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In re:	)	**APPEAL NO. BP-A086**
	)	
Appeal of Coldwell Solar, Inc.	)	CUC-RFP-11-028
	)	
	)	"Solar Photovoltaic Generation"
	)	

BACKGROUND

On March 28, 2011, the Commonwealth Utilities Corporation ("CUC") issued a request for proposals from independent power producers for solar photovoltaic generation ("RFP-11-028" or "the RFP"). The RFP closed on September 29, 2011 (CUC protest decision). In response to the RFP, American Capital Energy ("ACE") submitted a bid and, in due course, was selected as the lowest responsible offeror. CUC issued a notice of intent to award the contract to ACE. *Director's Decision*, p. 1 (July 10, 2014).

Between September 2012 and February 2014, further negotiations under the RFP were delayed due to a conflicting power purchase agreement for construction of a diesel fired power plant and a grid study which was necessary to connect the subject solar system to the existing grid. *Director's Decision*, p. 1 (July 10, 2014). The integrated grid study was completed in November of 2013. *Id.* The conflicting diesel power purchase agreement was declared void by the Commonwealth Superior Court on February 4, 2014. *Id.* Negotiations between CUC and ACE resumed after that date. *Director's Report*, p. 3 (August 28, 2014).

On June 19, 2014, ACE presented details of its solar project to the recently-revived CUC Board of Directors (CUC had operated under Emergency Declaration for several years, which placed the ordinary duties of the Board of Directors under the management of the Governor). The CUC Board of Directors expressed its support to CUC management in moving forward with the project. *Director's Report*, p. 3 (August 28, 2014).

On July 3, 2014, Coldwell Solar, Inc. ("Coldwell") lodged a protest with the CUC Director pursuant to Commonwealth Procurement Regulation 50-50-401 (NMIAC § 50-50-401) objecting to the award based primarily on concern that the 2011 RFP and award to ACE was based on out of date pricing which would be seriously disadvantageous to CUC and its ratepayers. *Protest,* at p. 1

On July 10, 2014, the CUC Director issued a decision denying Coldwell's protest on three grounds: that Coldwell lacked standing under CUC procurement regulations, that Coldwell's appeal was untimely, and that CUC is not compelled to cancel procurements to respond to changes in market conditions. *Director's Decision*, p. 1.

On July 20, 2014 Coldwell filed the present appeal with the Office of the Public Auditor. Coldwell's appeal contends that the original protest was timely based on the recent action on the RFP by the CUC Board of Directors, that they have standing as "prospective bidders" under the CUC procurement regulations, and that CUC's insistence on proceeding with the present contract based on 2011 prices is unreasonable. *Appeal*, p. 2-4.

On August 28, 2014, CUC issued its report pursuant to NMIAC 50-50-401(a)(4) detailing responses to Coldwell's appeal and objecting to OPA's jurisdiction over the same. *Director's Report,* p. 1-5.

On September 5, 2014, ACE submitted comments to the Director's Report asserting that all activity on RFP-11-028 was in compliance with CUC's legal authority and its procurement regulations and that the power purchase agreement is consistent with the RFP and its selection criteria. *ACE Comments,* p. 1.

On September 12, 2014, Coldwell submitted comments to the Director's Report countering CUC's challenges to OPA's jurisdiction over the present appeal, addressing CUC's claims of untimeliness of the protest and lack of standing. *Coldwell Comments*, p. 2-4.

On September 20, 2014, the comment period provided for by NMIAC § 50-50-405(d)(4) ended.

OPA JURISDICTION

OPA lacks jurisdiction to decide this appeal. Generally speaking, NMIAC § 50-50-405(a) vests OPA with jurisdiction to hear and decide appeals from procurement protest decisions of the CUC Executive Director. However, the CNMI Legislature has chosen to alter the existing regulatory scheme with respect to the limited field of Private Sector Assistance Agreements ("PSAA"), creating an alternate review and appeal process which excludes OPA participation. As discussed more specifically below, the present matter falls within that alternate scheme, thus preventing OPA from reaching the merits of this appeal.

Public Laws 16-17 and 17-34 establish a review process for PSAA procurement disputes. This process is codified at 4 CMC § 8192. Section 8192 (a)(7) provides: "The Public Auditor shall have no involvement in a CUC PSAA procurement, nor jurisdiction over an appeal arising from such a procurement." Instead, protests are heard and decided by the CUC director and appeals are taken before the Public Utilities Commission ("PUC"). *Id.* at (b). In addition, aggrieved parties may further appeal from the PUC decision to the Commonwealth Superior Court.

The RFP in the present matter falls within the definition of a PSAA. Section 2 (d) of P.L. 17-34 (codified at 4 CMC § 8191) defines what procurements constitute a PSAA under the statutory scheme. Section 8191 (d)(6) includes a contract for an independent power producer (IPP). RFP-11-028 solicits proposals from "Independent Power Producers for Solar Photovoltaic Generation." While the solicitation does not contemplate an award of a contract *per se*, the winning bidder (or bidders) does receive the privilege of an exclusive right to negotiate a power purchase agreement with CUC. RFP at p. 8. Accordingly, OPA concludes RFP-11-028 is a contract for an independent power producer.

Section 2 (b) of P.L. 17-34 (codified at 4 CMC § 8191 (b)) provides special exemptions for "Renewable Energy Projects" but those exemptions do not alter the review process set forth in 4 CMC § 8192. Section 2 (b) exempts all Renewable Energy Projects[1] from the strict prohibitions

[1] Defined as "any projects that do not use as their main source of power generation fossil fuels, including but not limited to oil, coal or natural gas, but instead use power generating forces including but not limited to wind, solar, geothermal, biomass or nuclear battery." 4 CMC § 8191 (b).

on use of requests for proposals for procurements in place for all other PSAA procurements. The Renewable Energy Projects are also exempt from the remainder of the section 8191, but the exemption is specifically limited to section 8191 by the statutory language.[2] Accordingly, while RFP-11-028, being for solar photovoltaic generation is clearly a "Renewable Energy Project" under the law, this status does not exempt it from the procurement dispute review scheme set forth in 4 CMC § 8192. Accordingly, OPA does not have jurisdiction to review the present appeal and it must be dismissed.

Fortunately for Coldwell Solar, Inc., there appears to be a viable alternate forum to entertain their dispute. As the CUC Director pointed out in the Report, it appears the Public Utilities Commission will be required to approve the contract, thus availing Coldwell Solar, Inc. of the process set forth under 4 CMC § 8192.

DECISION

The CNMI Legislature created a limited exception to OPA jurisdiction over CUC procurement appeals for Private Sector Assistance Agreements. The present RFP falls within that exception, thus preventing OPA from reaching the merits in this matter. Accordingly, for the foregoing reasons, the appeal by Coldwell Solar, Inc. is DISMISSED.

Dated this 29th Day of September 2014.

BY:

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CONCUR:

MICHAEL PAI, CPA
Public Auditor

[2] "Renewable Energy Projects shall be exempt from all the provisions of ***this section.***" 4 CMC § 8191 (b) (emphasis added).

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