



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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In the Appeal of)

NEW BLUE SKY CORPORATION)

APPEAL NO. BP-A079

CUC-RFP-13-019

“Supply & Delivery of Engine Lube
Oils for Power Generation”

New Blue Sky Corporation (“NBS”) filed an appeal with the Public Auditor (“OPA”) on August 13, 2013 claiming that the Acting Director of the Commonwealth Utility Corporation (“CUC”) erred in rejecting NBS’ bid protest as untimely.

BACKGROUND

CUC notified NBS on June 25, 2013 that lubricating oil in NBS’ proposal was “not suitable for CUC Power Plant No. 1 Engines.” *See* CUC Letter Number 06-13-029, June 25, 2013. On July 3, 2013, NBS inquired about the reasons for the rejection of its proposal. CUC responded with an emailed explanation on July 15, 2013 and on July 19, 2013 NBS filed a formal bid protest with CUC. NBS takes the position that the facts giving rise to the protest did not occur until the receipt of the CUC email on July 15, 2013. In the alternative, NBS states that it protested, albeit informally, on July 3, 2013 when it emailed CUC asking for information regarding the rejection of the oil.

Since NBS had knowledge that the lubricating oil it proposed was unacceptable on June 25, 2013, its protest on July 19, 2013 was untimely.

The appeal is DISMISSED.

DISCUSSION

The CUC procurement regulations state:

“Any actual or prospective bidder ... who is aggrieved in connection with the solicitation or award of a contract may protest to the Director. The protest shall be received by the Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto.”

NMIAC 50-50-401(a) (1) (emphasis added)

On June 25, 2013, NBS received a letter from CUC stating that the lubricating oil it had proposed in response to CUC RFP-13-019 was not suitable for use by CUC. *See* CUC Letter Number 06-13-029, June 25, 2013. CUC procurement regulations provide a ten working day period during which time a protest may be filed after a party knew or should have known the facts that would give rise to a bid protest. If a protest is filed beyond this ten-day period, it is untimely. *Id.*

NBS' email of July 3, 2013 cannot be seen as a bid protest. This email asked for clarification and more detail about CUC's decision the rejection of NBS' proposed oil. NBS failed to state that it was protesting the decision made by CUC. Instead, it asked for clarification of that decision. The NBS email also states that NBS did not want to "take action" on the CUC decision. Procuring agencies cannot guess if an email or letter is a bid protest; the vendor must clearly articulate if the communication is intended to be a bid protest. Where an email or letter only asks for clarification, it fails to rise to the level of a bid protest. The NBS email of July 3, 2013 asked for clarification and its email was answered by CUC on July 15, 2013.

NBS' bid protest on July 19, 2013 was based on CUC's letter of June 25, 2013 that rejected the lubricating oil NBS had proposed. As a protest, this letter was untimely because it was filed more than ten working days after NBS had actual knowledge that its proposed lubricating oils were unacceptable for use by CUC. That decision by CUC gave rise to the necessary facts upon which a protest could be based; but the protest had to be timely filed to be considered.

In order to appeal a protest decision to OPA, the initial protest must have been timely filed and, if appealed, the appeal must also be timely filed according to the CUC Procurement Regulations. Thus, on June 25, 2013, NBS had actual knowledge of facts that were sufficient for it to protest and it had ten working days to do so. NBS' protest of July 19, 2013 was untimely having been filed 17 working days after NBS became aware of facts sufficient to justify a protest.

CUC's procurement regulations state that only bidders, offerors and/or contractors who are 'aggrieved' may file a bid protest. NMIAC 50-50-401(a) (1). NBS was 'aggrieved' once it received the CUC letter of June 25, 2013. 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 an entity "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." *Id.* If the term is looked at by analogy to section 1 CMC 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 by the government agency that empowers the bidder/offeror/contractor with standing to protest the government's action within a set time period. *See* NMIAC 50-50-401(a) (1).

The action taken by CUC was the rejection of NBS' lubricating oils in NBS' bid. If its proposed oils were not able to be used by CUC in its machinery, then NBS was 'aggrieved' because its proposal could not be considered. At that point, on June 25, 2013, NBS had standing to protest the decision CUC made in rejecting the lubricating oils NBS proposed. It did protest that decision but did so more than 10 days after it had knowledge of these facts.

DECISION

The Public Auditor determines that NBS was an 'aggrieved' bidder on June 25, 2013 when it received CUC's letter indicating that the lubricating oils it proposed were unsatisfactory for use in CUC's equipment. At that point, NBS had 10 working days to file its protest over that decision. Instead, NBS waited until July 19, 2013 to file its protest. NBS' position is that the correct date it became aware of facts sufficient to justify a protest was on July 15, 2013 -- the date CUC clarified its decision on the suitability of the proposed oil. This position is unsupportable. NBS became aware that the lubricating oils in its proposal were unsatisfactory on June 25, 2013 and that knowledge was sufficient for NBS to have filed a protest within the prescribed time period.

NBS was untimely in the filing of its protest and thus has no standing to appeal to OPA for the same reasons. Accordingly, the appeal is DISMISSED.

DATED, this 5th day of September, 2013.

BY

CONCUR



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