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Commonwealth of the Northern Mariana Islands

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IN RE APPEAL OF
KAUTZ GLASS CO.

)
) APPEAL NO. BP-A047
) DECISION
) PSS IFB 05-044

I. SUMMARY

This is a decision on an appeal filed by Kautz Glass Co. (Kautz), through Brien Sers Nicholas, Attorney at Law, from the denial of Kautz's protest by the Commissioner of Education of the Public School System (Commissioner) regarding PSS IFB-05-044. The Office of the Public Auditor (OPA) has jurisdiction of this Appeal as provided in Section 5-102 of Public School System's Procurement Regulations (PSS-PR) (Amendments Adopted 20 Com. Reg. 15965 (June 15, 1998); Proposed 19 Com. Reg. 15423 (Aug. 15, 1997); Adopted 11 Com. Reg. 6155 (Apr. 15, 1989); Proposed 11 Com. Reg. 5878 (Feb. 15, 1989)).

OPA finds that the appeal was timely, but otherwise denies the appeal.

II. APPLICABLE REGULATIONS

The PSS-PR, promulgated under the authority of Public Law 6-10,¹ although similar to the CNMI Procurement Regulations (CNMI-PR), do not mirror the CNMI-PR.

On October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-13 (Opinion 03-13) regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Opinion 03-13 concluded, inter alia, that "both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid." Opinion 03-13 at 7-8.

¹ Public Law 6-10 was codified in portions of titles 1 and 3 of the Commonwealth Code. 1 CMC §2268(b) provides that the Board of Education has the power and duty to: "establish and revise as necessary on its own or through its agents, rules, regulations and policies for the operation of the Public School System, including policies relating to the appointment, promotions, and removal of all Public School System staff, health and welfare benefits, financial affairs and budgeting[.]"

At this time, however, as the validity of PSS-PR, as potentially questioned in Opinion 03-13, has not been ruled on by a court of competent jurisdiction, nor have PSS-PR or relevant CNMI statutes been revised, OPA will apply PSS-PR in interpreting this Appeal.

III. PROCEDURAL AND FACTUAL BACKGROUND

On December 29, 2004, PSS issued a solicitation entitled Invitation for Bid, PSS IFB 05-044 (the IFB). On February 9, 2005, the bidders were notified that the criteria were amended.² On February 28, 2005, the bids for the IFB were opened. Five bids were opened at the bid opening and it was stated that representatives of the five bidders were present at the opening.³ On or about March 8, 2005, an evaluation team evaluated the bids based on the amended criteria. Based on the evaluation team's recommendation, PSS Contract Number 30478 OC (the Kautz Contract), pursuant to the IFB, was entered into with Kautz. The Kautz Contract was signed by Kautz's representative and was also certified as complete by PSS on April 28, 2005.

In May, 2005, PSS received two protests from two different bidders, Eyun Ji Corporation and Carpet Masters regarding the IFB.

The Commissioner, by letter dated May 5, 2005, gave Kautz notice of the appeal filed by Eyun Ji Corporation. In addition to requesting a response to the protest, the letter requested that "[u]ntil a Commissioner of Education decision on the protest is made, we seek your mutual agreement to suspend performance of the contract on a no-cost basis." This request appears to be in line with PSS-PR 5-101(3).⁴ By letter dated May 13, 2005, PSS gave notice to the bidders that Carpet Masters, through attorney Steve Nutting, had filed a protest regarding the IFB. By a second letter on that date, May 13, 2005, PSS gave individual notice to Kautz that Carpet Masters had filed a

² The original criteria listed in the bid package appear to have been amended at the request of the CIP Coordinator in February 2005.

³ The Commissioner's report states: "On February 28, 2005, the bids submitted by Tae Woo Corporation, Carpet Masters, Kautz Glass, Railing Pacific, and Eyun Ji Corporation were opened and reviewed by representatives of each firm." See Commissioner's Report, page 1. Although the Pre-Bid/Bid Proposal Opening form has representatives listed from four of the five companies, the Sign Out Sheet has signatures from all five of the bidders. The absence or presence of the fifth companies' representative is not, however, dispositive in this case.

