



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF) APPEAL NO. BP-A030.1
 MARIANAS INFORMATION TECHNOLOGY GROUP) DECISION ON REQUEST FOR
) RECONSIDERATION
) (Protest Decision No. 02-0005)

BACKGROUND

On July 23, 2002, the Commonwealth of the Northern Mariana Islands (CNMI) Department of Finance, Division of Procurement and Supply (P&S) submitted a Motion for Reconsideration of the Office of the Public Auditor's Appeal Decision No. BP-A030. Appeal Decision No. BP-A030 denied in part and affirmed in part Marianas Information Technology Corporation's (Maritech) appeal concerning the Department of Finance's (DOF) issuance of Contract No. 378229-OC to A.O. Enterprises, Inc. (A.O.) for computer maintenance services for the Business Gross Revenue (BGR) and Employer Withholding Receipt (EWR) CNMI Tax Subsystems of the CNMI Department of Finance, Division of Revenue and Taxation.

OPA's Appeal Decision

The Office of the Public Auditor (OPA) denied the appeal in part and affirmed the appeal in part. OPA affirmed the claim by Maritech that Contract No. 378229-OC failed to satisfy the required elements of CNMI Procurement Regulations (CNMI-PR) §3-108 to support the approval of an expedited procurement because the urgency cited resulted from a lack of planning on the part of the CNMI Government. OPA denied Maritech's claim that A.O. Enterprises violated immigration and business licensing laws which prohibited them from performing the work. The Director of P&S counterclaimed that the appellant 1) failed to sufficiently plead its complaint and 2) that the complaint was filed on frivolous grounds solely for the purpose of harassing the Government. OPA found that the appeal was sufficient in pleading form to satisfy the CNMI-PR requirements and that there were sufficient grounds for filing the appeal.

The Director of Procurement and Supply's Reconsideration Request

The Director of P&S filed a timely reconsideration request with OPA on July 23, 2002. In the request, the Director of P&S objects only to OPA's finding that the urgency cited by the Government for issuance of Contract No 378229-OC was not justifiable because it resulted from a lack of advance planning on the part of the CNMI Government.

ANALYSIS

In order to prevail on a request for reconsideration, the requesting party must present 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 [CNMI-PR 6-102(9)(a)]. OPA's analysis of the P&S Director's request for reconsideration finds that there is no basis to reconsider the earlier decision in this matter because the P&S Director's arguments have not persuaded OPA that the appeal decision contained errors of fact or law which warrant reversal or modification of the decision.

The contract which is the subject matter of the appeal and request for reconsideration was issued as an expedited procurement under CNMI-PR §3-108. There are four factors required under CNMI-PR §3-108(2) to support an expedited procurement:

- (a) The urgency of the government's need for the good or service;
- (b) The comparative costs of procuring the goods or service from a sole source or through the competitive process;
- (c) The availability of the goods or services in the Commonwealth and the timeliness in acquiring it; and
- (d) Any other factors establishing that the expedited procurement is in the best interest of the Commonwealth Government.

The subject of this request for reconsideration focuses on the first, the urgency of the government's need for the service.

In the appeal, OPA found that an "urgency of the government" existed that required obtaining the services. The deadline for tax filings was approaching and failure to maintain the system could have resulted in financial harm to the government. However, OPA found that the urgency cited did not support an expedited procurement because the urgency that existed arose from a lack of planning on the part of the Department of Finance to begin a competitive solicitation when it knew that its former contract was expiring.

OPA looked at the *Signals & Systems, Inc.* case, B-288107 at 8-9 (Comp. Gen. Sept. 21, 2001), cited by Maritech, and the language in the case based on 10 U.S.C. sect. 2304(f)(5)(A) which clearly and strictly prohibits an award of a contract where the need has arisen from the failure to plan. OPA noted that a clear statement to that effect does not exist in the CNMI-PR as it does in the federal statute. However, OPA found that such an interpretation is a logical interpretation of the language and intent of the requirement found in CNMI-PR 3-108(2)(a) because to rule otherwise would be to create a loophole where one was clearly not intended by the CNMI-PR. The Director of P&S argues that such an interpretation by OPA was not a fair reading of the language in 3-108(2)(a).

The urgency of the government's need for the good or service is only one of a number of factors

to be considered when approving or disapproving an expedited procurement request. The general guiding principle justifying such request is found in CNMI-PR§ 3-108(1): “[w]hen special circumstances require the expedited procurement of goods or services.” The four factors in CNMI-PR§3-108(2) are provided to assist the P&S Director in making the determination under §3-108(1). To interpret the intention of CNMI-PR §3-108 and how to apply the section to factual situations, OPA needs to look at the overall framework of the CNMI-PR. *Sutherland Statutory Construction* states that “policy considerations dictate the interpretation according to what is conceived as the purpose, equity or spirit of the statute. It is not uncommon for a statute to contain, in most cases, a general section outlining what policy the legislation is supposed to serve. Provisions of this sort have often been helpful in resolving doubtful statutory meanings.” NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* §56.02 (6th ed. 2000 and 2002 Supp.).

CNMI-PR §1-101 sets forth the Purposes and Policies of the CNMI Procurement Regulations. Subsection (d) states that one of the purposes is to “insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth.” Subsection (e) states that another purpose is to “provide increased economy in Commonwealth procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds.” Section (f) states that still another purpose is to “foster effective broad-based competition within the free enterprise system”; and the final purpose set forth in subsection (g) is to “provide safeguards for the maintenance of a procurement system of quality and integrity.”

The general theme of the procurement system is that to have fair and effective competition to provide the Commonwealth the best value for its dollars. To accomplish that objective, the procurement system set forth in the Regulations requires that the Commonwealth obtain goods after competitively seeking out the best price. Government agencies must plan their procurement activities and act responsibly to foster the principles and purposes set forth in section 1-101 of the Regulations.

Expedited procurement is permitted when there are “special circumstances” which justify not soliciting the services in the normal competitive manner. The Department of Finance (DOF) did not provide a “special circumstance” explaining the failure to plan ahead in seeking the maintenance services contracted for under Contract 378229-OC, which created the urgency it cited. It appears from the record that there was sufficient notice to DOF that it needed to proceed with seeking continued services. DOF knew that its existing contract with Maritech was ending on December 31, 2001 and appears to have been aware that the level of ability of its EDP staff was not sufficient to assume the full maintenance responsibilities. The record does not indicate why the Department of Finance did not adequately address the upcoming expiration of the Maritech contract at an earlier date.

Looking to the overall intention of the CNMI-PR and the fact that DOF did not provide any explanation for its lack of planning that makes the situation special or unique, OPA finds that sufficient justification to support an expedited procurement did not exist.

DECISION

To obtain reconsideration of an appeal decision under the CNMI Procurement Regulations, the requesting party is required to present 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 properly considered. For the reasons set forth above, the P&S Director's argument has not convinced OPA that its appeal decision contained errors of fact or law which warrant reversal or modification of its decision.

We therefore affirm the findings of fact presented in our appeal decision that there was not sufficient justification for the use of expedited procurement for Contract No. 378229-OC and for our legal conclusions based thereon. The request for reconsideration by the Director of P&S is denied in its entirety.

A handwritten signature in blue ink, appearing to read 'MS Sablan', is positioned above the printed name of the Public Auditor.

Michael S. Sablan, CPA
Public Auditor

September 11, 2002