



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

Website: <http://opacnmi.com>

1236 Yap Drive, Capitol Hill, Saipan, MP 96950

Mailing Address:
P.O. Box 501399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 322-6481
Fax: (670) 322-7812

In re:) **APPEAL NO. BP-A083**
)
Appeal of NAPA Auto/Truck Parts) **CUC RFP-13-019**
)
) **“Supply and Delivery of Engine Lube**
) **Oils for Power Generation”**
)
_____)

BACKGROUND SUMMARY

On April 23, 2013, the Commonwealth Utilities Corporation (“CUC”) issued RFP-13-019, *Supply & Delivery of Engine Lube Oils for Power Generation* (the “RFP”). The RFP requested proposals for lubricating oils for the engines in CUC’s Power Plants.¹ The RFP listed two pre-approved brand name oils suitable for use in Power Plant No. 1. RFP at p. 5. In the RFP, CUC reserved the right to reject any or all proposals for any reason including the rejection of unsuitable oils. RFP at pp. 2, 4 and 5.

On May 23, 2013, Bisnes-Miami Saipan, Inc., *dba* NAPA Auto & Truck Parts (“NAPA”), submitted a proposal (the “NAPA Proposal”) for the use of Valvoline Valmarin TP-1240 lubricating oil (the “Valvoline Oil”) at Power Plant No. 1. *NAPA Proposal*, at p. 7 (May 23, 2013). The RFP did not list the Valvoline Oil as a suitable, pre-approved brand. RFP at p. 5. The CUC Source Selection Committee determined the Valvoline Oil was unsuitable and rejected it. *CUC Letter No. 06-13-027* (June 25, 2013). NAPA protested this decision claiming the Valvoline Oil met the RFP’s specifications and is the functional equivalent of the brand name oils that were pre-approved in the RFP. *NAPA Protest Letter*, p. 1 (July 10, 2013) (the “First Protest”). The CUC Executive Director denied the First Protest. *Protest Denial Letter* (July 29, 2013). NAPA timely appealed the Protest Denial Letter to OPA on August 12, 2013. *NAPA First Appeal Letter* (August 12, 2013) (the “First Appeal Letter”).

¹ Note this appeal is limited to consideration of the lubricating oils proposed for Power Plant No. 1.

Due to a competitor's protest on July 19, 2013, NAPA first learned of the evaluation methodology process CUC used and filed a second protest over that process. *NAPA Second Protest Letter* (July 31, 2013) (the "Second Protest"). CUC found the Second Protest untimely and did not render a decision on it. *See CUC's Report to OPA following the First Appeal*, at p. 1 (September 11, 2013). NAPA appealed the non-decision of its protest to OPA pursuant to CUC Procurement Regulations, Section 50-50-405(a). *NAPA Second Appeal Letter* (September 11, 2013) (the "Second Appeal"). OPA has merged the First and Second Appeals² into this decision due to similarity and interrelationships of the underlying facts. OPA DENIES the appeals since CUC acted reasonably in evaluating non-brand name oils.

NAPA Proposal

The NAPA Proposal claimed that the Valvoline Oil met the RFP's criteria. *NAPA Proposal*, pp. 1-2. In support, NAPA provided several pages of technical details about the Valvoline Oil including product information published by Ashland, the manufacturer of the Valvoline Oil. *NAPA Proposal*, Technical Pages, p. 1 (Version 451/05b). The product information indicated several times that the Valvoline Oil was designed for use in *marine engines*. *Id.* at p. 1 (emphasis added).

The NAPA Proposal also included letters of support from suppliers or manufacturers familiar with the Valvoline Oil. The letters were submitted from New Sulzer Diesel, KRUPP MaK, Ashland (the manufacturer of the Valvoline Oil) and MAN B&W. The Ashland letter was limited specifically to approving the use of the Valvoline Oil in ship's engines. *Ashland Letter* (July 3, 2013). The Sulzer letter stated that the final approval of the Valvoline Oil could only occur after operational experience documented satisfactory results. *Sulzer Letter to Valvoline Oil Company* (February 23, 1994). The KRUPP MaK letter recommended the use of the Valvoline Oil in an engine (8M332C) that differed from the engine type used in Power Plant No. 1. *KRUPP MaK Letter to Valvoline* (February 27, 1995). The MAN B&W letter, originally sent to Ashland, indicated that a 'general release' of the Valvoline Oil could occur only after positive

