



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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	)	APPEAL NO. BP-Ao68
	)	
In Re Primtek Construction	)	Contract 569-OS and
Company	)	RFP11-GOV-077
	)	
	)	

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## I. SUMMARY OF DECISION

The Office of the Public Auditor lacks jurisdiction to decide an appeal brought by a contractor whose contract with the Commonwealth government has been terminated where the award was based on a faulty evaluation process. Government agencies have broad discretion to take corrective actions, such as the termination of a contract or solicitation as may be necessary to ensure that a procurement is fair and impartial. Any remedy sought by a contractor whose contract with the Commonwealth government has been terminated thusly must be decided in other forums.

The appeal is DISMISSED.

## II. FACTUAL SUMMARY

1. Primtek Construction Company ("Primtek") appeals the denial of a protest it filed on December 5, 2011 with the Division of Procurement and Supply ("Procurement").
2. The basis of the protest was that Procurement cancelled Primtek's contract (Contract No. 569-OS) as well as the underlying solicitation (RFP11-GOV-077).
3. The expenditure authority for this matter is the Water Task Force ("WTF"), part of the Office of the Governor. WTF had solicited three contracts previously for water leak detection in the CNMI. All of the three prior contracts and the RFP here were funded by a federal government grant. RFP11-GOV-077 is the fourth leak detection contract to be solicited and awarded and, according to WTF, the same procurement process, solicitation and contract were used with RFP11-GOV-077 as were used with

the three prior solicitations and contracts. Except for Procurement cancelling RFP11-GOV-077 and its contract, all of the prior solicitations and contracts were approved by Procurement.

4. On September 30, 2011, Primtek's General Manager signed the contract's signature page, thus forming the contract with this final signature. The contract indicated that various other documents, such as the Notice to Proceed, would automatically become contract documents once executed. *See* Contract 569-OS at page 2 of 5. Nonetheless, the contract existed as of the date of the final signature.
5. On November 17, 2011, Procurement notified Primtek that the contract was cancelled. *See* Procurement contract cancellation letter to Primtek dated November 17, 2011 at page 1, second paragraph.
6. On November 23, 2011, Procurement cancelled RFP11-GOV-077. *See* Procurement's RFP cancellation letter to Primtek dated November 23, 2011.
7. Procurement's basis for both of these cancellation actions was that discussions had not occurred with all bidders who had a reasonable chance of being awarded the contract and cancellation was in the best interests of the government.
8. Procurement quoted various regulatory requirements from the CNMI Procurement Regulations in both letters and copied various parties, including the two unsuccessful bidders, GPPC and RNV.
9. Contract 569-OS contained two nearly identical Termination for Convenience provisions that allowed the contracting official, in this case Procurement, to terminate the contract. *See* Contract 569-OS, Special Conditions, No. 2, at p. 2 of 5 and General Conditions, No. 22, at p. 6 (WTF Rev. 01-31-08). These provisions contain guidance for the terminated contractor to follow.<sup>1</sup>
10. The two termination provisions cited above were mandated for inclusion in the contract by the Department of the Interior for recipients of federal agency grants.
11. The Termination for Convenience provisions cited above control the rights of the parties in a situation where the contract is terminated.<sup>2</sup>
12. Procurement denied Primtek's protest over the cancellation of Contract 569-OS on April 3, 2012.
13. Primtek timely appealed the denial of its protest to the Office of the Public Auditor on April 18, 2012 and provided rebuttal documentation to Procurement's denial of its protest.

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<sup>1</sup> Procurement used the term 'cancellation' in its letters with regard to the contract and RFP. The effect of a 'cancellation' is the same as that of a 'termination' and thus the terms are synonymous. They mean the same thing since they have the same effect.

<sup>2</sup> The Public Auditor will not provide a legal interpretation of contractual terms other than applying them in the context of the contract's termination provision.

14. In its appeal, Primtek asked the Public Auditor to “reverse the Decision of the Director [of Procurement] to cancel the contract and the RFP ... [and to allow the contract] to proceed ...”
15. The WTF submitted documents and written arguments also urging the Office of the Public Auditor to affirm the contract, allowing it to proceed.
16. The unsuccessful vendors, GPPC and RNV Construction (“RNV”), provided comments, documents and arguments relevant to this appeal.
17. Prior to the cancellation of Contract 569-OS and RFP11-GOV-077, there were two additional protests, one from GPPC and the other from RNV, both vendors who submitted bids in response to RFP11-GOV-077.
18. Both protests were denied by Procurement and eventually appealed to the Public Auditor. However, both appeals were made moot first by the award of the contract and subsequently by Procurement’s cancellation actions. Although the Public Auditor communicated via letter with counsel for GPPC and for RNV, no decision was issued on their appeals.

