



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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August 12, 2010

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**Subject: Decision on ITSI, Inc. Appeal of DPW 09-IFB-19,
Puerto Rico Dump Final Closure**

Dear Mr. Frink:

Enclosed is the decision on the appeal you filed with our office on June 4, 2010, on behalf of ITSI, Inc., regarding the above referenced IFB. ITSI, Inc. appealed the Procurement & Supply Director's May 24, 2010 denial of its protest concerning the solicitation for bids for final closure of the Puerto Rico Dump.

Please contact us if you have any questions regarding the decision.

Sincerely,

Michael Pai, CPA
Public Auditor

Enclosure

c: Herman Sablan, Director P & S
Martin C. Sablan, Secretary, DPW
Mark Hanson, Attorney for GPPC
James Stump



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IN RE APPEAL OF
ITSI, INC.

) APPEAL NO. BP-A062

) DPW 09-IFB-19

) PUERTO RICO DUMP
) FINAL CLOSURE

DECISION ON APPEAL

I. SUMMARY

This is an appeal filed by ITSI, Inc. (ITSI) from the denial of its protest regarding DPW 09-IFB-19 by the Director of the Division of Procurement and Supply (“The Director” or P & S), Department of Finance. The Office of the Public Auditor (OPA) has jurisdiction over this appeal as provided in Section 505(a) of the Department of Finance’s Procurement Regulations (the CNMI Procurement Regulations), NMIAC §70-30.3-505(a).

II. FACTUAL BACKGROUND

In May 2009, the Department of Public Works (DPW) issued an Invitation for Bid (DPW 09-IFB-19) on the Puerto Rico Dump Final Closure. The IFB was amended by five addendums in June and July of 2009.

GPPC, Inc., (GPPC) previously filed two protests and then appeals on this IFB. The Public Auditor issued his Decisions on those appeals on November 18, 2009 and April 1, 2010.¹ There is currently a case (Civil Action Number 10-015-CV) pending in the Superior Court for the Commonwealth of the Northern Mariana Islands regarding those protests and appeals. Judge David Wiseman has granted a Temporary Restraining Order precluding the award of a contract to ITSI, in effect until further order of the Court.

¹ The OPA Decisions on Appeal are available on the OPA web site, opacnmi.com.

The first protest and appeal filed by GPPC had to do with the timeliness of the ITSI bid submission. The second GPPC protest and appeal alleged ITSI's bid was not responsive, though OPA determined the issue to be responsibility.

The primary issue in ITSI's protest and appeal in the instant case (see more thorough discussion of the issues *infra*) has to do with the timing of the communications between the CNMI and ITSI and whether the CNMI can hold ITSI to the bid proposal it submitted in August 2009. Some of the relevant dates are as follows:

On March 30, 2010, the Capital Improvement Projects (CIP)² Contracting Officer (CO), James Stump, sent an e-mail to John Pepin of ITSI, requesting "your specific confirmation yesterday of the ITSI bid price for contract No. DPW09 - IFB - 019."

On April 5, 2010, the Capital Improvements Projects Office, Office of the Governor, sent a Notice of Intent to Award a Contract to ITSI.

On April 9, 2010, ITSI sent a letter to the CO, declining to execute a contract.

On April 14, 2010, the CO sent ITSI a letter requesting ITSI to provide either the "final documents" or sufficient assurances it intended to honor its Puerto Rico Landfill bid or the CNMI would consider it in breach of the bid, make alternate plans for completion of the project, and if there were increased contract costs due to the breach, the CNMI would make a claim against ITSI and its bid bond and possibly seek ITSI's debarment from future CNMI government projects.

III. PROCEDURAL BACKGROUND

ITSI filed a protest on this IFB on April 19, 2010.

The Director issued his Decision on May 24, 2010, denying ITSI's protest.

On June 4, 2010, ITSI appealed the Director's Decision to OPA.

OPA provided notice to all interested parties after the weekend, on June 7, 2010.

² DPW was the agency that promulgated the IFB and its addendums. DPW transferred responsibility for this project to the Capital Improvement Projects office.

On June 7, 11, and 25, 2010, ITSI filed supplements to its appeal with OPA.

The Director issued his Notice of Appeal on June 10, 2010. In the June 10 letter, the Director wrote that in addition to the Notice of Appeal, he was “providing this Report. . . .” and the following:

1. The protest and the protest decision;
2. The bids submitted by the appellant and GPPC;
3. The solicitation, including specifications relevant to the protest;
4. The abstract of relevant offers [the bid opening sheet];
5. Our statement setting forth findings, actions, recommendations, and any additional evidence deemed necessary to determining the validity of the appeal.