² While unusual, OPA has previously considered two protests and appeals by a vendor arising from the same solicitation and merged the appeals. *See In Re: Chongs Corp.*, OPA Appeal No. BP-A073 (April 11, 2013).

test results had been obtained. *MAN B&W Letter to Ashland* (October 26, 1992). NAPA provided these letters in the proposal but did not provide further information regarding the testing, approval or operational experience of the Valvoline Oil mentioned in these letters. See *NAPA Proposal*, Technical Pages, pp. 1-2. On June 25, 2013, CUC rejected the NAPA Proposal indicating that the Valvoline Oil was unsuitable for use in CUC's engines in Power Plant No. 1. *CUC Letter No. 06-13-027* (June 25, 2013).

Protests

NAPA filed two protests involving the RFP.³ The First Protest was filed on July 10, 2013 and protested the rejection of NAPA's proposed Valvoline Oil claiming that the oil met the RFP's specifications and was the functional equivalent of the brand name oils preapproved in the RFP. *First Protest*, pp. 1, 4 - 5. The Second Protest was filed on July 31, 2013 and, although it repeated many of the allegations in the First Protest, it primarily questioned the evaluation process conducted by CUC. *Second Protest*, p. 1. This protest issue was based on new information that NAPA received on July 19, 2013 when a competitor filed a protest over the rejection of its proposal. *Id.* CUC denied the First Protest. *CUC Letter No. 07-13-047*, p. 1 (July 29, 2013) (the "Protest Denial Letter"). CUC did not issue a decision regarding the Second Protest believing that it was untimely.

First Protest

The First Protest claimed the following:

1. CUC failed to explain the evaluation standard it used to conclude that the Valvoline Oil was not suitable for the engines in Power Plant No. 1. *First Protest*, p. 1.
2. CUC violated CUC Procurement Regulations § 50-50-001(1) – (5). *Id.* at 5.

³ OPA notes that NAPA filed three protests, the third objecting to a requirement in the RFP to submit audited financial statements as a part of its proposal. Since NAPA's proposal was disqualified, this protest was not dealt with by CUC nor was it appealed to OPA by NAPA. See *NAPA Proposal Letter to CUC*, p. 1 (May 23, 2013).

3. By providing to proposers the listing of salient characteristics at a pre-proposal conference, CUC changed the RFP from one based on CUC determining the suitability of a non-brand name oil to one based on the listing of salient characteristics. *Id.* at 2 – 4.

The CUC Executive Director denied the First Protest on July 29, 2013. In the Protest Denial Letter, the Executive Director addressed two issues: (1) discussions with proposers and (2) the suitability of the Valvoline Oil. *Protest Denial Letter*, p. 3 (July 29, 2013). The Director also explained the background of the procurement as well as several CUC Procurement Regulations and cited federal law to the effect that an agency has discretion to use its own expertise in procuring needed services. *Id.* at p. 4, citing *Office Depot, Inc. v. United States*, 95 Fed.Cl. 517, 528 (2010). CUC also specifically discussed the listing of salient characteristics that was given to proposers on May 13, 2013 at a pre-proposal conference. *Protest Denial Letter*, p. 2 (July 29, 2013). In its conclusion, CUC indicated that it never considered the listing of salient characteristics given to proposers as a document that would supersede CUC's reserved right to determine if a non-brand name oil was suitable. *See Protest Denial Letter*, p. 8 (July 29, 2013).

Second Protest

Through a protest filed by a competitor, New Blue Sky ("NBS"), NAPA learned of the process used by CUC in evaluating the suitability of oils proposed under the RFP on July 19, 2013. A CUC email to NBS was disclosed in its protest and it was this email that outlined the evaluation process used by CUC. After receiving CUC's decision on July 29, 2013 denying the First Protest, NAPA filed the Second Protest on July 31, 2013 claiming the evaluation methodology process was flawed. *Second Protest*, p. 1. CUC did not decide the Second Protest within the specified thirty-calendar day period. NAPA subsequently appealed the non-decision of its protest to OPA under the provisions of NMIAC § 50-50-405(a). As mentioned above, this appeal is being merged with the first as the two appeals raise similar issues and arise from the same solicitation.⁴

⁴ Because the first protest and appeal were timely filed, this protest and appeal will be accepted as supplemental to that appeal and OPA makes no finding as to the timeliness of the second protest.

