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Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
ROSARIO B. ALDAN

)
) ITB00-0054
) DECISION ON APPEAL
) No. BP-A023
)

SUMMARY

This is an appeal by Rosario B. Aldan, represented by her legal counsel Joseph Aldan Arriola, from the failure of the Director of Procurement and Supply (P&S) to decide on her protest on the CNMI Nutrition Assistance Program's (NAP) solicitation for issuance agents. The P&S director directed the cancellation of ITB00-0054 after determining that it violated CNMI-PR Sections 3-201(1) and 3-102(f). This led the P&S director to nullify Aldan's protest and all her protest grounds. In her appeal, Aldan made a number of allegations, including a claim that the P&S director acted beyond his authority in cancelling an "award." In addition, Aldan alleges that the P&S director and one of the bidders, Nora Sablan d.b.a. Anaks, are close relatives, thereby creating a conflict of interest.

We *deny* the appeal. Our review showed that (1) the P&S director has a valid basis and the authority to cancel ITB00-0054 under Sections 3-201(1) and 3-102(1)(f), because ITB00-0054 failed to sufficiently describe the needs of NAP to allow bidders to properly respond to its solicitation, and (2) Aldan failed to present any evidence to establish that Nora Sablan is an immediate family relative to the P&S director, as defined under Section 6-101(6). As a result of the cancellation of ITB00-0054 and the decision to re-issue a new solicitation for this procurement, Aldan's appeal, together with all her other appeal grounds, becomes moot.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In April 2000, P&S, thru ITB00-0054, solicited contractors for printing, issuance and redemption of food coupons for NAP under the Department of Cultural and Community Affairs (DCCA). Interested parties were directed to the Division of Public Lands (DPL) office in As Lito for copies of scope of work.

On May 2, 2000, the scheduled bid opening date, P&S received 4 bids for issuance agent, 2 bids for printing agent, and 1 bid for redemption agent, for a total of 7 bids. All the bids were

picked up on the same date by a representative from NAP for evaluation. On August 15, 2000, the DCCA secretary submitted to the P&S director draft contracts for the three selected agents for its approval. It included the contract for its selected issuance agent¹, Elizabeth Tenorio d.b.a. Spinners.

On August 23, 2000, the P&S director disapproved the proposed award to Spinners because there were two other bidders who submitted lower bid amounts than Spinners. DCCA initially rejected those two bidders, Nora Sablan d.b.a. Anaks and Rosario B. Aldan (hereinafter “Aldan”), for failure to submit certain bid information. The P&S director, however, stated that the information lacking was not in the scope of work, and can be addressed in the letter of intent to award a contract. The P&S director then informed the DCCA secretary that, absent any compelling objections from DCCA, he would select the winning bidder between Anaks and Aldan by flipping a coin.

In his reply dated September 5, 2000, the DCCA secretary sought the reversal of P&S’s decision, stating that the bid amount is not the only determining factor in bid selection. He said it should also include the outcome of the on-site physical inspection, bidder’s reputation and integrity. The DCCA secretary emphasized that it has been DCCA’s standard evaluation procedure for the past 18 years. He stated that NAP cannot rely solely on the lowest bid in making selection, considering that one of the two tied bids has been altered without proper initials.

On September 14, 2000², P&S went ahead with its plan of flipping a coin to break the tie between Anaks and Aldan. According to the P&S director, it was done in the presence of the NAP administrator, Anaks representative, Aldan and her legal counsel. After the coin toss, it was determined that Anaks will get the contract for NAP issuance agent. On September 15, 2000 the P&S director, with the concurrence of the DCCA secretary, began processing the issuance agent contract for Anaks.

The Protest and Subsequent Appeal to OPA

On September 15, 2000, Aldan, through her legal counsel, filed a protest with P&S citing the following grounds:

- (1) Anaks had visibly altered her bid amount on the bid form [to equal Aldan’s bid], which puts into question whether Aldan’s bid remained sealed “until the contract at issue was awarded.”

¹ Since the subject protest pertains to the issuance agent solicitation, the succeeding discussion will focus on this particular procurement.

² Based on the information provided by the Director of Procurement and Supply.

- (2) Anaks owner is the close relative of the P&S director, thus the P&S director had a duty to recuse himself from the procurement.
- (3) Conduct of a coin toss to select the winning bidder is an arbitrary method of decision making. Contracts should be awarded on rational and appealable grounds.
- (4) NAP administrator specifically recommended Aldan for contract award based on Aldan's quality of service, but the P&S director ignored this recommendation.
- (5) Numerous witnesses can attest that Anaks' bid was visibly altered. The P&S director failed to act in good faith as required under CNMI-PR Section 1-104 when he did not address the "potential bid tampering."

