



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF  
WESTERN EQUIPMENT ML JOINT VENTURE

)  
) APPEAL NO. BP-A027  
) DECISION ON APPEAL  
) (Protest Decision No. 01-007)  
)

## SUMMARY

This decision is on the appeal filed by the joint venture of Western Equipment, Inc. and DRC Pacific, Inc. (WEI/DRC) from the denial of its protest by the Division of Procurement and Supply (P&S) Director pertaining to the construction of the Marpi Solid Waste Facility (Landfill Project) on Saipan under Invitation to Bid (ITB) No. DPW00-IFB-049.

In its appeal, WEI/DRC (1) asserts that the Department of Public Works (DPW) Division of Solid Waste Management (DSWM) Program Manager was biased against WEI/DRC and that at least an appearance of impropriety was created by his actions, and (2) questions whether Pacific Drilling, Ltd. (PDL) is capable of performing its part of the project and, if not, whether PDL's participation qualifies the Dick Pacific Construction/Pacific Drilling, Ltd. (DPC/PDL) joint venture for the local bidder preference. WEI/DRC seeks to overturn the notice of intent to award the project to DPC/PDL to protect the integrity of the procurement process and avoid injustice to WEI/DRC.

The Public Auditor grants the appeal in part. Based on our evaluation, we conclude that there is enough evidence of ill will or animosity between the DSWM Program Manager and DRC to question his participation in the evaluation of PDL's responsibility. In addition, it appears from the record that not all the appropriate factors under CNMI-PR Section 7-102(3) were considered in determining DPC/PDL's local preference status. Accordingly, the determination of DPC/PDL's responsibility and local bidder preference is remanded back to P&S with instructions as set forth in OPA's recommendations.

## PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On September 14, 2000, ITB No. DPW00-IFB-049 was issued jointly by the Department of Public Works (DPW) Secretary and the Procurement and Supply (P&S) Director for the construction of the Marpi Solid Waste Facility on Saipan. Five bids were received on the scheduled bid opening date of February 9, 2001. The lowest bidder was Black Micro Corporation,

but its bid was rejected on March 15, 2001 pursuant to CNMI Procurement Regulations<sup>1</sup> (CNMI-PR) Section 3-102(7)(b)(i). The next low bidder was the DPC/PDL joint venture, while WEI/DRC came in third.

On June 1, 2001, the DPW Secretary informed DPC/PDL of the government's intent to award the project to DPC/PDL. By letter dated June 13, 2001, the DSWM Program Manager informed the other bidders of the intent to award the project to DPC/PDL.

On June 22, 2001, WEI/DRC protested the government's intent to award the project to DPC/PDL. On June 28, 2001, the P&S Director, upon the recommendation of the DPW Secretary, made a determination of urgent and compelling circumstances allowing DPW to continue processing the contract for the project despite the pendency of WEI/DRC's protest. On July 2, 2001, DPC/PDL filed its comments on the protest. On the same day, WEI/DRC was notified of the P&S Director's determination to proceed with the award, and responded by filing on the same day a supplemental protest contesting that determination. By letter dated July 7, 2001, DPC/PDL filed its comments on the July 2, 2001 supplementary protest of WEI/DRC.

On August 10, 2001, the P&S Director issued a decision denying WEI/DRC's protest, and on August 24, 2001, WEI/DRC filed an appeal with the Office of the Public Auditor (OPA). On August 27, 2001, OPA notified P&S, and requested a complete report on the appeal. P&S' report was submitted on August 28, 2001. WEI/DRC and DPC/PDL submitted their comments on the P&S report to OPA on September 5 and 12, 2001, respectively.

On September 19, 2001, the DSWM Program Manager filed unsolicited comments on the appeal. Although the comments were untimely filed, OPA furnished WEI/DRC a copy and gave it an opportunity to respond.

On September 24, 2001, Harding ESE, the Construction Management (CM) contractor of the Landfill Project, filed unsolicited comments on the appeal. Although these comments were also untimely filed, OPA again gave WEI/DRC an opportunity to respond.<sup>2</sup> On October 10, 2001, WEI/DRC submitted its response to both unsolicited comments as a supplement to its appeal.

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<sup>1</sup> The procurement regulations referred to are the regulations adopted on October 15, 1990 (Volume 12 Commonwealth Register No. 10).

<sup>2</sup> Copies of the DSWM Program Manager's and Harding ESE's unsolicited comments were also furnished to all other interested parties.

## **ANALYSIS**

We now discuss the arguments presented in the appeal process, including our comments on the merits of these arguments.

