



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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)	APPEAL NO. BP-A067
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In Re Tropex Garden)	CUC-IFB-12-007
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I. SUMMARY OF DECISION

Tropex Garden (“Tropex”), timely responded to IFB-12-007, the San Vincente Area Extension, Exploring Drive Fina-Sisu & Herman’s Bakery Waterline Replacement (the “IFB”), issued by the Commonwealth Utility Corporation (“CUC”). Following notification from CUC that it would not be receiving the award on March 30, 2012,¹ Tropex sent CUC two letters within 10 working days of being informed that it would not be receiving the contract award. Tropex claims that the first letter, dated April 3, 2012, merely informed CUC of possible bid defect in two of the bids CUC received. The second letter, dated April 16, 2012, was identified as a bona fide bid protest by Tropex and alleged that CUC had improperly rank-ordered the bidders. It also incorporated by reference the issues Tropex raised in its first letter of April 3, 2012. CUC believed that both letters were bid protests and handled them as such. After consideration of each letter soon after they arrived, CUC denied the first one as untimely, indicating that Tropex had notice of the defects mentioned in the letter when bids were opened on March 6, 2012 and thus failed to file its protest within the procurement regulation’s prescribed 10 workday period. Nonetheless, CUC also responded to the allegation of a bid defect in one of the bids indicating that it was immaterial and indicated that the second issue would be dealt with during the evaluation process. For the second letter on April 16, 2012, Tropex indicated in the language of the document that it was a bid protest. CUC denied this protest on the merits, correcting a grammatical error in CUC’s award announcement. Tropex timely appealed to the Office of the Public Auditor pursuant to NMIAC §50-50-405.

The appeal is denied.

¹ Tropex was notified by CUC on March 30, 2012 via email attachment of the letter emailed to Mr. Francisco Bernardo and Melvin Malvar on that date. The letter was also sent by First Class Mail to Pablo Mendoza, President of Tropex.

II. FACTUAL SUMMARY

1. Bid Opening for CUC-IFB-12-007 occurred at 10:00 am on March 6, 2012. All bidders were present based on the bid opening sign-in sheet.
2. Minutes were taken of the bid opening and indicate that bid pricing was disclosed, bids were available for public inspection and that during the bid opening, a bidder (USA Fanter) asked if another bidder, GPPC, had submitted a defective bid by not acknowledging one of two IFB Addenda in its bid; CUC submitted the question to the Bid Review Committee for consideration.
3. On March 30, 2012, CUC sent by email attachment and first class mail a one-page notice to Tropex that it would not be receiving the award by stating "... your firm was not selected as the lowest most responsive bidder; ..." (Emphasis added).
4. On April 3, 2012, Tropex submitted a letter to CUC that was received on the same day indicating that Tropex believed the GPPC bid was in error by not acknowledging one of two IFB addenda and that the USA Fanter bid contained a mathematical calculation error that would eliminate it as the second lowest bidder.
5. On April 16, 2012, two communications were issued between CUC and Tropex.
 - a. FIRST LETTER: CUC to TROPEX. The first letter, delivered at 2:31 pm on that date from CUC to Tropex replied to Tropex's April 3, 2012 letter. CUC considered the Tropex letter of April 3, 2012 to be a bid protest. CUC denied the claims therein as both untimely and as an immaterial defect in the GPPC bid.
 - b. SECOND LETTER: TROPEX to CUC. The second letter was sent by Tropex on the same date and received by CUC at 4:15 pm based on the CUC date/time stamp on the document. This letter identified itself as a bid protest. It incorporated the issues raised in the Tropex letter of April 3, 2012 (see Item 4, above) and added one additional protest issue based on the inarticulate language used by CUC in its March 30, 2012 notice to Tropex (see Item 3 above). This letter was also sent to the CNMI Office of Procurement improperly as that office has no jurisdiction over CUC procurement protests. That office correctly did not respond to the letter.
6. On April 24, 2012, CUC issued its decision on the Tropex protest and denied it on the merits correcting the grammatical defect in CUC's March 30, 2012 award notification letter to Tropex.
7. On April 30, 2012, Tropex appealed the denial of its protest on April 3, 2012 and April 16, 2012 to OPA. The appeals are considered as one appeal and were timely filed.

8. On May 1, 2012, OPA requested from CUC various documents as provided for in OPA and CUC regulations.
9. On May 11, 2012, OPA received comments on the protest from GPPC, one of the bidders on the IFB.
10. On May 24, 2012, OPA received comments and procurement documents from CUC.
11. On May 30, 2012, OPA received, at its request, the bid sign-in sheet and documentation of delivery of a letter to Tropex's counsel on April 16, 2012.

III. ISSUES, ANALYSIS and DECISION

WAS TROPEX AN 'AGGRIEVED' BIDDER AND, IF SO, WHEN DID IT BECOME 'AGGRIEVED'?

CUC determined that Tropex's first letter of April 3, 2012, which CUC considered to be a bid protest, was untimely because it was filed 20 workdays after Tropex had actual knowledge of the facts contained in its letter. Tropex attended the bid opening. At that meeting, USA Fanter's representative asked the CUC bid opening representative if there was a defect in GPPC's bid since GPPC did not acknowledge the second IFB addendum. Additionally, the pricing of all bidders was made public. This information was also published by CUC in its minutes of the bid opening.

