



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

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)	APPEAL NO. BP-A053
IN RE APPEAL OF)	DECISION
<u>ALLIED CONSTRUCTION CORPORATION</u>)	PSS RFP 07-025

I. SUMMARY

This is a decision on an appeal filed by Allied Construction Corporation doing business as Barney's Pizza (Barney's), through Mark B. Hanson, Attorney at Law, from the denial of Barney's protest by the Commissioner of Education (Commissioner) regarding PSS-RFP-07-025 (the RFP) issued by the Public School System (PSS). The Office of the Public Auditor (OPA) has jurisdiction over this Appeal as provided in the Public School System Procurement Rules and Regulations (PSS-PR) as set forth in Chapter 60-40 of the Northern Mariana Islands Administrative Code (NMIAC).

OPA finds that the Appeal was brought after award; that no fraud or bad faith on the part of the contractors that were granted awards under the RFP was alleged or exists; and, that it is in the best interest of PSS and the Commonwealth to affirm the contracts.

As such, the Appeal is denied.

II. APPLICABLE REGULATIONS

The Board of Education promulgated the PSS-PR under its authority set forth in Public Law 6-10.¹ Although the PSS-PR, set forth in NMIAC Title 60 Chapter 60-40, are similar to the CNMI Procurement Regulations (CNMI-PR), NMIAC Title 70 Subchapter 70-30.3, they do not mirror the CNMI-PR. As stated in the PSS-PR, the Commissioner is responsible for procurement and supply for PSS.

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[.]"

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.

At this time, however, the issues raised in Opinion 03-13 related to PSS have not been brought before or ruled on by a court of competent jurisdiction. As the application of the PSS-PR is not otherwise an issue, OPA will apply the PSS-PR in interpreting this Appeal.

III. PROCEDURAL AND FACTUAL BACKGROUND

A. RFP and Awards

On or about March 30, 2007, by authorization of the Commissioner, the Procurement and Supply Office of PSS issued RFP 07-025, entitled Food Services Privatization. The RFP, excluding attachments, was forty-seven pages long.² The RFP requested proposals from food services management companies (FSMC) for the school meal program for the 2007-2008 school year. The RFP indicated that the contract(s) may be renewable annually for up to two additional years. The school meal program was for all eligible schools on the islands of Saipan, Rota, and Tinian. Although the RFP requested proposals for food service on three islands, the proposers were to indicate which island(s) the proposal covered. Six vendors submitted proposals for the island of Saipan. As the Appeal relates solely to services on Saipan, OPA will address and include information related to the proposals and contracts issued for services on Saipan, but may include information related to the entire RFP or the other islands, as deemed appropriate.

On April 16, 2007, PSS held a pre-submission conference. Representatives from each of the companies that subsequently submitted proposals were present. Addendum No. 1 to the RFP, which was a summary of the pre-proposal conference, was issued after the conference. In June, pursuant to the RFP, the RFP evaluation committee made its recommendations to the Commissioner in the form of a report. Subsequently, in July, five contractors, including Barney's, entered into contracts with PSS to provide food service for the 2007 - 2008 school year, as follows:

² The attachments are listed on page 3 of the RFP and include: School Data; Sample Menus; CNMI Meal Patterns; List of Ingredients; Site Review Form and Facility Review Form; Meal Count Form; and, Evaluation Guidelines. Page four of the RFP references the CNMI Public Health Rules and Regulations Governing the Manufacturing, Packing, Importation, Distribution, Warehousing or the Holding of Food for Human Consumption; the U.S. Public Health Service FDA Food Code; and, the Food Buying Guide. Page 4 also includes a list of acronyms used in the RFP and the industry.

Summary of Contracts for Saipan

Contract Number ³	Name of Contractor ⁴	Date Signed by Contractor	Not to Exceed Amount	Ranking ⁵
50325-OC	LSG	7/25/07	\$1,512,220	2
50292-OC	MV Reyes	7/23/07	\$ 987,689	4
50293-OC	Kalayaan	7/24/07	\$ 918,073	1
50351-OC	Barny's	7/26/07	\$ 851,960	5
50290-OC	Auntie Mag's	7/04/07 ⁶	\$ 832,764	3

B. Barny's Protest and Related Documents

1. July 12th Letter Questioning Proposed Number of Meals

Prior to executing a contract with PSS or filing its protest, in a letter dated July 12, 2007, Barny's President, Jimmy Ham, requested that the Commissioner reconsider the number of

³ Each of the contracts were erroneously marked as having been procured through Competitive Sealed Bids. Although incorrect, this error appears to be simply administrative in nature and is not fatal to the contracts or this Appeal. However, as noted elsewhere in this Decision, inappropriate terminology, "bid" and "bidder" for example, were used throughout the RFP, protest and appeal processes.

⁴ LSG Lufthansa Sky Chef/Catering Services is referred to herein at LSG. MV Reyes Catering is referred to herein as MV Reyes. Kalaya'an, Inc., dba Mangkok Catering is referred to herein as Kalayaan. Allied Construction Corporation brought this Appeal doing business as Barny's Pizza, however, Barny's contract actually names "Barny's Pizza & Pasta House" as the contractor. Auntie Mag's Catering is referred to herein as Auntie Mag's.

⁵ Ranking of the proposals is derived from the total evaluation scores set forth on page three of the RFP evaluation committee's recommendation report to the Commissioner: Kalayaan - 78, LSG - 77, Auntie Mag's - 72, MV Reyes - 69, Barny's - 67.

⁶ Although the contractor's signature appears to be dated July 4, 2008, the contract was certified as complete on July 24, 2008. In the instances of the other four contracts, the contracts were certified as complete on the same date as the date of the contractor's signature or the following day. A typographical error may exist in the date of the contractor's signature. If the contractor's signature was obtained on July 4th, prior to the other signatures on the contract, NMIAC § 60-40-115(i) may have been violated. NMIAC § 60-40-115(i) states that "[i]t is the responsibility of the official with expenditure authority to ensure that the contractor does not sign the contract or incur any expenses under it until all necessary government signatures have been obtained." Assuming that the contractor's signature was obtained on July 4th, before all necessary government signatures were obtained, it does not appear that any expenses were incurred prematurely. As such, the potentially minor violation of the PSS-PR is not an issue in this Appeal that alters the conclusion herein.

meals that Barney's had verbally been informed by PSS that it may receive under a contract.⁷ Mr. Ham also stated in that letter that:

We believe that the evaluation committee just only looked at the total area of the caterer's facility & did not consider other factors like caterer's previous past performance, financial capabilities, kitchen & cooking equipment capabilities, USDA-Sanitation compliance, completeness of the submission proposals, etc.

