



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE MOTION TO ALTER OR AMEND) DECISION ON REQUEST FOR) RECONSIDERATION NO. BP - A016.1)) _____)	CUC RFP 97-0025 OPA No. BP-A016.2 DECISION
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Commonwealth Utilities Corporation, hereinafter referred to as “CUC,” requests the Office of the Public Auditor (OPA) to alter or amend its findings herein, specifically, to delete and exclude reference to a memorandum by CUC’s Acting Power Division Manager from its already published Decision on the Request for Reconsideration Filed by Commonwealth Utilities Corporation on OPA’s Appeal Decision No. BP A-016. The basis for the request, as alleged in CUC’s Motion To Alter Or Amend Decision On Request For Reconsideration No. BP-A016.1, is that the referenced memorandum is covered by the attorney-client privilege and by the “deliberative process or executive privilege.”

Appeals to the Office of the Public Auditor concerning alleged violations of procurement procedures by CUC are governed by CUC’s Procurement Regulations (CUCPR). Section 5-102, et. seq., of CUCPR specifies the procedures, remedies and due process requirements to be followed in processing such an appeal. Section 5-102(9) provides for a Request for Reconsideration by a party adversely affected by an OPA appeal decision, with strict time limitations placed thereon. Nothing in CUCPR provides for further proceedings after an OPA decision on a Request for Reconsideration is made. CUC’s “Motion To Alter Or Amend Decision On Request For Reconsideration No. BP-A016.1” is unique in this respect and, because of lack of procedures pertaining to authorization for such a motion, OPA is limited in its approach. This Motion will, therefore, be treated as a request for clarification for the public interest, and shall not be considered as a further Request for Reconsideration, as none is allowed.

In its original Request for Reconsideration, CUC challenged OPA’s findings and conclusions regarding the competitive range selection process, to wit: That the (CUC) records do not indicate that the strengths and weaknesses of the proposals were compared during the competitive range selection process. OPA, in an effort to fully address CUC’s concerns and to provide full consideration to their challenge, made a complete review of the records involved in this procurement. During the process of this on-site review, OPA made copies of pertinent documents.

The subject of CUC’s Motion is a memorandum cited by OPA on page 8 of its reconsideration decision. CUC maintains that OPA should not have quoted from or made reference

to said memorandum as it is allegedly covered by the attorney-client privilege, and is also covered by the “deliberative process or executive privilege.”

A copy of the subject memorandum was obtained by OPA on or about July 8, 1998. At that time, three members of OPA staff met with CUC’s legal counsel and requested a review of CUC’s files pertaining to the 80 MW power plant procurement. It was explained that our review deals with OPA’s ongoing investigation, including the 80 MW power plant appeal. The legal counsel referred our staff members to the CUC Procurement and Supply Office, and contact was made with the procurement and supply manager and the power division manager. When we asked to see and copy documents pertaining to the requests for proposals (RFP’s) involved in the proposed 80 MW power plant, we were advised that CUC’s legal counsel would have to approve such access. Later that day our staff members again visited with the legal counsel. At that time we were provided access to the requested files by the legal counsel. The subject memorandum by CUC’s Acting Power Division Manager was among the documents provided by the legal counsel. It should be noted that the same legal counsel prepared and filed CUC’s reconsideration request with OPA, which challenges our findings that the selection process was flawed. His reconsideration request was filed with OPA only 13 days before our staff members sought access to the subject materials on July 8, 1998, and he was informed at that time that the 80 MW power plant appeal was included in the reasons for requesting the documents. No admonishment or reservation was made by the legal counsel about any of the documents provided, and no privilege was claimed. The memorandum in question was within the general file containing the proposals and related documents pertaining to the 80 MW power plant procurement, and was not marked confidential or in a separate confidential or “legal” file.¹

OPA, in its reconsideration decision, stated on page 8: “Questions about the technical expertise of the evaluators and CUC’s non-responsiveness to this concern raise doubt as to the propriety and objectivity of the evaluation of the proposals which, *although not controlling in this case*, strengthens our conclusion that the evaluation was flawed.” (Emphasis added). When OPA discovers information in CUC’s procurement files prepared by a member of the selection committee that raises concerns about his own technical abilities and those of other members of the committee, OPA has a duty to consider such an important revelation in its evaluation.

