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In the Appeal of	)	**APPEAL NO. BP-A075**
	)	
KUTH ENERGY	)	CUC-RFP-11-048
	)	CIP-RFP13-GOV-024
	)	
	)	
_____	)	

BACKGROUND

This decision involves two appeals by KUTh Energy ("KUTh") over the denial of two protests involving a geothermal project on Saipan in the Commonwealth of the Northern Mariana Islands ("CNMI"). One protest, CUC-RFP-11-048 (the "-048 RFP"), was brought under the Commonwealth Utility Corporation's ("CUC") Procurement Regulations at Title 50, Chapter 50 of the Northern Mariana Islands Administrative Code (the "NMIAC"). The other protest, CIP-RFP13-GOV-024 (the "-024 RFP"), was brought under Title 70, Chapter 70-30, Subchapter 30.3 of the NMIAC. OPA decided to combine these appeals because the factual basis for each are intertwined, the grant funding source is the same and the general scope of each solicitation is similar. The cancellation of the -048 RFP led directly to the publication of the -024 RFP. Therefore, this appeal will address both solicitations and reaches the following conclusions: The -048 RFP appeal essentially alleged that CUC had dealt with KUTh in bad faith. This appeal is **DENIED**. The -024 RFP appeal was based on the denial of KUTh's protest by Procurement & Supply on the basis that KUTh lacked standing to bring the protest. The -024 RFP protest appeal is **GRANTED** as KUTh had standing to protest; additionally, the matter is **REMANDED** to Procurement & Supply to determine the merits of the protest not inconsistent with this appeal decision.

CHRONOLOGY

March 2011: Public Law 17-34 is signed into law. This law allows the Commonwealth Utilities Corporation ("CUC") more flexibility in partnering with the private sector in order to provide utility services by restoring CUC's procurement authority and requiring the use of the Request for Proposal ("RFP") process in obtaining renewable energy. PL 17-34 at Sections 1 and 3.

July 2011: The National Renewable Energy Laboratory ("NREL") published its technical study, Report No. NREL/TP-7A40-50906, entitled "Commonwealth of the Northern Mariana Islands Initial Technical Assessment Report" (the "NREL Report"). This Report was an "initial technical assessment that would detail current energy consumption and production data to establish a baseline." NREL Report at vi.

August 5, 2011: CUC issued RFP-11-048, *Geothermal Energy Development.*

August 14, 2011: Then-Governor Fitial gave public remarks at an energy conference in Alaska. In his remarks, the former Governor mentioned the -048 RFP as well as a $1.2 Million grant from the Department of Energy in order to fund geothermal projects. *Saipan Tribune,* August 23, 2011.

November 8, 2011: A delegation of authority to CUC for a $500,000 grant was approved by then-Governor Fitial designating CUC as the expenditure authority responsible for the direct management of the grant for geothermal resource geophysical assessment. A second delegation of authority to CUC for a $1.2 Million grant was also approved on November 8, 2011 by then-Governor Fitial also designating CUC to directly manage geothermal energy projects.

November 15, 2011: Bid opening for the -048 RFP. Four proposals were received by CUC.

January 27, 2012: Notice of Intent to Award a contract resulting from the -048 RFP was issued by CUC to KUTh.

September 10, 2012: Former Lt. Governor Inos wrote to the Acting Director of CUC stating that the specifications for the geothermal project were being restructured. Lt. Gov. Letter to CUC, undated but with a notational date of September 10, 2012.

September 14, 2012: The Acting Director of CUC notified the CUC Director of Procurement that three of four alternative energy procurements were being canceled by the Lt. Governor.

September 20, 2012: Executive Order 2012-12 was issued. This Order continued prior Orders that gave the Governor executive power over CUC which is shared with a designated CUC Executive Director and suspended the portion of P.L. 17-34 dealing only with the Public Utility Commission's regulation of CUC.

September 21, 2012: CUC cancelled the -048 RFP and so notified KUTh.

September 26, 2012: KUTh timely filed a protest with the Acting Director of CUC over CUC's cancellation of the -048 RFP alleging primarily bad faith on the part of CUC.

October 23, 2012: CUC wrote to KUTh extending the due date for CUC's decision on KUTh's protest and stating that "CUC has determined that [it] is advantageous to the Utility to re-issue an RFP for Geothermal Energy Development." CUC also indicated in its letter that "CUC would greatly appreciated [KUTh's] response to this re-issued RFP." *See* CUC Letter No. 10-12-028, final paragraph, dated October 23, 2012.

