



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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In Re:) APPEAL NO. BP-A082
)
Appeal of Mary's Security Services) DPW12-RFP-004
) Procurement of Security Services
) for the Marpi Solid Waste Facility
)
) DECISION TO DISMISS
)

BACKGROUND

Mary's Security Services, Inc. ("Mary's") timely filed an appeal with the Office of the Public Auditor ("OPA") of the August 22, 2013 protest decision from the Director of Procurement and Supply for DPW 12-RFP-004, Procurement of Security Services for the Marpi Solid Waste Facility.

On September 25, 2013, the Public Auditor received confirmation from the Director of Procurement & Supply ("P&S") that the Secretary of Public Works made a decision to cancel the Requests for Proposals. The cancellation was determined to be in the best interests of the government, and the P&S notification stated that the Department of Public Works ("DPW") intends to re-issue the solicitation as an IFB. NMIAC 70-30.3-240(h). On September 30, 2013, the Public Auditor received a letter from Mary's requesting that OPA maintain jurisdiction of this appeal and not dismiss it as moot until the time to protest the cancellation has passed without protest or until any such protest has been fully and finally resolved.

DISCUSSION

As a general matter, the Director of Procurement and Supply retains jurisdiction to cancel a procurement at any time, even if a matter has been appealed to OPA. NMIAC 70-30.3-510(a) and (b) (prior to or after an award, "the P&S Director or the Public Auditor" may determine "that a solicitation or proposed award of a contract is in violation of law or regulation..."). The Public Auditor will not object to an agency's corrective action, including the cancellation of a solicitation, unless there is evidence of fraud or a failure to follow applicable regulations. *In re Primtek Construction Company*, BP-A068, June 19, 2012, p. 4. But typically, an agency may cancel a procurement under NMIAC 70-30.3-240, and "OPA will not engage in second-guessing...the necessity of the changes made to the specifications or scope." See *In re Appeal of Reaction Co.*, BP-A051, April 2, 2007, p. 6. In an administrative setting, when a procurement is cancelled, it renders an appeal on other issues moot. *In re Appeal of Rosario B. Aldan*, BP-A023, January 25, 2001, p. 8. See *KAES Enterprises, LLC*, B-402050.4, February 12, 2010, p. 2 (protest dismissed as academic based on a proposed corrective action).

In support of its request, Mary's cites to the case of *Gear Wizzard, Inc. v. U.S.*, 99 Fed.Cl. 266, 277 (2011) for the proposition that if a mootness argument is raised based on cancellation of a solicitation, an analysis of the merits of the plaintiff's case which challenged the validity of the cancellation is required. In *Gear Wizzard*, there are two material differences from this case which must be considered. First, under the Tucker Act, the *Gear Wizzard* matter was brought directly to the Court of Federal Claims for injunctive relief, not before an administrative body. *Gear Wizzard, Inc. v. U.S.*, 99 Fed.Cl. at 273, citing the Tucker Act, as amended by the Administrative Dispute Resolution Act (ADRA), 28 U.S.C. § 1491(b)(1) (2006). Second, the cancellation issue in *Gear Wizzard* was a basis for the requested injunction and other relief, so it was raised directly before the court initially as provided for by law.

Here, however, OPA must follow the procedures set forth in the CNMI Procurement Regulations. If a bidder seeks to protest an agency action, that protest must go to the P&S Director first. NMIAC 70-30.3-501. OPA only gains jurisdiction for a protest after it has been submitted to P&S and it has been denied, or P&S has failed to act. NMIAC 70-30.3-505. See *Appeal of Herman's Modern Bakery*, BP-A070, September 18, 2012. While OPA did have jurisdiction for the underlying appeal, the cancellation issue, if it is raised by Mary's, would be new. Before OPA considers any appeal, P&S should have an opportunity to review any protest regarding the cancellation, which would be a new cause of action under the CNMI Procurement Regulations.

DECISION

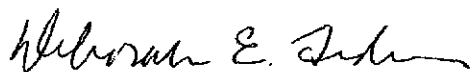
The Public Auditor agrees that if Mary's wishes to protest the cancellation, it may do so, and the underlying procurement may be examined in the course of a review. But, because this is an administrative proceeding under the CNMI Procurement Regulations, the proper procedure is to protest the cancellation to the Director of Procurement and Supply before an appeal can be taken on this new issue to OPA.

Accordingly, due to the cancellation, at this time, the pending appeal has become moot, and is therefore dismissed without prejudice. If Mary's decides to protest the cancellation, that protest must be brought first to P&S, and go through the normal administrative process as set forth in the CNMI Procurement Regulations.

DATED, this 8th day of October, 2013.

BY

CONCUR



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