The Director’s Report is his Decision on the Protest. Numbers 1 through 4 are self-explanatory. In addition to the Director’s Decision on the Protest, Number 5 contained the following documents:

- A. The April 19, 2010 ITSI protest, with attachments;
- B. The August 5, 2009 bid opening sheet;
- C. The September 25, 2009 letter from Henry K. Pangelinan and Associates, Inc. (HKPAI)³ to ITSI requesting additional information;
- D. ITSI’s October 9, 2009 response to HKPAI;
- E. A December 3, 2009 letter transmitting the transcription of the October 30, 2009 teleconference and the transcription;
- F. HKPAI’s November 6, 2009 Responsibility Determination re: ITSI;
- G. Jim Stump’s May 19, 2010 Declaration;
- H. Keith Augenbaugh’s May 12, 2010 Declaration.

Since both GPPC and ITSI did not receive the attachments to the Director’s Report, OPA provided them the list of documents above on June 24, 2010 and gave both parties until June 30, 2010 to request from OPA any documents that they might be missing. In that same letter, OPA gave the parties the full 10 working days for comments, which extended the deadline for comments until July 9, 2010.

In its June 22, 2010 letter to OPA, in addition to requesting the Director’s Report, ITSI requested a conference on the merits of the appeal pursuant to NMIAC §70-30.3-505(h).

³ Henry K. Pangelinan and Associates, Inc. is contracted to DPW as the Construction Manager for this project.

In a second letter dated June 24, 2010, the Public Auditor explained his decision that this conference was not “necessary for resolution of the appeal” because there is an extensive record in this case upon which the Public Auditor can base his decision

GPPC submitted comments on July 9, 2010.

IV. ISSUES

1. Did ITSI timely raise the issue of a design defect?
2. Was the CNMI government’s Notice of Intent to Award a Contract timely or had ITSI’s bid expired?
3. May the CNMI seek restitution from ITSI’s bid bond?

V. JURISDICTION

OPA has jurisdiction over this appeal pursuant to Section 505(a) of the Department of Finance’s Procurement Regulations, NMIAC §70-30.3-505(a).

VI. STANDARD OF REVIEW

The CNMI Procurement Regulations are silent as to the standard of review. *See* NMIAC §70-30.3-505, “Appeals of the P & S Director’s Decisions to the Public Auditor.”

The CNMI’s Administrative Procedures Act (APA), 1 CMC § 9101 *et. seq.*, provides a standard for *judicial* review of agency cases but does not supply a standard of review for an administrative appeal of an agency case.⁴ *See* 1 CMC § 9101 *et. seq.* and 1 CMC § 9112.

⁴ Where the standard for *judicial* review in the underlying statute is different from the one provided in the APA, the more specific agency review standard applies. *See, e.g., In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37 (1993). (providing that standard for judicial review of final decisions of the Coastal Resources Management Office Appeals Board under 2 CMC § 1541(b) is whether decision is supported by substantial evidence on record made before Board taken as a whole, and that the facts in question are not subject to trial de novo).

The US Government Accountability Office (GAO) reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or abuses of discretion. *New Breed Leasing Corp.*, B-274201, 96-2 CPD ¶ 202 (Nov. 26, 1996). The protester generally has the burden of demonstrating the agency action is unreasonable. *The Saxon Corp.*, B-232694, 89-1 CPD ¶ 17 (Jan. 9, 1989). As part of its review, the GAO has demonstrated a willingness to probe factual allegations and assumptions underlying agency decisions or award determinations. See, e.g., *Redstone Tech Services*, B-259222, 95-1 CPD ¶ 181 (March 17, 1995); *Secure Services Tech, Inc.*, B-238059, 90-1 CPD ¶ 421 (April 25, 1990) (GAO conducted a comparative analysis of competitors' proposals and their alleged deficiencies and sustained the protest when it determined the agency had not evaluated the proposals in a consistent manner).

Both the Armed Services Board of Contract Appeals and the Court of Federal Claims review appeals *de novo*. 41 U.S.C. § 605(a); 41 U.S.C. § 609(a)(3). The Court of Federal Claims will not presume the contracting officer's findings of fact and conclusions of law are valid; rather, the Court will consider the contracting officer's final decision as one more piece of documentary evidence in the record. *Wilner v. United States*, 24 F.3d 1397 (Fed. Cir. 1994) (overruling previous case law that a contracting officer's final decision constitutes "a strong presumption or an evidentiary admission" of the government's liability).