July 12th letter at 1-2.

The letter also stated that Barney's believed it was superior to the other proposers.⁸ The letter further requested that the meal distribution be reconsidered.⁹ The letter, however, did not state it was a protest and was not treated as such by PSS.

2. The Protest

After executing a contract with PSS under the RFP on July 26, 2007, Barney's, through counsel Mark B. Hanson, filed its Protest with the Commissioner by letter dated July 31, 2007.¹⁰ The Protest was stamped as received by PSS on August 1, 2007. The Protest included a request for documents.¹¹ It also indicated Barney's intention to expand its Protest after review of the additional documents to be provided by PSS.¹² Barney's raised the following six issues in its Protest as indicated by the headings set forth in the correspondence:

⁷ "We are writing to you in regards to the number of meals which was verbally provided to us by FNS." July 12th letter at 1.

⁸ "We believe that we are much, much far better than them." *Id* at 2 (emphasis in original).

⁹ "We therefore request that the meal distribution to each caterer be given a careful study & re-evaluation based on the merits of submission of requirements, financial capabilities, kitchen & equipments capabilities & safety/sanitation of the area." *Id* at 2.

¹⁰ It appears that Barney's signed the contract on July 26, 2007, the day after the contract was e-mailed to Barney's counsel, Mark B. Hanson. *See* Appeal at 3. There is no evidence that the issues raised by Barney's in its July 12th letter to PSS had been resolved at the time Barney's signed the contract as PSS did not respond to Barney's July 12th letter until August 8, 2007. As such, an estoppel argument was made by both Kalayaan and Auntie Mag's in response to Barney's Protest. *See* Kalayaan's August 27th Comments; Auntie Mag's August 27th Comments; and Footnotes 14 and 15 herein. Barney's, however, argued that it would not have had access to certain solicitation documents until all contractors, including Barney's, signed the contracts. *See* Barney's September 4th Response at 1.

¹¹ "By this letter, Barney's requests access to and a copy of all of the documentation attached to the Review and Recommendation and, if not already included therein, all other documents prepared by PSS or any of its evaluators or any of its procurement officers or attorneys or other agents with regard to this Procurement. . . ." Protest at 2.

¹² "In any case, without full access to the documents reflecting the substance of the individual evaluations that ultimately led to the various award to bidders on this particular Procurement, Barney's cannot fully articulate all of the basis for its protest of this Procurement . . . Barney's reserves the right to advance after full disclosure . . ." *See* Protest at page 2.

- i. Awards were made to unqualified/non-responsive bidders.
- ii. Some awards exceed Maximum Meal Output for the particular bidder.
- iii. An award to one bidder exceeds the bidders weighted average where other bidders were awarded less than their weighted average.
- iv. The weighted average calculation appears to differ from the RFP calculation.
- v. The determination of maximum meal output is wholly subjective and is arbitrary and capricious as applied to Barney's in this Procurement.
- vi. Barney's evaluation was erroneous, arbitrary and capricious.

3. PSS Acknowledgment, Notice and Response

By letter dated August 8, 2007, addressed to Mark B. Hanson, PSS acknowledged receipt of Barney's Protest. On that same date, PSS gave notice and provided a copy of the Protest to the interested parties. In another separate correspondence dated August 8, 2007, addressed to Jimmy Ham, President/Owner of Barney's Pizza, PSS responded to Barney's July 12th letter that questioned the proposed number of meals to be distributed.

4. Initial Responses to Protest

Management for Kalayaan and MV Reyes responded to the Protest by submitting letters to the Commissioner dated August 10, 2007, and August 16, 2007, respectively. LSG responded to the Commissioner in writing, through the Law Offices of Mark S. Smith, on August 17, 2007.

5. Supplement to Protest

By letter dated August 27, 2007, and stamped as received by PSS on August 28, 2007, Barney's, through counsel, presented five additional issues to supplement its Protest. In this Supplement to Protest, Barney's set forth the following additional issues:¹³

- i. PSS' Refusal to Provide Financial Documents.
- ii. PSS Bid Price Calculation is Incomprehensible.
- iii. Not All of the Evaluators Were Even Present at Site Visits.
- iv. The Technical Evaluations were Erroneous in Some Respects.
- v. LSG's additional meals is (sic) not properly reflected.

6. Comments to Protest and Barney's Reply

On August 27, 2007, Kalayaan and Auntie Mag's, both through counsel, filed written comments to Barney's Protest. Kalayaan outlined four points in its comments and concluded that the Commissioner should deny the Protest and affirm and ratify the contracts.¹⁴ Auntie

¹³ See Supplement to Protest section headings 1-5, pages 1-6. Note the Supplement to Protest includes two issues numbered 4 and capitalization inconsistencies are written as in original text.

¹⁴ In addition to its conclusion, Kalayaan sets forth the following four headings for its arguments in its comments dated August 27, 2007:

Mag's comments adopted all of Kalayaan's arguments, set forth three additional issues, and requested that Barney's Protest be dismissed.¹⁵ Barney's responded to those comments on September 4, 2007. Throughout October, additional comments, responses and replies were filed with PSS.

C. The Commissioner Denied Barney's Protest

The Commissioner in the Protest Decision, dated October 24, 2007, and issued on October 25, 2007, denied Barney's Protest. The Commissioner found that the contracts awarded under the RFP were made in the best interest of PSS and pursuant to § 60-40-401(a)(3) re-affirmed the validity of all of the contracts awarded under the RFP.¹⁶

D. Barney's Appeal to OPA

1. The Appeal

Barney's, through counsel Mark B. Hanson, filed its Appeal with OPA on November 8, 2007. Barney's raised seven issues in its Appeal.¹⁷ In its conclusion, Barney's claimed that the award

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1. Barney's accepted the benefits of the RFP, including the number of schools and meals it was awarded, by signing a contract with PSS before it filed this protest, and is thus, estopped from protesting;
 2. Kalayaan's manager meets the RFP requirements;
 3. Barney's again seeks to eat its cake and have it too with regard to maximum meal output and the weighted average; and,
 4. Barney's has its facts wrong regarding Kalayaan's evaluation.

¹⁵ Auntie Mags argues the following in its response to Barney's Protest dated August 27, 2007: (1) timeliness of Protest; (2) estoppel of Barney's (sic) from protesting; and, (3) Factual issues related to Auntie Mag's management.

¹⁶ The Commissioner stated "in examining the factual background of this procurement, the Public School System has respectfully come to the conclusion that Barney's Pizza's protest is unwarranted." Protest Decision at 10.

