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Div. of Procurement
and Supply

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IN RE APPEAL OF
ISLAND BUSINESS SYSTEMS & SUPPLIES

APPEAL NO. BP-A048
DECISION
PROTEST 05-006

I. SUMMARY

This is a decision on an appeal filed by Island Business Systems & Supplies (IBSS) from the denial of its protest by the Director of the Division of Procurement and Supply (Director) regarding the procurement of a copier machine from Xerox Corporation (Xerox) by the Northern Mariana Islands Housing Corporation (NMHC). The Office of the Public Auditor (OPA) has jurisdiction of this Appeal as provided in Section 6-102 of the Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR). (Amendments Adopted 23 Com. Reg. 17855 (May 24, 2001); Amendments Proposed 23 Com. Reg. 17640 (Feb. 23, 2001)).

OPA finds that the solicitation and the resulting lease agreement for a photocopier from Xerox were not in conformity with the CNMI-PR and, therefore, grants the appeal as set forth herein.

II. PROCEDURAL AND FACTUAL BACKGROUND

On May 26, 2005, the Administrative Officer for NMHC prepared a one page facsimile addressed to Xerox and IBSS. The facsimile was apparently sent to Xerox, IBSS, and National Office Supply. It stated in all capital letters:

Our office is in desperate need of a quotation on a Xerox machine to update our "Xerox Document Centre 230ST" unit. We would appreciate your prompt respond (sic) on this request. Should you have any question, please do not hesitate to give me a call at the numbers listed above. Once again, thank you.

NMHC received three responses to this facsimile request. The responses were from IBSS, Xerox, and National Office Supply.

On July 13, 2005, NMHC, through Edith C. Fejeran, appears to have entered into a lease

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agreement with Xerox for a 60 month lease of a Xerox photocopier. The lease agreement is on a Xerox form, references a negotiated contract, not attached to the copy provided to OPA (#071828900), totals \$25,230.00 in base charges (\$420.50 for 60 months), and provides for prints over 10,001 to be charged at .0105 each. The lease agreement does not appear to have been processed pursuant to CNMI-PR 2-104, does not contain the required signatures of CNMI Government officials, and does not contain mandatory contract clauses. A Purchase Order (PO), number 17748, was issued to Xerox on or about that same date; the attachment contains the same signature for NMHC as the Xerox lease agreement. The PO was for "one year lease of Xerox's Document Centre 430 Digital Copier" in the amount of \$5,046.00. The full lease term of 60 months is referenced in the PO.

By letter dated July 14, 2005, NMHC, through Thomas C. Duenas, Officer-in-Charge, gave notice to IBSS that "[a]fter delicate review of all proposals that were submitted, our office has made its decision and unfortunately, your proposal was not selected."

IBSS filed a protest with the Director, which was contained in a letter dated July 23, 2005 (the Protest). P&S issued an acknowledgment of the receipt of the Protest, also dated July 23, 2005. The Protest, among other things, alleged that the lease or purchase of machinery and equipment in excess of \$2,500, as in this procurement, shall be procured through Competitive Sealed Bidding as prescribed in CNMI-PR 3-102.

By letter dated August 11, 2005, addressed to Helen Olbes, Sales Supervisor for IBSS, and copied to all photocopier vendors in the CNMI and the Executive Director of NMHC, the Director issued P&S Protest Decision 05-006 (the Initial Decision). This Initial Decision concluded that "[a]ny selection or contract made by NMHC in this situation is invalid and null and void." The Initial Decision's reasoning concurred with the IBSS assertion that the CNMI-PR require "that the solicitation of equipment valued at over \$2500 be done through formal competitive bidding rather than quotations." It stated that "NMHC has confirmed that the selection of a photocopier vendor was made through the process of quotations rather than (sic) through an Invitation to Bid processed through the Division of Procurement and Supply in compliance with the CNMI Procurement Regulations." Although the NMHC lease agreement was dated July 13, 2005, the Initial Decision stated that it was "unclear" as to whether a contract had been finalized with the selected vendor. The Initial Decision, however, held that "any selection, or any contract accomplished here is in violation of the CNMI Procurement Regulations and is 'invalid' per Section 1-107."