October 23, 2012: On the same day that CUC wrote to KUTh about re-issuing the canceled -048 RFP, the Capital Improvement Program ("CIP") office issued RFP13-GOV-024, *RFP for the Provision of Geothermal Consulting Services.* This RFP states that its purpose is to provide "guidance in the examination of geothermal energy on the island of Saipan." *See* -024 RFP, 1st paragraph.

December 5 & 17, 2012 and January 3, 2013: The -024 RFP was publicly advertised three times in the *Saipan Tribune.*

December 20, 2012: CUC's Acting Director denied KUTh's protest over the -048 RFP.

January 7, 2013: KUTh appealed the CUC Acting Director's protest decision on the -048 RFP to OPA.

January 23 and 24, 2013: KUTh filed comments with OPA regarding its -048 RFP appeal.

January 30, 2013: Final date for bid submittal for bidders not located in the CNMI (provided notice was given to Procurement & Supply by January 9, 2013). Two (2) proposal packages were received.

January 31, 2013: One bidder's proposal was delayed in the U.S. Postal Service and allowed to be received late (proper notice was given by this off-island vendor).

February 1, 2013: The late vendor's proposal was received from the U.S. Postal Service and all three (3) proposals submitted responding to the -024 RFP were opened by Procurement & Supply. KUTh did not submit a proposal.
February 14, 2013: KUTh protested the issuance of the -024 RFP and filed supplemental arguments on March 1, 2013.
April 26, 2013: The Director of Procurement & Supply issued Director's Decision 13-002 denying KUTh's protest finding KUTh lacked standing to protest the -024 RFP because it had not submitted a bid.
May 10, 2013: KUTh appealed the -024 RFP protest decision to OPA.
June 2013: OPA Investigations Division conducted an investigation of the management of the -048 RFP at CUC. OPA ceased processing all appeals from KUTh until the investigation was completed. The investigation failed to document any bad faith by CUC in dealing with KUTh.
June 4, 2013: Procurement & Supply issued its Report on the -024 RFP appeal stating that KUTh was without standing to protest since it did not submit a bid.
June 11, 2013: KUTh submitted comments on the Procurement & Supply -024 RFP Report.
June 18, 2013: The CIP Office, in response to an email from OPA asking why it took a year after the NREL Report was published to determine that the -048 RFP should be restructured, stated that the -048 RFP was canceled because it deviated from the NREL recommendation and was restructured to bring it into compliance with that Report.

KUTh's PROTEST OF THE CUC -048 RFP

KUTh claims that the following amount to evidence of bad faith on the part of CUC with respect to the -048 RFP:

1. Following the Notice of Intent to Award the geothermal contract to KUTh, CUC continued to negotiate with KUTh over technical and contract language while at the same time negotiating with another company, the Saipan Development Corporation, LLC, for a diesel-powered power plant (the "PPA" agreement).

2. KUTh claims that the notice of cancellation of the -048 RFP on September 21, 2012 was made after a long delay and failed to be based on a determination by the CUC Acting Director.
3. KUTh claims that the cancellation process was improper because there was no explanation given for the cancellation and such action was not approved by the Public Utility Commission's Board of Directors pursuant to NMIAC §50-50-235.

In its appeal of the -048 RFP, KUTh asked the Public Auditor make the following rulings:

1. The CUC Director's cancellation of RFP-11-048 was improper.
2. CUC's cancellation of RFP-11-048 was not supported by a written determination.
3. CUC failed to negotiate with KUTh in good faith.
4. CUC acted in bad faith when it canceled RFP-11-048.
5. The cancellation of RFP-11-048 was improper and was not done in good faith.
6. CUC failed to act in good faith in violation of its own regulations and other laws when it represented to KUTh that a contract was pending while it simultaneously negotiated a separate contract with another party, thus rendering the negotiations with KUTh meaningless.
7. CUC's failure to act in good faith and its misrepresentations caused reasonable and foreseeable damages to KUTh.
8. Any contract awards for geothermal projects should be withheld pending the resolution of this matter.
9. CUC failed to timely handle KUTh's protests within the required 30 day period of their submission.

Dealing with a vendor in bad faith is a violation of the CNMI and CUC Procurement Regulations. *See* NMIAC § 70-30.3-015 and § 50-50-015. Although there are references to the term 'bad faith' in the CNMI Administrative Code, any examples of the application of that term are few. For guidance in situations where no law or regulations exist in CNMI law, OPA often relies on the written decisions of the federal General

Accountability Office ("GAO"). The GAO decides over 2,000 protests annually involving federal government contracts and publishes its decisions under the authority of the Comptroller General of the United States. Such decisions are accepted as persuasive authority in the CNMI and are used as policy guidance by OPA.