¹⁷ The seven issues raised by Barney's include:

1. Whether PSS erred in determining that all bidders receiving awards under the RFP were qualified and responsive;
2. Whether PSS erred in determining that it was in compliance with its RFP, PSS Procurement Regulations and CNMI law when it made awards to bidders that exceeded the bidders' maximum meal output as determined by PSS;
3. Whether PSS erred in determining that it was in compliance with its RFP, PSS Procurement Regulations and CNMI law when it made awards to bidders that exceeded the bidders weighted average where other bidders were awarded less than the bidders' weighted average;
4. Whether PSS' determination of a Maximum Meal Output for each proposer on the RFP was arbitrary and capricious thereby denying Barney's a fair opportunity to participate in the PSS food service program;
5. Whether PSS evaluation of Barney's proposal submitted pursuant to the RFP was arbitrary and capricious thereby denying Barney's a fair opportunity to participate in the PSS food service program;
6. Whether PSS erred in determining that it was in compliance with its RFP, PSS Procurement Regulations and CNMI law when it made awards to bidders based

process was arbitrary and capricious and stated that:

the Public Auditor should remand this matter to the Commissioner of Education with instructions to:

- (A) revoke all awards in this case;
- (B) disqualify all unqualified/non-responsive bidders including Kalayaan and MV Reyes who both lack the management experience required by the RFP, among other apparent and possibly latent deficiencies;
- (C) reevaluate Barney's fairly[,] particularly in light of the initial disparity in points awarded to other bidders relative (sic) to the facts reported in the preliminary documents received from PSS;
- (D) re-apportion and re-award the meal services so that they comply with the RFP, with the PSS Procurement Regulations and with Commonwealth law; and
- (E) turn over the full contents of all proposals submitted in response to the RFP, including any supplements thereto, and all other documents contained in the files of PSS with regard to the RFP.

Appeal at 17.

2. PSS Report and CD Supplement

On December 6, 2007, PSS filed its Report with OPA. The Report set forth the procedural background for the Protest, the issues raised by Barney's in its Protest and Supplement, and a time line of events. The Report also briefly discussed the evaluations under the RFP and issues PSS had with evaluating Barney's. The Report referenced a CD that was not included in the package filed with OPA. On December 10, 2007, PSS transmitted a copy of the RFP CD that had been distributed to parties interested in the RFP and was referenced in the PSS Report.

3. Comments to Appeal Report and Other Correspondence

Barney's provided comments to the PSS Report on December 21, 2007. Kalayaan requested an extension from Friday, December 21st to Monday, December 24th to file its comments. On December 21, 2007, Auntie Mag's counsel, Timothy Bellas, provided a letter to OPA stating that he had not received notice of the Appeal and would not be able to submit any comments

on patently erroneous technical evaluations – evaluations mandated by the RFP; and

- 7. Whether PSS can deny the public in general, and aggrieved proposers in particular, access to financial information and other business information submitted to PSS by a proposer in response to a request for proposals that has, as an evaluation criteria therein, a percentage of the total evaluation factors allocated to the "financial capabilities" of the proposer.

Appeal at 5-7.

until after January 14, 2008. On December 24, 2007, Kalayaan filed its comments.

OPA, by letter addressed to the Commissioner dated December 24, 2007, requested confirmation that notice had been provided to all interested parties, including Auntie Mag's, as it appeared from Kalayaan's comments and the correspondence received from Timothy Bellas, counsel for Auntie Mag's, that Auntie Mag's was an interested party. OPA could not ascertain from the documents in its file whether or not notice of the appeal, the appeal documents, and the report were provided to any affected party. OPA also requested that PSS ensure that all parties are provided a copy of any response to OPA's request.

The Commissioner responded on December 26, 2007, and stated that "on November 14, 2007, Auntie Mag's Catering was indeed given notice of the Appeal." The letter indicated that the appeal documents were included with the notice. In addition, the Commissioner stated that on December 6, 2007, Auntie Mag's was "also furnished a copy of the Office of the Commissioner of Education's report on the appeal to OPA." Attached to the letter were copies of two letters addressed to Auntie Mag's Catering Services, Inc., attention Mr. James Kintol, which were stamped received and contained a signature and date that were handwritten. Further, the letter to OPA from the Commissioner did contain a copy distribution list that included Auntie Mag's counsel. No further correspondence was received from Auntie Mag's regarding the PSS Report.

4. Additional Information Requests and Communication Delays

Pursuant to NMIAC § 60-40-405(g), OPA requested additional information from the parties. On February 1, 2008, OPA requested that the Commissioner provide a copy of the contracts issued to the contractors under the RFP and other information necessary to determine the Appeal. Barney's, through counsel Mark Hanson, and other interested parties were provided a copy of this request via facsimile. In a second letter dated February 1, 2008, addressed to Mark Hanson, counsel for Barney's, OPA requested additional information from Barney's. The Commissioner and other interested parties were provided a copy of this request via facsimile.

PSS responded to OPA by letter dated February 12, 2008, and received on February 14, 2008. No additional information was received from Barney's or any of the other interested parties at that time. After reviewing the documents provided by PSS, it was noted that the maximum dollar amount per meal was used for all contractors. As such, on February 25, 2008, OPA by letter to the Commissioner, a copy of which was provided to all interested parties, requested clarification regarding the pricing portion of the procurement and award process as price had been a factor in the evaluation of contractors.

PSS responded with a letter dated February 29, 2008, and received by OPA on March 6, 2008. That letter provided in part:

The total contract amount for each vendor was calculated using maximum reimbursement prices set for both breakfast and lunch. In all contracts, the maximum reimbursement rate, rather than what was in the contractors' proposals, was used as a means for cost projection. Mistakenly, all contractors are being reimbursed the maximum reimbursement rates rather than the lower price

evaluated in the proposal. This is an oversight that we will work to resolve. Corrective action is in order, and the PSS Food and Nutrition Service department has been informed to correct the mistakes.

On April 3, 2008, Sean Frink acknowledged receipt of OPA's February 25th letter and advised OPA that he, as counsel for Kalayaan, had not received any additional information submitted pursuant to OPA's requests for additional information.¹⁸ OPA reviewed the PSS correspondence related to the additional information that had been provided and could not ascertain whether or not any of the interested parties had been provided a copy of the additional information from PSS. As such, on April 14, 2008, OPA advised the Commissioner and, by copy, all parties that OPA had "received correspondence from Sean Frink, counsel for Kalayaan, that indicates that copies of the additional information provided by the Public School System (PSS) in response to OPA's request for additional information were not provided to all parties." OPA requested that "PSS immediately provide all such information and correspondence previously provided to OPA in response to those requests to all parties." The letter further discussed the previous requests made to the parties for additional information and set the deadline for receipt of any further comments.¹⁹

Later that week, a PSS staffer came to OPA and requested copies of the correspondence and attachments that PSS had previously provided to OPA from OPA's administrative personnel. As it was apparent that the information had not been previously provided to the other parties, allowing adequate additional time for response to the additional information might be necessary to the Appeal. As such, OPA held the Appeal in abeyance for a longer period of time to allow adequate time for response.