NMHC, through its Officer-in-Charge, Thomas Duenas, by letter to the Director dated August 17, 2005, requested that the Director approve an expedited procurement for the photocopier from Xerox. The letter also cites to CNMI-PR 3-106, Sole Source Procurement, but does not specifically discuss or request sole source approval for a contract. The letter further acknowledges that the Xerox lease is for 60 months and exceeds the \$25,000.00 cap for an expedited procurement. The letter also acknowledges that NMHC "did not formally go through the RFP or IFB" process, but it feels that it "satisfied the requirements of requesting quotations from the

only known vendors on the island.”

Subsequently, approximately 35 days after the Initial Decision, by letter addressed to IBSS, dated September 14, 2005, the Director reversed his Initial Decision (the Reversal). The Reversal appeared to be based upon assertions that NMHC “solicited quotes/proposals from the three known suppliers of copier machine on the island” and NMHC solicited quotes/proposals from all three suppliers. As “all three vendors were solicited and responded to the solicitation accordingly” the Director, in his Reversal, determined “that the procurement was conducted competitively thereby upholding the award of a contract to Xerox.”¹

On September 22, 2005, OPA received an appeal from IBSS (the Appeal). The Appeal claimed that NMHC’s request for quotations for the photocopier violated the CNMI-PR. Specifically that the photocopier, as a lease or purchase of machinery or equipment, should have been procured through the Sealed Bidding process under the CNMI-PR.

On October 4, 2005, OPA received the Director’s Report on the Appeal (the Report). The Report confirmed that the selection of Xerox was done through the solicitation of quotations from photocopier vendors. The Report stated that NMHC “had solicited quotations from the three known suppliers of copiers on the island.” It concluded that: “While we agree that the letter of these regulations was not followed, we believe that the spirit and the substance of these regulations which requires full competition was fully satisfied by the fact that NMHC contacted each of the three known vendors on Saipan for quotations.”

On October 17, 2005, OPA received Comments on the Report from IBSS.

OPA requested additional information from the parties, specifically from the Director. OPA received a response to its request for additional information from the Director and no further comments from any of the other parties.

¹ The September 14th letter to IBSS – (one month and three days after P&S Protest Decision 05-006 issued) reads in full:

This is in reference to your protest relative to NMHC procuring a copier machine through request for proposal/quotes rather than an Invitation to Bid (ITB).

After careful review of the scenario surrounding the issue, I note that Northern Marianas Housing Corp. (NMHC) solicited quotes/proposals from the three known suppliers of copier machine on the island, to wit: IBSS/CANON, NATIONAL OFFICE SUPPLY and XEROX, to replace its old copier which often breaks down, hampering operations. IBSS/CANON responded to the solicitation by the offering quotes less advantageous than that offered by Xerox. And since all three vendors were solicited and responded to the solicitation accordingly, the Director of Procurement and Supply determines that the procurement was conducted competitively thereby upholding the award of a contract to Xerox.

III. ISSUE

Were NMHC's solicitation and resulting lease of the photocopier from Xerox in conformity with the CNMI-PR?

IV. ANALYSIS

Pivotal to this matter is the information found in the lease agreement² entered into by NMHC with Xerox regarding the lease term and payment obligation. The lease agreement with Xerox is unquestionably for a lease term of 60 months at a base monthly charge of \$420.50 per month, which equals \$25,230.00. See 7/13/2005 lease agreement with Xerox and PO number 17748. The issuance of the PO on a yearly basis for the base monthly amount for a 12-month period does not detract from the full lease term set forth in the lease agreement and reflected on the PO, and resulting total base charge.