OPA has read and considered the points and authorities cited by CUC, along with those cited by Robert J. O’Connor, Esq. in his letter to OPA dated October 6, 1998 (with copies to both CUC legal counsel). CUC cites several cases dealing with attorney-client privilege as it relates to a client seeking legal advice from his or her counsel. We have no quarrel with the principles set forth in the authorities cited by CUC, however, we take exception to the suggestion that the document in question is in fact a request for legal advice. Even if through some liberal interpretation of the document it could be construed as a request for legal advice, any possible privilege that could have

¹*Consider In re Horowitz*, 482 F2d 72, 81-82 (2d Cir) cert denied, 414 US 867 (1973) (quoting *United States v. Kelsey-Hayes Wheel Co.*, 15 FRD 461 (ED Mich 1954). (Wherein documents were indiscriminately mingled with other routine documents and no special effort to preserve them in segregated files with special protections was made - no privilege).

been asserted was certainly waived by the circumstances. Mr. O'Connor correctly points out through his points and authorities that construction of an attorney-client privilege must be narrowly, not liberally, construed.

OPA has carefully reviewed the subject memorandum and concludes that, contrary to CUC's contention, it is not a request for legal advice. The memorandum is addressed first to "Executive Director," second to "Legal" and third to "Comptroller" in that order. These three individuals, along with the author of the memorandum, constitutes the entire 80 MW power plant selection committee. This memorandum was nothing more than a communication between one member of the selection committee and the other three. Nothing contained in the memorandum asks for a legal opinion. To the contrary, the memorandum clearly states that its author does not have sufficient technical expertise on generation to adequately evaluate the proposals, and explains why; questions the expertise and qualifications of other members of the committee; suggests that a technical representative for evaluating proposals and preparing the power purchase agreement be retained; and warns of the consequences of a contested selection process. Nowhere in the memorandum is there a request for legal advice. "Legal" is presumably included in the address of the memorandum because CUC's legal counsel is a member of the selection committee. One might question how CUC's legal counsel could give official legal advice to committee members while at the same time participate as a committee member. Conflict?

CUC cites *Santrade, Ltd. V. General Electric Co.*, 150 F.R.D. 539 (E.D.N.C. 1993) to support its contention that there is a "...privilege applied to various levels of intra-corporate communication." In this case, however, the court states that ...(documents) do not (meet the test) because the communications were made for the primary purpose of communicating business or technical information; these documents are ordered disclosed." (at page 544). The court found that in such cases, where the communication exchanges business or technical information and is not specifically seeking legal advice, the communication is not protected.

CUC also contends that the subject memorandum is covered by "the deliberative process, or executive privilege." They cite *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149-153, (1975) to support this assertion. This case deals with information sought through the U.S. Freedom of Information Act. The court discusses how an agency's decision-making process may be affected by disclosure of a communication before, versus after the decision. The court supports the majority of cases that seem to uniformly draw a distinction between predecisional communications, which are privileged, and communications made after the decision. In our situation, the subject memorandum was received, and portions thereof disclosed, by OPA well after the relevant decisions were made pertaining to scoring, narrowing down, requesting and receiving best and final offers. Disclosure of the contents of the memorandum cannot be said to have in any way affected the already made decisions by the CUC selection committee. The court goes on to say:

This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of post-decisional communications, but also, in the case of those communications which

explain the decision, by increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. *In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted.* These reasons, if expressed within the agency, constitute the ‘working law’ of the agency and have been held by the lower courts to be outside the protection of Exemption 5 (U.S. Freedom of Information Act). (Emphasis Added).

Id., at 152.

The subject memorandum, which expresses a serious question of expertise on the part of selection committee members, is clearly of public interest. The memorandum was disclosed after the fact; during the protest and appeal process; and goes to the heart of the issue as another example of a flawed procurement process. Qualifications and expertise of those persons assigned the responsibility of evaluating technical proposals and making recommendations for selection is relevant in determining whether or not the entire procurement process met the required standards.

For the foregoing reasons, CUC’s Motion To Alter Or Amend Decision On Request For Reconsideration No. BP - A016.1 is DENIED.

DATED: _____

ORIGINAL SIGNED

LEO LAMOTTE
Public Auditor