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IN RE APPEAL OF PACIFIC MARINE AND INDUSTRIAL CORP. & OGDEN ENERGY, INC.	)	CUC RFP 97-0025 DECISION ON APPEAL No. BP-A016

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal by Pacific Marine and Industrial Corporation & Ogden Energy Inc. (hereinafter "PMIC/Ogden"), represented by its legal counsel, Klemm, Blair, Sterling & Johnson (KBSJ), from the denial of its protest on the Commonwealth Utilities Corporation (CUC) Request for Proposals (RFP) No. 97-0025. The Office of the Public Auditor (OPA) has jurisdiction in this appeal as provided in Section 5-102[1] of the CUC Procurement Regulations (CUCPR). PMIC/Ogden filed a timely appeal with OPA on February 4, 1998.

CUC RFP 97-0025 was a solicitation of proposals from Independent Power Producers (IPPs) to provide an additional 80 Megawatt (MW) power generation facility (hereinafter "Facility") for the island of Saipan, Commonwealth of the Northern Mariana Islands. Among the requirements stated in the RFP, the winning IPP will:

- Provide 80 MWs of efficient power generation, with individual unit sizes between 10-25 MWs. The facility must fit the site chosen by CUC, be expandable to accommodate a total of 200 MWs of generation, and be aesthetically acceptable to the surrounding area;
- Build and operate a 115-kilovolt (kV) Transmission/substation system from Lower Base to Chalan Piao, with substations at Lower Base, Kagman, San Vicente and Chalan Piao;
- Provide potable water from a desalination process using waste heat from the generation process;
- Perform all environmental and licensing requirements to meet the 200 MWs of power generation;
- Enter into a power purchase agreement with CUC for the latter to buy power primarily on a kilowatt-hour (kWh) basis and water on a per gallon basis. The agreement will be either a Build\Own\Operate or a Build\Own\Operate\Transfer.

[1] CUC Procurement Regulations that were published in the Commonwealth Register on June 15, 1990 referred to "Appeals of Director's Decisions to the Public Auditor" as Section 54-192; however, this section should have been numbered 5-102 based on the sequence of the section numbers.

In addition to the above RFP requirements, the Scope of Work (a separate document given to interested vendors upon request) specifically required the winning offeror to comply with the requirements of Title V of the Clean Air Act as established by the United States Environmental Protection Agency (US-EPA), as well as with all other Federal and CNMI environmental laws. The Scope of Work also stated that the winning offeror shall prepare all environmental studies and documentation needed to obtain licenses required by Coastal Resources Management and the Department of Public Works.

The criteria for the evaluation of proposals as set forth in this RFP are as follows: (1) IPP's experience in designing, building, owning and operating generation - 40 maximum points, (2) experience in designing, building, owning and operating 115 kV transmission/substation systems - 10 maximum points, (3) experience in performing environmental studies for generation and transmission/substation systems - 10 maximum points, (4) experience in preparing licenses for similar work - 10 maximum points, and (5) cost - 30 maximum points. Additionally, the Scope of Work stated that the successful offeror would be selected based on its experience in doing this type of work and price, and the information needed for selection was as follows:

1 Experience in designing, building, owning and operating generation facilities. Offerors shall provide a list of generation plants built in the last 20 years, describing the size and type of generators, building requirements, desalination incorporation, aesthetic considerations, environmental concerns, and contact names and phone numbers of people that can be called to confirm information.
2. Experience in designing, building, owning and operating 115 kV transmission/substation systems. Offerors shall provide a list of 115 kV transmission/substation systems designed and built in the last 20 years, stating the names and phone numbers of people that can be called to confirm information.
3. Experience in performing environmental studies for generation and transmission/substation systems. Offerors shall provide summary reports on the studies performed.
4. Experience in preparing licenses for similar work.
5. Cost. The price shall be a minimum kWh charge for electrical power and per gallon charge for water. Any other costs are to be listed individually and with a full explanation.
6. Offerors shall provide a certification, signed by a principal of the company, stating that the company has in the past, and is currently, in compliance with all applicable CNMI and federal labor and environmental laws, or an explanation of any violations of such labor or environmental laws and any remedial action taken. Failure to provide this certification or explanation is a ground for rejecting the entire proposal.

On June 6, 1997, CUC issued Addendum no. 1 to the RFP through which CUC announced a pre-bid conference which was scheduled on June 18 and 19, 1997 at the CUC main conference room. The highlights of the conference were a presentation of the project by CUC and a visit to the proposed plant site. As stated in this addendum, all the offerors were given until June 30, 1997 to submit their questions to CUC. All the parties who requested a copy of the Scope of Work package were furnished a copy of CUC's response to the offerors' questions.

On June 26, 1997, CUC issued a second amendment to the RFP (Addendum no. 2) that extended the proposal due date to July 21, 1997. This addendum also included the minutes of the June 18 & 19, 1997 pre-bid conferences, a portion of the master plan, copy of the fuel contract, environmental air quality report, and other technical information. Through this addendum, CUC extended to July 11, 1997 the period for submitting additional questions on the RFP. CUC then answered the questions presented by the prospective offerors by issuing Addendum no. 3. According to CUC officials, Addendum no. 3 was not published in the local newspaper as it merely answered certain technical questions and did not change the contents of the RFP. Copies of Addendum no. 3 were distributed to all the parties who were earlier furnished a copy of Addendum no. 2.

On July 21, 1997, the last day for the submission of proposals, CUC received thirteen timely proposals from IPPs worldwide which proposed various power generation technologies. PMIC/Ogden was among the 13 proposers in this RFP.