Thus, Tropex had actual knowledge of the facts contained in its April 3, 2012 letter on March 6, 2012, the date of bid opening. NMIAC 50-50-401(a) (1), part of CUC's procurement regulations, states that only bidders, offerors and/or contractors who are 'aggrieved' may file a bid protest. *Id.* Guidance on what constitutes 'aggrieved' may be obtained from several sources. West's Encyclopedia of American Law, Edition 2 defines the term "aggrieved" as a situation where someone "whose financial interest is directly affected by a decree, judgment, or statute...(is) entitled to bring an action challenging the legality of the decree, judgment, or statute." West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. If the term is looked at by analogy to section 9112(b) of the CNMI Administrative Procedures Act regarding when judicial review of an agency action may occur, further guidance may be discerned. There, to be 'aggrieved' means that a person has suffered some type of wrong based on agency action. *See* 1 CMC §9112(b). This means that there must be both some form of agency action taken and a resulting adverse effect. Therefore, a bidder/offeror/contractor gains the ability to protest issues it may have with some aspect of a procurement only when a government agency has taken an action adverse to the interests of that bidder/offeror/contractor. It is the action taken that empowers the bidder/offeror/contractor with standing to protest the

government agency action within a set time period. *See* NMIAC 50-50-401(a) (1). On March 6, 2012, Tropex had knowledge of a possible defect in GPPC's bid but it did not yet have standing to file a bid protest based on that knowledge because CUC had not yet taken any action detrimental to Tropex. However, Tropex obtained the required standing to protest when it received CUC's notice on March 30, 2012 that it would not be receiving the award. At that point, Tropex was an aggrieved bidder with standing to protest.

Combined, the two Tropex letters of April 3 and 16, 2012 were its protest; alternatively, they were two protests. Nonetheless, since the April 3, 2012 letter was incorporated into the April 16, 2012 protest letter, OPA holds that Tropex submitted one protest composed of issues raised in both of its letters. The point is that on April 3 and 16, 2012, Tropex had standing to file a protest as an aggrieved bidder because it had received notice that it would not be receiving the award of the contract with the receipt of the March 30, 2012 CUC notification. Not receiving the award would logically have a negative financial interest to Tropex as a result of CUC's decision to award the contract to another bidder.

CUC incorrectly denied the first Tropex letter as untimely based on the rationale that Tropex had notice of a bid defect on March 6, 2012 and failed to protest within the prescribed 10-day period. This rationale is defective in that it ignores a fact necessary for protesting – being an aggrieved bidder/offeror/contractor. Until March 30, 2012, Tropex was merely a bidder pending award; it was not an 'aggrieved' bidder yet. As such, it could not protest what it thought was a defect in the GPPC bid until CUC took some sort of action adverse relative to Tropex. That adverse action was the notice of award to another bidder. The notice created the adversity and, as of March 30, 2012, Tropex had standing to protest under the CUC procurement regulations.

Therefore, OPA determines that Tropex had standing to protest as of March 30, 2012, the date of CUC's adverse action in selecting another bidder for award of the contract, and did so on April 3 and April 16, 2012. Both submissions were timely since they were filed within a 10-day period of March 30, 2012, based on work days and not counting the April 6, 2012 holiday. *See* NMIAC 50-50-401(a) (1) and (d) (1).

TROPEX PROTEST and DECISIONS BY CUC

Tropex therefore had standing to pursue its protestable claims on April 3 and April 16, 2012. Tropex argues that its April 3, 2012 letter was informational and not a protest, apparently unaware of the March 30, 2012 notification from CUC. Nonetheless, the record indicates that by April 3, 2012, the date of the first Tropex letter, CUC had decided which bidder would receive the award and had

already notified Tropex. Tropex's second letter on April 16, 2012 is identified as a "letter of protest" on its face. In this second letter, Tropex reiterates the issues contained in its April 3, 2012 letter and identifies another issue involving the language used by CUC in its March 30, 2012 notification implying that CUC ranked the bidders based on their relative responsiveness. Relative determinations of responsiveness, as alleged by Tropex, are impermissible methods of determining a potential awardee. Tropex's letter of April 16, 2012 incorporated the protest issues from its April 3, 2012 letter.

In reviewing the pertinent documents, OPA finds that Tropex timely protested within 10 work days from the date it received notification that it would not be receiving the contract award on March 30, 2012. On that date, Tropex was an aggrieved bidder eligible to protest the procurement provided it did so prior to midnight on April 16, 2012 pursuant to the CUC procurement regulations.

Tropex had knowledge of a possible defect in the bid of another bidder at bid opening on March 6, 2012 but could not protest it until it became an aggrieved bidder on March 30, 2012. In applying the intent of the CUC procurement regulations to these facts, OPA finds that the ten-day period during which a protest could be lodged in this instance began on the first work day after Tropex received the CUC notification that it would not receive the award. Since the March 30, 2012 notification was sent by email attachment and first class mail on March 30, 2012, OPA concludes that Tropex received the notice on that date. Therefore, the final day to file a protest in this matter was April 16, 2012, the tenth workday after the March 30, 2012 notification. Therefore, Tropex's first letter on April 3, 2012 and its second letter on April 16, 2012, when combined, constitute a timely-filed protest.