DISCUSSION

In its appeals, NAPA requests that OPA:

1. Reverse the CUC Executive Director's first protest decision and direct CUC to evaluate the Valvoline Oil or to cancel the procurement and re-bid it. *See First Appeal* (August 12, 2013).
2. Determine that CUC erred in applying the evaluation suitability process, as identified in the CUC employee's email of July 15, 2013. *See Second Appeal* (September 11, 2013).

OPA has jurisdiction to render a decision under NMIAC § 50-50-405(a).

The RFP did not identify the factors CUC would use in evaluating non-brand name lubricating oils that might be proposed. Instead, CUC clearly indicated in the RFP that it would have to make an evaluation of the suitability of such oils if they were proposed. RFP at p. 4- 5. When CUC provided the listing of salient characteristics to proposers at a pre-proposal conference, it did not eliminate from the RFP, as NAPA claims, its ability to determine suitability of non-brand name oils that were proposed. The question then becomes whether CUC's suitability analysis was reasonable and consistent with CUC's regulatory scheme.

CUC Procurement Regulations

NAPA claims CUC violated NMIAC § 50-50-001(b) by not identifying in the RFP the process it would undertake to evaluate non-brand name lubricating oils. NMIAC § 50-50-001(b) sets forth the purposes and policies under which the remainder of the CUC regulatory scheme is to be construed, but does not set forth any independent standard capable of being breached. *See* NMIAC § 50-50-001(a). Put another way, unless CUC's action in failing to specify the criteria for evaluating non-brand name lubricating oils in the RFP violated some specific CUC procurement regulation, there can be no violation of the spirit of the policy represented by NMIAC § 50-50-001(b). NAPA's reliance upon NMIAC § 50-50-001(b) is, by itself, insufficient to warrant any finding that CUC's actions were improper.

Having determined that NAPA's basic position relying on NMIAC § 50-50-001(b) is misplaced, OPA will evaluate whether the process used by CUC to evaluate the non-brand name oil, specifically the Valvoline Oil, was reasonable.

Reasonableness of the CUC Evaluation Process

The CUC procurement regulations offer no guidelines for evaluation of non-brand products in "brand name or equal" procurements. Where there are no CNMI laws or regulations to guide procurement decisions, it has been OPA's practice to consult GAO decisions as persuasive authority. *In re: Appeal of KUTH Energy*, OPA Appeal No. BP-A075, p. 5 (July 26, 2013).

The GAO has consistently concluded that contracting agencies have broad discretion in identifying their needs and determining what characteristics will satisfy those needs. *See generally, Bombardier, Inc., Canadair, Challenger Div.*, B-243977 (Aug. 30, 1991). The fact that specifications are based upon a particular product is not improper in and of itself; and a mere assertion that a specification was "written around" design features of a particular product will not provide a valid basis for protest if the record establishes that the specification is reasonably related to the agency's minimum needs. *Hewlett-Packard Co.*, B-239800 (Sept. 28, 1990).

When a protester challenges a salient characteristic included in a brand name or equal solicitation as unduly restrictive of competition, the GAO reviews the record to determine whether the restrictions imposed are reasonably related to the contracting agency's minimum needs. *Herley Indus., Inc.*, B-246326 (Feb. 28, 1992).

The GAO has consistently held that "In determining whether a particular item meets the solicitation's technical requirements ... a contracting agency enjoys a reasonable degree of discretion, and we therefore will not disturb its technical determination unless it is shown to be unreasonable." *Datacomm Management Sciences, Inc.*, B-261089, (Aug. 8, 1985). Furthermore, the evaluation of an offeror's proposal is a matter within the agency's discretion. *VT Griffin Servs., Inc.*, B-299869.2 (Nov. 10, 2008); *IPlus, Inc.*, B-298020 (June 5, 2006). Unless the

agency's conclusions are inconsistent with the solicitation's evaluation criteria or not reasonably based, the GAO will not substitute its judgment for that of the procuring agency. *See DRS ICAS, LLC*, B-401852.5 (Sept. 8, 2010).

OPA agrees with and adopts the GAO's position with respect to brand name or equal solicitations. In reviewing CUC's treatment and evaluation of NAPA's proposed non-brand name oil, OPA finds CUC's actions to be entirely reasonable.