Evaluation of Proposals

A four-member selection committee ("Committee") chosen by the CUC Executive Director ("Director") evaluated the 13 proposals to determine the responsibility of the offerors and responsiveness of the proposals to the RFP. Each of the thirteen offerors was given the opportunity to present its proposals to the Committee. After the presentation of the proposals, the Committee scored the proposals using the criteria and the point scale published in the RFP. Based on this evaluation, CUC determined 6 proposals to be within the competitive range on November 14, 1997. Accordingly, CUC sent notification letters to all 13 offerors who submitted proposals for this project informing them of their inclusion in or exclusion from the competitive range.

The Protest and Subsequent Appeal to OPA

On November 24, 1997, ten days after CUC determined the six offerors within the competitive range, PMIC/Ogden thru its legal counsel filed a protest over this competitive range determination. The main point of contention in the protest was that CUC did not indicate in its decision either a factual or legal basis for disallowing PMIC/Ogden to further participate in this procurement. In its protest letter, PMIC/Ogden claimed that: (a) it is a responsible offeror and its proposal was responsive in all respects and reasonably susceptible of being selected for award, and (b) the RFP and the corresponding guidelines issued by CUC violated CUCPR Section 3-106(5) (it appears that the protester meant to claim that the RFP requirements were too general, vague and lacking in technical detail).

On December 4, 1997, CUC notified PMIC/Ogden of its receipt of the protest. In the same letter, CUC explained that PMIC/Ogden was not selected for further participation in the RFP process because it was determined not to be within the competitive range. On December 11, 1997, PMIC/Ogden made an additional statement in response to CUC's notification letter. As a point of rebuttal, PMIC/Ogden expressed its belief that its proposal was rejected because CUC had certain preferences of a technical nature which were not disclosed in the RFP.

On January 13, 1998, the then Acting CUC Director certified the complexity of the protest and extended the period of decision for another two weeks. On January 26, 1998, CUC rendered it's decision denying the protest of PMIC/Ogden in its entirety. After seven working days, on February 4, 1998, PMIC/Ogden thru its legal counsel appealed the Director's protest decision to OPA. Accordingly, OPA notified CUC on February 5, 1998 that the appeal had been filed, and requested the Director to provide the required notice of appeal and copies of the protest and appeal documents to the necessary parties as required in the CUCPR. In the same letter, OPA requested the Director to submit a complete report on the appeal as expeditiously as possible, and to furnish a copy of this report to the appellant and all other affected parties.

On March 2, 1998, CUC submitted to OPA its report on the appeal which included the Director's additional statement dated February 27, 1998. On the same date, CUC provided to all offerors a copy of the report which was edited[2] by CUC to exclude non-public documents. OPA received only one comment on the CUC report within the comment period. The comment letter presented by Pacific Century, Inc., coordinator of ABB Energy Ventures (ABBEV), supported the appeal and the arguments presented by PMIC/Ogden. On April 10, 1998, we were informed by KBSJ, the appellant's legal counsel, that PMIC/Ogden's copy of the CUC report was sent to the appellant's address in Hongkong despite an earlier notice by KBSJ about the appellant's new contact address in Guam. On April 13, 1998, CUC sent KBSJ a copy of its report by fax. On April 15, 1998, OPA sent a letter to KBSJ granting it ten working days from April 13, 1998 to make any comment on the CUC report. PMIC/Ogden submitted to OPA a timely comment on the CUC report on April 27, 1998. After requesting a 5-day extension for the rebuttal period, CUC submitted to OPA on May 5, 1998 its rebuttal to PMIC/Ogden's comments. Subsequently, OPA attempted to verify and review the information contained in the comments and rebuttals; however, responsible CUC officials were off-island and therefore not available to respond to appeal inquiries. We were able to complete our discussions with these officials only on May 15, 1998. Also, certain CUC records that were requested for this appeal were not submitted to OPA until after these officials returned from their trip, with the most recent document provided to OPA on June 3, 1998.

OPA is issuing its decision on this appeal pursuant to Section 5-102 (8)(c)(I) which provides that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received.

ANALYSIS

The Executive Director's denial of PMIC/Ogden's protest on the procurement of an 80MW generation facility for the island of Saipan under CUC RFP 97-0025 is the issue of this appeal. The following discusses the arguments by CUC and PMIC/Ogden as they were presented in the protest and appeal processes, including OPA's comments on the merits of the arguments.

[2] Section 1-301 of the CUCPR provides that in order to ensure proper bidding procedures, procurement information may be kept confidential when necessary as determined by the Director.

PMIC/Ogden's Arguments in its Protest to the Commissioner

In its November 24, 1997 protest letter, including its December 11, 1997 supplementary statement, PMIC/Ogden argued that (1) CUC did not indicate in its decision either a factual or legal basis for disallowing PMIC/Ogden to further participate in this procurement, and (2) it believes that there was no basis for rejecting its proposal as non-responsive. The protest letter asserted that PMIC/Ogden was a responsible offeror because it met all the requirements of Section 3-301(1)(a) to (g) of the CUCPR, and that its proposal was responsive in all respects and was reasonably susceptible of being selected for award.

In addition, PMIC/Ogden stated that the RFP and its guidelines violated Section 3-106(5) of the CUCPR because they were too general, vague and lacking in technical detail. According to PMIC/Ogden, the RFP guidelines were inadequate to advise the offerors as to CUC's priority requirements and goals. In its December 11, 1997 letter, PMIC/Ogden expressed its belief that CUC had certain preferences of a technical nature that were not disclosed in the RFP and which caused its proposal to be rejected despite the fact that its proposal, from a technical standpoint, met the requirements of the RFP. PMIC/Ogden stated that CUC should have clearly stated in the RFP any specific technical preferences bearing on its evaluation of the proposals; otherwise there would be a violation of the CUCPR.

