



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF  
SEN MAULEG CORPORATION

)  
) ITB00-0017  
) DECISION ON APPEAL  
) No. BP-A022  
)

## SUMMARY

This is an appeal by Sen Mauleg Corporation (SMC) from the denial of its protest on the Department of Public Health's (DPH) procurement of outside ground maintenance services under ITB-00-0017. The Procurement & Supply (P&S) Director had earlier denied SMC's claim that it should have been awarded the contract, and sustained award of the contract to 3A's Ground Maintenance Services (3A's). Appellant asserts that: (1) 3A's was not selected by the Commonwealth Health Center's (CHC) selection and evaluation committee; and (2) Appellant holds a valid contract and denying any remedies upon termination would be a breach of contract terms.

We *deny* the appeal. We affirm the P&S Director's ruling that award to SMC violated Commonwealth of Northern Mariana Islands Procurement Regulations (CNMI-PR) Section 3-102(9), and that the contract should have been properly awarded to 3A's, as the lowest responsive and responsible bidder. Our review of CHC's selection justification showed no valid grounds to deny the contract award to 3A's. CHC did not raise any responsiveness or responsibility issue against 3A's, and also failed to show a reasonable basis for the selection of SMC, the next low bidder.

Because award to SMC violated the CNMI-PR, SMC's contract is not valid under CNMI-PR Section 1-107, and therefore none of the contract provisions apply. As regards the Appellant's appeal for remedy, we find this argument to be moot since the P&S Director's decision had in fact awarded SMC appropriate remedies under Section 5-103(2)(a)(ii) [Remedies after an award]. We find nothing in this case that would outweigh the benefit of awarding the contract to the lowest responsive and responsible bidder in compliance with the CNMI-PR.

## **PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

On December 20, 1999, the DPH Secretary and the P&S Director thru ITB-00-0017 solicited bids for outside ground maintenance services at specified DPH locations, including the CHC. On January 11, 2000, bids received were opened as scheduled by the P&S Director and were turned over to DPH for evaluation. On February 2, 2000, the P&S Director notified all bidders that SMC had been selected for contract award.

On February 16, 2000, the contract was formally awarded to SMC (Contract no. 342413-OC). On the same date, 3A's filed a protest against the award to SMC, claiming that it should have been awarded the contract since it submitted the lowest bid. On April 6, 2000, the P&S Director sustained 3A's protest (Protest Decision No. P&S 00-008) after determining that the award to SMC violated CNMI-PR Section 3-102(9) - the provision requiring contract award to the lowest responsive and responsible bidder. In its protest decision, P&S determined that 3A's bid, even though the lowest among the bids, was erroneously omitted from the initial ranking made by CHC. Accordingly, P&S ordered the termination of SMC's contract under CNMI-PR Section 5-103(2)(a)(ii), and the award of a new contract to 3A's under ITB-0017.

### **The Protest and Subsequent Appeal to OPA**

After a week, on April 14, 2000, SMC filed a protest<sup>1</sup> against the P&S Director's decision. SMC argued that it was the "most responsive and responsible bidder" in this solicitation based on CHC's selection justification, citing CHC's concern about 3A's number of employees. In addition, SMC stated that should P&S deny ratification of its contract, the contract should be terminated under the "termination for convenience" clause<sup>2</sup> because a valid contract was already in effect.

On April 26, 2000, the P&S Director denied SMC's protest (Protest Decision No. P&S 00-009). P&S pointed out that award under CNMI-PR Section 3-102(9) is not based on who is the "most responsive and responsible" but rather the "lowest responsive and responsible" among the bidders. P&S maintained its prior decision (P&S 00-008) that 3A's was the lowest

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<sup>1</sup> Prior to filing this protest with P&S, SMC had filed an appeal with OPA from the April 6, 2000 P&S decision (Decision no. P&S 00-008) which sustained 3A's protest. However, OPA determined that under the CNMI-PR, only 3A's as the party who submitted the protest had the right to appeal the April 6 P&S decision. OPA recommended that SMC file first its own protest with P&S before initiating an appeal to OPA, as outlined in the CNMI-PR. Accordingly, SMC filed its protest with P&S on April 14, 2000.

