



# 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](mailto:mail@opacnmi.com)

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

	)	
	)	
	)	APPEAL NO. BP-A0 55
IN RE APPEAL OF	)	DPW07-IFB-022
RESOURCES MANAGEMENT _____)	)	
<u>INTERNATIONAL CORPORATION</u> _____)	)	DECISION

## I. SUMMARY

This is the Office of the Public Auditor’s Decision on the Appeal filed by Resources Management International Corporation (RMIC) appealing the Protest Decision of the Director of Procurement and Supply (Director). The Decision denied RMIC’s protest of the Director’s Responsibility Determination in DPW07-IFB-022 (IFB).

The Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR), codified in subchapter 70-30.3 of the Northern Mariana Islands Administrative Code (NMIAC), are applicable to this Appeal. The Office of the Public Auditor (OPA) has jurisdiction over this Appeal as set forth in the CNMI-PR at NMIAC § 70-30.3-505.

OPA denies the Appeal.

## II. PROCEDURAL AND FACTUAL BACKGROUND

### A. The IFB and Bids Submitted

The IFB for the Hardening and Retrofitting of the Tinian Gymnasium was issued in June 2007. The IFB was published in the newspapers in June and July. Three addendums were issued in July, 2007. According to the Bid Opening worksheet, bids were opened on August 6, 2007. Four bids were submitted. One of the four bids was rejected at the time of opening as the required insurer certification clearance was not submitted. RMIC submitted a bid of \$95,488, which was the lowest of the three remaining bids. The two other bidders submitted bids in the amounts of \$153,937 and \$157,780.<sup>1</sup>

---

<sup>1</sup> Although not discussed in the Responsibility Determination, it is noteworthy that the bid submitted by RMIC was \$58,449 and \$62,290 less than the next lowest bidders’ bids. A difference of greater than 60% of RMIC’s

## B. Responsibility Determination

By letter dated August 28, 2007, the Acting Secretary of Public Works requested information from RMIC related to its responsibility. RMIC responded to the Acting Secretary by letter dated the next day, August 29, 2007. The Acting Secretary forwarded the information obtained from RMIC to the Director on August 31, 2007, requesting the Director's action on responsibility.

On November 27, 2007, the Director issued the Responsibility Determination for RMIC. The Director found that the evaluations of the two construction projects recently completed by RMIC indicated that RMIC does not have a satisfactory performance record or the necessary organization, experience and skills required to successfully perform the contract under this IFB. *See* Responsibility Determination at 2. The Director concluded that "it is clear that RMIC cannot be found to be a 'responsible contractor' within the meaning of the CNMI-PR . . . RMIC's bid is rejected as a bid from a 'non-responsible' contractor." *Id.*

## C. Protest and Protest Decision

By letter dated December 10, 2007, RMIC filed its Protest to the Responsibility Determination issued by the Director. The Director acknowledged receipt of RMIC's Protest in a letter dated December 11, 2007.

On January 17, 2008, the Director issued a one-page Decision affirming the rejection of RMIC's bid "as a bid from a 'non-responsible' contractor' and denying RMIC's protest in its entirety."<sup>2</sup>

## D. RMIC's Appeal and Director's Appeal Report

On January 25, 2008, RMIC, through counsel Douglas F. Cushnie, filed its Appeal of the Director's Decision with OPA. RMIC claimed that the Director's non-responsibility determination "has effectively debarred RMIC from participating in future government construction contracts." Appeal at 7. RMIC also claimed that the determination was based on unsupported conclusions. *Id.* RMIC requested that the Public Auditor reverse the determination and order the Director to award the contract to RMIC. *Id.*

---

bid price.

<sup>2</sup> The Decision was two paragraphs long. The first paragraph addressed the Director's decision, the second addressed the procedures for appealing the decision. The first paragraph of the Director's Decision reads:

After careful review and consideration of the contractor performance evaluation relative to contracts no. 462036 and 462039, performed by Mr. Brian Smith of DPW Technical Services Division and the additional comments received from Mr. Gene Weaver, the Hazard Mitigation Grants Manager, Resources Management International Corporation's rejection of its bid no. DPW07-IFB-022 as a bid from a 'non-responsible' contractor stands. As such, your protest is denied in its entirety.

On May 19, 2008, the Director submitted his response on the Appeal to OPA. The response included a transmittal letter, the Director's report on the Appeal (Appeal Report), and documents relevant to the matter. The Director concluded that he remained "steadfast in rejecting RMIC's bid" in this IFB. Appeal Report at 3.

### III. ANALYSIS

#### A. CNMI-PR Responsibility Determination Procedures

The Director is charged with the duty to make an affirmative responsibility determination before awarding a contract. See generally NMIAC § 70-30.3-245. An award can only be made to a responsible contractor. NMIAC § 70-30.3-245(a). When a bid is rejected because the prospective contractor is found to be non-responsible, a written determination stating the basis for the finding shall be signed by the Director and placed in the contract file. See NMIAC § 70-30.3-245(d).

In order to be determined responsible, the CNMI-PR require that a prospective contractor:

- (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; and
- (7) Be otherwise qualified and eligible to receive an award under applicable laws and rules.

NMIAC § 70-30.3-245(a).