A. CNMI-PR 3-105(5) Requirement Not Followed

It is undisputed that the CNMI-PR require that "[a]ny lease or purchase of machinery and equipment in excess of \$2,500 shall be procured pursuant to Section 3-102 or other applicable provisions of these regulations." CNMI-PR 3-105(5). It is further undisputed that this is a lease of an office photocopier. The lease agreement is for \$25,230.00 for the full 60-month term. The yearly lease calculation, as set forth in PO 17748, is \$5,046.00. Both of these amounts are unquestionably in excess of \$2,500.00. The photocopier, however, was undisputably not procured pursuant to CNMI-PR 3-102, Competitive Sealed Bidding. As such, the requirement set forth in CNMI-PR 3-105(5) was not followed.

B. Letter Bidding – Not an Alternative Solicitation Practice Under the CNMI-PR

In the Director's response to OPA's request for additional information, the Director states in item number 3 that:

For a number of years P&S has practiced "letter bidding" and considered it the functional equivalent of Section 3-102 for the procurements (sic) of copiers and automobiles valued in excess of \$2500. The rationale for this is that the primary intent of Section 3-102 in requiring public bidding is to insure that the fullest possible competition is obtained for the Government's needs and this intent is fully satisfied by the "letter bidding" practice in these two sets of circumstances since

² The lease agreement does not comply with the CNMI-PR regarding necessity of government signatures (CNMI-PR 2-104) or inclusion of required clauses, among other things. These issues are not, however, necessary to the conclusion reached herein and will not, therefore, be discussed.

there are only three companies which are authorized by manufacturers to sell and service copiers in the CNMI, and there are only three companies authorized by manufacturers to sell and service automobiles in the CNMI. In any procurement of copiers or automobiles each appropriate source receives a request to bid by letter. This practice also speeds up these procurements and saves money on formal advertising.

Admittedly, there is no formal authorization for this "practice", but is (sic) has developed as an exercise of the Director's discretion to do what is in the Government's best interest and fully consistent with the intent of the CNMI-PR. We recognize the need to add such provisions to the CNMI-PR.

Director's Response to Request for Additional Information, November 17, 2005, page 1 (emphasis added).

The question of this "practice" in general will not be addressed here nor will the Director's discretion to do what is in the best interest of the Government. The "practice" is admittedly not specifically authorized or set forth in the CNMI-PR. The use of this "practice" in the solicitation of the photocopier in this instance is not authorized by the CNMI-PR.

C. Full and Open Competition Required

The September 14th Reversal by the Director found that "... since all three vendors were solicited and responded to the solicitation accordingly, the Director of Procurement and Supply determines that the procurement was conducted competitively thereby upholding the award of a contract to Xerox." It further states that "[w]hile we agree that the letter of these regulations was not followed, we believe that the spirit and the substance of these regulations which requires full competition was fully satisfied by the fact that NMHC contacted each of the three known vendors on Saipan for quotations."

"The fundamental concept of sealed bidding is that the public interest is best served when the Government describes its needs with precision, conducts an open competition to obtain the best price, opens the bids publicly, and awards to the responsible bidder that submits the lowest price and agrees without qualification to meet all the material contract requirements." JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 506 (3rd ed. 1998). Further, the CNMI-PR require that "Officials with expenditure authority shall provide for full and open competition through use of the competitive procedure that is best suited to the circumstances of the contract action." CNMI-PR 3-101. Although the Director is stating that this was not an Invitation for Bid pursuant to CNMI-PR 3-102, but was under the "practice" of letter bidding, the needs of the Government should be set forth in order to ensure an even playing field and full and open competition. In this instance, the entire solicitation is set forth in two sentences on the May 26th facsimile. The facsimile did not contain a description in sufficient detail nor did it contain essential contract terms and conditions. The deficiencies in the

solicitation cannot be ignored. Due to the deficiencies in the solicitation, the quotes received were too disparate, making equal evaluation impossible. Specifically, the terms of the leases were for varying lengths and the features and specifications of the machines listed on the quotes were either distinctly different or not included in all quotes submitted. When the Government issues an Invitation for Bid (IFB), the specifications of the product and the contract terms necessary to the Government are included and addressed by the bidders. Therefore, when the Government opens the bids, it may choose the lowest bidder from the responsive bids without having to determine best value for the government. Bid solicitations need to “accurately reflect the Government requirement” and “adequately state what is to be done or what is to be delivered to the Government in order to allow bidders to properly respond and evaluations to be made on a uniform basis.” CNMI-PR 3-102(4). Although the letter bidding “practice” is not set forth in the CNMI-PR, minimal requirements must still be present in order for the open competition requirement under the CNMI-PR to be met and to ensure that the Government is efficient, effective and fair in its procurement of goods and services.