⁴ PSS-PR 5-101(3) reads: "Protest After Award: Although persons involved in or affected by the filing of a protest after award may be limited, in addition to the Commissioner of Education, at least the contractor shall be furnished the notice of the protest and its basis in accordance with paragraph (1)(b) above. *When it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Public School System's interest, the Commissioner of Education should consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis.*" (Emphasis added).

protest on the IFB and again requested an “agreement to suspend performance of the contract on a no-cost basis.”

The Commissioner, by letter dated May 25, 2005, gave notice to Kautz that the Kautz Contract was “terminated for PSS’ convenience under the clause entitled Section 13, Termination for Convenience of the Terms and Conditions.” By a second letter dated that same day, May 25, 2005, PSS gave notice to Kautz that the “award of a contract for invitation for bids must be in accordance with PSS-PR 3-102(9)(a).” That letter went on to state that Kautz “did not submit the lowest responsive bid [the] [c]ontract with Kautz Glass shall be terminated Carpet Masters has the lowest bid price and will be awarded contract after review and approval”

It appears that this letter was the Commissioner’s decision in the Carpet Master’s protest, as an identical letter was sent to Stephen J. Nutting, attorney for Carpet Masters. Although not cited by the Commissioner, PSS-PR 5-103(2)(a)(ii) includes termination of a contract as a possible remedy after an award, if a contract is determined to be in violation of law or regulation.

On May 26, 2005, Kautz filed a protest with the Commissioner. The Commissioner issued her decision on the Kautz protest, dated June 1, 2005. That decision was sent via the United States Postal Service and received by Kautz as discussed below in Section IV. On July 29, 2005, OPA received Kautz’s appeal of the Commissioner’s Decision, dated July 28, 2005.

The Commissioner’s Report on Kautz’s appeal was received by OPA on August 26, 2005. Kautz did not file a response to the Commissioner’s Report. On September 15, 2005, OPA received a letter from the Commissioner dated September 14, 2005. The letter was “to inform [OPA] that [PSS] will award IFB 05-044 to Carpet Masters.” The letter provided that this notice was given under PSS-PR 5-102(5) which provides:

When an appeal has been filed before award, the Commissioner of Education will not make an award prior to resolution of the protest except as provided in this section. In the event the Commissioner of Education determines that award is to be made during the pendency of an appeal, the Commissioner of Education will notify the Public Auditor.

PSS-PR 5-102(5)

The letter further appears to set forth the Commissioner’s reasoning for the award.

In a letter dated September 19, 2005, Kautz, through its attorney requested that OPA direct the Commissioner “not to award the project in this case . . . pending resolution of this appeal.” Later on September 19, 2005, OPA’s legal counsel requested additional information from both parties, through an e-mail to attorneys for Kautz and PSS, pursuant to PSS-PR 5-102(7). The request, among other things, asked the parties to provide any further information or argument regarding the request from Kautz that OPA direct the Commissioner not to award the contract under PSS-PR 5-102(5).

By letter dated September 20, 2005, Kautz made an emergency request for a conference. OPA responded that same date by letter sent via facsimile to Kautz and PSS, and the other interested parties, that although OPA recognized the request as one made under unusual circumstance, it did not believe a conference was necessary for the resolution of the appeal. The letter further stated that OPA "will be able to make a determination and enter a decision without the necessity of a conference, based upon the submission of the parties and the application of the PSS-PR and procurement law." Finally the letter requested that any further legal argument, factual substantiation, or information that would be helpful to OPA in making its determination be forwarded to OPA. OPA's decision regarding the conference was based on PSS-PR 5-102(8) which states:

(8) Conference.