GAO's consistent position in many bid protest decisions is that contracting officers are presumed to act in good faith and their decisions will not be undone on the basis of inference or supposition. *Pride Mobility Prods. Corp.*, B-292822.5, Dec. 6, 2004, 2005 CPD ¶ 72 at 5. Further, the GAO has opined that in order to show bad faith, a protester must present virtually irrefutable evidence that the contracting agency directed its actions with the specific and malicious intent to injure the protester. *Information Res., Inc.*, B-271767 et. al., July 24, 1996, 96-2 CPD ¶ 38 at 2. *See also Saturn Landscape Plus*, B-297450.3, April 18, 2006 at 3.

In deciding whether to cancel a solicitation, the GAO has held that a contracting officer has broad discretion and need only advance a reasonable basis for a decision to cancel a procurement. *Sunshine Kids Serv. Supply Co.*, B-292141, June 2, 2003, 2003 CPD ¶ 119 at 2. The GAO has also held that where a reasonable basis exists to cancel a solicitation, an agency properly may cancel it no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after proposals have been submitted and evaluated and protesters have incurred costs in pursuing the award. *MedVet Development LLC, supra.*

In KUTh's appeal as to the -048 RFP, OPA agrees with the rationale of the GAO in the *MedVet Development LLC* decision. When KUTh received the Notice of Intent to Award, it did not yet have a contract. In fact, the notification letter from CUC specifically stated that the Notice of Intent to Award was not a contract. KUTh was also informed of this fact several other times during the contracting process. Contracting agencies have wide discretion in canceling procurements and here, the then-Lt. Governor informed the Acting Director of CUC that the specifications for the geothermal project were being

revised. Specification revisions are a valid reason to cancel a procurement.[1] *See* NMIAC §50-50-235(b). Thus, cancellation of a pending procurement, when it is authorized by regulation, is insufficient to indicate that such a decision was unreasonable or that CUC was motivated by bad faith toward KUTh. *See* *MedVet Development LLC*, B-406530, June 18, 2012, 2012 CPD ¶ 196 at 2-3; *WorldLink Aviation, LLC*, B-403289.2, Oct. 27, 2010, 2010 CPD ¶ 267 at 4.

Moreover, KUTh has set forth no evidence to indicate that CUC was simultaneously negotiating with another company (the PPA) at the same time as they negotiated with KUTh. Indeed, the local press articles and testimony at the former Governor's impeachment hearings before the CNMI Legislature seem to indicate otherwise – that CUC was not made aware of the PPA negotiations, a major portion of KUTh's bad faith claim.

DECISION ON THE CUC -048 RFP CLAIMS

Neither the separate investigation conducted by the OPA Investigations Division, or KUTh's assertions document any activity that amounts to bad faith on the part of CUC. Therefore, OPA **DENIES** KUTh's appeal of the -048 RFP.

KUTh's PROTEST OF THE CIP -024 RFP

The protest decision issued by the Director of Procurement on April 26, 2013, as Director's Decision No. 13-002 regarding the -024 RFP, denied KUTh's protest on the basis that KUTh had no standing as a prospective bidder. KUTh appealed and asked OPA to rule on the following:

[1] OPA makes no decision on the validity of the reason for cancellation as was directed by the then-Lt. Governor. OPA only acknowledges that the letter from the Lt. Governor was a reasonable basis for cancellation under the CUC regulatory scheme. However, OPA is concerned that the central government waited more than a year after the NREL Report was published to determine that CUC's -048 RFP should be canceled.

1. That the Director's finding that KUTh lacked standing to protest the -024 RFP was error.

2. That KUTh has standing to protest the -024 RFP.

3. That the CNMI acted in bad faith when it issued the -024 RFP.

4. That OPA should cancel the -024 RFP and direct that geothermal development should be handled by CUC.

5. That any geothermal contact awards should be stayed pending the resolution of the appeal.

6. OPA should grant any other appropriate relief.

The decision of the Director of Procurement on the -024 RFP was restricted to the threshold issue of standing and did not address the merits of KUTh's claims in its protest. Accordingly, OPA will exercise restraint and limit its review to the issue of standing only. *See generally, In Re: Request for Reconsideration of OPA Appeal Decision BP-A027 by the Procurement & Supply Director* (November 28, 2001), OPA Appeal Decision BP-A-027.1 (OPA will not act as procurement officer and decide protests in place of the responsible agency or the Division of Procurement and Supply absent extraordinary circumstances).