When the draft of this Decision was in near final form, OPA received correspondence from Mark Hanson dated June 2, 2008, and stamped as received by OPA on June 3, 2008. In that correspondence, Mr. Hanson inquired as to the status of the Appeal. He also stated, among other things, that he did not receive OPA's February 1st request for additional information

¹⁸ The April 3rd letter provided in part:

"I have not, however, received copies of any documents provided to you in response to your request. Additionally, I note that your letter makes reference to a review taking place of "additional information" that had previously been submitted to your office. I have not received copies of that additional information. Please either provide me with copies of any documents provided to your good office in response to your February 25, 2008 and February 1, 2008 letters to PSS, your February 1, 2008 letter addressed to Mr. Hanson, and any other additional documents that have been submitted to your office beyond the parties' initial briefs, or cause the responsible parties to expeditiously provide me with such documents."

¹⁹ The April 14th facsimile stated that: "The letter to Appellant, it has been noted, did contain a typographical error in the year – the letter requested information related to dates in August, 2006, which should have been August, 2007. No information or comments to that request, or the requests sent to PSS, were received from Appellant or any of the parties. OPA has the draft of the opinion waiting to be finalized at this time. However, as it is apparent that all parties may not have received the additional information provided by PSS, if any party has any comments to the additional information PSS will be providing shortly, those comments should be delivered to OPA prior to 4:30 p.m. on Friday, April 18, 2008. If any such comments are made, as always, please provide copies to all parties to the Appeal."

directed to Barny's. Prior to having the opportunity to respond to the June 2nd letter, OPA received a second letter from Mr. Hanson dated June 3, 2008, and stamped as received by OPA on June 4, 2008. Mr. Hanson's June 3rd letter advised OPA that its February 1st request had "never made it out of the memory of the machine before the machine removed it from memory."²⁰ Mr. Hanson, however, stated that he was now in receipt of OPA's request for additional information dated February 1st addressed to him. The letter also provided certain responses to OPA's previous request for additional information. Prior to June 2nd, OPA had not received any response or additional information from Barny's related to any of the foregoing requests or questioning the status of the Appeal.²¹

OPA has proceeded with great caution in issuing this Decision as many red flags were raised that indicated that the parties, including Appellant and PSS, were not fully communicating with each other and providing copies of correspondence sent to OPA. Although the lack of comment on Appellant's part also raised a red flag and made OPA proceed with caution, OPA did not find it overly unusual that an Appellant might choose, for some reason, not to respond to a request for additional information. OPA copied Appellant with each and every correspondence in the manner it copied all parties, via facsimile. Appellant's late response to the February 1st correspondence, which was received on June 4th, has been reviewed and considered in this Decision.

IV. ISSUES

Although Barny's raised many interesting and potentially sound concerns, which are set forth in Footnote 17 and have been considered and discussed throughout this Decision, OPA's authority to make a determination in this Appeal is limited by the PSS-PR, specifically NMIAC § 60-40-410(b). In an instance when an appeal is brought after contract award, if the

²⁰ The letters to the Commissioner and Mr. Hanson were faxed with a transmittal cover page to the Commissioner, Mr. Hanson, and the other interested parties, either directly or through counsel. OPA's facsimile transmittal report reflected that the two facsimiles were successfully sent to Mr. Hanson's law office fax number on February 1, 2008 – the first at approximately 3:27 p.m. and the second at approximately 3:37 p.m., ten minutes later. OPA does not make it a practice to communicate with the parties via email, except in instances of unreliable communication via other methods to foreign countries or, on occasion, when distributing a final decision, in order to avoid ex parte communication issues. Further, for interim correspondence, OPA typically does not expend public funds on mail or hand delivery as, in most instances, facsimile communication has proved to be both reliable and cost efficient.

²¹ Barny's apparently received: (1) OPA's letter to the Commissioner, dated February 25th, discussing receipt of additional information provided by PSS; (2) Mr. Frink's April 3rd correspondence, which references both the request for additional information made to the Commissioner and to Barny's and the additional information received from PSS; and, (3) OPA's April 14th correspondence to the Commissioner and all interested parties, which discusses: (a) the previous requests for information to the Commissioner and Appellant, (b) the additional information received from PSS, (c) the absence of information and comments received by OPA in response to the request to the Appellant and to PSS, and, (d) set 4:30 p.m. on Friday, April 18, 2008, as the deadline for additional comments. Despite receipt of such correspondence, however, Barny's did not respond, question, comment, or reply to OPA until June 2nd/June 3rd. OPA does not fully comprehend Appellant's delay in responding. Even if the requests for additional information were not received due to office equipment malfunction on February 1st, Appellant should have known by the correspondence later in February and then in April that OPA was in need of additional information to determine the Appeal.

solicitation or award of the contract(s) violated law or regulation, then:²²

- (1) 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 the Public School System.
 - (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.

- (2) If the person awarded the contract has acted fraudulently or in bad faith:
 - (i) The contract may be declared null and void; or
 - (ii) The contract may be ratified and affirmed if such action is in the best interests of the Public School System, without prejudice to the Public School System's right to such damages as may be appropriate.

NMIAC § 60-40-410(b).

In the case at hand, no allegation or evidence of fraud or bad faith on the part of any of the contractors was alleged, presented or found. As such, § 60-40-410(b)(2) is inapplicable and § 60-40-410(b)(1) governs this matter. Thus, if it is determined that either the solicitation or award(s) violated law or regulation, the ultimate issue is whether it is in the best interest of PSS to affirm or to terminate the contract(s).

V. ANALYSIS

A. PSS-PR Competitive Sealed Proposal Requirements are Limited

Although other sections of the PSS-PR apply to procurement in general, such as qualifications and duties of contractors, ethics in contracting, and contract administration, the complete section regarding Competitive Sealed Proposals, § 60-40-225, consists of less than half a page in the NMIAC.²³ Unlike the CNMI-PR provision addressing Competitive Sealed Proposals,

²² In this case, not only was an award made to another proposer/vendor prior to appellant bringing its Protest, but five contracts, including one to the protester, now appellant, were awarded in July, 2007.