Decision on the Protest by the CUC Executive Director

In his January 26, 1998 protest decision, the Director denied PMIC/Ogden's protest. His protest decision commented on each of the protest grounds as follows (we supplied the titles below based on the substance of the arguments):

1. Whether PMIC/Ogden was a Responsible Offeror under CUCPR Section 3-301

   CUC found this objection unfounded as it had already determined that PMIC/Ogden was a responsible offeror under the CUCPR.

2. Whether PMIC/Ogden's Proposal was Responsive to the RFP

   The CUC Director stated that PMIC/Ogden confused the procedure for rejecting non-responsive bids during competitive sealed bidding under Section 3-102(7), with the competitive range determination for sealed proposals under Section 3-106(6). The Director explained that where competitive sealed proposals are solicited, PMIC/Ogden's proposal does not automatically become "reasonably susceptible of being selected for award" just because its proposal may have substantially complied with the requirements of the RFP. In support of his statement, the CUC Director cited a GAO decision [*Bollam, Sheedy, Torani & Co., Comp. Gen. Dec. B-270700 (April 11, 1996)*] which held that a proposal that is technically acceptable as submitted need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award, based on price or other factors.

Moreover, CUC explained that there was no finding by CUC that PMIC/Ogden's proposal was non-responsive, making PMIC/Ogden's objection on this ground unfounded.

3. Whether the RFP was in Violation of CUCPR, Section 3-106 Because Too Vague for a Meaningful Evaluation

CUC found this objection disingenuous. It argued that PMIC/Ogden waited nearly seven months after it submitted its proposal before raising this issue. According to CUC, PMIC/Ogden had a representative present at the pre-proposal conference held on June 18 & 19, 1997. CUC added that PMIC/Ogden submitted a proposal on July 21, 1997 and participated in the initial round of discussions on September 16, 1997, yet it raised an objection to the contents of the RFP only on November 14, 1997 when it was excluded from the competitive range. CUC found this objection untimely, arguing that PMIC/Ogden failed to file its written protest within the ten-day period required by the regulations[3]. CUC pointed out that PMIC/Ogden should have known the basis for protesting the evaluation criteria and the scope of work before the due date for proposal submission on July 21, 1997. For this reason, CUC stated that it did not have jurisdiction to consider this objection.

4. Whether The Evaluation was Based on Undisclosed Technical Preferences

CUC stated that PMIC/Ogden offered no facts to support this argument. CUC added that the protester failed to specify the "preferences" CUC had allegedly used in its evaluation. According to CUC, the selection committee scored the proposals based on the point scale published in the RFP, and determined the competitive range offerors based on those scores.

5. Whether PMIC/Ogden's Proposal was Reasonably Susceptible of Being Selected for Award

CUC found that PMIC/Ogden's objection to its competitive range determination was without merit. The CUC Director stated that the selection process was conducted according to the scoring criteria published in the RFP. Furthermore, he stated that nothing had been presented either in the protest or the comments from other offerors that would alter CUC's competitive range determination.

In addition, the Director stated that the selection of competitive range offerors inherently relies on a comparison of the proposals, and a responsive proposal can be excluded if, in light of the relative quality of the other proposals, the proposal has no reasonable chance of being selected for award. The Director also stated that CUC has

[3] CUCPR Section 5-101 (1)(a) requires that protests shall be received by the Director in writing within 10 days after such aggrieved person knows or should have known of the facts giving rise thereto.

broad discretion in determining whether to place a proposal within the competitive range.

PMIC/Ogden's Arguments in its Appeal to the Public Auditor

PMIC/Ogden contended in its appeal letter dated February 4, 1998 that the Director's decision was incorrect in all respects, claiming that it had been improperly and illegally disqualified from further participation in this procurement. PMIC/Ogden stressed that the primary basis for its appeal is its continuing belief that the proposals were evaluated based on technical preferences not disclosed in the RFP. Additionally, PMIC/Ogden reiterated the grounds set forth in its earlier protest with CUC, as follows:

1. CUC did not indicate in its decision either a factual or legal basis for its decision;
2. PMIC/Ogden is a responsible offeror, and its proposal was responsive in all respects;
3. The RFP and the guidelines issued are too general, vague and lacking in technical detail;
4. CUC had certain preferences of a technical nature which were not disclosed in the RFP.

PMIC/Ogden requested the Public Auditor to issue a ruling that it should be promptly reinstated as a qualified participant in this procurement.

CUC Executive Director's Report on the Appeal

CUC asserted that its review of the scores received by each offeror showed that CUC's competitive range determination was not in violation of law or regulation, and was totally reasonable. CUC reiterated that such determination was well within its discretion.

With regard to the first and second protest grounds that were again presented in this appeal, the Director argued that his decision specifically held that PMIC/Ogden was a responsible offeror and that its proposal was responsive to the RFP. He stressed that these were not CUC's grounds for excluding PMIC/Ogden's proposal from the competitive range, and any contention that the protest decision was incorrect based on these grounds was more likely the result of a "hastily prepared appeal."

As for PMIC/Ogden's third ground, CUC stated that PMIC/Ogden offered no authorities and facts to rebut the protest decision. According to CUC, PMIC/Ogden offered no explanation as to why it waited nearly seven months to file a protest about the language of the RFP. The CUC Director reiterated that the time limit for filing protests on alleged defects in the selection process is ten Commonwealth business days, and that such time limit is mandatory and jurisdictional [*Rivera v. Guerrero, 4 N.M.I. 79,82 (1993)*].