### **P&S Director's Decision**

On August 10, 2001, the P&S Director denied WEI/DRC's protest. In his decision, the P&S Director ruled that:

1. The DSWM Program Manager's attitude toward DRC and its unsolicited proposal to close the Puerto Rico Dump (PRD) and construct the Marpi Landfill was objective and realistic, and no matter how WEI/DRC characterized the DSWM Program Manager's attitude toward DRC, there was no evidence that such attitude caused any harm to WEI/DRC in the bid process.
2. There was evidence supporting the determination that PDL was a responsible bidder.
3. There was evidence supporting the determination that PDL will perform at least 51% of the work on the Landfill Project (and thereby qualify for local preference).

### **WEI/DRC's Appeal to the Public Auditor**

On August 24, 2001, WEI/DRC appealed the P&S decision to OPA. In its appeal, WEI/DRC seeks to overturn the notice of intent to award the project to DPC/PDL to protect the integrity of the procurement process and avoid injustice to WEI/DRC. WEI/DRC (1) asserts that the DSWM Program Manager was biased against WEI/DRC and that at least an appearance of impropriety was created by his actions, and (2) questions whether PDL is capable of performing its part of the project and, if not, whether PDL's participation qualifies the DPC/PDL joint venture for local bidder preference.

#### ***DSWM Program Manager's Alleged Bias Is Objectively Evident and Created an Impermissible Appearance of Impropriety***

WEI/DRC states that the DSWM Program Manager's bias against DRC was apparent, P&S' rehabilitation attempt failed, and this bias created an impermissible appearance of impropriety such that the Program Manager should have been removed from all participation in the procurement. WEI/DRC argues that the DSWM Program Manager's bias is clearly evident in the following instances:

1. The January 29, 2001 Solid Waste Task Force (SWTF) meeting - WEI/DRC asserts that P&S attributed the DSWM Program Manager's misbehavior to his poor emotional state because of news of his father dying. However, WEI/DRC contends that this explanation does not

explain why DRC's Pacific Regional Manager was the direct focus of the Program Manager's outburst, or why he never made a personal apology for his misbehavior.

2. The June 5, 2001 MCV interview - WEI/DRC states that the DSWM Program Manager's failure to correct the reporter's offensive and defamatory allegation against DRC (that DRC had essentially stolen the Program Manager's plan) is not excusable for a government official in his position.
3. The DSWM Program Manager's June 13, 2001 memorandum to the SWTF members containing alleged defamatory statements against DRC - WEI/DRC argues that P&S admitted that some of the information and statements were very negative toward DRC, but then dismissed the memorandum by saying in effect that P&S gets this kind of misinformation all the time and can sort it out.

#### ***PDL's Alleged Non-Responsibility and DPC/PDL's Qualification for Local Bidder Preference***

On this issue, WEI/DRC contends that:

1. In P&S Protest Decision No. 01-007, P&S argued, without citation to authority, that since PDL or its partner could hire expertise, equipment and facilities, it met the responsibility requirement.
2. If PDL was not responsible, then DPC/PDL would not qualify for local bidder preference.
3. P&S, in its protest decision, did not discuss its investigation of PDL's responsibility as a government contractor.

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

In his report on the appeal dated August 28, 2001, the P&S Director recommends that the appeal be denied as being without merit, and provides the following response to the allegations in the appeal:

#### ***Whether the DSWM Program Manager's Alleged Bias Was Objectively Evident and Created an Impermissible Appearance of Impropriety***

The P&S Director argues that:

1. The contention that the alleged bias created an impermissible appearance of impropriety is totally without substance, should be rejected as pure conjecture, and is based not on WEI/DRC's bid on this procurement, but rather on the Program Manager's analysis and evaluation of DRC's unsolicited proposal to both close PRD and build the landfill.

2. Since WEI/DRC was not the low bidder, it was not subject to evaluation and review, and therefore any assertion that the DSWM Program Manager did not accord fair treatment to WEI/DRC is baseless.

***Regarding PDL's Alleged Non-Responsibility and DPC/PDL's Qualification for Local Bidder Preference***

On the issue of contractor responsibility, the P&S Director contends that:

1. His responsibility determination dated May 22, 2001 is on file, and shows that the rational and deliberate process undergone to reach that decision can hardly be characterized as arbitrary and capricious. Also, the responsibility information gathered in the review is and has been available for review by WEI/DRC since June 11, 2001.
2. The determination by the contracting officer that PDL could perform at least 51% of the work was reviewed and concurred with by the Attorney General's Office on May 30, 2001, and this is also available for review by WEI/DRC.