Finally, Aldan claimed that "the contract awarded" to Anaks is voidable for failure to comply with CNMI-PR Section 1-107. As remedy, Aldan requested the P&S director to, (1) cancel the contract award to Anaks and begin the bidding process de novo, or (2) order the contract award to her.

On October 12, 2000 the P&S director notified the DCCA secretary and Aldan, through separate letters, that it had cancelled ITB00-0054 under CNMI-PR Sections 3-201(1) and 3-102(f). The P&S director stated that ITB00-0054 contains ambiguous and inadequate specifications to permit full and open competition to allow bidders to properly respond. The P&S director directed DCCA to resubmit a new ITB which would list all material government requirements. At the same time, he advised Aldan that because of the ITB cancellation, its protests against award to Anaks was nullified. For this reason, P&S did not address the issues raised in Aldan's protest except the conflict of interest issue, which it dismissed for lack of evidence.

On October 23, 2000, Aldan, through her legal counsel, filed an appeal citing a failure of P&S to act on its protest. Aldan states that P&S's failure to address the majority of its protest grounds is tantamount to a failure to act under CNMI-PR Section 5-102 (Appeals of Chief's Decision to the Public Auditor). Aldan claims that the P&S director's decision to nullify ITB00-0054 is a "smoke screen" in order to shield his activities from scrutiny.

In her appeal, Aldan reiterated the issues raised in the protest and, in addition, claims that the P&S director acted beyond his authority in cancelling "the award." Aldan states that Section 3-201 refers only to cancellation and rejection of bids and proposals, and not cancellation of awards. Aldan's appeal states that "the act of awarding the bid to a bidder is an appealable decision, not a voidable 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

We now discuss the arguments of Aldan and P&S as presented in the protest and appeal process, including our comments on the merits of the arguments. In summarizing the protest and appeal arguments, we combined those arguments which we believe are interrelated.

Aldan's Arguments in its Protest to the P&S Director

Aldan raised three main issues in her protest, namely, (1) Anaks' bid was altered to equal Aldan's, (2) conduct of a coin toss in selecting the winning bidder is arbitrary, and (3) the P&S director and the owner of Anaks are close relatives.

First, Aldan alleged that Anaks' initial bid amount was "whited-out," and was replaced with a bid amount identical to Aldan's. She claimed that there are numerous witnesses who can attest to this. According to Aldan, changing the initial bid amount should be made with the prior approval of the P&S director, and with a method of alteration other than "white-out" so that the preceding bid is still visible. Aldan stated that the P&S director failed to act in good faith (under Section 1-104) when he proceeded with the bid selection without addressing the "potential bid tampering."

Second, Aldan stated that the contract should be awarded on rational and appealable grounds, not through tossing of a coin. Aldan asserted that this method is arbitrary, and is not provided for in the CNMI-PR. She claims that the P&S director should have instead looked at other rational factors, similar to what the NAP administrator recommended. Aldan stated that the NAP administrator made a specific recommendation to award the contract to them based on rational tangible criteria, i.e., parking facilities. She claims that this is the secondary method of "contract allocation" after bid amounts are considered.

Finally, Aldan alleged that the owner of Anaks and the P&S director are close relatives, creating an ethical conflict. Although she did not present any form of evidence, Aldan asserted that the director should have recused himself from the contract awarding process.

Aldan claimed that the contract award to Anaks is voidable under CNMI-PR Section 1-107. As a remedy, Aldan requested either (1) the cancellation of the contract award and to begin the bidding process de novo, or (2) awarding the contract to her.

P&S Director's Action

On October 12, 2000, the P&S director ordered the cancellation of ITB00-0054 under Sections 3-201(1) and 3-102(f), citing inadequacy and ambiguity of ITB specifications. The P&S director directed DCCA to reject all bids received from the initial solicitation, and to re-issue another ITB that would contain all material government requirements. It should be

noted that the action by the P&S director is similar to one of the remedies sought by Aldan in her protest.

Because of the ITB cancellation, the P&S director nullified Aldan's protest, together with the protest grounds raised therein. As regards the conflict of interest issue, however, the P&S director denied the allegation, claiming that it was only in the bid opening that he first met Nora Sablan. The P&S director stated that Aldan offered no evidence to show that Ms. Sablan falls within the definition of immediate family under Section 6-101(6).