KUTh's STANDING TO PROTEST THE CIP -024 RFP

OPA has addressed the issue of standing in several previous appeals and no changes in the Commonwealth system of procurement or specific issues with the present case justify a departure from its previous approach. Commonwealth Procurement Regulations provide that: "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" NMIAC § 70-30.3-501(a) (1). Once a bid proposal period ends, a firm which has not filed a proper bid protest can no longer qualify 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 (9th Cir. 1988); *In re appeal of Carrier Guam, Inc., BP-*A012, p. 5 (February 26, 1998) *(citing Waste Management of North America v. Weinberger, Id.).*

Generally speaking, in order to preserve its standing to protest, a party must have filed a proper protest *before* closing of bids or have become an "actual" bidder by submitting a bid. *Id.* OPA does, however, recognize an exception to the rigid requirement that a party submit a proper protest or a bid before closing of bids where "there was a failure on the part of the Government to publicly announce the solicitation, including ineffective or defective advertisements that reasonably could have caused a vendor to be unaware of the solicitation, whereas, with adequate public notice, the vendor would have known of the solicitation and would have submitted a bid." *In re Appeal of Joeten Motor Company, Inc.* BP-A013, pp. 7-8 (March 11, 1998); *See also In re Appeal of Carrier Guam, Inc., BP*-A012, p. 5 (February 26, 1998).

In *Joeten,* OPA found a *non-bidder* had standing to protest an Invitation to Bid ("ITB") for the procurement of minivans by the Commonwealth Superior Court *after* the closing of the bid period. In its decision, OPA found that, while there were no specific violations of the notice requirements in the CNMI Procurement Regulation, there were several problems in the publication of the bid announcements, rendering the public notice misleading. *Id. at* 8. Specifically, OPA found that the advertisements were inappropriately comingled with other personnel requirements and were published in fine print. *Id.*

In addition to the inadequate notice problem, OPA took issue with the fact that the Superior Court accepted the single proposal that was submitted, despite the many (then five) auto dealers on Saipan, without soliciting the remaining vendors. Finding that "although (the Procurement Regulations) do not require that copies of RFP solicitations be sent to known vendors, reasonable prudence should have prompted the Judiciary to contact other automobile dealers on Saipan when it learned that only one ... submitted a proposal on this RFP." *Id.*

The undisputed facts in the -024 appeal are analogous to those in *Joeten* and support a finding that KUTh has standing to protest this procurement. KUTh admits having no actual knowledge of the -024 solicitation and KUTh filed its protest soon after

discovering its existence. Additionally, and more importantly, several issues unique to this procurement and its relationship to the -048 RFP support a finding that, while CIP's publication of the -024 solicitation may well have followed the letter of the law, such publication was not sufficient with respect to KUTh. Finally, given KUTh's status as the selected bidder on the similar -048 RFP prior to its cancellation, reasonable prudence should have prompted CIP to consider KUTh as a potential bidder and at least question why KUTh failed to submit a proposal on the -024 RFP.

KUTh satisfies the first portion of the standing test as laid out in *Carrier* and *Joeten*. KUTh lacked actual knowledge of the -024 RFP prior to bid closing and, if KUTh had been aware of the -024 RFP, it would have submitted a bid. All indications support such a finding. KUTh has a history of interest in geothermal development projects in the CNMI as indicated by their submission of a bid in the -048 RFP issued by CUC. Moreover, at the time of the bid closing for the -024 RFP, KUTh was still actively communicating with CUC with respect to geothermal development and indeed expected CUC to re-issue the -048 RFP in a revised form.

Certain facts relative to this procurement render the government's publication of the -024 RFP ineffective as to KUTh. CUC's letter to KUTh on October 23, 2012 provided that: "CUC has determined that [it] is advantageous to the Utility to re-issue an RFP for Geothermal Energy Development." CUC Letter No. 10-12-028, dated October 23, 2012. CUC also indicated in its letter that "CUC would greatly appreciated [KUTh's] response to this re-issued RFP." *Id.* On that very same day, CIP issued RFP -024, a similar, albeit different, procurement for geothermal energy development. Thus, CUC was apparently uninformed on October 23, 2012 about CIP issuing the -024 RFP when it wrote to KUTh that CIP would re-issue the solicitation. As it turns out, on the same day, the -024 RFP was issued by CIP. Thus, CUC's action in notifying KUTh that it [CUC] would re-issue the -048 RFP resulted in KUTh being misled into believing that CUC, not CIP, would be issuing a RFP for geothermal energy development. OPA therefore determines that CUC's letter of October 23, 2012 misled KUTh into believing that CUC would be re-issuing the geothermal procurement and excused KUTh's failure to diligently scour the CNMI newspapers for the three publications of the -024 RFP.

