



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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

2nd Floor J. E. Tenorio Building, Chalan Pale Arnold
Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 501399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

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

IN RE APPEAL OF
ISLAND BUSINESS SYSTEMS & SUPPLIES

)
) APPEAL NO. BP-A026
) DECISION ON APPEAL
) (Protest Decision No. 01-009)
)

SUMMARY

This decision is from an appeal filed by Island Business Systems & Supplies (IBSS) of the denial of its protest by the Director of Procurement and Supply (P&S) concerning a procurement of a medium volume copier for the Department of Public Health.

In its appeal, IBSS questioned P&S' decision to draw lots to break the tie between Xerox and IBSS. IBSS believes that copier speed is a valid and logical criteria in which to determine the selected vendor. IBSS further questioned P&S' use of competitive sealed bidding when bids were actually requested via facsimile and not published in the newspaper.

We deny the appeal. We find that IBSS' and Xerox' bids are equal, and that both companies' copiers meet the specifications. We hold that drawing by lots is appropriate in this case where there are equally low bids. P&S failed to comply with the CNMI-PR by not publishing the solicitation as required by the CNMI-PR, however, we find the issue irrelevant since no prejudice to IBSS was shown. In this particular instance, cancelling the solicitation or revising it to comply with the regulation would serve no useful purpose.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On June 8, 2001, upon request from the Department of Public Health, P&S solicited price quotations under ITB01-PHS-0073 for the purchase of a medium volume copier with the following specifications: (1) digital copier producing 32 to 40 copies per minute (cpm), with an automatic document feeder, stapler finisher, auto booklet making, pedestal, sorting capability, 4 trays, and networking functionality; (2) one year warranty on parts and labor, and quarterly maintenance for the first year; (3) maintenance coverage throughout the life of the equipment; (4) trade-in for an existing analog copier; and (5) budgetary limit of \$10,000. The solicitation of price quotations was transmitted by P&S via facsimile to three vendors on Saipan, namely: IBSS, Xerox Corporation, and National Office Supply.

P&S received sealed bids from the three vendors by the scheduled bid opening date of June 13, 2001. The bids were evaluated, and on June 14, 2001, P&S informed IBSS that it was the selected bidder in the procurement, and the two other bidders were informed that they were not selected.

On June 21, 2001, Xerox Corporation (Xerox) filed a protest with the P&S Director, claiming that it (Xerox) met every requirement of the bid, and still lost the bid for not being responsive. In its July 3, 2001 decision, the P&S Director granted Xerox' protest, ruling that Xerox is a responsive bidder. The P&S Director also ruled that since both Xerox' and IBSS' bids are equally low bids, the winning bidder will be selected by a drawing of lots.

On July 6, 2001, IBSS filed its protest on the P&S decision. The P&S Director denied IBSS' protest in its P&S Protest Decision 01-009, dated July 30, 2001.

On August 9, 2001, IBSS filed an appeal with the Office of the Public Auditor (OPA) on the P&S decision. On August 10, 2001, OPA informed the P&S Director of the filing of the appeal, and requested a complete report on the appeal, which P&S provided on August 17, 2001.

ANALYSIS

We now discuss the argument of IBSS and P&S as presented in the protest and appeal process, including our comments on the merits of the argument presented.

IBSS' Argument in its Protest to the P&S Director

On July 6, 2001, IBSS filed its protest with P&S objecting to its decision to rescind the notice of selection of IBSS, and the drawing of lots to break the tie. IBSS stated that:

1. IBSS challenged P&S' decision that CNMI Procurement Regulations (CNMI-PR) Section 3-102¹ (Competitive Sealed Bidding) was used in this procurement. IBSS alleged that this procurement should be governed by CNMI-PR Section 3-106¹ on Competitive Sealed Proposals, which states that award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the government, taking into consideration price and the evaluation factors set forth in the request for proposal.
2. It disagreed with the decision of drawing lots to break an alleged tie between IBSS and Xerox when all published specifications and quoted prices are equal. IBSS stated that it has an edge and should win the bid since its quoted copier is faster by 1 cpm.

¹ Reference in this case is made to the CNMI Procurement Regulations adopted on October 15, 1990 per Commonwealth Register Volume 12 No. 10.

P&S Director's Decision

On July 30, 2001, P&S issued its decision on IBSS' protest. In response to IBSS' argument, the P&S Director stated that:

1. IBSS and Xerox met the specification requirement of 32-40 copies per minute, therefore, both would be considered responsive in this procurement. It would be a violation of CNMI-PR Section 3-102(6)¹ (Bid Acceptance and Bid Evaluation) to break the tie between IBSS and Xerox on the basis that IBSS' bid is one copy per minute faster than Xerox', because there was no such requirement in the ITB.
2. Competitive sealed bidding is applicable to this procurement because revised CNMI-PR² Section 3-105(5) states that purchase of equipment in excess of \$2,500 shall be procured using competitive sealed bidding or other applicable provisions of the CNMI-PR. The use of competitive sealed proposals requires the official with expenditure authority (Secretary of Public Health) to determine in writing that competitive sealed bidding is not practical or advantageous to the government, and receives the approval of the P&S Director. This procedure was not invoked in this case.