Aldan's Arguments in her Appeal to the Public Auditor

Aldan appealed the P&S director's action, and asks OPA to reverse his decision and redirect the contract award to them. Aldan stated that the P&S director has no authority to cancel an award once it has been made. She claims that the CNMI-PR Section 3-201 cited by the director only pertains to cancellation of bids and proposals, not contract awards. She claims that the cancellation was done as a "smoke screen" to cover the P&S director's alleged wrongdoing listed in her protest. Aldan states that the P&S director's failure to hear all her protest grounds is tantamount to a "failure to act," thus giving her a valid basis to file an appeal with OPA under Section 5-102.

Additionally, Aldan restates all the arguments raised in the protest, and supplements her contention on the conflict of interest issue. In response to the P&S director's comment on the ethics issue, Aldan states that "[w]hile Ms. Sablan may not be an immediate relative, she consanguineally[sic] close to the Chief making it a *potential conflict of interest*." She states that under Section 6-204(2), the employee in conflict should promptly disqualify himself from further participation in a procurement upon discovery of an actual or potential conflict of interest. Aldan adds that the P&S director is required to conduct himself in a manner as to foster public confidence in the integrity of the government procurement system, citing Section 6-201(2).

P&S Director's Report on the Appeal

In his report on the appeal, the P&S director states that it is not logical for Aldan to assert a "failure to act," and use it as a basis for appeal because the solicitation against which Aldan had protested no longer exists. He recommends that the appeal be rejected for failure to establish that the protest was denied, or that P&S has failed to act on it within the specified time.

On the other hand, the P&S director states that should OPA determine that his October 12, 2000 letter qualifies as a protest decision, he recommends that Aldan's appeal be denied. The P&S director asserts that P&S (1) has the authority and responsibility to cancel ITB00-0054, and (2) has no obligation to respond on issues that are already irrelevant. The P&S director states that Aldan misunderstands CNMI-PR Section 3-201, pointing out that it clearly gives

the P&S director authority to cancel a solicitation. He adds that it was done on his own initiative by virtue of his oversight responsibility under CNMI-PR Section 2-103.

As regards Aldan's allegation pertaining to the cancellation of an award, the P&S director clarifies that no award had been made on this procurement. According to the director, this allegation is erroneous because all that had occurred on this procurement was the determination of the lowest bidder by coin toss, and the following had not been made: (1) determination of bidder's responsibility under Section 3-301, and (2) presentation of a contract with all the required government signatures to the selected bidder under Section 3-102(9)(b). He emphasizes that the presentation of the contract to the selected bidder is the only recognized method of award notification in the CNMI-PR, and this had not been made.

OPA's Comments

Although Aldan raises a number of issues in this appeal, we will first resolve the conflict of interest issue raised by Aldan in her protest and appeal, since this hinges on the integrity of this procurement and the actions taken by the P&S director.

Whether the P&S Director has a Conflict of Interest

In her protest, Aldan claims that the P&S director and Nora Sablan are close relatives. The P&S director denied this claim, stating that it was only in the bid opening that he first met Nora Sablan. Aldan then modified her claim in the appeal by stating that Nora Sablan may not be an immediate relative, but Nora Sablan is consanguineously close to the Chief, making it a potential conflict of interest. In both her protest and appeal, Aldan did not provide any form of evidence to support her claim.

CNMI-PR Section 6-204 (1)(a) prohibits employees to participate directly or indirectly in the procurement when the employee knows that he or any member of the employee's immediate family has a financial interest pertaining to the procurement. CNMI-PR Section 6-101(6) has clearly defined immediate family by limiting it to spouse, children, parents, brothers and sisters. There was no evidence to show that Nora Sablan falls within this definition, and Aldan admits this in her appeal.

Notwithstanding this, Aldan claims that there is a "potential" conflict of interest, because the P&S director and Nora Sablan are consanguineously related, or related by blood. While Nora Sablan may somehow be related to the P&S director, the evidence does not show that they are close enough to violate the CNMI-PR. Again, the CNMI-PR has clearly limited the degree of relationship that would create an actual or potential conflict of interest to spouse, children, parents, brothers and sisters. We have no reason to believe that Nora Sablan falls within that definition.

Whether the P&S Director's Action to Cancel the ITB is Reasonable

Appellant Aldan claims that the P&S director acted beyond his authority in cancelling what she claims was a contract award. She states that Section 3-201 only pertains to cancellation of solicitations and not contract awards.