²³ NMIAC § 60-40-225 reads:

§ 60-40-225 Competitive Sealed Proposals

- (a) Condition for Use. When the Commissioner of Education determines in writing upon the advise (sic) of the legal counsel that the use of a competitive sealed bidding is either not practical or not advantageous to the Public School System, a contract may be entered into by competitive sealed proposals.
- (b) Request for Proposals. Proposals shall be solicited through a request for proposals.

codified in NMIAC § 70-30.3-210, which was substantially amended and expanded in 2001, the PSS-PR provision regarding competitive sealed proposals remains quite limited.

The PSS-PR do not include the additional competitive sealed proposal requirements regarding competitive range, technical evaluations, and technical criteria that are found in the CNMI-PR. The PSS-PR requirement regarding evaluation factors, § 60-40-225(e), for example, simply states that the “request for proposals shall state the relative importance of price and other evaluation factors.” Further, the PSS-PR provision that addresses contract award in instances of competitive sealed proposals, § 60-40-225(g), simply requires award to be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to PSS, considering price and the evaluation factors. Although that section does set forth a prohibition on the use of other factors or criteria in the evaluation and requires that the contract file contain the basis on which the award is made, the requirements are not overly restrictive and create abundant leeway for PSS to exert discretion in determining which proposal is most advantageous.

B. Discretion and Best Interest are Factors in the Evaluation Process

1. PSS has Broad Discretion in Evaluating Proposals

The responsibility of evaluating proposals lies with PSS as the contracting entity. PSS has the authority and duty to determine the merits of the proposals submitted and to make the award selection. Consequently, PSS must then deal with any aftermath that stems from any defect in the procurement process. As such, although PSS is bound by reasonableness and the PSS-PR, it has broad discretion in the evaluation process. OPA’s appellate level review of the evaluations made by PSS is not *de novo*. Evaluations that are arbitrary, contrary to law or

(c) Public Notice. Adequate public notice of the request for proposals shall be given in the same manner as provided for in competitive sealed bids.

(d) Receipt of Proposals. Proposals shall be opened so as to avoid disclosure of the contents to competing offerors during the process of negotiation. A register of proposals shall be prepared and opened for public inspection after contract award.

(e) Evaluation Factors. The request for proposals shall state the relative importance of price and other evaluation factors.

(f) Discussion with Responsible Offerors and Revisions to Proposals. As provided in the request for proposals, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers. In conducting discussions there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(g) Award. Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the Public School System taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation and the contract file shall contain the basis on which the award is made.

regulation, or erroneous, may, of course, be overturned. Evaluations will otherwise not be disturbed. Further, in the event an appeal is post-award, as in this Appeal, the contract(s), if it in the best interest of PSS, may be affirmed pursuant to § 60-40-410(b)(1).²⁴

2. PSS Conveyed that Best Interest Governs Selection & Distribution

The PSS-PR require that award be made to the responsible offeror whose proposal is most advantageous to PSS. See § 60-40-225(g). The RFP also included provisions that made it clear that the best interest of PSS would govern the selection and award of services for the schools.²⁵ PSS specifically set forth that it would “select as soon as practicable the company or companies it believes will best provide this service to PSS on the islands of Saipan, Tinian, and Rota, Commonwealth of the Northern Mariana Islands.” See RFP Section 44.0. In addition, PSS informed proposers that “[i]n the event that multiple awards are to be given, Contractors shall be assigned to specific school locations and island(s) which PSS deems is in its best interest.” RFP Section 9.1. Further, Addendum 1 to the RFP, issued after the pre-proposal conference, reiterated that “PSS retains the final discretion on how best schools will be distributed.” Addendum 1 at 4.

C. Responsibility and Responsiveness

1. Responsiveness – Generally a Sealed Bid Concept

Barny’s alleged that “PSS erred in determining that all bidders receiving awards under the RFP were qualified and responsive.”²⁶ See Appeal at 7. Whether or not a contractor is qualified usually involves capability factors and the question of responsibility. Responsibility is addressed in Section V(C)(2) herein. Whether or not a bid/bidder is responsive, however, is a separate and distinct issue in the procurement process. Responsive and responsiveness are terms that typically refer to whether a bid, submitted in response to a formal advertisement for submission of competitive sealed bids, conforms in all material respects with the invitation for bid. See NMIAC § 60-40-040 (r); see also NMIAC § 60-40-205(i)(1). Although § 60-40-225(f) mentions responsiveness, non-responsiveness remains a concept of sealed bidding.²⁷

²⁴ The Commissioner in the Protest Decision stated that: “The Office of the Commissioner of Education has determined that the contracts awarded under this RFP have been made in the best interest of the Public School System.” Decision at 10. The Commissioner then re-affirmed the validity of all of the contracts awarded under the RFP. *Id.*

²⁵ Section 1.3 of the RFP states: “The Public School System reserves the right to accept or reject any or all proposals and to award a single or multiple awards which it deems most favorable to the interests of the PSS.” RFP at 6.

²⁶ Throughout the RFP, the Protest, and this Appeal, terms such as bid and bidder and the concept of responsiveness appear to be used inappropriately for this type of procurement.

²⁷ Subsection (f) provides in part that: “discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements.” See NMIAC § 60-40-225(f). It goes

The PSS-PR do not contain the more extensive version of competitive range found in the CNMI-PR, as mentioned herein. The PSS-PR do, however, provide that discussions “may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award” to insure the responsiveness to the solicitation requirements. *See* § 60-40-225(f). This does not mean that an initial proposal that contains deficiencies that may be made technically acceptable prior to award must be rejected, as is the case in sealed bidding wherein modification of bids is limited and negotiations are prohibited. It is not out of the ordinary for items in a proposal that might be considered as preliminary ‘nonresponsiveness’ and the cure to any deficiencies to be the subject of negotiation, in order to reach a final acceptable proposal. The determination of whether a proposal is within the competitive range or, in this case of the PSS-PR, reasonably susceptible of being selected for award is usually left to the discretion of the agency/contracting officer.

2. Matters of Responsibility May Be Resolved Prior to Award

It is undisputed that contracts may only be awarded to responsible contractors. The PSS-PR address contractor responsibility and qualification in § 60-40-240.²⁸ To be determined responsible, a prospective contractor must: have adequate financial resources to perform, or the ability to obtain such resources; be able to comply with delivery and performance schedules; have a satisfactory performance record and record of integrity and business ethics; have necessary organization, experience and skills to successfully perform, or the ability to obtain them; have necessary production, construction and technical equipment facilities or ability to obtain; be otherwise qualified and eligible to receive award; and must submit a valid business license and other certification as may be required.²⁹

on to discuss revisions after submission and prior to award for the purpose of obtaining the best and final offers. *See id.* In the case of sealed bidding, bidders are typically not allowed such opportunity. In a sealed bid, the contract must be awarded to the lowest responsive bid by a responsible bidder whose bid fully meets the requirements of the invitation for bids and the applicable PSS-PR. NMIAC § 60-40-205(i)(1). As such, if a bid is not responsive to the advertisement, a contract cannot be awarded. In the case of procurement by sealed proposals, negotiations and revisions allow for the government to determine the offer that is most advantageous with much more leeway than the competitive sealed bid process.

