



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
SSFM (SAIPAN), INC.

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APPEAL NO. BP-A031
DECISION ON APPEAL
(Protest Decision No. 02-007)

SUMMARY

This is a decision on an appeal filed by SSFM (Saipan), Inc.(SSFM) from the denial of its protest by the Director of the Division of Procurement and Supply (P&S) pertaining to solicitation of the A&E design for the CNMI Veteran’s Memorial Cemetery under Request for Proposal No. DPW01-RFP-023 [“RFP-023”] by the Department of Public Works (DPW). The Office of the Public Auditor (OPA) has jurisdiction of this appeal pursuant to Section 6-102 of the CNMI Procurement Regulations (CNMI-PR).

The Public Auditor grants the appeal on the issue of timeliness of the filing of the protest and remands the matter to the Division of Procurement and Supply for a decision on the merits of the remaining arguments raised by SSFM.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In June 1996, DPW issued Request for Proposal (RFP) No. DPW96-RFP-014 [“RFP-014”] for the A&E Design of the CNMI Veteran’s Memorial Cemetery.

In April 2000, the project was re-announced due to the addition of a public cemetery to the proposed project. RFP No. DPW00-RFP-015A [“RFP-015A”]¹ was issued to incorporate this change.

The project was subsequently re-announced again as a result of a change of site from the original location. On October 24, 2001, RFP No. DPW01-RFP-023 [“RFP-023”] was issued for the A&E Design of the CNMI Veteran’s Cemetery at the new site.

Seven companies submitted proposals in response to RFP-023. On January 21, 2002, DPW faxed letters to four of these companies informing them that they were “short-listed” for the proposal award

¹ This information is based on a statement in the Appeal from SSFM to OPA dated June 12, 2002. Documents for this RFP are missing from the P&S files.

selection. These companies were 1) Leo A. Daly Company, 2) Duenas & Associates, 3) RIM Architects (Guam), Inc., and 4) SSFM.

On May 14, 2002, the DPW Secretary faxed letters to all interested parties of RFP-023 stating that the government intended to award the project to RIM Architects (Guam), Inc. (RIM) as the highest qualified firm.

On May 24, 2002, SSFM filed a protest with the P&S Director. On May 29, 2002, through Protest Decision 02-007, the P&S Director rejected SSFM's Protest on the grounds that: 1) no decision had yet been made to award the project to RIM and therefore the Protest had no factual basis, and 2) the Protest was not timely filed. On June 12, 2002, SSFM filed a notice of appeal on Protest Decision 02-007 with the Office of the Public Auditor.

On June 13, 2002, OPA informed the P&S Director of the filing of the appeal and requested a complete report pursuant to CNMI-PR Section 6-102. P&S filed its report with OPA on June 18, 2002, within the 10 days provided by the CNMI-PR. No comments on the report were submitted by SSFM and no other party submitted any comments on the appeal.

ANALYSIS

We now discuss the argument of SSFM and P&S and comment on their merits.

SSFM's Protest to the P&S Director

On May 24, 2002, SSFM sent a Notice of Protest to the P&S Director. In its protest, SSFM stated that it had been selected for the first two RFPs issued for the cemetery project, RFP-014 and RFP-015A. SSFM further stated that it had done some work for the project based on instructions to do so. SSFM claimed that it submitted a bid in RFP-023 as a precautionary matter and "under protest." The bases for SSFM's protest to the P&S Director were: 1) DPW's decision to award the contract to RIM was arbitrary and capricious; 2) SSFM was denied its right to have its proposal reviewed fairly by DPW; and 3) DPW's decision was not supported by substantial evidence in this case, as well as being unwarranted by the facts.

P&S Director's Decision No. 02-007

On May 29, 2002, the P&S Director denied SSFM's protest, finding that:

- 1) According to DPW, there had been no decision made to award the project to RIM, therefore there was no factual basis for the appeal, and
- 2) The protest was untimely because it was not received by the P&S Director in writing "within ten days after such aggrieved person knows or should have known of the facts giving rise thereto" as required by CNMI-PR Section 6-101(1)(a).

P&S found that SSFM should have submitted its protest by October 23, 2001, ten days after RFP-023 was first issued, because it was then that SSFM knew that it was going to have to again compete for the project and that there was a chance the contract could be awarded to another firm. SSFM submitted its protest on May 24, 2002.

SSFM's Argument in its Appeal to the Public Auditor

On June 12, 2002, SSFM filed its appeal on Protest Decision 02-007 with OPA. The basis for the appeal was the P&S Director's denial of the protest on the grounds of timeliness. SSFM asserted that it was not, and could not have been, aggrieved until P&S awarded RFP-023 to another company. It argued that the grievance required by the CNMI-PR in section 5-101(1)(a) is an actual rather than a potential grievance. SSFM stated that it was not "aggrieved" by the decision to publish the RFP. It was the decision regarding the selection of the most qualified firm that created the grievance. SSFM requested that OPA overturn both the P&S Director's decision on the protest and DPW's decision to award the project to RIM.

P&S Director's Report on Appeal

On June 18, 2002, the P&S Director filed his report on the appeal with OPA. In the report, the P&S Director acknowledged that the factual basis P&S had relied upon in making its decision on the Protest was incorrect. He stated that P&S had been informed that a decision had not yet been made by DPW to award the project to RIM. P&S claimed that based on this misinformation, it had determined that the protest was untimely. The P&S Director states in the Report, for the record, that P&S finds Appellant's protest on this issue to have been timely, and recommends that Appellant's argument against RIM's selection be examined on appeal.

OPA's Comments

The P&S Director has acknowledged that the protest decision was issued in error, and that P&S withdraws its finding that the protest filed by SSFM was untimely. Based on such representation and because we find that it is in conformity with the law, OPA finds for the Appellant on the issue of timeliness of the filing of the protest with the Division of Procurement and Supply.

With respect to the decision on the merits, OPA notes that the Protest was filed on May 24, 2002 and the P&S Protest Decision was issued by the P&S Director on May 29, 2002. CNMI-PR Section 6-101(1)(b) states that following the filing of a Protest with the Division of P&S,

[o]ther persons, including bidders involved in or affected by the protest shall be given notice of the protest and its basis in appropriate cases. These persons shall also be advised that they may submit their views and relevant information to the P&S Director within a specified period of time. Normally the time specified will be one (1) week.

Only five days passed between the filing of the Protest and the issuance of the Protest Decision by the P&S Director. This limited amount of time would not offer full opportunity for parties to submit their views on the protest as provided by CNMI-PR Section 6-101(1)(b). Given the complexity of the underlying substantive issues and the history of the various RFPs involved, it is necessary to obtain a thorough review of the substantive issues involved to issue a decision in this matter.

DECISION

The Office of the Public Auditor upholds the appeal on the issue of timeliness of the filing of the Protest with the Director of P&S. OPA does not rule on the merits of the remaining arguments made by SSFM with respect to the decision to award the project to RIM. OPA remands the matter to the Director of P&S for a full analysis of the substantive issues and to provide the interested parties proper opportunity to comment.



Michael S. Sablan, CPA
Public Auditor

July 24, 2002