CUC indicated in the RFP that it would have to approve non-brand name oils if they were proposed. RFP at p. 5. However, at a pre-bid conference attended by NAPA and other suppliers, CUC indicated that any non-brand name oil would have to meet certain specific technical requirements published by Mitsubishi, the manufacturer of the engines in Power Plant No. 1. *See "Quality Requirements for Lube Oil for Four-Stroke Engines Running on Gas Oil or Diesel Oil"* (undated Mitsubishi documents provided by NAPA in its appeal and to vendors by CUC). Notwithstanding these documents, CUC still reserved the right to evaluate for suitability any non-brand name oil that was proposed. RFP at p. 5. Consistent with this reservation, CUC evaluated the non-brand name oils for suitability in its engines, finding that the Valvoline Oil was not suitable. *CUC Letter No. 06-13-027* (June 25, 2013). NAPA claims it was error for CUC to reject the Valvoline Oil.

During the appeal process, OPA requested the submission of additional information regarding the evaluation process pursuant to NMIAC § 50-50-405(g). In response, CUC provided detailed information on its evaluation process on October 28, 2013 (the "CUC Evaluation Letter"). No other interested party supplemented their prior submissions in response to OPA's request or to rebut CUC's submission.

The CUC Evaluation Letter explained in great detail the efforts CUC undertook to determine if the Valvoline Oil was suitable for use in the engines operating in Power Plant No. 1. NAPA presented no evidence of bad faith or other improprieties in CUC's evaluation or decision making process and OPA's review revealed none. NAPA's claim is simply that CUC added

evaluation standards and/or criteria that were not in the RFP and therefore its decision to reject NAPA's proposed non-brand name oil was in error.

The CUC Evaluation Letter stated that vendors proposing any non-brand name oil were required to submit documentation validating that the oil they proposed would be suitable for use in the engines of CUC's Power Plant No. 1. *CUC Evaluation Letter*, (October 28, 2013); *see also* RFP at p. 5. As explained in the CUC Evaluation Letter, CUC went through the following process when it evaluated NAPA's submission of the Valvoline Oil:

1. CUC collected information about the proposed oil from the proposal and third party documents. The conclusion by CUC was that no document submitted by NAPA "clearly supported the use of the Valvoline TP-1240 lube oil [in] CUC engines, namely the 18V-52/55B and 18V-40/54A models in use at PP-1 [Power Plant Number 1]." *CUC Evaluation Letter*, p. 3 (October 28, 2013). Further, CUC determined the manufacturer's letters provided by NAPA in its proposal did not use the Valvoline Oil in the 18V-52/55B and 18V-40/54A engine models. *Id.* For instance, Mitsubishi, the engine manufacturer, only used the Valvoline Oil in the smaller 8-M332C engine but not in the 18V-52/55B and 18V-40/54A models. *Id.* Lastly, the Valvoline Oil was not listed as an approved oil by any of the third party manufacturers. *Id.*
2. CUC reviewed the letters of support submitted by NAPA from manufacturers. Their findings were that one source, Sulzer, in a 1994 letter, stated that final approval of the Valvoline Oil could only be given for use in diesel engines *after evidence of satisfactory use in field environments had been provided*. *CUC Evaluation Letter*, p. 4 (October 28, 2013) (*emphasis added*). No such approval was submitted by NAPA in its documentation or proposal. Similarly, Mitsubishi stated that its approval could only be provided after satisfactory field testing had been completed. *Id.* No such approval of field testing was provided in NAPA's proposal. Ashland's technical information, provided by NAPA in the proposal, illustrated that the Valvoline Oil was designed for a marine engine environment. *See NAPA Proposal*, Technical Pages 1 and 2 (Version 451/05b). It is not up to OPA or the procuring agency to search out documentation showing that a product meets certain criteria. Offerors bear the burden of submitting adequately written

proposals, and contracting agencies are not obligated to go in search of needed information. *See Carolina Satellite Networks, LLC, et al.*, B-405558, p. 3 (Nov. 22, 2011); *Sam Facility Mgmt., Inc.*, B-292237, p. 5 (July 22, 2003).

3. Lists of approved oils were provided at CUC's request by the engine manufacturers and the Valvoline Oil was not listed by any manufacturer on the documents that were provided. *CUC Evaluation Letter*, p. 5 (October 28, 2013).
4. CUC also made inquiries at its own Power Plants as well as to 24 utility companies in the Pacific region to determine if the Valvoline Oil was ever used in a power plant setting. CUC's Source Selection Committee was informed that the Valvoline Oil had never been used by CUC or by any power plant in the Pacific region's 24 utility organizations. *Id.* Further inquiries by CUC determined that the Valvoline Oil was used in vehicles but was not used in any of the 143 engines powering fishing boats berthed on Guam. *Id.* NAPA also stated in its proposal that it had never supplied the Valvoline Oil in engines identical to the 18V-52/55B and 18V-40/54A models used in Power Plant No. 1 by CUC. *See NAPA Proposal*, Section 3.