²⁸ The title of § 60-40-240 is “Responsible of Bidders and Duties” and not “Responsibility of Bidders and Contractors” as in the CNMI-PR, however OPA refers to this as responsibility of bidders and contractors, as the term appears applicable.

²⁹ PSS-PR § 60-40-240(a) reads:

- (a) Awards shall be made only to responsible contractors. To be determined responsible, a prospective contractor must:
- (1) Have adequate financial resources to perform the contract, or the ability to obtain them;
 - (2) Be able to comply with the required delivery or performance schedule;
 - (3) Have a satisfactory performance record;
 - (4) Have a satisfactory record of integrity and business ethics;
 - (5) Have the necessary organization, experience and skills (or the ability to obtain them), required to successfully perform the contract;
 - (6) Have the necessary production, construction and technical equipment facilities, or the ability to obtain them;

Barney's claims that the RFP sets forth particular qualifications that the other contractors do not meet. *See* Appeal at 7. Barney's argues that two of the contractors were "patently unresponsive bidders" and one was "arguably unresponsive to the RFP" as a result of their lack of qualifications. *Id* at 8. Although responsiveness is discussed above, as it is the qualifications, or lack thereof, of the contractors and their staff/management that are the root of Barney's argument, it appears Barney's argument also involves matters of responsibility. In the instances/examples raised by Barney's, however, it appears that PSS attempted to make it clear that the areas were matters of responsibility that could be resolved prior to award and also that PSS retained discretion on the heightened qualifications set forth in the RFP.³⁰

The determination of whether or not a contractor is responsible is not necessarily made at the time of submission, but at the time of award. Although a determination of non-responsibility must be written and signed by the official with expenditure authority, the PSS-PR do not require an affirmative finding of responsibility to be written and signed and retained in the contract file. *See* 60-40-240. As awarding a contract to a non-responsible party is prohibited, there is a presumption that if award is made, the contractor is responsible. In this procurement, no written finding of non-responsibility was made for any of the contractors. In addition, the qualifications set forth in Section 17.2 of the RFP appear to be heightened qualifications for personnel/management, over which PSS retained discretion as set forth in Section 17.3. Retention of such discretion does not appear to be contrary to the general requirements of § 60-40-240(a). Further, responsibility is the ability to perform a contract. In this matter, it appears PSS had past experience with all of the contractors in question to assist it in making responsibility determinations.

D. Award Methods Not Arbitrary or Capricious

1. MMO Calculations Not Arbitrary and Capricious

The RFP provided that PSS evaluators would determine Maximum Meal Output based on a variety of factors, including facility size using data taken from *The New Design Handbook for School Food Service* by The National Food Service Management Institute (*Handbook*). Barney's claims that the MMO determination was arbitrary and capricious and denied Barney's a fair opportunity to participate in the food service program. *See* Appeal at 10.

It appears that PSS did give consideration to the MMO calculations and based them, for the most part, on recognized standard calculations. PSS adjusted the MMO calculations for four

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- (7) Be otherwise qualified and eligible to receive award under applicable laws and rules; and
 - (8) Submit a valid original business license and other certification as may be required.

³⁰ Barney's cites to Section 17.2 of the RFP in this argument. *See* Appeal at 7. Although the requirements for "Contractor's proposed manager" are set forth in Section 17.2, the following section, 17.3, states that "PSS reserves the right to accept or reject the Contractor's selection of said manager." Similarly, although Section 17.4 sets forth criteria related to "Contractor's proposed head chef" Section 17.5 "PSS reserves the right to accept or reject the Contractor's selection of said chef." It appears, therefore, that these personnel requirements were additional responsibility requirements/qualifications that PSS retained discretion over.

of the contractors, two figures were lowered where it appears that PSS believed the square footage calculations may have skewed the meal capacity and two were raised based on past performance figures that were greater than the calculations based purely on the facility size. The evaluation committee's report to the Commissioner and the supporting documentation appear to justify downwardly adjusting Barny's MMO calculation based upon its new facility set up. Barny's facility, which was reported to be a total of 9,100 square feet, contained a dry storage area equal to greater than 48% (4,380 square feet) of total square feet reported.³¹ The RFP Section 44.1 included not only the square footage chart breakdown, but also advised that other factors including the workflow and design of the facility would be considered. See RFP at 39. In addition, the MMO calculation was also discussed with the proposers during the process and further addressed in Addendum 1.³²

The MMO calculations appear to have started with the standards set forth in the *Handbook*, which was provided to proposers, and were also set forth in the RFP. The method of calculation was then further discussed with the proposers and addressed in Addendum 1. Adjustments were made to the initial calculations by the evaluation committee after the facilities had been observed. The adjustments appear to have taken into consideration the facility design, workflow and other factors as was provided for in the RFP. Although OPA agrees that the process could have been made clearer, the calculations and adjustments do not appear to have been arbitrary and capricious or denied Barny's a fair opportunity to participate in the food service program.

2. PSS Believed ADMP Method Appropriate

The awards for food service were based upon the ADMP (Average Daily Meal Participation) figures for October, 2006. As actual figures for participation in the upcoming school year

³¹ Barny's MMO based on total square feet was 2,087. PSS reduced this number by approximately 14% to 1,800 based upon the disproportionately large storage area. See *generally* Protest Decision at 6-7.

³² MMO was specifically addressed in relation to Barny's disproportionately large dry storage area in Addendum 1. Written question number 4 submitted by Barny's on March 10, 2007, and the PSS response to that question discusses MMO and the site evaluation and are set forth in Addendum No. 1 to the RFP as follows:

Regarding section 44.1, [h]ow will do (sic) assessed (sic) a facility if it has a "very large" dry storage but has a "very small cooking area . . .

PSS: Maximum meal output take (sic) into account many factors not just the chart in said section. In assessing facility size, usually the smallest area will dictate how many meals can be produced.

Addendum 1 to RFP at 8 (emphasis in original).