If the procurement is negotiated, judicial review is more deferential than in advertised procurements:

It is also of key significance that the procurement in this case was conducted in the context of *negotiation* rather than by *formally advertised bidding*. **In formally advertised bidding, the pertinent statutes and regulations are far more strict about the conduct of the procurement than in a negotiated one**, consequently in a negotiated procurement the contracting officer is entrusted with a relatively high degree of discretion.

Burroughs Corp. v. United States, 223 Ct. Cl. 53, 65, 617 F.2d 590, 597-98 (1980) (italics emphasis in original; bold emphasis added).

"[T]he degree of proof necessary to overturn procurement determinations is related to the amount of discretion vested in the administrative official whose actions are being challenged." *Action Manufacturing v. United States*, 10 Cl. Ct. 474, 478 (1986) (citation omitted). Because of . . . [this] breadth of discretion . . . in negotiated procurement, the burden of showing this discretion was abused . . . is certainly much

heavier than it would be in a case of formal advertising.” *Burroughs Corp.*, 223 Ct. Cl. at 65, 617 F.2d at 598, (citation omitted). Thus, when investigating an advertised procurement rather than a negotiated one, less discretion is given to the contracting officer’s evaluation of bids, application of procurement regulations, and determination of bidder responsibility. See *DLM & A, Inc., v. United States*, 6 Cl. Ct. 329, 331 (1984).

VII. POSITION OF THE PARTIES

ITSI argues it timely raised the issue of a design flaw by first submitting questions on the design in July 2009 and maintains that it “alerted the CNMI to design flaws early and often.” Appeal at p. 7.

ITSI further argues its bid expired on February 4, 2010, 180 days after its submission. ITSI claims there was no explicit or implicit extension of the bid and the CNMI’s reliance on the bid’s continued validity was unreasonable since the CNMI did not seek bid extension in accordance with NMIAC §70 - 30.3 - 501(b)(2). Finally, ITSI claims it revoked its bid prior to the CNMI’s acceptance of it.

The Director found that ITSI had not timely raised the issue of the design flaw. He also found ITSI had both explicitly and implicitly extended its bid proposal, had not revoked the offer prior to the CNMI’s acceptance of it, and moreover, the ITSI offer was still viable because of the CNMI’s reliance upon it.

VIII. ANALYSIS

A. The Alleged Design Flaw or Defect

ITSI claims it timely raised the issue of the design flaw⁵ “early and often.” Appeal at page 7. On the contrary, prior to its April 2010 protest, ITSI seems to have raised the issue only once and that was before the bids were even submitted. On July 9, 2009, ITSI submitted formal questions on the project design. See ITSI Questions 9, 10, and 11, IFB Addendum No. 5. ITSI then submitted a bid proposal on the project as written in the IFB and its five

⁵ “The lines and grades of the proposed Landfill cap, when the thickness of the cap is taken into account, are of insufficient dimension to contain known Landfill material. At minimum, were any responsible contractor to accept the contract Project as currently written, a major claim would soon develop regarding the basic adequacy of the design.” ITSI Protest at page 2.

addendums. At that point, ITSI waived any claim of design defect.

Moreover, at no time during the transcribed October 30, 2009 teleconference did ITSI ever mention the design was fatally flawed. Rather, ITSI enthusiastically expounded on the ready availability of the equipment, materials, and sub-contractors and its firm price thereon. Presumably if the thickness of the cap were insufficient, additional materials (and thus expense) would have been required, but none of the ITSI representatives at the teleconference (and there were five linked to the conversation) indicated that additional materials or a re-design were needed.

B. Bid Expiration

The IFB (DPW 09-IFB-019) required that bids be valid for 60 days. By its own terms, the ITSI bid proposal expressly extended that time to 180 days.

The Director found that ITSI had both explicitly and implicitly extended its bid proposal, had not revoked the offer prior to the CNMI's acceptance of it, and moreover, the ITSI offer was still viable because of the CNMI's reliance upon it.

As to the explicit extension, the Director relied upon:

- the CNMI's Contracting Officer (CO) telephone call with Tom Russell wherein Russell said that ITSI would continue to honor its bid proposal throughout the protest and appeals;
- the CO's telephone conversation with Chad Kaiwakuamo who assured him of the bid's continued viability; and
- a March 10, 2010 telephone call with both the CO and the US Department of Interior Capital Improvement Projects Coordinator and ITSI representative John Pepin.