On PMIC/Ogden's fourth ground, CUC stated that PMIC/Ogden again offered no details or explanation, as was the case in its original protest. Although PMIC/Ogden did not disclose any details of the claimed technical preference, CUC speculated that it might have something to do with the generation technology chosen by PMIC/Ogden. CUC explained that it had no

hidden technical preference although generation technology does affect fuel costs and had a bearing on the selection committee's evaluation of the offeror's experience with the technology chosen. To support this statement, CUC stated that one of the offerors within the competitive range proposed the same technology as did PMIC/Ogden.

PMIC/Ogden's Comments on the CUC Executive Director's Report

In response to the Director's report on the appeal, PMIC/Ogden claimed that CUC "discriminated" against PMIC/Ogden and other offerors by not disclosing the evaluation criteria upon which the best and final offers were selected. In addition, PMIC/Ogden stated that CUC's refusal to reveal the actual evaluation factors was highlighted by the "improper" redaction of certain information on CUC's February 27, 1998 additional statement in the appeal. PMIC/Ogden maintained that CUC evaluated the proposals upon a criteria not explicitly identified in the RFP. As to what these criteria or technical preferences were, PMIC/Ogden stated that only CUC knows for certain. However, PMIC/Ogden offered the following in support of this contention:

1. Fuel is not a criteria set forth in the RFP but ultimately became an evaluation factor.

   PMIC/Ogden claimed that CUC evaluated the proposals on a fuel criterion not stated in the RFP. In its rebuttal letter, PMIC/Ogden argued that although CUC stated that it had no preference as to the type of fuel, it had required the offerors to comply with relative EPA requirements. PMIC/Ogden believes that CUC evaluated the offers based on an undisclosed assumption that a waiver of Title V of the Clean Air Act would be granted, since the existing CUC power plant is operating under such waiver from EPA.

2. CUC had a preference as regards fuel cost since it favored offers based upon a waiver of Title V.

   PMIC/Ogden believes that CUC had already assumed a waiver of Title V of the Clean Air Act at the time when the criteria on compliance with EPA requirements were established, but without informing PMIC/Ogden of such assumption. PMIC/Ogden submits that since there may have been an assumption of a waiver of Title V, CUC preferred the proposals offering the use of cheaper bunker fuel (heavy diesel no. 6) over diesel fuel (light diesel no. 2) which was the type of fuel PMIC/Ogden offered.

3. CUC eliminated offerors prior to providing all offerors the opportunity to review the critical air modeling data.

   According to PMIC/Ogden, CUC knew that the air modeling data would have a critical impact on the type, design and cost of the power plant. However, PMIC/Ogden claimed that it and other offerors were not afforded an equal opportunity to review this data since it was delivered only to those offerors in the competitive range.

4. The size of the generator units constituted a hidden technical preference.

   PMIC/Ogden claimed that CUC had a preference for 15 MW generators and apparently gave demerits for generators larger or smaller than 15 MW, based on the information it received.

5. CUC did not provide a basis for all offers to be compared on equal terms.

   PMIC/Ogden claimed that CUC knew that the only basis for comparing each proposal was to develop a draft Power Purchase Agreement (PPA) that would provide the criteria and assumptions for the operating condition of the plant. According to PMIC/Ogden, although the PPA is essential in preparing a meaningful responsive proposal, CUC provided the PPA only to those offerors in the competitive range.

CUC Executive Director's Rebuttal to PMIC/Ogden's Comments

In his letter dated May 5, 1998, the Director stated that PMIC/Ogden's letter of April 27, 1998 contained many legal misconceptions and factual inaccuracies. CUC offered the following rebuttal to each of PMIC/Ogden's comments on this appeal:

1. PMIC/Ogden knew that fuel choice was an integral part of the price evaluation.

   CUC claimed that PMIC/Ogden knew that fuel price and efficiencies were part of CUC's price analysis when PMIC/Ogden submitted its financial data sheet using a fixed-cost per gallon of $0.71 - provided by CUC in Addendum no. 3 as the price for diesel no. 2.

2. PMIC/Ogden's assumptions regarding the Clean Air Act are incorrect.

   CUC stated that PMIC/Ogden offered no studies or analysis to support its claim. According to CUC, there are a number of variables involved in plant licensing which make it impossible to determine what type of plant can be licensed or not. However, CUC stated that a number of reports clearly indicate that a plant burning 1% sulphur meets the National Ambient Air Quality Standards (NAAQS).

3. PMIC/Ogden's contention that it was entitled to participate in the discussions after being found not reasonably susceptible of award is incorrect.

   The Director clarified that the air modeling study was made in compliance with EPA regulations, and not for the benefit of the offerors. He stressed that the study was wholly independent of this procurement and did not amend the solicitation, but that if there had been an amendment to the solicitation, it would have been sent only to offerors remaining in the competitive range. Furthermore, the Director mentioned that PMIC/Ogden's contention that CUC should reopen the selection process as a result of an "independent production" of the study is unsupported. According to him, the CUCPR only required

further discussions with those offerors who were found to be reasonably susceptible of being selected for award.

4. PMIC/Ogden's assumption that CUC had a preference as to generator size is incorrect.

   CUC claims that the allegation that it gave demerits for generators greater or lesser than 15 MW is false and unreliable. CUC pointed out that two of the six proposals in the competitive range offered a plant consisting of eight 11 MW medium speed reciprocating diesel units. As for the best and final offers received by CUC, the Director stated that one of the two offerors selected by CUC proposed six 17.4 MW reciprocating diesel units.

5. All offerors found reasonably susceptible of being awarded the contract were treated equitably.

   The CUC Director stated that the draft PPA was used in conjunction with the solicitation of best and final offers to insure uniform responses, and that the PPA served the same function as the uniform financial data sheet earlier provided by CUC. He pointed out that this was issued only to offerors who were found to be reasonably susceptible of award, in compliance with the CUCPR.