Ordinarily, publication sufficient to satisfy the notice requirements of procurement regulations will constitute constructive notice upon all prospective bidders. *See Cygnus Corporation*, B-406350; B-406350.2 (April 11, 2012). However, where a prospective bidder is actively misled by a government agency, fairness requires a deviation of the norm. It is without consequence whether CUC had any knowledge that CIP would in fact be the agency soliciting the procurement for geothermal energy development; what matters is that KUTh was informed by CUC that CUC would re-issue it. With the relatively small size of the CNMI government, it is reasonable to presume that CUC either knew or should have known that CIP was issuing the similarly-structured and identically funded RFP for geothermal energy development. Accordingly, the ineffective notice with respect to KUTh deprived KUTh of the opportunity to bid on the -024 RFP and thus endows them with standing to challenge the same on its merits.

Additionally, OPA questions why the three (3) bid submissions in response to the -024 solicitation, in conjunction with the lack of a submission by KUTh, the selected bidder on the similar -048 RFP issued by CUC, did not prompt any inquiry from CIP as to whether sufficient competitive bids were submitted to satisfy the requirements for open and competitive bidding. While OPA does not base its finding of inadequate notice on CIP's failure to notify KUTh, it does point out that when one agency essentially commandeers a procurement from another, as CIP apparently did with CUC, it behooves everyone, including the government, the private sector and the public, to communicate in order to avoid duplication of effort and a waste of public resources.

OPA recognizes that its *Joeten* and *Carrier* holdings create a notice exception not found in many federal decisions. Such a departure in those previous cases and the present are reasonable given the unique geographical and socio-governmental environment of the CNMI. The CNMI is geographically isolated and attracts fewer bidders on specialized procurements such as a complicated and highly technical geothermal energy development effort. Additionally, the socio-governmental makeup of the CNMI is unique in that it is a small government and tight community in contrast to the mainland United States with its endless vendors and vast government actors. These factors

mandate a more stringent oversight of the specific notice issues on a case-by-case basis and require flexibility to cater to unique circumstances such as is found in contracting for geothermal energy. Additionally, the GAO recognizes that where a bidder is actively misled by the government, they may have standing to contest proper notice. *See Solutions Lucid Group, LLC.* B-401128 p. 2 (April 2, 2009).

DECISION ON KUTh's PROTEST OF THE CIP -024 RFP

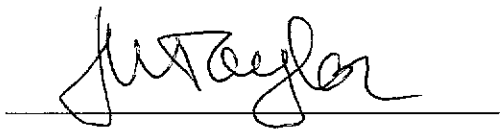
The specific history of KUTh's participation (and selection) in the -048 RFP in conjunction with CUC's misleading communication to KUTh on the same day that CIP issued the -024 RFP rendered the government's subsequent publication of the -024 RFP notices ineffective as to KUTh. In short, KUTh was misled by government confusion brought about by the failure to communicate between agencies. Accordingly, OPA finds that KUTh has standing to challenge the -024 RFP. OPA believes that based on KUTh's reasonable reliance that CUC would be the agency that would issue a revised solicitation for the geothermal project, and the undisputed fact that KUTh had been selected as the responsible contractor for CUC's -048 RFP award, and thus would have submitted a proposal had it known about the -024 RFP prior to its bid opening deadline, KUTh shall be considered a prospective bidder that was aggrieved at not being considered for the -024 RFP award due to its detrimental reliance on what it was being told by CUC. Such a status comports with CNMI Procurement Regulations. NMIAC §70-30.3-501 (a) (1).

To ensure that all parties are treated fairly and that the geothermal development project is properly managed, OPA hereby orders the following remedial actions:

1. The appeal of KUTh as to the -024 RFP is **GRANTED**.
2. KUTh's protest is **REMANDED** to the Director of Procurement & Supply who shall rule on the merits of the protest in a timely manner.

DATED, this 26th day of July, 2013.

IT IS SO ORDERED



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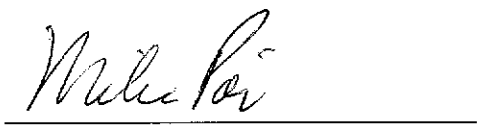
CONCUR



MICHAEL PAI, CPA
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[2] OPA Attorneys Ashley Kost, Joe Przyuski and Brian McMahon participated in this decision.

CUC-RFP-11-048 – KUTH ENERGY
CIP-RFP13-GOV-024

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