<sup>2</sup> Under §13 of Contract no. 342413-OC, when the interest of the Commonwealth so require, the P&S Director may terminate the contract in whole or in part for the Commonwealth's convenience. Under this mode of termination, SMC may be entitled to compensation, including but not limited to, "contract prices for supplies or services accepted under the contract" should SMC fail to file a claim within one year from the effective termination date. In contrast, under CNMI-PR Section 5-103(2)(a)(ii), compensation shall be for actual expenses incurred under the contract, plus reasonable profits, prior to termination.

responsive and responsible bidder in this solicitation, having addressed all the ITB requirements as well as CHC's concern as to the number of personnel. As regards the application of the contract's termination for convenience provision, P&S stated that this provision did not apply because no valid contract has been formed. The P&S Director cited CNMI-PR Section 1-107 which states that "...no government contract is valid unless it complies with these regulations...."

On May 1, 2000, SMC appealed the P&S Director's protest decision to OPA. In its appeal, SMC claims that: (1) 3A's was not chosen by the selection committee as evidenced by the bid summary prepared by CHC; (2) 3A's is not the "most responsive and responsible bidder" because its bid was fraudulent and invalid, claiming that 3A's bid indicated that it had six employees although the certificate filed with the Worker's Compensation office showed only three employees; and (3) it is entitled to "remedies after an award" because it had a valid contract with the government and was not a party to any mistake that could have occurred.

In response to the appeal, the P&S Director states that: (1) the bid summary attached to SMC's appeal letter contains the initial ranking which erroneously excluded 3A's; (2) SMC misunderstood the term "average" number of employees, explaining that at any given time 3A's could have had 6 employees more or less; and (3) SMC is incorrect in claiming that P&S did not award any remedies because in fact a remedy was awarded in the protest decision under CNMI-PR Section 5-103(2)(a)(ii) in the protest decision.

OPA is issuing its decision on this appeal pursuant to 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 P&S Director's denial of SMC's protest against termination of its contract and the selection of 3A's for a new contract award are the issues of this appeal. We now discuss the arguments of SMC and P&S as presented in the protest and appeal process, including our comments on the merits of the arguments.

### **SMC's Arguments in its Protest to the P&S Director**

In its April 14, 2000 protest letter, SMC disputed the conclusions reached by P&S in its protest decision (P&S 00-008) which overturned its contract award and made the award to 3A's instead. SMC claimed that it was the "most responsive and responsible bidder" based on CHC's selection justification. This selection justification<sup>3</sup> stated that it was in the best interest

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<sup>3</sup> OPA obtained a copy of the selection justification from the P&S file stamped "received" by P&S on February 2, 2000, and it contains, among other information: (1) the names of contractors with their bid

of the Commonwealth to select SMC over 3A's despite the latter's lower bid price because (1) it was not cost effective to select a new contractor who lacked full knowledge of the project and its complexities, and (2) 3A's had only three employees based on its Workers' Compensation Certificate and in addition failed to provide a listing of its personnel. The justification stated that for these reasons, 3A's "may faced[sic] difficulties performing the required project requirements."

In addition, SMC responded to one of the P&S Director's conclusions [item no. 2 of P&S Decision No. P&S 00-008, page 5] by asserting that should P&S finally deny ratification of its existing contract, then the contract provision on "termination for convenience" should apply. As mentioned earlier, this provision establishes detailed compensation procedures for bidders whose contracts are terminated in the best interest of the Commonwealth.

### **P&S Director's Decision on the Protest**

The P&S Director denied SMC's protest, pointing out that the basis for award is the "lowest responsive and responsible bidder," not the "most responsive and responsible bidder" as SMC claimed. The P&S Director reiterated his determination in the prior protest decision that 3A's was the lowest responsive and responsible bidder in this procurement. He explained that 3A's bid contained the lowest money offer and conformed in all material respects to the invitation for bids. The P&S Director found 3A's bid an unequivocal offer to perform the ITB terms in all important respects such as price, quantity, delivery and schedule. He emphasized that the published ITB never asked bidders to respond to any specific manpower requirement.

The P&S Director argued that the number of personnel is a responsibility item which refers to the bidder's ability and willingness to meet contract requirements and could be determined at the time of award. He claimed that CHC made no effort to probe 3A's responsibility as required by the regulations because its intention was to give the contract to its existing contractor. The P&S Director stated nonetheless that 3A's had been determined to be a responsible bidder based on the interviews his office conducted.