OPA's Comments

PMIC/Ogden claims in its appeal that it was improperly and illegally disqualified from further participation in this procurement. It also stresses that the primary basis for its appeal is its continuing belief that the proposals were evaluated based on technical preferences not disclosed in the RFP. Since the determination of the competitive range offerors and the alleged technical preferences are the main issues in this appeal, we will first discuss the merits of the arguments on these issues, including our findings of fact.

Determination of Competitive Range

The appellant claims that (a) CUC improperly and illegally disqualified PMIC/Ogden from further participation in this procurement. Also, in its protest letter, PMIC/Ogden argued that (b) CUC did not indicate either a factual or legal basis for disallowing PMIC/Ogden from further participation.

Whether the Appellant was Illegally and Improperly Excluded from the Competitive Range

Aside from stating in its appeal that it was improperly and illegally disqualified from further participation in this procurement, PMIC/Ogden referred to its protest argument that there was no basis for rejecting its proposal as it is "reasonably susceptible of being selected for award." In considering a challenge to an agency's procurement decision, such as the competitive range determination in this case, we examine the record to determine whether the agency's action is in compliance with the applicable Procurement Regulations.

CUCPR Section 3-106(6), which establishes the requirement for the determination of competitive range offerors, provides that "...discussions may be conducted with responsible offerors who submit proposals determined to be *reasonably susceptible of being selected for award* for the purpose of clarification and to ensure full understanding of, and responsiveness to, solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers ..." [Emphasis added.] It is clear from the requirement of the CUCPR that any proposal that is "reasonably susceptible of being selected for award" should be included in further participation in the competition by allowing revisions to the proposals which normally take the form of best and final offers from the proposers.

We have determined that CUC's determination of competitive range offerors was not in compliance with the CUCPR. In an interview, one of the committee member stated that twelve out of the thirteen proposers were reasonably susceptible of selection for award. Furthermore, as shown in the following discussion, we believe that CUC did not include in the competitive range all proposals that were reasonably susceptible of award because (1) CUC merely narrowed the number of competitive range offerors from 13 to 6 based on a cut-off score of 57 points and concluded that the 6 proposers whose scores were above the cut-off number were the only ones reasonably susceptible of award, and (2) the 57-point cut-off score itself was flawed as it was based on erroneous calculations.

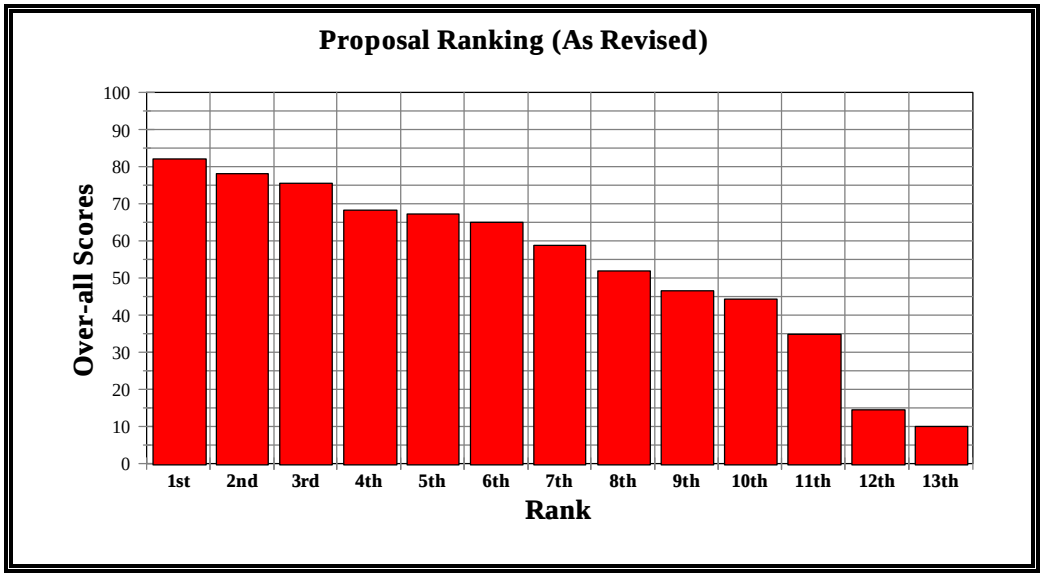
CUC's Basis for Competitive Range Determination was Not Sufficient to Ensure that all Proposals Reasonably Susceptible of Selection for Award were Included. In its May 5, 1998 rebuttal to the appellant's comment, the Director stated that "...After its initial discussion with the thirteen companies submitting proposals, CUC limited the competitive range to six...This is the process the regulations provide and which CUC has used...." We believe that the procedure adopted by CUC, which established a cut-off score for selecting the competitive range offerors, was not adequate for determining proposals which were reasonably susceptible of award. We believe that each proposal's strengths and weaknesses should be considered in comparison with other proposals before concluding that a proposal is not reasonably susceptible of award. Moreover, we wish to clarify that the process of selecting the competitive range through reducing the number of proposals by half, or setting a cut-off score, is not sanctioned by the CUCPR. Again, the CUCPR merely requires that for a proposal to qualify for further participation, it need only be "reasonably susceptible of being selected for award."