(a) A conference on the merits of the appeal with the Public Auditor may be held at the request of the appellant, any other interested party, or the Commissioner of Education. Request for conference should be made prior to the expiration of the time period allowed for filing comments on the agency report. Except in unusual circumstance, requests for a conference received after such time will not be honored. The Public Auditor will determine whether a conference is necessary for resolution of the appeal.

(b) Conferences normally will be held prior to expiration of the period allowed for filing comments on the agency reports. All interested parties shall be invited to attend the conference. Ordinarily, only one conference will be held on an appeal. . . .

PSS-PR 5-102(8)(a),(b)

On September 21, 2005, Kautz responded to OPA's letter of the previous day. The response included argument regarding the jurisdiction issue that had been raised by PSS regarding the timeliness of appeal, among other things. In addition to this response from Kautz providing additional argument, additional information was further provided on September 20, 2005, September 29, 2005, and September 30, 2005, in response to the OPA requests for such information.

On Thursday, September 29, 2005, OPA was informed by Kautz's counsel, via email to OPA's legal counsel, that he had filed a complaint on behalf of Kautz with the court that afternoon and was planning to serve PSS that day. OPA retrieved a copy of the complaint, without attachments, from the Clerk of the Superior Court on Friday, September 30, 2005. The complaint filed in Civil Action No. 05-0391A, captioned Kautz Glass, Co., Plaintiff, vs. CNMI Public School System and Rita Hocog Inos, Commissioner, Defendants, is entitled Complaint for Declaratory and Injunctive Reliefs or, in the Alternative, for Damages.

PSS-PR 5-102(8)(c)(i) addresses the time for a decision in an appeal to OPA, as follows:

Time for Decision; Notice of Decision: The Public Auditor shall, if possible, issue a decision on the appeal **within twenty-five (25) days after all information necessary for the resolution of the appeal has been received.** A copy of the decision shall immediately be mailed or otherwise transmitted to the appellant, other participating parties, and the Commissioner of Education.

PSS-PR 5-102(8)(c)(i) (Emphasis added).

As such, based upon the filing of the supplemental information by the parties, this decision is being issued within the time frame set forth in the PSS-PR.

IV. TIMELINESS OF APPEAL

Section 5-102 of the PSS-PR addresses appeals of the Commissioner's decisions to the Public Auditor. In accordance with that section, Kautz filed an appeal with OPA, which was dated July 28, 2005, but was received by OPA on July 29, 2005.

PSS has raised the question of the timeliness of Kautz's appeal. The Commissioner's Decision on Kautz's Protest was dated July 6, 2005. PSS presented a copy of its postal log to show that the Decision was mailed to Kautz, and others, on July 7, 2005. However, according to the representations made by Mr. Sers Nicholas and Kautz, the Decision was not received by Kautz until July 15, 2005. PSS argues that Kautz's appeal must be filed within ten (10) calendar days and was, therefore, untimely and should not be reviewed by OPA, pursuant to PSS-PR 5-102(3), which states:

Time for Filing an Appeal. An appeal from the Commissioner of Education's decision must be received by the Office of the Public Auditor not later than ten (10) days from the date that the protester or their agent received notice of the Commissioner's decision of the protest pursuant to 5[-]101(1)(c) above. *Any appeal received later than ten days after receiving notice (sic) of the Commissioner's decision shall not be considered by the Public Auditor.* The Public Auditor shall only consider issues raised to the Commissioner in the original protest and shall not allow amendments to the appeal after the ten day time for filing an appeal has passed.

PSS-PR 5-102(3) (Emphasis added).

Although the emphasized portion of this section is a bit confusing, possibly due to missing language, it is clear that the appeal must be received by OPA not later than 10 days from the date the protester receives notice of the decision. The word "days" without further clarification, such as "calendar" or "working" days, is used. PSS, however, argues in the Commissioner's Report that the plain meaning of the word "days" must be used as the section "does not include any reference to working days." See Commissioner's Report at 4.