It is noteworthy that this issue was discussed during the procurement and that PSS stated that "usually" the smallest area will dictate. Therefore, at the time of the issuance of the Addendum, at the latest, Barny's could have calculated that its MMO would have been less than 350 meals based on the size of its toilet/locker area and less than 750 based upon the size of its holding and packing area, if the chart set forth in the RFP was to dictate the MMO without adjustment or other considerations, such as work flow and past production. Although Barny's argues that it is the "entire process" and not just Barny's MMO calculation that it objects to, it appears that PSS did advise the proposers that the minimum may apply, but other factors would be considered. This issue may have been more appropriately raised prior to award, perhaps even prior to proposal submission.

could not be ascertained, PSS had to select a figure from which to begin the process. At the time of the solicitation, perhaps the figures for the previous August were the most accurate that were available. Included in the information provided, it appears that the total enrollment figures for the previous school year were also available to the proposers.

The true numbers for the number of breakfasts, lunches, snacks and total enrollment for the 2007-2008 school year were not available at the time of the RFP. Calculations had to be made based upon information available to PSS at the time. PSS chose to use the ADMP for August, 2006 and Total Enrollment figures that were available for the previous school year.

The RFP, in Section 44.2, does provide that “Contractors will then be assigned schools until they have reached their weighted average or maximum meal output which ever is lower.” RFP at 40. Section 9.0, however, clearly provided that the ADMP data “shall only be used as a guide for the purposes of basing Contractor’s proposal as well as to assist in determining Contractor’s capability to provide services at selected schools.” *Id* at 11.

Even without considering other factors, such as school location and the fact that schools cannot be divided, it would have been impossible to distribute the contracts in a manner wherein some of the contractors would not have been given awards where the ADMP exceeded either Weighted Average or Maximum Meal Output.³³ Further, the total enrollment for the 2006-2007 school year clearly reflects that staying below the minimum Weighted Average and Maximum Meal Outputs for all of the contractors would be an impossible task.³⁴ The five contractors awarded contracts had, it appears, provided food service to PSS in the past. All, therefore, should have been familiar with the ADMP process and the potential for change orders based on actual enrollment and participation figures. As such, OPA does not find the use of the ADMP figures by PSS arbitrary.

3. Appellant was Awarded a Contract

In reviewing this matter, the fact that Barny’s was actually awarded a contract confounds the process. In most appeals brought after award, another party, not the Appellant, has been awarded a contract. In this RFP, however, the Appellant, along with four other contractors,

³³ Note that if the lower of the Weighted Average and Maximum Meal Output for each of the contractors is totaled, the maximum meals available to be provided would only be 7,572 (1400+1569+1500+1300+1803), but the total ADMP on which the awards were calculated was 8,538.

	Auntie Mag’s	Barny’s	Kalayaan	MV Reyes	LSG
WA	1688	1569*	1826	1616	1803*
MMO	1400*	1800	1500*	1300*	3150

³⁴ Total enrollment for the 2006 - 2007 school year reflected in the evaluation report is 12,373, a number far greater than the total of the minimums (7,572) as set forth above.

received awards to provide services in Saipan. As such, the typical argument that Appellant would or may have received the award “but for” the error, mistake, illegality, or the like on the part of the government is not present. In this instance, Appellant was not precluded from receiving a contract award to which it may have been entitled “but for” the government’s actions.

Barny’s, the Appellant, signed PSS Contract Number 50351-OC on July 26, 2007, apparently after review by Barny’s counsel and before Barny’s Protest. Although the not to exceed amount of Barny’s contract was \$851,960.00, it appears that the food service contracts are subject to change through change orders if the participation for the schools assigned increase.³⁵ The RFP, Section 44.2, provided that “Contractors will be considered in the succession of their evaluation scores, highest scores being considered first.” RFP at 40. As set forth in Section III(A) herein, although ranked fifth in the evaluation, based on the not to exceed figures, Barny’s award appears to be the fourth largest in Saipan.³⁶ Further, based on the ADMP and the previous year’s actual enrollment for the schools assigned to Barny’s, Barny’s may have received the third largest award as the final number of meals to be served is not set by the ADMP.³⁷

The remedy options set forth in § 60-40-410(b)(1), which are applicable to this Appeal, are very limited and the procurement involved is extraordinarily large and involved. Therefore, the fact that Barny’s was awarded a sizeable contract, although a contract for less than what Barny’s felt entitled, is significant.³⁸

E. Best Interest Under § 60-40-410(b)(1)

The food service contracts are for provision of food to both private and public schools in Saipan. The contracts include breakfast, lunch, and headstart snacks. In many instances, the food provided under the contracts may be critical to ensuring that a child receives adequate nutrition. There does not appear to be a single vendor on Saipan capable of providing the services for all of the meals at all of the schools. As such, in the event the contracts are terminated, the meal programs would be interrupted. This would not only be contrary to the best interest of PSS, but would be contrary to the best interest of the children receiving those meals. Despite any infractions of the PSS-PR or the RFP that have been argued or found, it is in the best interest of PSS to affirm the award of the contracts, once amended to reflect the

³⁵ Although OPA requested information regarding any adjustments to Barny’s contract, no information was received. OPA cannot, therefore, discern whether or not any adjustments were made.

³⁶ Three of the other contractors’ not to exceed figures should be less than reflected herein and in their contracts. As is discussed in Section VI(B), a mistake was made during contract processing related to the calculation and payment for those contractors. All contracts were erroneously processed using the maximum prices.

³⁷ As PSS stated in its letter to Barny’s dated August 8, 2008, “...ADMP is a conservative projection and the actual number of meals to be served remains to be seen.”

³⁸ This is especially true when considering Barny’s two issues that assert that PSS denied “Barny’s a fair opportunity to participate in the PSS food service program.” See generally Appeal at 10-12.

correct price per meal.³⁹ In addition, due to the delay in receiving all of the information necessary to review this Appeal, the term for the initial contracts is coming to a close and services for this year have been provided. As such, terminating the contracts would have no impact for this school year. As the contracts may be extended for the next school year, discussion regarding future action in this matter is discussed below.

VI. OTHER MATTERS

A. Disclosure of Financial Information Limited by § 60-40-240(c)

Pursuant to NMIAC § 60-40-240(a), “[a]wards shall be made only to responsible contractors.” In order to be determined responsible, a prospective contractor must, among other things, have adequate financial resources to perform the contract, or the ability to obtain them. NMIAC § 60-40-240(a)(1). The official with expenditure authority, in this case the Commissioner of Education, must obtain information necessary to make a determination of responsibility, which includes determining that the offeror has adequate financial resources. NMIAC § 60-40-240(b). Although procurement information is a matter of public record and is required to be available for public inspection, the decision to keep information confidential when necessary may be made.⁴⁰ Further, information provided by an offeror related to the responsibility determination may not be disclosed outside a limited circle of participants in the procurement process without the prior consent by the offeror. *See* NMIAC § 60-40-240(c).