Until a bidder is 'aggrieved' it cannot protest. NMIAC 50-50-401(a) (1). A bidder may notify the procuring agency of a possible defect in a competitor's bid at any time. Here, CUC and all of the bidders who attended the bid opening knew about the possible defect in GPPC's bid since that issue was raised orally at bid opening by Fanter's representative. By the time Tropex sent in its first letter on April 3, 2012, CUC had already made an award decision and notified Tropex of it. None of the bidders present at the March 6, 2012 bid opening would be able to protest what the Fanter representative asked about until such time as CUC took some sort of action adverse to one or more of the bidders. Between March 6th and March 30th, the only recourse available to any of the bidders was to inform the agency about the possible defect in the GPPC bid and hope that the agency would consider it in evaluating bids. A tolling of the ten-day clock until a bidder is aggrieved seems more likely to meet the intent of the procurement regulations than simply applying the ten-day limitation at the time facts that could lead to a protest are gained if a bidder/offeror/contractor is not yet aggrieved. To be

'aggrieved' requires agency action and some type of perceived 'wrong' to a bidder. Until March 30, 2012, there were neither.

Therefore, OPA concludes that CUC erred in determining that Tropex did not protest the alleged defect in the GPPC bid within ten workdays of bid opening. Nonetheless, since Tropex protested within 10 days of becoming aggrieved and since CUC responded to the allegation with a great deal of detail in its April 16, 2012 decision, CUC's action in denying the initial protest of April 3, 2012 as untimely is inconsequential; its error is harmless since it dealt with the protest issues in a substantive fashion and denied the Tropex complaint about GPPC's bid as immaterial. Also at bid opening and in its April 16, 2012 letter to Tropex, CUC deferred the Fanter bid pricing issue to the bid review committee to determine if Fanter's bid had a calculation error. According to CUC's letter, apparently Fanter's bid had several other errors or responsiveness irregularities. These are not before the OPA and will be left up to the discretion of CUC to resolve if necessary.

OPA determines that CUC's denial of Tropex's April 3, 2012 protest over the issues of the GPPC bid and Fanter's calculation error are valid and, as such, upholds CUC's action.

CUC's denial of Tropex's third issue, that CUC's notification on March 30, 2012 of the award to another bidder was based upon a bidder ranking of relative responsiveness, was also of a minor nature in that it did not reflect what CUC actually did during the bid evaluations and was a grammatical error that was clarified by CUC in its denial letter. As such, OPA determines that CUC's denial of this third protest issue is valid and upholds the CUC decision.

OPA DECISION

The issues before OPA are as follows:

1. When did Tropex have actual or constructive knowledge of facts that formed the basis of a protest? Answer: Tropex had knowledge of facts that supported a protest on March 6 and March 30, 2012. On March 6, 2012, Tropex knew of the possible defect in GPPC's bid due to an oral question at bid opening and it was also aware of a possible calculation error in Fanter's bid. On March 30, 2012, Tropex interpreted CUC's letter of that date to mean that the agency ranked bidders based on 'relative' responsiveness basis because of the language in the CUC letter indicating that Tropex was not the lowest "most" responsive bidder.

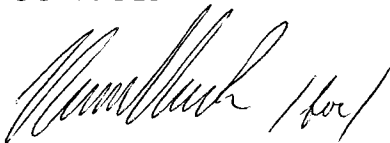
2. When was Tropex an 'aggrieved' bidder under NMIAC 50-50-401(a) (1)? Answer: Tropex became an aggrieved bidder on March 30, 2012 and thereafter had standing to protest until midnight on April 16, 2012.
3. Is the Tropex letter of April 3, 2012 a letter of protest or informational in nature? Answer: The April 3, 2012 letter was a bid protest because it complained about possible defects in two other bids and was submitted after Tropex had become an aggrieved bidder.
4. Is the Decision of the Director of CUC that was issued on April 16, 2012, regarding the Tropex letter of April 3, 2012, based on valid factors? Answer: CUC's decision denying the protest filed on April 3, 2012 was based on valid factors since the defect in GPPC's bid was immaterial and the pricing calculation error was factored into the agency's award decision calculations. CUC erred in denying the protest as untimely.
5. Is the Tropex letter of April 16, 2012 a valid bid protest? Answer: the letter was a valid protest that incorporated the issues raised in Tropex's April 3, 2012 protest and raised a new protestable issue over possible bidder rankings based on relative responsiveness.
6. Is the Decision of the Director of CUC that was issued on April 24, 2012, regarding the Tropex letter of April 16, 2012, based on valid factors? Answer: CUC based its decision in denying the protest on valid factors determining that the grammatical error in its award notice letter was immaterial and that it had previously decided the protest issues raised by Tropex in its April 3, 2012 letter.

The appeal is DENIED.



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CONCUR



Michael Pai
Public Auditor