The Basis for Cut-Off Score was Erroneous. CUC failed to include one proposer in the competitive range as a result of an error it made in computing the scores on the cost criteria. Our subsequent review of the scoring procedures used by CUC's four-man Selection Committee showed that the cut-off score of 57 points was erroneous. As published in the RFP, each proposal was to be evaluated using the following criteria and scores: Generation (40%), Transmission (10%), Environmental (10%), Licensing (10%), and Price (30%). For the technical evaluation which comprised 70% of the total score, each committee member scored the proposals in four separate categories, *i.e.*, generation, transmission, environmental studies, and licensing, using the set percentages from the RFP. As for the price component which

accounted for 30% of the total score, the evaluation conducted by the same Selection Committee was based solely on the uniform financial data sheets which had been submitted by the proposers along with their technical proposals. The financial data sheets contained a breakdown of the cost quoted by the proposers at certain levels of power generation per month, and included information as to the fixed and variable elements of the cost quoted. The CUC Controller, who was a member of the Selection Committee, summarized these data over 25 years, the estimated operating life of the power plant, using uniform inflation and discount rates.

Using the same inflation and discount rates as well as the summarization procedures employed by the CUC Controller, we recalculated the cost summarization for all thirteen proposals. Accordingly, we applied CUC's inflation rate over 25 years using the cost for the first year of operations provided by the proposers as the base amount; the resulting figures were then discounted at CUC's discount rate over the same 25-year period to come up with the net present values. Based on these calculations, we noted significant differences in the price per kWh in five out of the thirteen proposals, ranging from $0.011 to $0.04 per kWh. These five proposals were among those which were not selected in the competitive range determination. According to the CUC Controller, the errors resulted from the transfer of the mathematical formula to the computer. We did not find any evidence showing that these errors were intentional.

From the summarized cost results (also termed net present values), CUC determined the lowest acceptable price per kWh, assigned the maximum points to the proposer with the lowest price per kWh, and gave "zero" points to those whose price per kWh went over the limit set by CUC. From the combined technical and cost scores, the overall scores and the ranking of several proposals changed, most notably an originally eighth ranked proposer advanced to third place. Additionally, the revised scores of four other proposers, including PMIC/Ogden, increased after making the above corrections; however, their revised scores did not put them in the top six places. The following chart shows the revised scores and ranking of all 13 proposers.



In comparing the corrected scores of all the proposers from the chart above, except for the variation between the scores of the 11th and 12th ranked proposers, the intervals between the respective scores of the rest of the proposers did not exceed 10 points. However, the difference between the 3rd and 4th ranked proposers, 6th and 7th ranked proposers, and 10th and 11th ranked proposers in each case registered more than 5 points. Based on CUC's procedure, it would therefore make just as much sense to set the cut-off point below the top three, the top ten, or the top eleven, as to arbitrarily set it below the top six as CUC has done. Additionally, we believe that there is a need for CUC to re-examine its formula for selecting the top six proposers because its cut-off number of 57 was based on erroneous computation, as discussed above.

Even if we were to consider guidelines from other jurisdictions with requirements similar to the CUCPR, we would still have to conclude that CUC's competitive range determination was not properly made. CUCPR Section 3-106(6) establishes a general direction to determine competitive range; however, there are no specific guidelines for including or excluding proposals. In the Federal Government, the U.S. General Accounting Office's (GAO) bid protest decisions have established guidelines that can be harmonized with the general directions to determine proposals "reasonably susceptible of being selected for award." U.S. GAO decisions have held that a proposal is not "reasonably susceptible of being selected for award" and can be excluded from the competitive range if it is clear that (a) its contents are so unacceptable that a revision of the proposal in the negotiation stage would be equivalent to accepting a new proposal [Harris Data Communications v. United States, 2 Cl. Ct. 229 (1983)], or (b) in comparison with other proposals, such proposal clearly has no chance of being selected for award [Caldwell Consulting Assocs., B-252590, July 13, 1993, 93-2CPD §18].

Under the first criterion, we do not have any evidence to show that the appellant's proposal is unacceptable, *e.g.*, technically deficient or unreasonable as to price. In our review of the revised overall ranking, the appellant ranked in the top six for the technical evaluation. Its ranking dropped below the top six after price was considered. However, there is nothing on record to indicate that the appellant was excluded from the competitive range because of an unreasonable price. Additionally, we have no reason to believe that the appellant's submitted price was a sufficient basis for excluding it from the competitive range. In an interview with two members of the Selection Committee, we determined that the price per kWh offered by the appellant was lower than CUC's cost of producing power during the evaluation of the proposals in September 1997.

Although it appears that the cut-off score of 57 points was not predetermined by CUC, we would like to point out that in excluding an offeror from the competitive range using a pre-determined cut-off score, an excluded proposal should be so low in comparison with other proposals that no prejudicial effect could be said to result. [52 Comp. Gen. 382 (B-174870), 1972]. As shown in the above chart, the appellant's revised score was competitive in that it was not substantially lower than the next higher ranked proposers. Additionally, GAO has held that point scores are intended only as guides to intelligent decision making and are not binding on agencies. [Bunker Ramo Corp., 56 Comp. Gen. 712 (1977), 77-1 CPD §427]. Also, other

procurement awards based only on point scores have been found by GAO to lack a reasonable basis. In SDA, Inc., B-248528.2, April 14, 1993, GAO held that "...because the cost/technical tradeoff was grounded solely on the point score, we find that the tradeoff lacked a reasonable basis. Other than a generic statement that the proposer's ...technical superiority... represents the greatest value to the Government, the agency offers no basis to support a determination that ... justified paying the price premium...." In light of the way in which CUC reached its conclusion on the determination of the six competitive range offerors, similar to the SDA, Inc. case, we believe that CUC's methodology does not represent a rational approach for measuring whether a proposal is reasonably susceptible of selection for award.

Secondly, a proposal may be excluded from the competitive range if in comparison with other proposals it has no reasonable chance of being selected for award. We find nothing in the records to indicate that the strengths and weaknesses of the thirteen proposals were compared during the competitive range determination. We believe that in order to determine whether a proposal has a clear chance of being selected for award, a comparison of the proposals' strengths and weaknesses, not just an individual scoring of each proposal, is necessary in this instance.

