

Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

World Wide Web Site: <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 OF
ISLAND BUSINESS SYSTEMS & SUPPLIES

)
) APPEAL NO. BP- A057
)
)

DECISION ON APPEAL NMC RFP 08-007

I. SUMMARY

This is a decision on an appeal filed by Island Business Systems & Supplies (IBSS) from the denial of its protest of NMC RFP 08 - 007 for copiers by the President of the Northern Marianas College (NMC).

The Office of the Public Auditor (OPA) has jurisdiction over this Appeal. See discussion *infra* at IV. Jurisdiction.

OPA finds that IBSS failed to file its original protest in a timely manner, and thus NMC was correct in its determination to essentially deny the protest.

II. PROCEDURAL AND FACTUAL BACKGROUND

NMC issued an RFP for copiers, RFP 08 - 007.

In a letter dated March 4, 2008, NMC notified IBSS that it did not receive the contract award because "another company offered a lower fee when compared with your offer."

On March 28, 2008, IBSS requested all documents pertaining to the solicitation.

On April 21, 2008, NMC provided IBSS with the documents it requested.

On April 30, 2008, IBSS sent a protest to NMC.

On December 11, 2008, NMC provided IBSS with a "courtesy" response that its protest was untimely.

By letter dated December 16, 2008 and received late the next day, IBSS appealed the College's action.

On December 18, 2008, OPA requested documents and a report from NMC.

On December 19, 2008, NMC's counsel provided a letter in response to OPA's request, offering to provide additional documents if needed.

By letter dated December 22, 2008 and received by OPA late on December 23, 2008, IBSS, through its counsel, responded to the letter sent by NMC.

III. RELEVANT REGULATIONS

NMC has its own Procurement Policy and Regulation (sic) (NMC PPR) that the College has been using at all times relevant to this protest and appeal. Though the procurement regulations NMC is using were approved by its Board of Regents on January 26, 2000, they were neither properly promulgated nor adopted through publication in the Commonwealth Register in accordance with the Administrative Procedures Act, 1 CMC §§ 9102 -9105.

In addition, the Office of the Attorney General issued a legal opinion wherein it determined that all autonomous agencies had to use the CNMI's (through its Procurement and Supply Division within the Department of Finance) Procurement Regulations (P & S PR) or at the very least, issue their own regulations that do not conflict with the P & S PR.¹

OPA understands that the College has drafted new procurement regulations that are under review in the Office of the Attorney General that will presumably be properly promulgated and adopted and not conflict with the P & S PR.

The difference between the College's regulations and those of P & S are immaterial here as the same result is reached under both sets of regulations.

¹ On October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-13 regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Opinion 03-13 concluded, among other things, that "both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid." Opinion 03-13 at 8.

IV. JURISDICTION

According to the NMC PPR that the College has been using at all times relevant to this protest and appeal, OPA has jurisdiction over this Appeal. NMC PPR Section 14 - A, Part II.1 .

Similarly, using the CNMI's Procurement Regulations, OPA has jurisdiction over this appeal as provided in Section 505(a) of the Procurement Regulations. NMIAC 70-30.3-505(a).

V. ISSUE

Was IBSS' protest timely filed?

VI. ANALYSIS

According to the NMC procurement regulations,

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the President. The protest shall be received by the President in writing within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto. . . .

NMC PPR, 14 - A, Part I (1)(a).

Similarly, under the CNMI's Procurement Regulations,

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

NMIAC 70-30.3-501(a)(1).

IBSS was notified by letter dated March 4, 2008 that another company was selected to provide the copiers. IBSS does not allege delay in receipt of that letter. Instead, in its April 30, 2008 protest, IBSS argues that its employee "[a]fter puzzling over [the letter dated March 4, 2008, wherein NMC notified IBSS that it did not receive the contract award because "another company offered a lower fee when compared with your offer"]", the IBSS employee wrote NMC a letter on March 28, 2008 requesting all documents related to the solicitation.

While it is possible that IBSS did not know how it was aggrieved on March 4, 2008, it certainly

knew that it was aggrieved. It could have at that time requested all the documents from NMC, thereby possibly staying the time required for its filing of a protest. Instead, it waited 16 working days of the College to request information.²

IBSS officially protested NMC's award of the contract on April 30, 2008, when it was not timely. NMC did not write a decision on the protest, but rather provided a "courtesy" response eight months later. NMC seems to believe that since it did not write a decision on the protest, OPA is precluded from writing a decision on the appeal. It is, perhaps, semantic, whether OPA refuses to accept the appeal or accepts it and then determines it not to be timely, but OPA believes that all its actions, as well as those of the College, should be on the record.

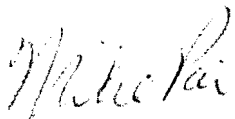
VII. CONCLUSION

Based on the foregoing, OPA finds the College properly denied IBSS' protest as untimely.

The appellant, any interested party who submitted comments during consideration of the protest, the President, and any agency involved in the protest may request reconsideration of the Public Auditor's decision.

The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. NMC PPR, 14 - A, Part II (9)(a), NMIAC 70-30.3-505(i)(1).

The request for reconsideration shall be filed within ten days after the basis for reconsideration is known or should have been known. NMC PPR, 14 - A, Part II (9)(b), NMIAC 70-30.3-505(i)(2).



Michael Pai
Public Auditor

²“Except as otherwise specified, all “days” referred to in this part shall be working days of the College. . . . “ NMC PPR, 14 - A, Part I (4)(a). Similarly, in the P & S PR, “Except as otherwise specified, all “days” referred to in this part are deemed to be working days of the Commonwealth government. The term “file” or “submit” except as otherwise provided refers to the date of transmission.” NMIAC 70-30.3-501(d)(1).