**WEI/DRC's Comments on the P&S Report**

On September 5, 2001, WEI/DRC submitted its comments on the August 28, 2001 P&S Director's report. WEI/DRC argues that:

1. The plain facts of the case make it obvious that the DSWM Program Manager was intimately involved in the selection process.
2. If the DSWM Program Manager was involved in the selection process, then his bias has tainted the procurement.
3. Regarding P&S's statement that the bias is separate from and irrelevant to the government's determination that DPC/PDL is a responsible bidder, WEI/DRC argues that the DSWM Program Manager's bias cannot be separated from his participation in this procurement and its evaluation and selection process.
4. If DPC/PDL is not responsible and not entitled to local bidder preference, then WEI/DRC would be the next low bidder.

**DPC/PDL's Comments on the P&S Report**

On September 12, 2001, DPC/PDL filed its comments on the P&S report. In its comments, DPC/PDL expresses its concurrence with all the arguments made by the P&S Director and supports the protest decision. DPC/PDL states that DPC, just like PDL, is also independently

entitled to local preference status based on the certification issued in response to its application for local business preference.

### **DSWM Program Manager's Unsolicited Comments**

On September 19, 2001, the DSWM Program Manager submitted his unsolicited comments to OPA on the issue of his alleged bias towards DRC. In his comments, the Program Manager states that:

1. There are two projects discussed throughout the appeal. One is the Marpi landfill construction and the other is the unsolicited proposal of DRC for the closure of PRD, operation of transfer station and landfill, and construction of port facilities (collectively referred to as DRC's unsolicited proposal).
2. His allegedly biased statements applied only to DRC's unsolicited proposals, and not to the joint venture bid.
3. His involvement in the responsibility review of DPC/PDL was limited to reviewing facts and analysis prepared by the DSWM Landfill Engineer and the Marpi Landfill Project Manager.
4. DPW's determination of responsibility was reviewed by P&S, while its determination of local preference was reviewed by the Attorney General's Office.

### **Harding ESE's Unsolicited Comments**

On September 24, 2001, Harding ESE submitted its unsolicited comments to OPA on the DSWM Program Manager's alleged bias towards DRC, DPC/PDL's responsibility, and the local preference issue. Harding ESE states its belief that the low bid process that led to the selection of DPC/PDL for the project was conducted fairly and in accordance with the regulations, that DPC/PDL met the definition of a responsible contractor, and that DPC/PDL has shown that it satisfies the local bidder preference requirements.

#### ***On DSWM Program Manager's Alleged Bias***

Harding ESE contends that the selection of the winning bidder is based on the lowest cost -- bias or lack of bias towards any of the bidders played no role in the bidding process. WEI/DRC's bid was not the lowest and therefore was set aside.

#### ***On PDL's Alleged Non-Responsibility and DPC/PDL's Qualification for Local Bidder Preference***

Harding ESE argues that the protest and appeal should focus on DPC/PDL's performance and resources, not just PDL's, and that DPC/PDL satisfied all concerns as to its ability to complete the project.

## **WEI/DRC's Response to the DSWM Program Manager's and Harding ESE's Comments**

On October 10, 2001, WEI/DRC submitted its response to the unsolicited comments of the DSWM Program Manager and Harding ESE, and presents the following rebuttals:

### *DSWM Program Manager's Denial of His Bias Towards WEI/DRC*

WEI/DRC challenges the DSWM Program Manager's denial of his bias towards WEI/DRC, citing the following evidence, information, and comments:

1. A statement from a DRC consultant describing three meetings he attended, along with the DSWM Program Manager and the DRC Pacific Regional Manager, from which he concluded that "it is clear to me that John Harder is biased towards DRC."
2. Contrary to his claim that comments from sources on Guam were mostly unsolicited, the DSWM Program Manager solicited disparaging information on DRC in anticipation that DRC might protest the award to DPC/PDL. WEI/DRC attached to its comments communications from the Program Manager to these Guam contacts soliciting information on DRC.
3. The DSWM Program Manager's statement that DRC copied DSWM's PRD closure plan and claimed it as its own is tantamount to saying that DRC stole the plan.
4. The DSWM Program Manager attempts to cover up facts indicating his bias, and the attempted cover-up becomes further evidence of bias. WEI/DRC claims that the DSWM Program Manager showers praises on DRC in his comments on the appeal, but disparaged DRC in his memorandum to the SWTF members. WEI/DRC questions whether the DSWM Program Manager was lying to the SWTF.
5. WEI/DRC states that it is meaningless to distinguish between bias towards DRC and its unsolicited proposal and bias towards WEI/DRC on its bid to construct the landfill. WEI/DRC further argues that the DSWM Program Manager never made this kind of distinction in his memorandum to the SWTF, where he spoke in general terms about "this . . . kind of firm" which "has its own agenda," in light of which "everything they say" must be considered.
6. WEI/DRC contends that bias towards WEI/DRC can, and in this case did, influence the determination of whether DPC/PDL is responsible. WEI/DRC claims that any person who is hostile to WEI/DRC, and knows that WEI/DRC will get the contract if DPC/PDL is disqualified, will be strongly motivated to find DPC/PDL qualified.