The section cited by both parties regarding timeliness, PSS-PR § 5-101(4), states:

(4) Computation of Time:

- (a) Except as otherwise specified, all “days” referred to in this part are deemed to be working days of the Public School System. The term “file” or “submit” except as otherwise provided refers to the date of transmission.
- (b) In computing any period of time prescribed or allowed by these procedures, the day of the act or event from which the designated period of time begins to run shall not be included.

PSS-PR § 5-101(4)(a),(b) (Emphasis added).

OPA disagrees with the PSS argument that this section applies only to protests to the Commissioner, as PSS-PR § 5-101(4)(a) specifically states “all ‘days’ referred to in this part are deemed to be working days of the Public School System.” The provision uses the term part, in lieu of an alternate term, such as section. Article 5 of the PSS-PR, Protests and Disputes, is divided into two parts, “Part A - Bid Protests and Appeals” and “Part B - Disputes” which leads OPA to the conclusion that the Computation of Time provision of PSS-PR § 5-101(4) applies throughout Part A - Bid Protests and Appeals. As such, the Computation of Time provision would apply to appeals made to the Public Auditor under PSS-PR § 5-102.

Further, regarding the time between mailing of the decision by PSS and the receipt of the decision by Kautz, PSS believes “that the eight-day lapse is suspect.” Although OPA agrees that eight(8) calendar days is an excessive amount of time for transmission through the United States Postal Service within Saipan, no other evidence was presented that Kautz received notice any sooner than July 15, 2005. As the PSS-PR provides, the time for filing of an appeal runs from “the date the date that the protester or their agent received notice of the Commissioner’s decision” and not from any other date. Absent a return receipt or other objective indication or evidence of earlier receipt by Kautz, or its agent, and given that the decision was mailed to a United States Post Office box, and not sent via facsimile as past correspondence with Kautz, absent argument to the contrary and supporting case law that delivery to such a box constituted receipt by an agent for Kautz, OPA finds Kautz’s appeal was timely filed with OPA.

V. ISSUES

Kautz sets forth the following as its basis for appeal:

1. Appellant, not Carpet Master, is the most “responsive and responsible” Bidder in this case, and
2. PSS cannot terminate an otherwise legally binding and enforceable contract with Appellant on the basis that it is convenient for PSS to do so.

Appeal at 3.

The Appeal incorporates Kautz's Protest to the Commissioner (the Protest) dated May 26, 2005. The Appeal and the Protest similarly argue that Kautz is the most "responsive and responsible" bidder in the solicitation. Kautz further argues that for PSS to say that "Carpet Masters is the most 'responsive and responsible' Bidder based on price alone is not supported by the facts and the law applicable to this case." See Appeal at 4. Regarding the termination of Kautz's contract by PSS, Kautz argues that the termination for convenience portion of the contract "must be read in the context of the whole contract." *Id* at 5.

VI. ANALYSIS

A. Most Responsive and Responsible Bidder

1. Responsibility Determinations Pursuant to PSS-PR

The PSS-PR states that in reference to a bidder, responsible "means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." PSS-PR 1-201(16). PSS-PR provides that a bid may be rejected if it is "a bid from a nonresponsible bidder." See PSS-PR 3-102(7)(d). Further, PSS-PR § 3-301, Responsibility of Bidders and Duties, mandates that awards shall be made only to responsible contractors. PSS-PR § 3-301(1) sets forth mandatory responsibility requirements, as follows:

- (1) *Awards shall be made only to responsible contractors.* To be determined responsible, a prospective contractor must:
 - (a) have adequate financial resources to perform the contract, or the ability to obtain them;
 - (b) be able to comply with the required delivery or performance schedule;
 - (c) have a satisfactory performance record;
 - (d) have a satisfactory record of integrity and business ethics;
 - (e) have the necessary organization, experience and skills, (or the ability to obtain them), required to successfully perform the contract;
 - (f) have the necessary production, construction and technical equipment facilities, or the ability to obtain them;
 - (g) be otherwise qualified and eligible to receive an award under applicable laws and rules;
 - (h) submit a valid original business license and other certification as may be required.