As to the applicability of termination for convenience, the P&S Director stated that none of the terms or conditions (including the termination provision) applied because the contract was determined to be in violation of CNMI-PR Section 3-102(9)[Award]. To support his argument, the P&S Director cited CNMI-PR Section 1-107 which states that "...No government contract is valid unless it complies with these regulations."

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amounts; and (2) justification for selecting SMC over the lowest bidder, 3A's. There was no indication, however, as to who prepared the justification whose heading states "Commonwealth Health Center."

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

In its appeal to OPA, SMC disputes the conclusion that 3A's was the "most responsive and responsible bidder" for this procurement, claiming that: (1) 3A's was not selected by CHC's selection and evaluation committee, as evidenced by the bid summary<sup>4</sup>; and (2) 3A's bid was fraudulent and invalid for stating that it had six employees although it reported only three employees to the Workers' Compensation office.

In addition, SMC asserts that it has a valid contract and is entitled to "Remedies After an Award." While acknowledging that its contract "is probably voidable," SMC declares that it is "confusing" to declare its contract invalid because: (1) there was a meeting of minds between the authorized representatives; and (2) the contract was not entered into fraudulently or for any unlawful purpose. SMC states that it was not a party to any mistake that the Government (or any of its agencies) may have committed, and therefore should be entitled to "Remedies After an Award."

## **P&S Director's Report on the Appeal**

In response to SMC's appeal, the P&S Director clarifies that the bid summary attached to SMC's appeal contains the initial ranking which erroneously excluded 3A's. He states that the circumstances surrounding this error were fully explained in Protest Decision No. P&S 00-008, adding that it was entirely inappropriate for SMC to rely on a superseded document.

As regards the issue of remedies after award, the P&S Director asserts that SMC's claim that it was not granted remedies is incorrect. P&S clarifies that although it denied SMC's request in its protest for a "termination for convenience," it did not withdraw its ruling on Protest Decision No. P&S 00-008, particularly its statement that: "...Accordingly, we terminate the contract with Sen Mauleg pursuant to CNMI-PR Section 5-103(2)(a)(ii). The requirement for compensation for actual expenses incurred, and a reasonable profit prior to termination are satisfied by the existing reimbursement agreement in the contract...."

## **OPA's Comments**

This appeal raises what we believe is an issue that needs to be clarified first in this decision. SMC, while conceding that its contract with DPH is "voidable," appears to question the P&S Director's finding that its contract is not valid. It claims that the elements of a contract are present in its service agreement with DPH. Accordingly, our discussion will first focus on whether SMC's contract with DPH (Contract no. 342413-OC) is valid or not.

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<sup>4</sup> This initial summary does not include 3A's among the bidders and shows SMC as the lowest bidder for this solicitation.

## Whether SMC's Contract is Valid

In seeking a remedy for its contract termination, Appellant asserts that it holds a valid contract because there was a meeting of minds and the contract was not entered into fraudulently or for any unlawful purpose. Appellant claims that its contract will be breached should P&S deny it remedies. In his protest decision, however, the P&S Director explains that because award to SMC violated the CNMI-PR, SMC's contract is no longer valid and therefore none of the contract provisions (including contract termination) apply, citing CNMI-PR Section 1-107.

We agree with the P&S Director. As stated in CNMI-PR Section 1-107 [Validity of Contract], no government contract which is covered by the CNMI-PR<sup>5</sup> shall be valid unless it complies with those provisions. In a previous appeal decision, we have stated that the government has the right to void contracts made in violation of a statute or regulation<sup>6</sup> having the force and effect of law. [*In re requests for reconsideration of OPA appeal decision filed by JWS Air Conditioning & Refrigeration and the CNMI Public School System*, BP-A014.1, May 18, 1998]. It is clearly established that a contract covered by the CNMI-PR may properly be held invalid if it fails to comply with the CNMI-PR.

Although SMC's contract was declared invalid under Section 1-107, the P&S Director terminated the contract and granted the required remedy in compliance with the CNMI-PR. SMC's contract was terminated pursuant to CNMI-PR 5-103(2)(a)(ii) [Remedies After an Award], after the Director found a violation of CNMI-PR Section 3-102(9) for failure to award the contract to the lowest responsive and responsible bidder.