First, we conclude that an award in this procurement has not been made. Section 3-102(9)(a) states that a 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. The section that follows specifies the method of notice to be by presentation of a contract to the bidder with all of the required signatures, and emphasizing that “[n]o other notice of an award shall be made.”

Our review of P&S files showed that a contract had been drafted for this solicitation prior to the ITB cancellation. However, it was not completed or was presented to Nora Sablan to effect the award under Section 3-102(9)(b). On the contrary, we note that Nora Sablan had been notified of the ITB cancellation and re-solicitation of this procurement by the P&S director's letter dated October 12, 2000. We found nothing in our review to show that award under Section 3-102(9) had been made.

Section 3-201 grants the P&S director authority to cancel an invitation for bids (ITB) or a request for proposals (RFP) in a number of conditions. In his October 12, 2000 memo to the DCCA secretary, the P&S director stated that ITB00-0054 was cancelled because of the inadequacy and ambiguity of specifications contained therein. He pointed out that the adequacy of the reception area size, parking spaces, liability insurance and surety bond, which were DCCA's basis for previously selecting the next lower bidder (Spinners), were not specifically defined. He stated that nowhere in the ITB or scope of work was the term “adequate” defined (as to numbers, sizes, dollar amounts). In addition, the P&S director stated that the ITB failed to give the number of NAP food coupon recipients that will be accommodated by the issuance agent.

The bid specification (or scope of work) issued by NAP for its issuance agent solicitation has three parts: (1) statement of work; (2) qualification criteria; and (3) completion dates. Under the statement of work, there were three subsections, namely, (a) background section, which gave brief information on the NAP food coupon program; (b) operational features, which provided guidelines in the issuance and redemption of food coupons; and (c) contractor responsibilities, which lists the duties of the issuance agent. It included the duty to maintain adequate premises (i.e., parking spaces, etc.) to accommodate the flow of all NAP food coupon recipients.

On the other hand the third part, which is the qualification criteria, listed five qualification requirements for bidders. These are as follows: (1) bidder should be located in Saipan, and is not authorized to print and redeem from participant households; (2) bidder must be

adequately bonded to protect against potential loss and theft; (3) bidder must have demonstrated ability to meet specified deadlines; (4) bidder must have no adverse records on file with regard to moral character or ability to perform; and (5) bidder must be an equal opportunity employer.

Our review of the August 11, 2000 memorandum from NAP, with subject heading “On-Site Inspection Reports for Issuance and Printing Agents and Recommendations for FY’01 Contracts and Request for Approval,” showed that Anaks and Aldan were previously disqualified mainly because NAP determined that the parking area, or the waiting area of the proposed issuance sites, were “too small” or “not big enough.” However, as noted by the P&S director, nothing in the bid package showed an estimate of the number of recipients to be served. It would be impossible for bidders to determine the adequacy of the proposed parking space or liability insurance if the ITB did not at least provide an estimated number of NAP food coupon recipients or the amount of food coupons to be covered.

Solicitation requirements should always convey the specific needs of the agency, particularly when using the sealed bidding method. Without a sufficient purchase description (as required under Section 3-102(1)(f)), it would be unreasonable to expect that bidders can properly respond to NAP’s requirements or submit a responsive bid. Accordingly, we affirm the P&S director’s decision to cancel ITB00-054 under CNMI-PR Sections 3-201(1) and 3-102(1)(f). Additionally, we affirm that the P&S Director has the authority to cancel the invitation for bid under the CNMI-PR.

Since the primary object of this appeal, ITB00-0054, has been cancelled, Aldan’s appeal is thereby rendered moot. Accordingly, we need not address the other appeal issues raised by Aldan.

DECISION

The Office of the Public Auditor *denies* the appeal. The P&S director has valid basis and authority to cancel ITB00-0054 under Sections 3-201(1) and 3-102(1)(f). We have determined that ITB00-0054 failed to sufficiently describe the needs of NAP to allow bidders to properly respond to its solicitation. As a result of the cancellation of ITB00-0054 and the decision to re-issue a new solicitation for this procurement, Aldan’s appeal, together with all her other appeal grounds, became moot.

As regards the conflict of interest issue, we deny the allegation because (1) we have no reason to believe that Nora Sablan fall under the definition of “immediate family” under Section 6-101[6], and (2) Aldan failed to show any evidence to support her claim.

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.

A handwritten signature in blue ink, appearing to read 'MS Sablan', with a stylized, cursive script.

Michael S. Sablan
Public Auditor

January 25, 2001