As to the implicit extension, the Director found that in all of the CO's dealings with ITSI, as well as notifications from both P & S and OPA which included ITSI as an "interested party," ITSI never demurred that it was not an interested party nor did it state its bid was no longer viable, and thus the Commonwealth accepted ITSI's offer on April 5, 2010 prior to any revocation by ITSI.

The Director also found ITSI did not explicitly or implicitly revoke its bid proposal.

Finally, the Director found that the Commonwealth justifiably detrimentally relied upon representations by ITSI that its bid proposal was still viable and that the harm the Commonwealth would suffer (harm to the environment, additional fines and penalties to be levied by the US Environmental Protection Agency, increased construction costs, and legal and administrative expenses) warranted holding ITSI to its bid proposal.

According to the CNMI's Procurement Regulations, when a protest prior to award is received:

the award will be withheld pending disposition of the protest. The bidders whose bids might become eligible for award shall be informed of the protest. In addition, those bidders shall be requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance to avoid the need for re-advertisement. In the event of failure to obtain such extensions of bids, consideration shall be given to proceeding with an award under subsection (b)(3) below. [See subsection (b)(3) under "**D. Remedies**" *infra*.]

NMIAC §70-30.3-501(b)(2).

This provision is silent as to whether the request for the extension or the extension itself needs to be in writing.

In procurement law, it is well-established that in an IFB, expiration of the bid period confers upon the bidder a right to refuse to perform a contract subsequently offered. The bidder may waive such right if following expiration of the acceptance period, the bidder is willing to accept the award on the basis of the bid accepted. See, e.g., *Cecile Industries, Inc.*, B-207277, 82-2 CPD ¶ 299 (Sept. 30, 1982); *Isometrics, Inc.*, B-205034, 82-1 CPD ¶ 340 (April 13, 1982); *International Graphics v. US*, 4 Cl.Ct. 515 (Feb. 8, 1984). The Court in *International Graphics* explained the primary purpose for the inclusion of a specific time limitation is for the protection of bidders who otherwise might be bound to accept a contract for a given price long after conditions had changed so it would render performance at that price impossible. *International Graphics* at 519. But, the Court also explained, the specified period was "not devoid of benefits to the government, insofar as it assures contracting officers that the awardee is legally bound to accept if the award is made within the stipulated period." *Id.* The acceptance must be for the bid as initially proposed. See, e.g., *Carnes Construction, Inc.*, B-241778, 91-1 CPD ¶ 215 (Feb. 26, 1991) ("Bidders may not revise their bid prices when granting a bid acceptance period extension, since to do so would be tantamount to submitting a second bid after bid opening contrary to competitive principles."); *Dawson Construction Co.*, B-244204, 91-CPD ¶523

(May 30, 1991); *International Graphics* at 519. Any attempts to change the bid necessitate a new solicitation. See *OPA Decision on Appeal, BP-A039, In re RNV Construction*.⁶ But the right to waive the expiration belongs to the bidder alone (either explicitly or by its actions)⁷ once the acceptance period has expired.

In this case, the ITSI bid expired by its own terms in February 2010. The CNMI was still free to offer a contract to ITSI in April 2010, but ITSI had the option of either accepting the contract on the terms it initially proposed or declining it. Changing the project design on the original IFB (and its five addendums) at this late date is not an option.

Thus, based on the explicit terms of ITSI's bid proposal, the acceptance period had expired and it was up to ITSI to decide whether or not to form the contract based on its initial proposal.

The CNMI argues ITSI explicitly and implicitly extended the period during which its bid proposal could be accepted. As to the explicit extension, the CNMI relies upon:

1. a phone call between the Contracting Officer (CO) and Pacific Rim Regional Manager Tom Russell on January 20, 2010 wherein Mr. Russell explicitly informed the CO the bid would remain viable;
2. a second phone conversation between the CO and an ITSI representative, Chad Kaiwakuamo, in which Mr. Kaiwakuamo assured the CO that the ITSI bid would be honored; and
3. a March 10, 2010 call between ITSI representative John Pepin and the CO and Keith Augenbach, the Federal CIP Coordinator, where Mr. Pepin

⁶ Available on the OPA web site, opacnmi.com.