In the instant case, Kautz states that it is the most "responsive and responsible" and gives no specific facts in its Appeal supporting why Carpet Masters cannot be or should not have been deemed responsible.

2. Review of Responsibility Determinations

Discretion

It is well settled that contracting officers have a wide discretion in determining responsibility. See generally John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 412 (3rd Ed. 1998); see also *Robert E. Dereckter of R.I., Inc. v. Goldschmidt*, 516 F. Supp 1085, 1096 (D.R.I. 1981) (internal citations omitted). The decision of responsibility is essentially a question of business judgment which any unsuccessful contractor may contest with consequent delay and cost to the Government, review of which should not be taken lightly and a contrary determination only made in the clearest case. *Id.*; see also *Dereckter*, *supra* 516 F. Supp. at 1096. Specifically, determinations as to types and degree of experience and the method of proving experience are solely within the discretion of the procuring agency. *CIBINIC*, *supra*. Unlike the Federal Acquisition Regulations, the PSS-PR does not address what evidence is necessary to be submitted to show contractor's responsibility. PSS-PR § 3-301(2) simply provides that information necessary to make a determination of responsibility shall be obtained from the offeror. Although information sufficient to make the determination satisfy the criteria set forth in PSS-PR § 3-301(1) shall be obtained, the language of subsection (2) appears to leave the determination of what information is necessary to the discretion of PSS.

3. Review Generally

A determination of nonresponsibility will not be disturbed “unless the protestor demonstrates bad faith by the agency or the lack of any reasonable basis for the determination.” *Matter of Automated Datatron, Inc.*, 68 Comp. Gen. 89 (B-232048) 1988, Lexis 1311 *4 (internal citations omitted); see generally *CIBINIC*, *supra* at 443. Similarly, “[p]rocurement officials are presumed to act in good faith, and in order to show otherwise, a protestor must submit virtually irrefutable proof that they had a specific and malicious intent to harm the protestor.” *Automated Datatron* at 6 (internal citations omitted). Further, it must be noted that “the Comptroller General will not normally review protests of favorable determinations of responsibility . . .”. *CIBINIC*, *supra* at 419, citations omitted. This refusal to review favorable responsibility determinations is true even if the successful offeror has had a previous contract terminated for default or has not met obligations on prior contracts. *Id.* In addition, as “the criteria for determining responsibility are not readily susceptible to reasoned review and because they essentially involve business judgment, affirmative determination of responsibility are generally not overturned absent fraud or bad faith.” *CIBINIC*, *supra* at 443, citations omitted. OPA follows the Comptroller General's line of reasoning in review matters and will not generally review favorable determinations of responsibility. In the instant case, Carpet Masters appears to have been found responsible; no evidence was presented and no bad faith was shown to substantiate OPA deviating from its position regarding review.

4. Responsiveness Pursuant to the PSS-PR

The PSS-PR state that, in reference to a bidder, responsive “means a person who has submitted a bid which confirms in all materials (sic) aspects to the invitation for bids.” PSS-PR 1-201(17). In its Protest, Kautz does pose a question asking how could it be possible for Carpet Masters to

be deemed responsive when it “did not follow the instructions in the bid package, vis a vis the bid schedules?” However, again Kautz does not give any facts supporting why Carpet Masters cannot be or should not have been deemed responsive. As such, OPA has no basis on which to make a determination that Carpet Masters was not responsive.

An award to Carpet Masters as the lowest responsive bid by a responsible bidder, appears to have been in accordance with PSS-PR 3-102(9)(a). OPA cannot, based on the foregoing, grant Kautz’s Appeal on this issue.