Further, in Competitive Sealed Bidding, the CNMI-PR do not normally allow use of a brand name or other purchase description to specify a particular brand name, product or feature of a product peculiar to one manufacturer, regardless of the number of sources solicited. CNMI-PR 3-102(3). Again, although the Director is characterizing this solicitation as a letter bidding, the facsimile requesting quotations did not set forth the specifications needed by NMHC, it stated “need of a quotation on a Xerox machine to update our ‘Xerox Document Centre 230ST’ unit.” Such a solicitation does not appear to foster the full and open competition requirement or intent of the CNMI-PR as it does not list the Government’s needs/requirements, specification and/or terms.

Although the Director is referring to this solicitation as a letter bidding solicitation, a “practice” he claims is under his discretion, it is undisputed that it is not specifically authorized under the CNMI-PR. In addition, the solicitation in this instance, although alleged to have been provided to the only three photocopier vendors on the island, does not appear to conform to the full and open competition and other requirements of the CNMI-PR or meet any exception to those requirements.

D. Purchase Order – Contract Splitting

“Purchase orders may be utilized for small purchasers (sic) subparagraphs (2) and (3).” CNMI-PR 3-105. In the instant case, a purchase order was used for the first year (12 months) of the 60-month lease of the photocopier. However, the purchase (total – yearly \$5,046.00; 60 months/5 years \$25,230.00) was not a small purchase and does not, therefore, fall under either CNMI-PR 3-105(2) or (3). Preparation of a PO did not modify the existence of the terms of the lease agreement, which was actually mentioned on the PO and was for an amount far in excess of the small purchase ceiling. Preparation of yearly POs to avoid bidding is indirectly addressed by CNMI-PR 2-104, which specifically states that if the “Director determines that a contract has been split into two or more contracts for the purpose of avoiding bidding, then he may require

the contract to be competitively bid.” In the instant case, there is no question that the base amount for the lease agreement is \$25,230.00. As such the purchase order cannot be deemed to be a small purchase, but simply a method of payment that was used for the yearly base fee on the larger contract with Xerox.

E. Not an Expedited Procurement

During the time period applicable to the procurement, CNMI-PR 3-108, entitled Expedited Purchasing in Special Circumstances, was repealed and reenacted by publication of emergency regulations. Those emergency regulations added and/or modified the exceptions to the dollar limit. The exceptions, however, are not applicable in this appeal involving the lease of an office photocopier. The standard dollar restriction found in CNMI-PR 3-108(6), which is relevant to this appeal and was not modified, states that “[t]he total amount of goods or services that may be approved under this section shall not exceed \$25,000.” Again, in the instant case the dollar amount of the total obligation under the lease agreement signed with Xerox (Xerox form) is \$25,230.00. This amount exceeds the dollar restriction of Expedited Purchasing in Special Circumstances.

Although a request for approval of an expedited procurement was made by NMHC by letter to the Director dated August 17, 2005, the Director specifically states that: “The approval conveyed in P&S’ letter of September 14, 2005, was not for an ‘Expedited’ procurement, but rather for NMHC having done a procurement which was the literal equivalent of P&S’ ‘letter bidding’ practice.” As expedited procurement was never approved or processed by P&S, it is clear that this procurement was not in compliance with CNMI-PR 3-108, a potential exception to the Competitive Sealed Bidding requirement for procurements of this nature. This is despite the Director’s assertion that NMHC’s letter “makes [it] clear that they believe they had made an Expedited procurement which dispenses with formal bidding...”. Although OPA does not agree with the interpretation made by P&S, because the Director specifically stated that his approval “was not for an ‘Expedited’ procurement’ but rather for NMHC having done a procurement which was the literal equivalent of P&S’ ‘letter bidding’ practice,” it is not necessary to further address whether or not NMHC met the requirements of an expedited procurement, as there was no determination or approval by the Director.³

F. Non-Compliance with CNMI-PR

CNMI-PR 1-107 provides that “[n]o government contract shall be valid unless it complies with these regulations.” OPA has not found that either the solicitation or lease agreement complied with the CNMI-PR.

