report, Telesource, through its legal counsel, Brian W. McMahon, stated that PMIC's protest was untimely and without merit. On the timeliness issue, Telesource stated that pursuant to CUC-PR Section 5-101(1)(a), a protest shall be received by the Director in writing within ten working days after such aggrieved person knows or should have known of the facts giving rise thereto.

Telesource argued that PMIC knew or should have known of the facts giving rise to the protest when the Committee Chairman responded to questions regarding unit size which were asked during the pre-submittal conferences. According to Telesource, the Committee Chairman notified all offerors that individual generating units do not have to be 5 MWs each as long as they meet the specifications of the RFP for an initial 10 MW load expandable to a 30 MW load. Telesource further argued that PMIC's protest based on CUC's failure to engage in meaningful discussions with any offerors other than Telesource was also untimely filed considering the fact that allowable variations in unit sizes were discussed with all offerors well before an award was made, and PMIC admitted knowledge of its concerns regarding this fact as early as March 1997.

Telesource concluded that PMIC, when it obtained a copy of the contract on December 3, 1997, had obtained knowledge of all three grounds for its protest which could have been known much sooner had it diligently requested a copy of the contract. According to Telesource, PMIC did not file its protest until December 19, 1997 (eleven working days after December 3, 1997), thus, under any scenario PMIC had not timely filed its protest.

### **PMIC's Comments on the Timeliness of its Protest**

In its comments on the Director's report, PMIC argued that (1) its protest was timely filed, (2) the award was in violation of various provisions of the CUC-PR, and (3) the Committee's decision that the Telesource proposal was financially more attractive than PMIC is erroneous.

On the timeliness issue, PMIC contended that its notice of protest was timely filed. PMIC argued that the 10-day period within which to file a protest is not necessarily triggered by a mere notice that the contract will be or has been awarded to another party. According to PMIC, the 10-day period is triggered when the party has or should have known of the specific facts upon which the protest will be based. PMIC stated that while it was aware that Telesource had provided 2.5 MW generating units instead of the 5 MW units, there were other facts that PMIC was not made aware of until recently upon which the protest was based. PMIC explained that it became concerned that it may have been treated improperly in this procurement because of its disqualification from further participation in the 80 MW Saipan Power Plant (CUC RFP 97-0025). According to PMIC, this prompted it to request pertinent CUC files in connection with the procurement of the 80 MW Saipan Power Plant, including the 10 MW Tinian Power Plant. The information obtained through the review of CUC files purportedly provided PMIC with the facts upon which the protest was based. PMIC believes that it acted timely considering the following information:

1. PMIC received Telesource's contract file on December 3, 1997.
2. PMIC reviewed the contract file from December 13 to 14, 1997.
3. PMIC claimed it knew the facts and could format its protest on December 15, 1997.
4. PMIC finally filed its protest with the Director on December 19, 1997.

### **Telesource's Rebuttal to PMIC's Comments on the Timeliness Issue**

In its March 16, 1998 rebuttal to PMIC's comments, Telesource again argued that (1) PMIC's protest was untimely, (2) PMIC's protest was without merit, (3) Telesource's contract with CUC financially benefits CUC more than the proposal of PMIC, and (4) PMIC seeks an unavailable remedy.

On the timeliness issue, Telesource contended that all grounds of the protest based directly on the generator size should be barred as untimely because PMIC knew of the facts giving rise to those allegations as early as March 1997. Telesource also contended that PMIC's allegation that CUC misinterpreted its proposals should likewise be barred as untimely since CUC clearly set forth the facts giving rise to this allegation in its February 20, 1997 evaluation justification. Telesource also argued that any remaining grounds for protest based upon information contained in the contract documents or files which were obtained by PMIC on December 3, 1997 must also be barred as untimely, since PMIC should have diligently

pursued its protest. Telesource concluded that a disqualification from the 80 MW Saipan Power Plant project is not relevant to the timing of a protest for an entirely separate project, nor does PMIC's belated suspicions allow it to revisit an alleged injury which it claims it was not aware of until several months after it occurred.

## OPA's Comments

CUC-PR Section 5-101(1)(a) provides, in pertinent part, that any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Director. The protest shall be received by the Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto. This time limit for filing an intra-agency appeal is mandatory and jurisdictional. [Rivera v. Guerrero, 4 N.M.I. 79 (1993)]. Because bid protests may delay the procurement of needed goods and services, OPA, except under specific circumstances, strictly enforces these timeliness requirements. This timeliness rule reflects the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. In this regard, the protester has an affirmative obligation to diligently pursue information which may form a basis for protest.

PMIC presented three grounds in its December 19, 1997 protest to the Director. First, PMIC claimed that Telesource offered 2.5 MW units although the RFP called for 5 MW units. Based on available information, we have determined that this claim was untimely filed. PMIC in its comment to the Director's report acknowledged that PMIC had prior knowledge of the 2.5 MW units offered by Telesource. In its March 9, 1998 comment to the Director's report, PMIC stated that "in this particular case, while Mr. Jones of PMIC was apparently aware that Telesource had for some reason provided 2.5 MW units, there were other facts upon which this protest is based which PMIC was not aware of until very recently." Additionally, according to CUC, PMIC should have known the basis for this ground as of March 1997. In its report on the appeal, CUC stated that after being notified of the results of the evaluation in March 1997, PMIC's Vice-President met separately with CUC's legal counsel and electrical engineer later that month. According to the Director, PMIC's Vice-President in both meetings stated that he knew that Telesource's proposal offered four 2.5 MW units, that he felt that such offer violated the terms of the RFP, and that he was thinking about filing a protest. PMIC in its March 9, 1998 comments to the Director's report did not take issue with this statement.