⁷ The Court in *International Graphics* described two methods recognized by the Government Accountability Office (GAO) wherein the government should not be prevented from accepting a bid after the bid acceptance period has expired, the "waiver" theory and the "tolling" theory. In the first, a bidder revives an expired bid by an actual or constructive waiver. In the second theory, a party's active participation in a bid protest tolls the period until final disposition of the protest. The Court in *International Graphics* views the "waiver" theory as the more "rational" one and holds the "acceptance period shall remain open as long as the parties, through litigation or otherwise, have actually or constructively expressed their intent to accept the award. . ." *International Graphics* at 521.

assured both the CNMI representative and the federal representative that ITSI was still willing to honor its proposal.⁸

As to the first, the CO has provided an affidavit stating that he and Mr. Russell had a phone conversation on January 20, 2010 and Mr. Russell assured him the bid remained viable. (Of course, at that point, the bid was still viable as the 180 day acceptance period had not yet expired.) But ITSI has submitted Mr. Russell's resignation letter (dated November 23, 2009 by Mr. Russell but without a date / time receipt stamp), which shows his resignation was effective on November 27, 2009. In addition, ITSI submitted an affidavit from Mr. Russell stating that after he left ITSI (and since October 30, 2009), he had no further dealings with the CNMI on ITSI's behalf. Even though the resignation letter's date is not corroborated by a date / time stamp, ITSI's version has more probative value on its face. In addition, since it is the CNMI that is claiming an explicit extension of the acceptance period, the burden is on the CNMI to establish the extension.

As to the second, as ITSI points out, the CNMI relies upon Exhibit G as proof (Director's Decision at page 9) but nowhere in the CO's affidavit is there any reference to a conversation with Mr. Kaiwakuamo.

Finally, both the affidavits of the CO and the federal representative support the notion that Mr. Pepin confirmed on March 10, 2010, the bid would remain viable. This is an almost \$12 million contract; standard business practice as well as the Federal Acquisition Regulations dictate a writing to substantiate such an important claim.⁹ Moreover, in Mr. Pepin's March 30, 2010 email, he very clearly stated ITSI would have to confirm the pricing. Perhaps he was not so cautious in his March 10 conversation with the federal and CNMI representatives, but then one would expect to have that representation documented

⁸ ITSI posits that its only "authorized representatives" were Tej Singh and Richard Thomas Dillon. See ITSI Appeal at page 11. Mr. Singh, an Executive Vice-President, is identified as the "authorized representative" on the signature page. See Attachment C to ITSI Appeal. But it is Mr. Dillon who has signed the price proposal. See Attachment B to ITSI Appeal. ITSI's argument that the ITSI representatives who were dealing personally with the CO were not "authorized" is disingenuous at best.

⁹ See Federal Acquisition Regulation 14.404-1(d): "Should administrative difficulties be encountered after bid opening that may delay award beyond bidders' acceptance periods, the several lowest bidders whose bids have not expired (irrespective of the acceptance period specified in the bid) should be requested, before expiration of their bids, **to extend in writing the bid acceptance period** (with consent of sureties, if any) in order to avoid the need for resoliciting." (Emphasis added.)

somehow, even if just in an email.

As to the implicit extension, the case law is clear that these situations are unusual: “In those rare instances where we have permitted agencies to infer an extension to a bid acceptance period, the bidder has taken some other affirmative step that provides clear evidence of its intent to extend, and the agency has been fully aware of this action.” *J.A.K. Construction Co., Inc.*, B-230056, 88-1 CPD ¶ 413 (April 28, 1988), citing *Surplus Tire Sales*, 53 Comp.Gen. 737 (1974), 74-1 CPD ¶ 161 (bidder signs waiver of description of specifications and submits it to the contracting agency); *American Photograph Industries, Inc.*, B-206857, 82-2 CPD ¶ 295 (Sept. 29, 1982) (bidder orally agrees to extend and agency telephone records reflect this agreement, in addition to bidder obtaining an extension of a letter of credit supplied as a bid bond).

The Director’s Decision enumerates a litany of correspondence from both the contracting agency and OPA in which ITSI is identified as an interested party, and ITSI never demurs. While OPA agrees this is somewhat troubling, the burden is not on ITSI to explicitly state it would not accept the contract if awarded. The burden is on the CNMI to establish that despite the expiration of the bid acceptance period, the bid is being awarded based on the initial proposal and ITSI is waiving its right to reject the contract.

The CNMI also points to ITSI’s involvement in the protest and appeals process, but ITSI’s only protest or appeal submission was comments on GPPC’s first protest in August 2009. This is not the kind of “active continuous role” the Court in *International Graphics* contemplated. *International Graphics* at 520. The Court in *International Graphics* held “the bid acceptance period shall remain open as long as the parties, through litigation or otherwise, have actually or constructively expressed their intent to accept the award. . . .” *Id.* at 522.