### ***Mistaken Evaluation of PDL***

WEI/DRC argues that:

1. Harding ESE and P&S did not consider any of the appropriate factors enumerated in the CNMI-PR in deciding whether a bidder qualifies for a 51% local partner status, such as (a) the amount of revenue to be received by each of the parties, (b) the amount of profit expected to accrue to each of the parties, (c) subcontracting plans or arrangements, (d) the amount of labor to be performed by the forces of each of the parties, and (e) other factors found to be relevant by the contracting authority or the Attorney General. Instead, the evaluators and P&S based their evaluation only on the monetary value of the work.
2. Even assuming that the monetary value could be one of the “other factors” cited in the CNMI-PR, it is at best secondary in importance to the percentage of labor. WEI/DRC quoted CNMI-PR Section 7-102(3)(a) which states, “when the procurement is for construction or other services, there shall be a presumption that the performance of work percentage requirement is not met if more than 49% of the labor will be performed by businesses that would not qualify for preference . . . ”

### **OPA’s Comments**

In its appeal, Appellant WEI/DRC (1) asserts that the DSWM Program Manager was biased against WEI/DRC and that at least an appearance of impropriety was created by his actions, and (2) questions whether PDL is capable of performing its part of the project and, if not, whether PDL’s participation qualifies the DPC/PDL joint venture for local bidder preference.

#### ***Effect of the DSWM Program Manager’s Appearance of Bias Towards DRC on DPC/PDL’s Responsibility Determination***

We cannot say that bias exists in this procurement; however, the appearance of ill will or animosity toward DRC’s representative is apparent. Such appearance sufficiently taints the selection process and compromises the requirements of fairness, good faith and good public policy prescribed by Sections 1-101 and 1-104 of the CNMI Procurement Regulations.

CNMI-PR Section 1-101(2) Purposes and Policies (in part).

- (c) to provide for increased public confidence in the procedures followed in public procurement;
- (d) to insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth;
- (g) to provide safeguards for the maintenance of a procurement system of quality and integrity.

## CNMI-PR Section 1-104 Requirement of Good Faith.

These regulations require all parties, including government employees, contractors and suppliers, involved in the negotiation, bidding, performance or administration of government contracts to act in good faith.

The determination of DPC/PDL's responsibility may very well be sound and justified. That determination, however, causes us great concern given the apparent ill will or animosity between the DSWM Program Manager and DRC. It is undisputed that the DSWM Program Manager participated in the determination of DPC/PDL's responsibility. His influence, if any, on others involved in the responsibility review of DPC/PDL cannot be determined; however, any direct involvement under circumstances of possible bias raises enough concern that the entire selection process becomes suspect.

In a memorandum to file dated May 15, 2001 bearing the subject, "Determination of Responsible Bidder, DPW00-ITB-049," the DSWM Program Manager clearly outlined his involvement in the determination of DPC/PDL's responsibility. He discussed his and Harding ESE's areas of concern and assessment of submitted information concerning DPC/PDL's responsibility and, based thereon concluded that DPC/PDL meets the requirements to be a responsible bidder under the CNMI-PR.

It is impossible to look into the mind of the DSWM Program Manager to determine whether or not he was actually influenced in evaluating DPC/PDL's responsibility. Lacking conclusive evidence that bias exists, we must view the entire record and evaluate the conduct of the parties using a reasonable person standard. Based on our evaluation, we conclude that there is enough evidence of ill will or animosity between the DSWM Program Manager and DRC to question his participation in the evaluation of PDL's responsibility. Based on his authority as program manager for the expenditure authority, any participation by him in a procurement where there is an appearance of bias, hostility, ill will or animosity against one of the bidders, makes the selection suspect. In order to cure such a defect, an independent re-evaluation of responsibility should be undertaken.