### **III. ANALYSIS and DECISION**

#### **ANALYSIS**

Contract 569-OS was entered into with Primtek on September 30, 2011. Once this occurred, the RFP merged into the contract and thus ceased to exist. Although Procurement indicated that it also canceled the RFP after it cancelled Contract 569-OS, it was already a moot point. The relationship between the parties changed once the final signature was on the contract. At that point, the procurement was transformed from one involving a government agency requesting proposals for a future contract pursuant to a solicitation to one of contracting parties with rights and obligations enforceable in court as identified by the terms of the contract. The contract was not entered into fraudulently or for an unlawful purpose and therefore was valid. It was cancelled pursuant to its terms and after it had come into existence on November 23, 2011.

The role of the Office of the Public Auditor is defined by the NMIAC Subchapter 70-30.3. These regulations do not provide the Office of the Public Auditor with jurisdiction to determine whether the termination of a contract, occurring under the terms of that contract, is or is not appropriate. In the terms of the contract itself, no remedy is provided via a protest process nor is one provided for in the NMIAC procurement regulations under these facts. Only issues with solicitations and awards of a contract can be protested. Cancellation of an executed contract cannot. See NMIAC 70-30.3-501(a) (1). Here, the contract was entered into and then cancelled. As such, the terms of the contract control whatever remedy may be available and the Office of the Public Auditor finds itself without jurisdiction to decide if the cancellation was proper.

However, it is important to note there that contracting officials, such as Procurement, have broad discretion in taking corrective action regarding contracts and solicitations. The Office of the Public Auditor follows the guidance of the Comptroller General of the United States and will not object to corrective actions taken by an agency which concludes that a contract award was tainted by a flaw in the procurement process. See Rockville Mailing Serv., Inc., B-270161.2, April 10, 1996, 96-1 CPD ¶ 184 at 4. If the procurement official decides on a course of action like the termination of a contract or solicitation, unless there is evidence of fraud or a failure to follow the applicable regulations, the decision will not be disturbed by the Office of the Public Auditor. Likewise, where a reasonable basis for the cancellation of a solicitation exists, the Office of the Public Auditor also will not object. See A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2.

Additionally, the CNMI Superior Court, in a similar contract cancellation protest that led to an appeal upheld the Office of the Public Auditor which took a view strikingly similar as the one expressed here. See Decision, *In re Kautz Glass Co.*, Appeal No. BP-A047, Oct. 27, 2005; *Aff'd*, Kautz Glass Company v. CNMI Public School System, CNMI Superior Court, Civ. Actions 05-0508 (C) and 05-0391 (A), August 31, 2006. In other words, the question of whether Procurement may cancel a contract and solicitation after the contract is formed must be decided in other forums on specific facts and not at the Office of the Public Auditor. See, e.g., Commercial Drapery Contractors, Inc. v. United States, 967 F. Supp. 1, 4 (D.D.C. 1997), *aff'd*, 133 F.3d 1, 6 (D.C. Cir. 1998).

## **OPA DECISION**

This matter is an appeal of a protest that was denied by Procurement over the cancellation of a contract and its solicitation after the contract was formed. Thus, the matter is a contract controversy involving the administration of a contract. It is not an appeal of a bid protest involving the award of a contract based on a solicitation. A remedy for this dispute is not found in the CNMI Procurement Regulations; it is found in the contract itself via the Termination for Convenience clauses cited above. Since a contract first existed and then was canceled, Primtek will have to find its remedy via the terms of the contract.

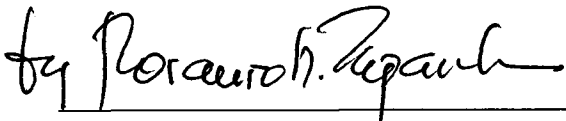
The Office of the Public Auditor does not have jurisdiction under the NMIAC's procurement regulations to decide this type of appeal. It is therefore DISMISSED.



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CONCUR



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MICHAEL PAI  
PUBLIC AUDITOR