



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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**In re:** ) **APPEAL NO. BP-A081**  
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**Appeal of Microl Corporation** ) **IFB13-HSEM-150 (A-D)-Vehicles**  
 )  
 ) **“Trucks for Homeland Security”**  
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## BACKGROUND

IFB13-HSEM-150 (A–D)-Vehicles (the “IFB”) was sent by facsimile to Joeten Motors (“Joeten”), Triple J Motors/Mazda, and Microl Corporation (“Microl”) by the Division of Procurement & Supply (“P&S”) on July 17, 2013. The IFB solicited the procurement of two 4-wheel drive, four-door pick-up trucks with vented disc brakes for use by the Homeland Security Office of the CNMI government.<sup>1</sup> It also notified the facsimile recipients that bids were due and would be opened at 10:00 a.m. on July 26, 2013. On July 23, 2013, P&S faxed an addendum to the IFB to all original recipients. This was the first of two addenda for this IFB. The first addendum modified the scope of work to include two (2) additional trucks with identical specifications as in the original IFB. The second addendum, regarding a “V-6” engine configuration, is not relevant to this appeal. In a letter dated July 25, 2013, the day before the bid opening, Microl filed a “Declaration of Protest” (the “Protest”) and did not submit a bid in response to the IFB. The Protest was denied by the Director of Procurement & Supply on August 22, 2013. Joeten was selected for award of the contract and the contract document was routed internally but no contract was signed due, in part, to Microl’s appeal to the Public Auditor on August 28, 2013. Appeals and/or protests filed prior to contract award prohibit the awarding of a contract until the protest and/or appeal has been decided. *See* NMIAC §70-30.3-505(e).

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<sup>1</sup> This specification – vented disc brakes – is the only specification relevant to this appeal; there were numerous other specification requirements.

## **MICROL'S PROTEST and the DIRECTOR'S DECISION**

The Protest disputes the technical requirement of vented disc brakes, claiming that this feature is exclusive to the Nissan Frontier, thus preventing Microl from participating in the IFB and preventing the IFB from producing a fair price. *See* Protest at 1. Microl requested that P&S revise the specifications to remove the disc brake requirement or include a specification for front wheel disc brakes with rear wheel drum brakes as an acceptable alternative. *Id.*

The P&S Director denied Microl's protest, stating that Microl received the IFB on July 17, 2013 at 10:56 a.m., had ten calendar days before the July 26th bid opening deadline to complain about the specification and failed to raise its concern until the day before bid opening. The P&S Director denied Microl's Protest without further discussion.

## **MICROL'S APPEAL**

Microl's Request for Appeal of the denial of its Protest (the "Appeal") identifies three (3) issues: First, Microl restates the grounds raised to the Director in its protest, namely that the disc brake specification in the IFB excluded Microl as a potential bidder and were exclusive to one vehicle model, thereby reducing competition. Second, Microl complained of a discrepancy in the numbering between the original IFB solicitation and a subsequent addendum. Third, and finally, Microl complained of the timing of an addendum to the IFB, which occurred just three (3) days before bid opening. This addendum added two (2) additional vehicles to the IFB, increasing the total to four (4). However, according to Microl's pricing scheme, although the increased number of vehicles would have allowed for more advantageous pricing, it also would have required additional time to compile a responsive bid.

## **STANDING TO PROTEST**

While the Director's decision makes no identifiable findings on whether Microl had standing to protest the IFB, sufficient facts exist in the record for OPA to conclude that it did. To have standing to protest, the CNMI Procurement Regulations require that the entity protesting must be an "actual or prospective bidder, ... who is aggrieved in connection with the solicitation or award

of a contract...” NMIAC §70-30.3-501(a)(1). Once a bid proposal period ends, a firm which failed to file a proper bid protest no longer qualifies as a prospective bidder. *See generally, In re Appeal of Joeten Motor Company, Inc.* BP-A013, p. 7 (March 11, 1998) (citing Waste Management of North America v. Weinberger, 862 F.2d 1393 (9<sup>th</sup> Cir. 1988); *In re appeal of Carrier Guam, Inc.*, BP-A012, p. 5 (February 26, 1998) (citing Waste Management of North America v. Weinberger). In the present situation, Microl was not an actual bidder because it did not submit a bid. Microl was, however, a prospective bidder because it protested the IFB specifications prior to bid opening. OPA finds that Microl’s Protest was submitted prior to the closing of the proposal period, as the Protest is dated July 25, 2013, and the Director’s Decision indicates that the Protest was received by P&S prior to the close of the proposal period. *See* Protest, p. 1; Director’s Decision, p. 1. Thus, qualifying as a prospective bidder, Microl had standing to protest the specifications of the IFB.

### **JURISDICTION**

The Office of the Public Auditor has jurisdiction over appeals of decisions of the P&S Director pursuant to NMIAC § 70-30.3-505 (a). Such jurisdiction is limited, however, to matters which the party taking the appeal has first submitted, in writing, to the P&S Director and which the P&S Director has denied or failed to act on within a specified number of days. *Id.* In the instant case, Microl’s Appeal includes two issues that were not first presented to, nor ruled upon, by the P&S Director. Specifically, Microl failed to raise the numbering discrepancy between the original IFB and the first addendum and the alleged insufficient time between the first addendum and the bid closing in its Protest. Accordingly, OPA lacks jurisdiction over these items and dismisses both claims. Microl did properly protest the disc brake specifications and thus OPA has jurisdiction over that portion of the Appeal.

### **DISC BRAKE SPECIFICATIONS**

Unfortunately, there is little in the record below, from either Microl or the P&S Director to form the basis of a decision in the present Appeal. Microl’s one claim is simple: it lacks a vehicle that satisfies the technical specification for disc brakes in the IFB. Microl’s second assertion is that the perceived limitation in the brake specification (requiring a vented disc brake) resulted in a

flawed solicitation that limited competition. Neither Microl's Protest not its Appeal includes any citation to facts or attached documentation to support this position. Therefore, where an appeal is lacking in substance, even if it has been submitted in a timely manner, it must be denied. This is the situation here and the result as well.

Agencies have discretion to set reasonable specifications for the items they procure. Where those specifications conform to the laws and regulations governing a procurement, OPA has no reason to substitute its own judgment for that of the procurement official unless the protesting/appealing party identifies some irregularity, bad faith, or lack of a rational basis for the specifications. Here, Microl provides no such substance.

OPA notes that in the present IFB, the specification goes to an important feature on the item procured, namely brakes on a vehicle. Where there is no reasonable relationship between the purpose of the item procured and the specification complained of, a different level of review might be appropriate. Similarly, where it can be shown that a unique specification is included for the *purpose* of reducing competition, a challenge to revise the specifications will prevail. Here, however, Microl has made no such showing. Based on the limited information presented, the Office of Homeland Security and Emergency Management sought trucks with certain features; among them were pick-up trucks with vented disc brakes. The specification in the IFB was satisfactory and the Director's denial of Microl's protest, albeit briefly done, was valid. Having presented no grounds of support for the Appeal, it is hereby DENIED.

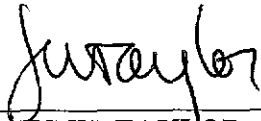
#### DECISION

For the foregoing reasons, the Appeal by Microl is DISMISSED in part and DENIED in part.

**Dated this First Day of October 2013.**

BY

CONCUR

  
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