### ***Review of DPC/PDL's Local Bidder Preference Determination***

On August 28, 2001, P&S transmitted its file on this procurement, together with the protest-related documents, to OPA. Based on our examination of this file, we note that DPC/PDL's local bidder preference was determined by the DSWM Landfill Engineer, concurred in by Harding ESE on May 21, 2001, and reviewed by the Attorney General's Office on May 30, 2001.

One of the documents included in the P&S file transmitted to OPA on August 28, 2001 is a May 24, 2001 memorandum to file from the DSWM Landfill Engineer bearing the subject, "DPC/PDL Joint Venture - Scope of Work Percentage Breakout". In this memorandum, the DSWM Landfill Engineer explains how the scope of work percentage breakout between DPC and PDL was

computed. Also attached to the memorandum is a spreadsheet prepared by the DSWM Landfill Engineer on the computation made.

Our review of the computation made by the DSWM Landfill Engineer shows that the DSWM Landfill Engineer took into account the amount of revenue DPC and PDL expect to receive from the project. Our review further shows that DPC expects to receive 46.54% of the total quoted bid, while PDL expects to receive 53.46%. The 53.46% for PDL satisfies the requirement that at least 51% of the revenue is allocated to companies qualifying for local preference.

The computation performed by the DSWM Landfill Engineer only meets the requirement on the amount of revenue. CNMI-PR Section 7-102(3) lists factors in addition to revenue that must be considered:

“Determination of whether a business entity applying for preference is a de facto joint venture and whether the percentage of work requirements are met by a stated or de facto joint venture shall be committed to the reasonable judgment of the contracting authority subject to the review by the Attorney General, taking into consideration the (1) amount of revenue to be received by each of the parties, (2) the amount of profit expected to accrue to each of the parties, (3) subcontracting plans or arrangements, (4) the amount of labor to be performed by the forces of each of the parties, *and* (5) other factors found to be relevant by the contracting authority or the Attorney General. (Emphasis added).”

There were no other documents in the P&S file showing that factors (2) to (5) were given consideration in determining the percentage breakout. In addition, the relevant information needed for determining factors (2) to (5) could not be found in the P&S file; therefore, an independent computation could not have been conducted.

It appears from the record that DPC/PDL’s local preference status was determined solely on the basis of revenue split. No consideration of the other four factors is evident. CNMI-PR Section 7-102(3) requires consideration of all five factors, not just any one of the five.

Another troubling aspect of DPC/PDL’s local preference determination is reference to the “reasonable judgment of the contracting authority” language in CNMI-PR Section 7-102(3). As stated earlier in our responsible bidder analysis, the appearance of bias in the procurement process violates the CNMI-PR’s purposes and policies (CNMI-PR Section 1-101(2)) and their requirement of good faith (Section 1-104)). Where the appearance of bias exists, the reasonable judgment of the contracting authority would necessarily come into question.

### ***OPA Recommendations***

Any participation by the DSWM Program Manager where there is an appearance of bias, hostility, ill will or animosity against one of the bidders makes the selection suspect. In order to cure the defect, OPA recommends that an independent re-evaluation of DPC/PDL’s responsibility be

undertaken. The matter is therefore remanded back to P&S who, in conjunction with DPW, should look for an independent and detached evaluator to conduct the re-evaluation of DPC/PDL's responsibility. P&S can source that procurement locally to expedite the evaluation.

In addition, DPC/PDL's local preference status was determined solely on the basis of revenue split, and the other four factors mentioned in CNMI-PR Section 7-102(3) were not considered. Accordingly, we recommend that a re-evaluation of DPC/PDL's local bidder preference qualification also be made, taking into consideration all the appropriate factors mentioned in CNMI-PR Section 7-102(3). The matter is therefore remanded back to P&S for re-evaluation. Since the reasonable judgment of the contracting authority is necessary, the determination should be made by an independent and detached evaluator in order to eliminate the questions of bias as heretofore mentioned.

## **DECISION**

The Public Auditor grants the appeal in part. Based on our evaluation, we conclude that there is enough evidence of ill will or animosity on the part of the DSWM Program Manager toward DRC to question his participation in the evaluation of PDL's responsibility. In addition, it appears from the record that not all the appropriate factors under CNMI-PR Section 7-102(3) were considered in determining DPC/PDL's local preference status. Accordingly, the determination of DPC/PDL's responsibility and local bidder preference is remanded back to P&S with instructions as set forth in OPA's recommendations.

Section 6-102(9) of the revised CNMI-PR provides that WEI/DRC, 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.



Michael S. Sablan  
Public Auditor

November 9, 2001