Finally, as to the CNMI’s detrimental reliance on the ITSI proposal, the reliance must be reasonable for it to be actionable. It is possible that ITSI was leading the CNMI on, waiting to see how many other projects it had or for some other reason, but given the magnanimity of the project and its environmental importance to the CNMI, it seems like the reliance would have been more warranted if the extension had been reduced to writing.

Moreover, GPPC raised two protests (and subsequent appeals to OPA). The first protest and appeal was on the timeliness of the ITSI bid submission. While GPPC’s first protest and appeal highlighted an interesting inequity between on and off island bidders, it was determined by the Director and OPA to be without merit. The second GPPC protest and appeal was an allegation of a lack of responsiveness of the ITSI bid that should have merited the bid’s immediate rejection and the then subsequent allegedly improper communications between ITSI and the CNMI. OPA found that the issue raised was in fact

responsibility and not responsiveness and the CNMI had acted properly when it had the October 30, 2009 teleconference in order to obtain information to help it make the responsibility determination.

That determination by Henry K Pangelinan and Associates was transmitted on November 6, 2009 to the Department of Public Works, the initial contracting agency. OPA's Decision on the first GPPC appeal was released on November 18, 2009. GPPC's second protest was submitted to P & S on December 3, 2009. The CNMI never raised the issue of timeliness as to GPPC's second protest. The Director's Decision on the second GPPC protest was issued January 22, 2009. GPPC appealed the Director's Decision on February 3, 2010. This is almost at the expiration of the bid acceptance period. Again, it seems like on such a large project, and especially one where the CNMI is facing the threat of EPA sanctions, the CNMI would have attempted a formal extension of the bid acceptance period.

C. The Bid Bond

ITSI has asked OPA to determine that it is in no way liable to the CNMI and the CNMI must return ITSI's bid bond to it. OPA has found that the CNMI cannot force ITSI to execute a contract on the Puerto Rico Dump based on the initial solicitation. OPA is making no determination on disposition of the bid bond.

OPA has no jurisdiction as to what the CNMI does with ITSI's bid bond. The issue is not yet ripe; no action has yet been taken on the bond, and OPA presumes that were such action to be taken, the Superior Court for the Commonwealth of the Northern Mariana Islands would be the more appropriate venue for injunctive relief.

D. Remedies

When there is a protest and / or an appeal, a contract can be awarded prior to the decision of the P & S Director or the Public Auditor under very limited circumstances:

When the P&S Director receives a protest, a contract may not be awarded pending the resolution of the protest and appeal to the Public Auditor, if any, (including the time period for filing an appeal), unless it is determined in writing that urgent and compelling circumstances which significantly affect the interest of the Commonwealth will not permit awaiting the decision of the P&S Director and the Public Auditor.

NMIAC §70-30.3-501(b)(3).

Such an undertaking is quite risky, however, because the remedies after contract award are quite complex and pose considerable financial risk.

In the instant case, there was no valid award of the contract to ITSI since ITSI's bid had expired and it had neither explicitly nor by its actions extended the acceptance period for its bid. Thus, the remedies available to OPA are as follows:

- (a) Remedies Prior to Award. If prior to award the P&S Director or the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor shall have the solicitation or proposed award:
 - (1) Canceled; or
 - (2) Revised to comply with law or regulation.

NMIAC §70-30.3-510(a).

The only option here is to have the solicitation canceled and to begin the laborious process again.¹⁰ OPA is cognizant of the legitimate environmental concerns and looming threat of federal sanctions as well as the frustrations inherent in the government procurement process. In addition, ITSI could have been forthright in its lack of continued interest in the project as detailed in the IFB and its addendums. However, the law is clear that the right to waive the expiration of the IFB acceptance period belongs to the bidder.

¹⁰ This process could be either an Invitation for Bid or a Request for Proposals (RFP). Both methods are fraught with issues, though the government has room to negotiate in an RFP.

IX. DECISION

Based on the foregoing, OPA finds:

1. The design defect was not timely raised by ITSI;
2. ITSI's bid acceptance period has expired and ITSI alone has the right to waive that expiration and it has refused to do so;
3. The solicitation DPW 09-IFB-19 is hereby canceled pursuant to NMIAC §70-30.3-510(a)(1).

ITSI, any interested party who submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. NMIAC §70-30.3-505(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 §70-30.3-505(i)(2).

Dated this 12th day of August, 2010.



Michael Pai
Public Auditor