



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Site: <http://opacnmi.com>

1236 Yap Drive

Capitol Hill, Saipan, MP 96950

Mailing Address:
P.O. Box 501399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 322-6481
Fax: (670) 322-7812

)	DECISION ON APPEAL
)	APPEAL NO. BP- A049
IN RE APPEAL OF)	PSS IFB 06 - 013
ONE CALL MAINTENANCE_____)	Cleaning of Kagman and
_____)	Southern High Schools

I. SUMMARY

This is a decision on an appeal filed by One-Call Maintenance (One-Call) from the denial of One-Call's Protest by the Commissioner of Education of the Public School System (Commissioner) regarding PSS IFB - 06 - 013. The Office of the Public Auditor (OPA) has jurisdiction of this Appeal as provided in Section 405(a) of Public School System's Procurement Regulations (PSS-PR). NMIAC § 60 - 40 - 405(a).

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

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[.]"

regulations that are in conflict with this authority would be invalid.” Opinion 03-13 at 7-8. At this time, however, as the validity of PSS-PR has not been ruled on by a court of competent jurisdiction, nor have the PSS-PR or relevant CNMI statutes been revised, OPA will apply the PSS-PR in deciding this Appeal.

III. PROCEDURAL AND FACTUAL BACKGROUND

PSS solicited for cleaning services for Kagman (KHS) and Southern (SSHS) High Schools food courts through PSS IFB 06 - 013. The bids were opened January 24, 2006 at 10:00 am. Eight (8) companies bid on SSHS and seven (7) bid on KHS.

After the bid opening, on February 7, 2006, the PSS Procurement and Supply office requested additional information by facsimile from all of the bidders who responded to the initial bid announcement. The information requested was for the purpose of determining whether the bidders were “responsive” and “responsible” in accordance with the PSS-PR. Specifically, the bidders were asked to “[s]ubmit a current certificate of good standing with the Department of Labor, and any professional letter of reference you may have.” Emphasis in original. The deadline for providing this information was initially February 15, 2006, though this deadline was later extended to February 17, 2006.

On February 17, 2006, One-Call submitted copies of a Letter of Compliance from the Division of Revenue and Compliance (Department of Finance) and a Certificate of Compliance from the Workers Compensation Commission. It did not submit a certificate of good standing from the Department of Labor.

On March 6, 2006, the PSS Procurement and Supply Office completed its responsiveness and responsibility analysis for PSS IFB 06 - 013. Only one bidder, MGB Enterprises, submitted all the required documents and was determined to have satisfied this criteria.

On March 9, 2006, PSS sent a letter to One-Call informing it that MGB Enterprises was determined to have been the responsive and responsible bidder with the lowest bid.

On March 29, 2006, One-Call requested that PSS “re-evaluate” the results of PSS IFB 06 - 013.

On April 5, 2006, the Commissioner of Education responded by letter to One-Call’s request for a “re-evaluation.” In that letter, the Commissioner recounted the procedural and factual history detailed above. The Commissioner explained that One-Call did not submit the certificate of good standing from the Department of Labor and was, therefore, not determined to be the lowest responsive and responsible bidder

On April 10, 2006, One-Call appealed the decision of the Commissioner of Education to the Office of the Public Auditor (OPA).

That same day, OPA provided Notice of the Appeal to the Commissioner of Education.

On May 3, 2006, the Commissioner of Education responded to One-Call's Appeal to OPA.

Though One-Call had ten (10) days to provide comments on the Commissioner's response, it did not do so.

IV. ISSUES ON APPEAL

I. Was the initial Protest timely?

II. Did the PSS Procurement and Supply Office improperly exclude One-Call as a nonresponsive and nonresponsible bidder?

V. ANALYSIS

A. Timeliness of Original Protest

Section 401(a)(1) of the PSS-PR states that a bidder who is aggrieved by an award of the contract may protest the decision to the Commissioner of Education. The written protest must be received by the Commissioner within ten (10) days of the bidder having received notice of PSS' intent to award the contract. NMIAC § 60 - 40 - 401(a)(1).

PSS' letter to One-Call is dated March 9, 2006. The request for a re-evaluation was dated March 29, 2006 and received by PSS on March 31, 2006.²

According to the PSS-PR § 401(d):

- (d) Computation of Time:
 - (1) Except as otherwise specified, all "days" referred to in this part are deemed to be working days of the Public School System. The term

² PSS, in its report to OPA, claims that One-Call's letter requesting a "re-evaluation" was not a protest and PSS responded merely as a "professional courtesy." PSS Report at p. 3.

PSS appears to have responded to One-Call's letter as if it were a protest; despite noting that "protests must be filed within ten (10) days of the bidder, offeror, or contractor knowing of the facts giving rise thereto," PSS made findings and a determination. Nevertheless, since PSS correctly observed that the protest was filed out of time, it would be inappropriate to consider the protest as having been properly filed with the Commissioner.

“file” or “submit” except as otherwise provided refers to the date of transmission.

- (2) 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.

NMIAC § 60 - 40 - 401(d).