Whether PMIC/Ogden was Improperly Notified of its Exclusion in the Competitive Range

The appellant claims that CUC did not indicate either a factual or legal basis for disallowing PMIC/Ogden from further participation. For this claim, PMIC/Ogden did not cite any statute or regulation that would require CUC to indicate in its notification letter a factual or legal basis for excluding PMIC/Ogden from the competitive range. The CUCPR do not include provisions specifying the form and manner of notifying offerors of the competitive range determination. However, in the Federal Government, its Federal Acquisition Regulations (which maybe used as a guide in the absence of applicable local procurement guidelines), provide that the contracting officer shall notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award, and the notice shall at least state in general terms the basis for such determination and that a revision of the proposal will not be considered.

On November 14, 1997, CUC sent notification letters to all 13 offerors containing the result of the competitive range determination which trimmed the number of offerors from thirteen to six. The November 14, 1997 letter to the appellant clearly indicated that CUC had determined, based upon the technical and financial review of proposals and interviews, that the appellant was not selected for further participation in this procurement. We believe this is a sufficient notice based on other precedents, e.g., the FAR guidelines.

As for PMIC/Ogden's claim that CUC had "technical preferences", we feel no need to comment further on this issue because of our finding that CUC's determination of competitive range offerors was flawed and that a proper remedy is a re-determination of competitive range offerors to include those who are "reasonably susceptible of being selected for award" as required by the CUCPR. We believe that any finding that CUC in fact had "technical preferences" would necessitate the same remedy. However, we offer the following

comments on the alleged "technical preferences" in order to help clarify the issues raised by PMIC/Ogden.

Alleged Technical Preferences by CUC

The records in this RFP do not support the appellant's claim that CUC had technical preferences. We considered the various allegations offered by PMIC/Ogden in support of its claims, as follows (we supplied the titles below based on the substance of the arguments):

Alleged Preference on Fuel Type

PMIC/Ogden argues that the type of fuel was not a criteria set forth in the RFP but ultimately became an evaluation factor. We believe that requiring the offerors to comply with the requirements of the EPA should not conflict in any manner with the offerors' preference on fuel type. Based on available information, the use of heavy diesel fuel (diesel no. 6) is not an automatic violation of EPA regulations, nor would the use of a light fuel (diesel no. 2) guarantee compliance. We understand that compliance with EPA requirements does not depend solely on the type of fuel to be used but is largely based on the actual emission performance of the facility. EPA's current requirements and limitations for the CNMI in Section 69.32 of the Federal Register Vol. 61 No. 220 grant the CNMI a conditional exemption from the requirement to develop, submit for approval, and implement an operating permit program under Title V of the Clean Air Act, upon the condition that the CNMI will develop and submit an alternate operating program to EPA for approval. Such alternate operating program, and the necessary statutory and regulatory authority, must be submitted by March 15, 1999; otherwise the exemption will automatically expire. According to an EPA Region IX official, the CNMI Division of Environmental Quality (DEQ) is in the process of developing such alternate program which would include all substantive air quality protections in the Federal operating program, but may be "administratively less complex". However, this conditional exemption does not apply to owners or operators of major sources[4] of hazardous air pollutants (HAPs).

In an interview with a DEQ environmental scientist, we were informed that compliance with EPA regulations does not depend on the fuel type alone (whether diesel no. 2 or no. 6) but upon whether the performance of each plant meets certain emission requirements. We were also told that several control techniques could be employed to limit HAP emissions to compliance level, such as increasing stack heights, use of scrubbers, and change of plant design.

[4] Section 112 of the Clean Air Act defines a major source as "... any stationary source or group or stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of any hazardous air pollutants...."

Alleged Preference on Fuel Cost

Records in this RFP did not reflect that CUC had a preference concerning fuel cost. In one of the pre-bid conferences, CUC was asked what choices of fuel were available, and it responded that the type of fuel to be used was the bidders' choice. With regard to the appellant's allegation that CUC preferred proposals offering the use of the heavy diesel no. 6 fuel over light diesel no. 2 fuel, our review showed that one of the offerors in the competitive range proposed the use of light diesel no. 2, which it maintained up to the "best and final offer" phase. If CUC had indeed preferred heavy diesel no. 6, then that proposer would have not been included in the competitive range.

Alleged Preference on Generator Size

The records do not show that CUC had a hidden technical preference on the size of the generator units. The appellant claims that CUC gave preference to proposals offering 15MW generators, according to information it received from an unnamed source. Our review of the initial proposals submitted by the six offerors in the competitive range showed that three offerors in the range submitted generators with less than 15 MWs each. Moreover, in the best and final offers, we also noted that one of the two offerors selected by CUC submitted generator units with more than 15 MWs each.

Alleged Improper Elimination of Offerors

We do not agree that CUC eliminated offerors prior to providing all of them the opportunity to review its critical air modeling data. The appellant alleged that although CUC knew that the air modeling data had a critical impact on the type, design and cost of the power plant, it delivered the data only to those offerors in the competitive range. Our review of the air modeling data (also known as the Air Emissions Modeling report) showed that this was done in compliance with the requirements of the grant of conditional exemption under Section 69.32(c)(2) in the Federal Register Vol. 61 No. 220. This section provides that "...CNMI shall complete and submit any additional modeling to EPA by March 16, 1998 to determine whether existing power plants cause or contribute to violations of the National Ambient Air Quality Standards (NAAQS) and Prevention of Significant Deterioration (PSD) increments ...." The relevant report was coursed through the Director of the Division of Environmental Quality on January 6, 1998, almost two months after the competitive range determination.