#### B. Director's Discretion in Determining Responsibility

It is well settled that contracting officers have wide discretion in determining responsibility. Determining a proposed contractor's ability to perform a contract requires a projection and is essentially an exercise of business judgment. Although that judgment must be based on fact, reached in good faith, and within CNMI-PR and the law, it must be left largely in the hands of the Director, as he is tasked with making final responsibility determinations under CNMI-PR § 70-30.3-245. The Director also has the duty to oversee the administration of all government contracts, as set forth in CNMI-PR § 70-30.3-110(j), and to manage the day to day activities of Procurement and Supply. As such, the Director must bear the brunt of any difficulties in obtaining adequate performance from a contractor. A determination of non-responsibility, therefore, will typically not be disturbed unless no reasonable basis for the

determination exists or the contractor demonstrates bad faith by the agency. As procurement officials are required and may be presumed to act in good faith and no showing of bad faith has been made, OPA presumes no bad faith existed in this matter.

As responsibility determinations essentially require an exercise of business judgment, reasonable minds may reach different conclusions based on the same set of circumstances and facts presented. Evaluating types and degree of experience and the method of determining a contractor's experience specifically fall within the discretion of the procuring officer. The criteria for determining responsibility are, therefore, not readily susceptible to reasoned review. In this instance, the Director found RMIC non-responsible in this major construction renovation based on a lack of a satisfactory performance record, CNMI-PR § 70-30.3-245(a)(3), and a lack of the necessary organization, experience and skills required to successfully perform this contract, CNMI-PR § 70-30.3-245(a)(5).<sup>3</sup> Responsibility Determination at 2. The Director's determination appeared to be based in great part on RMIC's performance in two recently completed construction or renovation projects for the government. Although RMIC had completed other government contracts, as reflected in the information provided by RMIC to the Acting Secretary on August 29<sup>th</sup>, those contracts were construction contracts.<sup>4</sup> RMIC's previous construction contracts involved contemporaneous procurements for construction services and appear to be the most comparable to the work to be performed under this IFB.

The Director stated that he could not make an affirmative finding that RMIC was a responsible contractor and, therefore, determined that RMIC's bid must be rejected. The Director relied, in part, on the evaluation of the two recent RMIC construction contracts, which were completed by Mr. Smith, who "is an engineer with twenty (20) years experience in design engineering and twelve (12) years in the CNMI as building inspection management." Appeal Report at 2. The Director stated that "[p]hotographs evidencing unsatisfactory work performed by RMIC on the Renovation of Rota and Tinian DPS building are on file at DPW/TSD." *Id* at 1. The Director also expressed concerns that the grant funding may have been subject to denial or withdrawal, based upon the Public Assistance Office/Hazard Mitigation Grants Program Manager's comments. *See* Determination at 2; *see also* Appeal Report at 3. The Director concluded his Appeal Report by stating that he remains "steadfast in rejecting RMIC's bid no. DPW07-IFB-022 for construction of Hardening and Retrofitting of the Tinian Gymnasium . . ." Appeal Report at 2. It appears, therefore, that the Director had a reasonable basis for his determination.

---

<sup>3</sup> The Director cites to the old numbering system set for the in the CNMI-PR prior to codification. OPA has substituted the proper section numbers from the NMIAC.

<sup>4</sup> Page two of RMIC's August 29<sup>th</sup> letter reflects the following RMIC contracts that are in addition to the two considered by the Director in his Responsibility Determination: (1) Saipan Seaport Docklighting Project, CP[A]-SS-001-07, completed July 25, 2007; (2) Tinian Harbor Docklighting Project, CPA-TS-001-07, completed July 25, 2007; (3) Saipan International Airport-Perimeter Fence/Roadside & Ditch Grass Cutting, no contract number stated, ongoing; (4) Saipan International Airport-Mowing, Trimming and Cleaning of Property Grounds, no contract number stated, ongoing; and (5) Materials Recovery Facility Operation, 465166-OC, ongoing.

### C. Non-responsibility Determination Does Not Equate to Debarment

The authority to debar or suspend a contractor, and the procedures to do so, are set forth in CNMI-PR § 70-30.3-760. A contractor can only be debarred through those procedures, which provide for procedural due process. Although the Director may base a debarment action on a recent record of unsatisfactory performance in one or more contracts, that is not the instance here. According to the information package submitted by RMIC to the Acting Secretary on August 29, 2007, RMIC completed two other projects for CPA in July, 2007, and had three projects that were still on-going at that time. Although a single determination of non-responsibility has been considered to be constructive debarment in limited instances involving lack of integrity on the part of the contractor, that is not the case in this instance. The Director's determination was specific to this particular construction project. The Director found RMIC non-responsible in this major construction renovation based on recent past construction contract performance and a lack of the necessary organization, experience and skills required to successfully perform this contract.

The Director has not made multiple or successive determinations of non-responsibility. There is no evidence that this determination of non-responsibility is part of a long-term disqualification attempt. RMIC may compete in the future for government contracts. There is no indication that the Director will not issue a contract to RMIC for another type of work or for construction projects if circumstances are shown to be different and RMIC is otherwise entitled to award of a contract under the CNMI-PR. As such, the Director's Determination does not rise to the level of constructive debarment.

## IV. CONCLUSION

Based on the foregoing, RMIC's Appeal is hereby denied.

The CNMI-PR § 70-30.3-505(i) provides that RMIC or any interested party that 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  
July 15, 2008