OPA determines that CUC's actions, as set forth above, were reasonable. CUC went to great lengths to obtain information in evaluating the suitability of the Valvoline Oil proposed by NAPA. CUC determined that the Valvoline Oil had never been used in its engines or those of 24 other utility companies in the region and that, pursuant to several letters from manufacturers submitted in NAPA's proposal, further testing would be required to validate the use of the Valvoline Oil. CUC also determined they were not under any obligation to act as the testing agent for the proposed Valvoline Oil. CUC's conclusion that the Valvoline Oil was not suitable for the engines CUC uses in Power Plant No. 1 was informed and based on a thorough evaluation without evidence of any impropriety.

The RFP stated several times that CUC would evaluate suitability of non-brand name oils. *See RFP* at p. 2, 4-5. CUC provided a list of salient characteristics at the pre-proposal conference and the RFP provided a scoring methodology listing of the importance of price and other factors used to evaluate proposals. *RFP* at p. 4. CUC evaluated the suitability of the non-brand name oils carefully and with consideration of the importance the oils would play (if they were

determined to be suitable) in maintaining engine performance. The performance of Power Plant engines has a direct bearing on electrical output and therefore a direct effect on public health and safety. Based on the above, the decision by CUC's Executive Director to reject NAPA's proposed Valvoline Oil was reasonable.

Contracting officers are presumed to act in good faith and their decisions will not be undone on the basis of inference or supposition. *See In Re: Chongs Corp.*, OPA Appeal No. BP-A073 pp. 12-13 (April 11, 2013); *In re: Primetek Construction Co.*, OPA Appeal No. BP-A069, p. 4 (June 19, 2012); *see also, Pride Mobility Prods. Corp.*, B-292822.5 (Dec. 6, 2004). NAPA has not demonstrated any bad faith in CUC's actions. To the contrary, CUC attempted to validate the use of the proposed Valvoline Oil in several ways. The use of the Valvoline Oil proposed by NAPA simply could not be validated and thus it was properly rejected by the CUC Source Selection Committee as unsuitable, a decision agreed to by the Executive Director of CUC in his protest decision.

DECISION

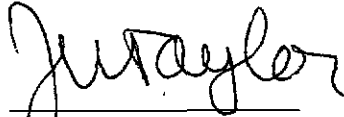
OPA concludes CUC had discretion to set reasonable specifications for the items it procured and to determine suitability of products that were proposed. Proposals offering "equal" products (a product not described by a brand name) were considered for award by CUC, but to be acceptable, those products had to be clearly identified in the proposals, meet the technical characteristics referenced in the RFP, and be determined to be suitable based on CUC's analysis of them. Thus, in this matter, CUC indicated that in addition to determining if the technical characteristics had been met, it would have to determine if a non-brand name oil would be suitable for use in CUC engines and CUC reserved the right to do this as well as being able to reject non-brand name oils that might be unsuitable. In making a determination as to suitability, CUC went through a reasonable process attempting to evaluate the Valvoline Oil for use in its engines at Power Plant No. 1. OPA has no reason to substitute its own judgment for that of the CUC Source Selection Committee or the Executive Director in the absence of some irregularity, bad faith, or lack of a rational basis for the specifications. NAPA has identified no such irregularities here.

For the foregoing reasons, the Appeal by NAPA is DENIED.

Dated this 3rd Day of March, 2014.

BY:

CONCUR:



JAMES W. TAYLOR
OPA Legal Counsel



MICHAEL PAI, CPA
Public Auditor

CC: Interested Parties and Counsel:

Gil Birnbrich, Deputy Attorney General (gbirnbrich@gmail.com)
Herman Sablan, Procurement & Supply (procurement@pticom.com)
Nancy Gottfried, Asst. Attorney General (gottfried.ago.procurement@gmail.com)
Marcia Shultz, Esq., NAPA Counsel (Mschultz@marianaslaw.com)
Jim Sirok, Esq., CUC Counsel (james.sirok@cucgov.org)
Mark Hanson, NBS Counsel (mark@saipanlaw.com)
Manny Sablan, CUC Purchasing Officer (manny.sablan@cucgov.org)