Although the report may have had a material effect on the proposal submissions, we believe that all offerors were given equal access to available information during the initial proposal submissions on July 21, 1997. Even the offerors in the competitive range would not have been aware of the contents of the report which was still in preparation at that time. The Air Emissions Modeling report was released almost two months after the selection of the top six offerors.

Alleged Failure by CUC to Compare Proposals on Equal Terms

There is no evidence that CUC failed to provide a basis for all offers to be compared on equal terms. The appellant alleged that although CUC knew that the only basis for comparing each proposal was to develop a draft Power Purchase Agreement (PPA), it provided the PPA only to the offerors in the competitive range. For this reason, the appellant believes that it was not accorded an equal opportunity for comparison.

We believe that at the time of the initial proposal submission, all 13 offerors stood on equal footing. Records showed that all offerors were informed of the technical and financial data requirements, through the RFP requirements and the pre-bid conferences, before the initial proposals were submitted. There is no evidence to show that any of the offerors might have seen or reviewed the PPA before the initial proposal submissions.

Lastly, PMIC/Ogden's appeal generally referred to the arguments raised earlier in its protest to CUC. The protest arguments included issues other than the determination of competitive range and alleged technical preferences by CUC. These other issues pertain to the following: (a) PMIC/Ogden's status in this procurement as a responsible offeror and its submission of a proposal that was responsive in all respects, and (b) the allegation that the RFP and its corresponding guidelines were too general, vague and lacking in technical detail.

PMIC/Ogden Status as a Responsible Offeror with a Responsive Proposal

The appellant claims that it should be given the opportunity to submit its best and final offer because CUC agreed that it is a responsive and responsible offeror. We do not agree with the appellant's contention. Section 3-106 (6) of the CUCPR states that "...As provided in the request for proposals, discussion may be conducted with *responsible* offerors who submit *proposals determined to be reasonably susceptible of being selected for award* for the purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements...." [Emphasis added.] The requirement is quite clear that in order to qualify for further discussions, an offeror need not only be responsible but its proposal must also be "reasonably susceptible of being selected for award." The issues of responsibility and responsiveness are not the only factors considered in competitive sealed proposals to qualify for further negotiations. CUC has stated time and again that the appellant was not excluded from the competitive range on grounds of responsibility and responsiveness.

The RFP and its Corresponding Guidelines are Allegedly Too General, Vague and Lacking in Technical Detail

The appellant alleges that CUC violated Section 3-106(5) of the CUCPR which provides that the RFP should state the relative importance of price and other evaluation factors. It also argues that the RFP and the guidelines issued by CUC for this project were inadequate to advise the offerors of CUC's priority requirements and goals. As for the alleged failure to comply with CUCPR Section 3-106(5), we have determined that CUC properly identified its evaluation criteria, including their relative importance. As shown in the RFP

announcement and the scope of work, CUC stated five evaluation factors and their relative weight (in terms of maximum scores for each criterion), as well as the documents corresponding to each criterion that needed to be submitted by the proposers. CUCPR Section 3-106(5) requires only that the RFP state the relative importance of price and other evaluation factors. With regard to the alleged inadequacy of the RFP and the corresponding guidelines, OPA cannot rule on a claim that is not clearly and sufficiently stated. In any event, nothing has come to our attention that would show that the RFP and the related guidelines issued by CUC were too general, vague and lacking in technical detail. If such was the case, no offeror would have submitted a responsive proposal to this RFP. As it turned out, based on our interviews, only one of the thirteen proposals was found to be non-responsive.

DECISION

The Office of the Public Auditor **grants the appeal in part**. Our review showed that CUC's determination of competitive range offerors was not in compliance with the CUCPR because (1) CUC merely narrowed the number of competitive range offerors from 13 to 6 based on a cut-off number of 57 points, and concluded that the 6 proposers whose scores were above the cut-off number were the only ones reasonably susceptible of award; (2) the 57-point cut-off score was itself flawed as it was based on erroneous scores; and (3) one of the committee members stated that twelve out of the thirteen proposals were reasonably susceptible of selection for award.

Even if we were to consider guidelines from other jurisdictions with requirements similar to the CUCPR, we would still have to conclude that CUC's competitive range determination was not properly made. We believe that a proposal can be excluded from the competitive range if it is clear that (a) the proposal is unacceptable to such an extent that any revision in the negotiation stage would be equivalent to submitting a new proposal, or (b) in comparison with other proposals, the proposal clearly has no chance of being selected for award. The records in this RFP do not show that those proposals excluded from the competitive range were disqualified from further participation for either of those reasons.

In light of the way in which CUC determined the six competitive range offerors, we believe that CUC's methodology does not represent a rational approach to measuring whether a proposal is reasonably susceptible for award. Aside from this, we believe that there is a need for CUC to re-examine its formula for selecting the top six proposers because its cut-off number of 57 was based on erroneous computation. Accordingly, we recommend that CUC make a redetermination of the competitive range offerors in compliance with the requirements of the CUCPR. All proposals which are reasonably susceptible of award should be included in the range, and those which qualify under this standard but were originally excluded from the competitive range should be reinstated in the competition by asking the proposers to submit best and final offers. The redetermination of competitive range should be made in strict compliance with the CUCPR, and OPA's comments in this decision should be considered to help ensure that the redetermination is properly conducted.

Section 5-102(9) of the CUCPR provides that the appellant, any interested party who submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. 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. Such a request must be received by the Public Auditor not later than ten (10) days after the basis for reconsideration is known or should have been known, whichever is earlier.

Leo L. LaMotte
Public Auditor, CNMI

June 18, 1998