B. Cancellation of Award to Kautz Allowed under PSS-PR

The PSS-PR address remedies in PSS-PR § 5-103. PSS-PR § 5-103(2) specifically addresses remedies after award, which is applicable in this Appeal, and provides in part:

- (2) Remedies After an Award. If after an award the Director or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then:
 - (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of CUC; or
 - (ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination;

PSS-PR § 5-103(2)(a).

In this Appeal, Kautz appears to have been terminated after the Carpet Masters Protest Decision by the Commissioner. Although termination under PSS-PR 5-103(2)(a) may have been permissible, the Commissioner in her termination letter cited to the termination for convenience provision of the Kautz Contract. OPA’s authority and powers are limited by the PSS-PR and, as such, has no authority to determine whether or not a termination under the terms of the contract was appropriate or not. As such, OPA cannot find reason to grant Kautz’s Appeal on this issue.

VII. Other Matters

A. The Solicitation was an Invitation for Bid

Although the matter was not directly brought to OPA and was obviously addressed by the Commissioner in the Carpet Masters’ Protest, OPA will briefly discuss the form of the

solicitation. The solicitation was not simply entitled an "Invitation for Bid" or simply numbered as an invitation for bid with an IFB number. The solicitation documents cited to PSS-PR 3-102, Competitive Sealed Bidding. The solicitation appears to have included the minimum requirements for an invitation for bid set forth in PSS-PR 3-102(1).⁵ Further, a public notice of the solicitation appears to have been given pursuant to PSS-PR 3-102(2), the proper time for bids set forth in PSS-PR 3-102(3) appears to have been given, and the bids appeared to have been publicly opened pursuant to PSS-PR 3-102(5).⁶

The PSS-PR require that contracts above the small purchase ceiling be awarded by competitive sealed bidding,⁷ unless otherwise authorized by law, regulation, or in certain provisions of the PSS-PR. Competitive sealed proposals, although one of the exceptions to competitive sealed bidding, require that the Commissioner of Education determine on the advice of legal counsel and in writing that the use of competitive sealed bidding is either (1) not practical, or (2) not advantageous to PSS, as set forth in PSS-PR 3-106(1). No such determination appears to have been made. Competitive sealed proposals are also required under PSS-PR 3-106 to be solicited through a request for proposal (RFP) and the proposals are required to be opened so as to avoid disclosure of the contents to competing offerors. In the instant case, these three requirements were not met with the solicitation.

Therefore, it appears that the solicitation was an invitation for bids, despite the inclusion of

⁵ PSS-PR 3-102(a) reads: "Invitation for Bids. An invitation for bids shall be issued and shall include at the minimum: (a) An invitation for bids number; (b) Date of issuance; (c) Name, address and location of issuing office; (d) Specific location where bids must be submitted; (e) Date, hour and place of bid opening; (f) A purchase description in sufficient detail to permit full and open competition and allow bidders to properly respond; (g) Quantity to be furnished; (h) Time, place and method of delivery or performance requirements; (i) Essential contractual terms and conditions; and (j) Any bonding requirements.

⁶ PSS-PR 3-102(3) reads: "Public Notice. Adequate public notice of the invitation for bids shall be given a reasonable time prior to the date set forth for the opening of bids. Publication of notice in a newspaper of general circulation in the Commonwealth once in each week over a period of thirty calendar days shall be deemed to be adequate notice." PSS-PR 3102(4) reads: "Bidding Time. A bidding time of at least thirty calendar days shall be provided, unless the Chief determines a shorter period is reasonable and necessary." PSS 3-102(6) reads: "Bid Opening. (a) The bid opening shall be conducted by the Chief of Procurement and Supply at the Office of the Commissioner of Education. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. (b) The Chief shall be present at the bid opening. The bids received prior to the bid closing date shall be publicly opened. The amount of each bid, together with the name of each bidder shall be recorded, the record and each bid shall be open to public inspection. The Chief shall prepare a written summary of the bid opening."