IBSS' Argument in its Appeal to the Public Auditor

On August 9, 2001, IBSS appealed P&S Protest Decision 01-009 to OPA. In its appeal, IBSS raised the following issues:

1. IBSS questioned the use of competitive sealed bidding when bids were actually requested via facsimile instead of publication of notice in a newspaper of general circulation, as required in CNMI-PR Section 3-102(2)¹.
2. IBSS stated that its copier is faster than Xerox' by 1 cpm, and since this is a published specification, it should serve as a tie breaker in favor of IBSS.
3. IBSS stated that it disagrees with the decision to draw lots to break the tie. IBSS opposes using a method that is very clearly a game of chance when IBSS had worked hard on this procurement in order to give the Department of Public Health the most appropriate machine.

P&S Director's Report on the Appeal

In his report on the appeal dated August 17, 2001, the P&S Director emphasized that the drawing by lots is the appropriate way to determine the winning bidder in an "equal low bid"

² Reference is made in this case to the revised CNMI-PR adopted on May 24, 2001 per Commonwealth Register Volume 23 Number 5.

situation. A 1 cpm speed advantage is not an appropriate tie breaker when the specifications called for a range of speed, and all bidders met that specification.

On the issue of the faxed solicitation instead of a publication of notice in a newspaper of general circulation, the P&S Director stated that because it is a known fact that there are only three vendors in the CNMI selling and servicing copier machines, P&S ensured full and open competition by faxing the ITB to those vendors. The P&S Director also said that with this method, P&S had put all vendors capable of responding on notice of the solicitation, and thereby expedited the procurement process as well.

OPA's Comments

We now discuss the merits of the argument presented by IBSS in its appeal to OPA. We first focus on the appropriate procurement method, and then discuss the manner in which the winning vendor should be determined.

A. Appropriate Method of Procurement

P&S stated that competitive sealed bidding is the procurement method that was used. IBSS questioned the use of competitive sealed bidding, claiming that the procurement specification was actually transmitted to the vendors via facsimile instead of publishing it in a newspaper of general circulation, as required by revised CNMI-PR Section 3-102(6).

Analyzing the actual procurement process, we find that the procurement was conducted using a mixture of small purchase and competitive sealed bidding procedures. Small purchase quotations were solicited from the vendors under revised CNMI-PR Section 3-105(3), while a bid evaluation and selection was also conducted under revised CNMI-PR Section 3-102(9) and (10).

The appropriate procurement method in this case is competitive sealed bidding. Revised CNMI-PR Section 3-105(5) provides that any lease or purchase of machinery and equipment in excess of \$2,500 shall be procured pursuant to Section 3-102 (Competitive Sealed Bidding), unless another procurement method applies. We agree that the competitive sealed proposal method does not apply in this case, as it was not shown that bidding was either not practical or advantageous.

Since competitive sealed bidding is the appropriate procurement method, advertisement of the solicitation in a newspaper of general circulation is required per revised CNMI-PR Section 3-102(6).

By transmitting the solicitation to the three vendors via facsimile instead of publishing it in a newspaper of general circulation, P&S failed to comply with the revised CNMI-PR's public notice requirement. However, we find that faxing the ITB to the vendors instead of publishing

the notice in a newspaper of general circulation caused no harm to IBSS. Public notice would not change IBSS' position as one of the vendors provided with notice and an opportunity to compete in the solicitation. IBSS received timely notice of the solicitation and responded thereto. Therefore, IBSS cannot demonstrate any prejudice by use of the facsimile method of notice. Accordingly, we find this issue irrelevant.

B. Whether “Copy per Minute” Should be Used as a Tie-Breaker

To be considered for award under revised CNMI-PR Section 3-102 (10) (bid responsiveness), a bid must comply in all material respects with the invitation for bids. Since “copy per minute” was one of the specifications in the solicitation, the relevant question is how a vendor meets such requirement in order to be considered responsive. In this case, the specifications called for a range of copies per minute, and any bidder's machine falling within this range meets the cpm specification *equally* with all other bidders falling within the range. In the procurement for the DPH copier, P&S found that both IBSS' and Xerox' bids met the specifications of the ITB, therefore, both should be equally considered for award. Under the Federal Acquisition Regulations (FAR) Part 14, Section 14.408-6(b) (Equal Low Bids), if two or more vendors still remain equally eligible after considering small business and other business concerns, award shall be made by a drawing by lot limited to those bidders. Finding no issues raised as to these concerns, we agree that drawing by lots is the appropriate method to break the tie in this instance.

DECISION

The Office of the Public Auditor denies the appeal. We find that IBSS' and Xerox' bids are equal, and that both companies' copiers meet the specifications. We conclude that drawing by lots is appropriate in this case where there are equally low bids. Although P&S failed to comply with the CNMI-PR by not publishing the solicitation as required, we find the issue irrelevant since no prejudice was shown. In this particular instance, cancelling the solicitation or revising it to comply with the regulation would serve no useful purpose.

Section 6-102(9) of the revised CNMI-PR provides that the appellant, any interested party who submitted comments during consideration of the protest, the P&S Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request shall 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 10 days after the date of this decision.


Michael S. Sablan
Public Auditor

October 9, 2001