We believe CNMI-PR Section 1-107 is critical in safeguarding the quality and integrity of the Commonwealth procurement system because it gives the government ample authority to pursue procurement violations even after contract award. Our review showed that the contract awarded to SMC recognizes this important point. The first section of Contract no. 342413-OC provides that:

*“Regulations Controlling: This contract is null and void if either the procurement processes or contract execution fails to comply with the CNMI Procurement Regulations. Commonwealth Register Vol. 12 No. 9 (September 15, 1990). Any procurement action of a government official or employee in violation of said regulations is not authorized by the government and is an act for which the government will not take responsibility or be liable for in any manner....”* [Emphasis added].

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<sup>5</sup> Section 1-201 defines “contract” to cover all types of agreements, regardless of what they may be called, for the procurement of supplies, services, or construction.

<sup>6</sup> Although the regulations governing this appeal decision are the Public School System's Procurement Regulations (PSSPR), the prior ruling would also apply in this case since the PSSPR are similar to the CNMI-PR.

## **Violation of the CNMI-PR**

We agree with P&S that award to SMC violated CNMI-PR Section 3-102(9) because SMC was not the lowest responsive and responsible bidder. P&S's review showed that 3A's was erroneously excluded from the initial evaluation by CHC which led to the improper award of the contract to SMC, the next lower bidder. Even after considering 3A's lower bid, SMC was still selected for award mainly because the selection justification cited SMC's exemplary performance as a ground maintenance contractor for CHC. However, after reviewing CHC's selection justification, P&S concluded that contract award should have been made to 3A's.

In determining whether award to the next lower bidder (SMC) violated the CNMI-PR, our review focuses on CHC's selection justification since this document formed the basis for the initial contract award to SMC. We will not review the issue of the omission of 3A's bid from CHC's initial evaluation since it is unquestioned that 3A's did submit a bid which was the lowest in amount. We believe that the initial omission of 3A's bid is a moot issue in the resolution of this appeal.

CHC's justification also stated that 3A's edge on bid price was not that significant in selecting a new contractor without full knowledge of the project and its complexities. CHC stated that "...in deciding, technical and cost factors are considered significantly important but must be equally balance[sic] by realistic cost in performance, operation continuity, and uninterrupted work..." We do not find this a valid justification to deny contract award to the lowest responsive and responsible bidder. CHC did not raise any issue of responsiveness or responsibility in its justification to support selection of the next lowest bidder. Again, the basis for selection under the sealed bidding method is the lowest responsive and responsible bidder, and not through performance cost, operation continuity, and uninterrupted work as claimed in CHC's justification.

Our review of the ITB package showed that 3A's fully responded to the ITB requirements and made an unequivocal offer to perform the requested service based on the ITB's scope of work. Denying a low bidder the award because he does not possess "full knowledge" of the project such as the current contractor has is not a proper basis for disqualification under this procurement. We agree with the P&S Director that replacement of a long-time contractor is inevitable under public contracting where the government's requirements are obtained through fair competition. In addition, CHC was concerned about the continuity of operations if its contractor for grounds maintenance were changed. We do not see how the project turnover could be very complicated in case a new contractor were to be selected. The project does not involve highly technical skills or functions to warrant concern by CHC.

Also, CHC faulted 3A's for not providing a listing of current employees, and for claiming that it had six employees while reporting only three in its Workers' Compensation Certificate. CHC evaluators stated in the justification that 3A's might face difficulty performing the project requirements because of these discrepancies. In its appeal, SMC added that the failure

of 3A's to provide the correct information made its bid fraudulent and invalid. However, the failure of 3A's to provide a listing of employee names does not warrant such a conclusion. CNMI-PR Section 3-102(1)(f) requires IFBs to include a purchase description in sufficient detail to permit full and open competition and allow bidders to properly respond. Our review of the ITB package showed that listing employee names was not required or even mentioned in the ITB package. Like the P&S Director, we believe this item should have been explicitly included in the published ITB or thru an ITB amendment if it was to be considered material to the solicitation. Our review showed that DPH did not issue an amendment to include this item among the requirements. Accordingly, 3A's could not be held at fault because it would be unreasonable to expect 3A's or any other bidder to submit an item not expressly required in the solicitation. An agency may not properly reject a bid for failing to comply with a requirement not set forth in the solicitation. [*Matter of Tri Tool, Inc.*, B-265649.2, January 22, 1996].