Formal responsibility determinations must be made prior to awarding a contract. It is not, however, uncommon for the government to include evaluation factors and subfactors in an RFP that are related to responsibility and qualification. Although at the federal level there has been controversy over whether financial ability should be used as an evaluation factor, such use has been upheld by the Comptroller General. Whether or not it is appropriate to include financial ability as an evaluation factor is not, however, before OPA at this time. In the instant case, financial information was provided by offeror. That information appears to have been used to assess responsibility and, based on the RFP criteria, to otherwise evaluate financial ability. The RFP specifically stated that the information submitted may be so used.⁴¹ The Submission Form for proposals also provided that information submitted may be used for

³⁹ See discussion in Section VI(C) herein.

⁴⁰ PSS-PR § 60-40-045 provides that “[p]rocurement information shall be a matter of public record and shall be available for public inspection. Procurement information may be kept confidential when necessary to insure proper bidding procedures. This decision shall be made only by the Board of Education.”

⁴¹ Section 3.5 of the RFP provided that:

Awards shall be made only to responsible contractors according to PSSPR 60-40-240. **Any information submitted by Contractor may be used to evaluate any criteria required herein or for the purpose of responsibility determination for PSSPR 60-40-240.**

RFP at 8 (emphasis in original).

either purpose.⁴²

In the Protest Decision, the Commissioner held that PSS was prohibited from releasing the financial information because the contractors that provided the information did not consent to the release of the information. *See* Protest Decision at 8. The PSS-PR, in § 60-40-045, provide that procurement information shall be a matter of public record and available for public inspection. The regulations, however, also provide for the right of non-disclosure of information supplied by contractors to be used for responsibility determinations as relied on by the Commissioner. *See* NMIAC §60-40-240(c). OPA will not, therefore, order the information released under its authority to hear appeals set forth in the PSS-PR. OPA will leave disclosure of the information pursuant to 1 CMC § 9917, or otherwise, to the courts if Appellant chooses to pursue this issue in that manner.

B. Inappropriate Terminology in Procurement Creates Confusion

Terminology inappropriate for use in a request for proposals was utilized throughout this entire procurement. OPA understands that: the term “bid” is commonly used in the private sector to mean a submission of any sort; the term “bid price” used to mean the cost/price of the service or item to be provided; and, the term “bidder” to mean the entity or person making a submission. Unfortunately, if these terms are used by the government in a request for proposals, it creates confusion. Terminology appropriate to a request for proposals should be used.⁴³ Although it appears minor, use of the appropriate terms by the government will help eliminate confusion. In this RFP, the use of the terms typical to sealed bidding continued throughout the procurement process, the Protest, and the Appeal.⁴⁴

C. Price per Meal Incorrect in Certain Contracts

The PSS-PR require that an RFP state the relative importance of price and other evaluation factors. NMIAC § 60-40-225(g). Section 41.0 sets forth the evaluation criteria and the percentage of total points to be allocated to each criteria. RFP at 36-38. Paragraph 3 of Section 41 discusses price and indicates that price will be 25 percent of the evaluation points. *Id* at 37-38. Unless a lower price was offered, PSS would reimburse \$1.60 for each breakfast and \$2.75 for each lunch served to students in Saipan. *Id* at 38. Although price was a factor,

⁴² The Submission Form provided that “[a]ny information submitted by Contractor may be used to evaluate any criteria or for the purpose of responsibility determination for PSSPR 60-40-240.” RFP at 43 (emphasis in original). The Responsibility Determination portion of the Submission Form required that the Contractor must “[p]rovide proof of adequate financial resources to perform the contract or the ability to obtain them. (*Submit evidence of adequate funding, such as bank account balance statements or letters of extended credit from a financial institution. The total amount should be proportionate to the bid price you have stated.*)” RFP at 44 (emphasis in original).

⁴³ In lieu of the terms bid, bid price, and bidder, the government should use proposal, price, proposer, or other such appropriate terms when procuring using competitive sealed proposals.

⁴⁴ In addition to the RFP, Addendum No. 1, the Protest, the Protest Decision, the Appeal, and many of the comments using such terminology, the contracts were erroneously marked as “Competitive Sealed Bids” on page 11 of each of the contracts.

the contracts that were issued to the five contractors in Saipan appeared to have been issued calculated at the maximum reimbursement rates. OPA, by letter faxed to the Commissioner and all parties, brought this to the Commissioner's attention and requested clarification in this regard.

The Commissioner acknowledged that price had been a factor in the RFP, that a mistake in the reimbursement rates had been made, and that corrective action would be taken by PSS.⁴⁵ The corrective action taken should both ensure that the reimbursement payments are correct and that the contracts are revised, if necessary, to reflect the agreement of the parties to those contracts related to price.

VII. RECOMMENDATION

OPA recognizes the difficulty in soliciting and managing such an extensive procurement when it appears that one contractor cannot be retained to manage the entire food service needs for all of the schools participating in the food service program in Saipan. Despite the denial of this Appeal based on § 60-40-410(b)(1), OPA strongly recommends that PSS immediately conduct a new procurement for the provision of food service in Saipan. OPA recommends that the existing contracts be extended, if necessary, under the existing procurement only for the limited time it would take to effectively and properly conduct the new procurement. In issuing any new procurement, PSS should consider and address the concerns raised in the Appeal, the underlying Protest, and this Decision.

VIII. CONCLUSION

Based on the foregoing, OPA finds that the remedies in this Appeal are limited to those found in NMIAC § 60-40-410(b). OPA further finds that the Decision of the Commissioner to re-affirm the validity of the contracts awarded pursuant to the RFP was in the best interest of PSS.⁴⁶

OPA, therefore, denies the Appeal.

⁴⁵ The Commissioner replied by letter dated February 29, 2008, and received by OPA on March 6, 2008. That letter indicated that price was taken into consideration for breakfast and lunch only. The Commissioner went on to state that:

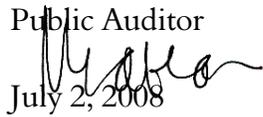
The total contract amount for each vendor was calculated using maximum reimbursement prices set for both breakfast and lunch. In all contracts, the maximum reimbursement rate, rather than what was in the contractors' proposals, was used as a means for cost projection. Mistakenly, all contractors are being reimbursed the maximum reimbursement rates rather than the lower price evaluated in the proposal. This is an oversight that we will work to resolve. Corrective action is in order, and the PSS Food and Nutrition Service department has been informed to correct the mistakes.

⁴⁶ This finding is contingent on PSS correcting the price per meal error/mistake, discussed in Section VI(C), as the Commissioner stated was in order and would occur.

The PSS-PR provide that Appellant, 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.

Michael S. Sablan, CPA

Public Auditor


July 2, 2008