⁷ PSS-PR 3-101, Methods of Source Selection reads: "Unless otherwise authorized by law or by regulation, all Public School System contracts above \$10,001.00 subject to Public School System Procurement Regulations 3-102 shall be awarded by competitive sealed bidding, except as provided in: (1) PSSPR 3-103 (Small Purchases); (2) PSSPR 3-104 (Sole Source Procurement); (3) PSSPR 3-105 (Emergency Procurement); (4) PSSPR 3-107 (Competitive Sealed Proposals); (5) PSSPR 3-103 (Professional Services); (6) PSSPR 3-103 (Architect-Engineer Services).

potentially inappropriate subjective non-price criteria and improper evaluation of the bids after bid opening. This error made by PSS was addressed in the previous protests related to the solicitation. Correction of the error seemed to have brought about the facts leading to Kautz's Protest and subsequent Appeal to OPA and the award to Carpet Masters. The issue of the conversion of the solicitation to a request for proposal process, however, was not raised to OPA in this Appeal.

B. Notification Provision Not Followed

As noted above, the solicitation cited to PSS-PR 3-102. However, it appears that PSS-PR 3-102(9)(a) was not followed. OPA noted that potential delay occurred in the procurement protest in this matter as it appeared that the unsuccessful bidders were not promptly notified, but found out about the award to Kautz by chance at subsequent bid opening for a separate solicitation.

C. Construction Procurement

It appears that the instant procurement could have been construed under the PSS-PR to be a construction procurement. This appearance is based on the definition of construction found in PSS-PR 1-201(4) which provides that:

“Construction” means the process of building, *altering, repairing, improving* or demolishing a public structure or building or public improvements commonly known as “*capital improvements*”. It does not include the routine maintenance of existing structures, buildings, or public real property.

PSS-PR 1-201(4) (emphasis added).

Construction procurement, set forth in PSS-PR 4-101, can be through solicited by an invitation for bids, however, other requirements, such as deposits and bid security may be required. As stated above, the solicitation appeared to be an invitation for bids under PSS-PR 3-102, but it did not mention or appear to follow the construction procurement requirements of PSS-PR 4-101.

D. Evaluation Errors

Although the solicitation appeared to be an invitation for bids as discussed above, PSS had an evaluation team review the bids based on the criteria in the solicitation, as amended. OPA briefly reviewed the evaluation teams' evaluations of the bidders. It was these evaluations on which the evaluation team based their recommendation to award the contract to Kautz. OPA found both mathematical and logic errors that appeared to go undetected by the evaluation team and PSS procurement. Although OPA did not make a determination as to whether these errors would have resulted in a different conclusion by the team had they been caught and corrected, OPA is disturbed by the existence of the errors and the accompanying apparent lack of oversight of the evaluation process.

VIII. DECISION

Based on the foregoing, OPA finds that:

1. Kautz's appeal filed with OPA was timely;
2. ~~The favorable responsibility determination of a proposer will not be reviewed~~ absent a showing of subjective bad faith, fraud, or lack of a reasonable or rational basis for the determination;
3. Good faith is presumed;
4. No subjective bad faith, fraud, or lack of a reasonable or rational basis for the determination was shown;
5. There was insufficient evidence to support that Carpet Masters was not responsive;
6. The contract awarded to Kautz has been cancelled;
7. Cancellation of the award is allowable under the PSS-PR as a remedy after an award;
8. OPA does not have authority to review cancellation under the terms of the contract and award of contractual damages in such instance is not within OPA's purview.

OPA, therefore, denies Kautz's Appeal.

Section 5-102(9) of the PSS-PR provides that Kautz, any interested party who submitted comments during consideration of the protest, the Commissioner of Education, 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 (ten) 10 days after the basis for reconsideration is known or should have been known, whichever is earlier.

David Blake
Analyst Manager

October 27, 2005