In addition, there was no ITB requirement for the specific manpower needed to perform the project. Section V of the ITB Package (ITB00-0017) listed the information that must be included in the bids, and the only required information in the bid package which related to employees was the "average" number of employees in the last three years. 3A's did submit this requirement, and indicated that it had an average of six employees for the last three years. Under the sealed bidding method, a bid may be invalidated or rejected if it fails to include a material solicitation requirement. In this case, 3A's complied with all the material requirements and Appellant provided no valid evidence to contradict that. The published ITB neither specified nor implied a requirement for a minimum number of employees. Thus, CHC could not properly disqualify 3A's bid for non-responsiveness where the requirement in question was not a material solicitation requirement.

CHC claimed in its justification that because 3A's had only three employees (based on its workers' compensation certificate), it could face difficulty in performing the project requirements. Although we have determined that the "average" number of employees cannot be a responsiveness issue, it may properly become an item for responsibility determination. Section 3-301(e) of the CNMI-PR requires that a prospective contractor must "have the necessary organization, experience and skills, (*or the ability to obtain them*)..." [Emphasis added]. In this case, however, there has been no determination that 3A's is a non-responsible contractor. Even SMC's appeal does not provide specific evidence to support the contention that 3A's is a non-responsible contractor. Nevertheless, we believe that a responsibility determination should also consider the contractor's ability to obtain the needed resources (manpower in this case). There has been no determination that 3A's does not have the ability to obtain needed manpower.

SMC argues that the discrepancy between the number of employees stated in the bid and listed in the workers' certificate made 3A's bid fraudulent and invalid. This alleged discrepancy does not make the bid fraudulent or invalid. We find it unreasonable for SMC to compare the "average" number of employees for the last three years with the current number

of employees (as shown in the Worker's Compensation Certificate). We agree with the P&S Director that 3A's could have had more than three employees at any time during the three-year span regardless of the smaller number listed in the Workers' Compensation Certificate, and therefore, an average of six employees as stated in 3A's bid would have been possible. SMC's appeal does not persuade us that the alleged discrepancy constituted fraud.

### **Remedies at Contract Termination**

We affirm the P&S Director's finding that award to SMC violated CNMI-PR 3-102(9). The contract for this solicitation should have been properly awarded to 3A's as the lowest responsive and responsible bidder. We now review the remedies provided to SMC by P&S.

In its appeal, SMC acknowledges that its contract is probably voidable "but certainly not without remedies." Appellant claims that since it was not a party to any mistake that occurred, it should be awarded "Remedies After an Award<sup>7</sup>." We find this appeal argument to be moot since the P&S Director's decision clearly awarded SMC appropriate remedies under Section 5-103(2)(a)(ii)[Remedies After an Award].

There are only two available remedies under the CNMI-PR for contract awards determined to be in violation of law or regulation where the person awarded the contract has not acted in bad faith [Section 5-103(2)(a)]. These remedies are: (i) the contract may be ratified and affirmed, 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. In his Protest Decision No. P&S 00-008, the P&S Director awarded SMC the second remedy.

The P&S Director favored maintaining integrity and confidence in the Commonwealth procurement process, and therefore chose to award SMC the second remedy. We find this remedy appropriate because there is nothing in this case which would outweigh the benefit of awarding the contract to the lowest responsive and responsible bidder in compliance with the CNMI-PR.

### **DECISION**

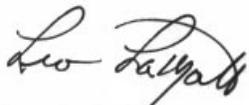
The Office of the Public Auditor *denies* the appeal. As stated above, we affirm the P&S Director's determination that award of the contract to SMC violated CNMI-PR Section 3-102(9). SMC was not the lowest responsive and responsible bidder for this procurement. We also affirm the P&S Director's decision to terminate SMC's contract under Section 5-

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<sup>7</sup> The remedy stated by SMC is exactly the same one provided in the CNMI-PR for contracts determined to be in violation of law or regulation.

103(2)(a)(ii) and properly award a new contract to 3A's. Termination of SMC's contract should be done as soon as possible, as should the award of a new contract to 3A's.

Section 5-102(9) of the CNMI-PR provides that the appellant, any interested party who submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than 10 days after the date of this decision.



Leo L. LaMotte  
Public Auditor, CNMI

July 12, 2000