³ CNMI-PR 3-108(3) states: “Upon the Director’s written determination that the factors in (2) above justify an expedited purchase, he shall process the necessary document(s) and assist the official with the expenditure authority in procuring the required goods or services in the most efficient manner.” This particular subsection of CNMI-PR 3-108 did not appear to change with the emergency amendments during the procurement in question.

CNMI-PR 6-103(2) provides that:

If after an award the P&S Director or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor may:

- (a) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (i) ratify or affirm the contract provided it is determined that doing so is in the best interest of the Commonwealth; or
 - (ii) terminate the contract 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[.]

...

There has been no claim or evidence presented to OPA that Xerox has acted fraudulently or in bad faith. As such, the CNMI-PR allow OPA to ratify or affirm the contract if it is determined that ratification is in the best interest of the Commonwealth. OPA, however, does not have sufficient information to support that affirming the lease agreement is in the best interest of the Commonwealth. Indeed, it is obvious that the Commonwealth's best interests would not be served by continuing with this lease agreement which apparently was not obtained through full and open competition and did not comply with the CNMI-PR. There is no evidence that the machines offered by the companies providing quotes were requested or evaluated on an equal basis (as to photocopier specifications or contract terms) or even upon the expressed direct needs of NMHC. As such, OPA's only alternative under this provision of the CNMI-PR is to determine that any contract resulting from the solicitation should be terminated as it was entered into against the CNMI-PR.

Pursuant to CNMI-PR 6-103(2)(a)(ii), Xerox should be compensated for its actual expenses reasonably incurred under a contract with the Government, plus a reasonable profit, prior to termination of the contract.

V. OTHER MATTERS

As questions exist as to the existence of a valid contract with the Government (due to deficiencies in the lease agreement, its form, lack of compliance with the CNMI-PR, absence of Government signatures, absence of mandatory clauses, etc., as set forth briefly in footnote 2) the issue will be remanded to P&S to determine if a contract existed under the CNMI-PR, including what effect

the PO may have. Termination of that contract and compensation due to Xerox may then be calculated as appropriate under the circumstances.

VI. CONCLUSION

Based on the foregoing, OPA finds:

1. CNMI-PR 3-105(5) provides in part that “[a]ny lease or purchase of machinery and equipment in excess of \$2,500 shall be procured pursuant to Section 3-102 or other applicable provisions of these regulations.”
2. The lease of the photocopier in this instance was in excess of \$2,500.
3. The lease of the photocopier was not procured pursuant to CNMI-PR 3-102.
4. The lease of the photocopier was not approved as an CNMI-PR 3-108, entitled Expedited Purchasing in Special Circumstances.
5. The lease of the photocopier was not procured through another exception to full and open competition set forth in the CNMI-PR.
6. The procurement and lease of the photocopier appears to be contrary to the CNMI-PR.
7. The lease agreement with Xerox does not meet the CNMI-PR requirements, specifically those set forth in CNMI-PR 2-104.
8. No bad faith on the part of Xerox was alleged or found.
9. Ratification of the lease agreement does not appear to be in the best interest of the Commonwealth based on the facts presented to OPA.
10. Remand to the Director is appropriate for determination of the existence or lack thereof of a valid contract, termination of the contract, and re-solicitation for the photocopier in compliance with CNMI-PR.

The Office of the Public Auditor, therefore, grants the appeal and remands the issue to the Director for appropriate action, including termination or other appropriate disposal of the lease agreement, and re-solicitation for the photocopier in compliance with the CNMI-PR.

Section 6-102(9) of the revised CNMI-PR provides that IBSS, 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 ten (10) days after the date of this decision.



Michael S. Sablan, CPA
Public Auditor
January 25, 2006