One-Call does not acknowledge when it received the PSS letter, even though it was sent the PSS Report and had the opportunity to submit comments. Assuming that the PSS letter dated March 9 was mailed on March 10 and received by One-Call on March 13 and given that Friday, March 24 was a CNMI recognized holiday, the tenth working day would have been March 28, 2006. PSS received One-Call’s letter on March 31, 2006. Thus, One-Call’s original protest was untimely and therefore, its Appeal to OPA was not properly filed.³

B. Exclusion of One-Call as a Nonresponsive and Nonresponsible Bidder

OPA need not reach the merits of the Appeal since it has determined that the Appeal was not properly filed because of the untimeliness of the original Protest. Nevertheless, should One-Call seek reconsideration of its Appeal or file for review of the Decision on Appeal in court, OPA will address whether PSS improperly excluded One-Call as a nonresponsive and nonresponsible bidder.

The facts are undisputed in this Appeal. On February 7, 2006, the PSS Procurement and Supply Office specifically requested additional information by facsimile from the eight (8)

³ One-Call’s Appeal to OPA was within the 10-day time limit prescribed by the statute (NMIAC § 60 - 40 - 405(c)) but did not otherwise meet the requirements of the appeal section:

- (a) Jurisdiction; Exhaustion of Remedies. A written appeal to the Public Auditor from a decision by the Commissioner of Education may be taken provided that the party taking the appeal has first submitted a written protest to the Commissioner as provided in § 60 - 40 - 401. . . .

NMIAC § 60 - 40 - 405(a). PSS - PR § 60 - 40 - 401 requires that the protest “must be received by the Office of the Commissioner of Education within 10 days of the bidder, offeror, or contractor receipt of the notification of PSS’ intent to award the contract.” Since One-Call did not submit its request to the Office of the Commissioner within the ten days from notification of the intent to award the contract, the Protest was not properly filed in conformance with § 60 - 40 - 401. Since the Protest was not filed in conformance with § 60 - 40 - 401, the Appeal cannot be properly filed with the Public Auditor in accordance with NMIAC § 60 - 40 - 405(a).

companies who had responded to PSS IFB 06-013. The PSS provision relating to “Responsible of Bidders [sic] and Duties” that listed all the required documents was attached to the letter. The letter asked the recipients to “[k]indly review the list of required documents compared to what you have previously submitted to Procurement and Supply for IFB # 06 - 013, and submit the remaining documents to the Procurement and Supply Office, 3rd Floor Retirement Fund Building by 4:30 p.m., Friday, February 17, 2006.”

PSS has submitted corroboration that the facsimile was sent to One-Call. One-Call does not claim to have not received the facsimile. Rather, it is undisputed that in response to the facsimile, One-Call provided PSS with copies of a Letter of Compliance from the Division of Revenue and Compliance (Department of Finance) and a Certificate of Compliance from the Workers Compensation Commission. It did not submit a certificate of good standing from the Department of Labor.

One-Call makes two arguments with respect to its exclusion from PSS IFB 06-013 as nonresponsive and nonresponsible. First, it argues that it was determined to be responsive and responsible with respect to PSS IFBs 06 - 009 and 06 - 012 and that those IFBs did not require the submission of the Labor certification. For PSS IFB 06-013, PSS specifically requested the document, which One-Call failed to provide. PSS set out specific, legitimate, and neutral criteria. Since the Labor Certificate of Good Standing appears facially valid and deference is given to the procuring agency (please see below), OPA is not going to delve into why some PSS procurements required this certification and others did not. All eight (8) companies were provided notice that they needed to submit the required documents; only one complied.

Second, One-Call argues that not all contractors employ non-resident workers and those that do not would not be able to get certification from Labor. Significantly, One-Call does not claim that it does not employ non-resident workers. An employer that does not hire non-resident workers could have submitted a letter to PSS stating that fact. Moreover, an employer that does not employ non-resident workers could get a certification from Labor as it would not have any claims filed against it. Finally, as PSS pointed out, Labor does have some jurisdiction of resident workers under its Division of Employment Services. One-Call’s argument therefore fails.

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). Generally, an evaluation made by a procuring agency will not be disturbed unless it is arbitrary, capricious, or in violation of procurement statutes or regulations:

It is not the function of our Office to evaluate proposals *de novo*. Rather, we will examine an agency’s evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since the relative merit of competing proposals is primarily a matter of administrative discretion.

Ryan Assocs., Inc., Comp. Gen. Dec. B-274194, 97-1 CPD ¶ 2. Here the stated evaluation criteria was reasonable and very specific. One-Call admittedly failed to submit the Labor certification.

Moreover, a determination of non-responsibility will not be disturbed unless the protester can demonstrate agency bad faith or unless the record fails to provide a reasonable basis for the non-responsibility determination. *System Dev. Corp.*, Comp. Gen. Dec. B-212624, 83-2 CPD ¶ 644. One-Call has made no such showing here.

VIII. DECISION

Based on the foregoing, OPA finds that:

1. One-Call's initial Protest was untimely, and therefore its Appeal to OPA was not properly filed.
2. PSS did not improperly exclude One-Call as a nonresponsive and nonresponsible bidder for PSS IFB 06-013.

OPA, therefore, denies One-Call's Appeal.

Section 405(i) of the PSS-PR provides that One-Call, 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. NMIAC § 60 - 40 - 405(i)(1). 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. NMIAC § 60 - 40 - 405(i)(1). 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. NMIAC § 60 - 40 - 405(i)(2).



Michael S. Sablan, CPA
Public Auditor

June 14, 2006