Second, PMIC claimed that CUC never developed a short list of responsible offerors, and never engaged in meaningful negotiations with parties other than Telesource. Again, we have determined that this ground was untimely filed. PMIC should have known this basis of protest by its receipt of CUC's March 7, 1997 letter which informed PMIC that it was not selected and that another firm would receive notice of intent to award the contract. This notification of CUC's intention to award the project to another firm should have informed PMIC that the period for short listing and negotiations had already passed and PMIC had not been included in any such negotiations. In other words, the March 7, 1997 letter provided necessary information for PMIC to have made a timely inquiry to CUC asking the reasons for its non-selection on this procurement and its exclusion in the negotiation stage. This inquiry would have revealed that no negotiations were conducted in this procurement. PMIC was already on notice, based on the RFP announcement, that "offerors shall be accorded fair and equal

treatment with respect to opportunity for discussion and revision of proposals...for the purpose of obtaining best and final offers.”

PMIC should have diligently pursued its inquiry in March 1997; however, as it turned out, it waited until it obtained a copy of the contract file on December 3, 1997 before filing a protest on December 19, 1997. This protest basis can be pursued without necessarily waiting for the completion of the contract processing. Instead, this basis was used to support PMIC’s conclusion on its December 19, 1997 protest that its review of the contract file led it to believe that the contract award to Telesource was in violation of the Procurement Regulations. In any event, even if we are to consider PMIC’s receipt of the contract file on December 3, 1997 as the date from which the 10-day period should start, this protest was still untimely because it was filed eleven working days after PMIC received a copy of the contract file.

Lastly, PMIC claimed that the contract with Telesource cost CUC more than what it would have spent had it accepted PMIC’s initial offer. We have also determined that this ground was untimely filed because the protest was filed eleven working days after PMIC received a copy of Telesource’s contract file on December 3, 1997. To be considered a timely protest pursuant to CUC-PR Section 5-101(1)(a), PMIC should have filed its protest not later than December 18, 1997. On bid protests filed with the U.S. General Accounting Office (GAO), it has been held that where supplemental protest grounds based upon information contained in the agency report were filed 15 days after receipt of the agency report, the supplemental protest was considered untimely filed. [B-270793; B-270793.2, Vinnell Corporation, April 24, 1996]. GAO Bid Protest Regulations require that protests not based upon solicitation improprieties be filed not later than 14 days after the basis of the protest is known, or should have been known, whichever is earlier. [4 C.F.R. Sec. 21.2(a)(2)(1996)]. In another decision, GAO held that a protester was on notice of its basis for protest as of its receipt of the evaluation results, and since the protest was filed more than 14 days later, it was properly dismissed as untimely. [B-270506.2, Acro Tech Inc., April 18, 1996]. In the above GAO cases, it is clear that the receipt of a notification document is the set point from which to count the mandatory filing period.

PMIC’s contention that its December 19, 1997 protest was timely filed is invalid even if we are to consider its claim that it reviewed the contract file on December 13 and 14, 1997. Although PMIC received Telesource’s contract file on December 3, 1997, it did not diligently pursue the information which could form the basis for its protest. As it turned out, PMIC waited until December 13, 1997 (ten calendar days after obtaining a copy of the subject contract file) to initiate its review of such file. PMIC then waited another four calendar days to file its two-page protest after it admittedly knew on December 15, 1997 the facts forming the basis for its protest. Under the circumstances, it is unreasonable to wait 10 calendar days before reviewing the document file obtained from CUC on December 3, 1997. The protester’s failure to timely review the files, whether intentional or not, does not waive or toll the timeliness requirement in the CUC-PR. Therefore, we could not consider December 15, 1997 as the point in time from which to count the 10-day filing requirement for protests.

The CUC-PR requirements on timeliness apply every time a protest allegation is filed by a protester. Issues are normally raised each time a protester knows or should have known the basis for relief through the protest and appeal processes, and therefore, it is only fair that each

new allegation be filed within a certain time after knowing the basis for such allegations. Thus, the knowledge that the proposal of the selected proposer offered four 2.5 MW units provided sufficient information for PMIC to have lodged a timely protest within 10 days after it knew of this basis. In addition, PMIC should have diligently pursued an inquiry from CUC after learning that Telesource offered 2.5 MW generators instead of 5 MW if it needed more information for its protest. In any event, even if we are to consider PMIC's receipt of the contract file on December 3, 1997 as the date from which the 10-day period should start, this protest was still untimely filed because it was filed eleven working days after PMIC received a copy of Telesource's contract file.

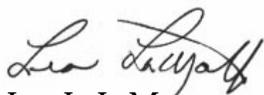
CUC-PR Section 5-102(1) provides that a written appeal to the Public Auditor from a decision by the Director may be taken *provided that the party taking the appeal has first submitted a written protest within ten days after such aggrieved person knows or should have known of the facts giving rise to the protest*, and the Director has denied the protest or has failed to act on the protest within the time provided for. [Emphasis added.] Since we have determined that PMIC filed an untimely protest to the Director, we are precluded by the CUC-PR from considering the merits of the appeal filed by PMIC based on the Director's inaction on its protest.

Since we have determined that PMIC failed to comply with the threshold requirement of a timely protest with CUC, we find no need to comment on the substantive issues presented in the appeal.

## DECISION

The Office of the Public Auditor **denies** PMIC's appeal on CUC RFP 97-0002. Because OPA has determined that PMIC did not file a timely protest with the Director pursuant to CUC-PR Section 5-101(1)(a), we do not have jurisdiction to hear the appeal filed by PMIC on this RFP.

CUC-PR Section 5-102(9) provides that the appellant, any interested party who submitted comments during the 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 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.



Leo L. LaMotte  
Public Auditor, CNMI

June 9, 1998