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Commonwealth of the Northern Mariana Islands

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)	
)	APPEAL NO. BP-A038
IN RE APPEAL OF)	DECISION ON APPEAL
<u>SK SHIPPING</u>)	

I. SUMMARY

This is a decision on the appeal of the denial of a protest by the Executive Director (“Director”) of the Commonwealth Utilities Corporation (“CUC”) regarding CUC-RFP-03-015. The Office of the Public Auditor (“OPA”) has jurisdiction over this appeal as provided in Section 5-102 of Commonwealth Utilities Corporation’s Procurement Regulations (“CUC-PR”)(Commonwealth Register Vol. 12, No. 6 (1990) and Vol. 13, No. 8 (1991)).

The Public Auditor denies the appeal.

II. APPLICABLE REGULATIONS

The CUC-PR “are promulgated under the authority of 4 CMC 8122 and 8123, which gives (sic) CUC the duties and powers to be in control of and be responsible for procurement and supply for utility services in the Commonwealth; and 4 CMC 8157, which empowers the Board to issue regulations.” CUC-PR § 1-102. The CNMI Procurement Regulations (“CNMI-PR”)(Commonwealth Register Vol. 22, No. 8 (2000) and Vol. 23, No. 05 (2001)) provide that CNMI-PR do not “apply to a public corporation or autonomous agency for the Commonwealth which has been authorized to conduct its own procurement by enabling statute or other law.” CNMI-PR 1-105. CUC-PR do not mirror CNMI-PR. CUC has not been authorized by the Department of Finance to administer procurement functions pursuant to CNMI-PR §§ 1-105 and 2-201.

On October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-13 (“Opinion 03-13”) regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Shortly thereafter, OPA received a copy of Opinion 03-13, which 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.

At this time, however, as the validity of CUC-PR, as questioned in Opinion 03-13, has not been ruled on by a court of competent jurisdiction, nor have CUC-PR or relevant CNMI statutes been revised, OPA will apply CUC-PR in interpreting this appeal.

III. FACTUAL AND PROCEDURAL BACKGROUND

CUC issued CUC-RFP-03-015 (“RFP”) on March 7, 2003. According to the RFP, CUC requested “proposals from qualified firms for the supply of fuel for its power plants of Saipan, Tinian, and Rota.” Prior to bid closing, CUC received two requests to extend the RFP, both of which were denied. On March 28, 2003, CUC received two proposals, one from SK Shipping (“SK”) and one from Mobil Corporation (“Mobil”). SK’s proposal included a Letter of Representation, dated March 24, 2003, appointing Pacific Petroleum Corporation (“PP”) as its Sales Representative for the solicitation for the sale of petroleum products to CUC in the CNMI. SK’s proposal also included a statement that it designated PP as its Sales Representative in the CNMI.

CUC designated a Source Selection Committee (“Committee”) to evaluate the proposals received. On April 23, 2003, the Committee submitted its findings and recommendations regarding the RFP (“Committee’s Findings”) to the Director. The Committee’s Findings found that SK’s proposal was non-responsive to the RFP and was, therefore, not susceptible to evaluation for two reasons:

1. Delivery of fuel to Rota, Tinian Power Plant III and IV was not addressed or priced in the proposal. SK specifically states that additional costs would be incurred for delivery to Rota.
2. CUC stated in the scope of work that the payment terms “shall be” sixty days from the invoice date. The payment terms SK proposes requires CUC to obtain a Letter of Credit (LOC), due and payable sixty days after the bill of lading and invoices are issued.

See Committee Findings.

By letter dated April 24, 2003¹, CUC notified PP that the Committee had reviewed SK's proposal and found that it was non-responsive to the RFP and was not susceptible to evaluation. In that letter, CUC stated that "SK did not provide for and price delivery to Tinian and Rota and did not accept CUC's terms as to payment."

The Committee recommended award of the contract to Mobil, the only other proposer, "as Mobil's proposal met the requirements of the scope of work and Mobil was determined to be a responsible bidder." Decision at 2. Subsequently, a contract was awarded to Mobil under the RFP.

On May 21, 2003, PP filed a protest concerning the award of the contract under the RFP. The protest was supplemented by an addendum dated May 28, 2003. The Director denied the protest.

IV. APPEAL TO OPA

On July 10, 2003, PP delivered, what it referred to as, a stack of "100 or so pages of documents"² to OPA with a cover letter that was dated July 9, 2003. The letter asked that OPA consider the letter a formal request "to investigate the CUC decision to sign a two year contract with Mobil ...". The letter went on to discuss the Director's letter to PP dated April 24, 2003. It was, therefore, initially unclear as to whether the letter and package of documents were meant as an appeal of the Decision or a request to investigate, or both. OPA received two subsequent letters from PP, one dated July 10, 2003, and one dated July 11, 2003, that clarified that PP had intended for the July 9, 2003 letter, which was delivered on July 10, 2003 with the documents, to act as an appeal. The July 11, 2003, states: "It is our opinion that the fuel supply contract was improperly awarded to Mobil. Therefore, we want to appeal that award." The letter dated July 10, 2003, states, in part: "...we

¹ Although the letter was dated April 24, 2003, there is some controversy as to when the letter was actually sent by CUC and received by PP. This is addressed in the Decision on page 4 as follows: "CUC records reflect that a letter was prepared on April 24 to Pacific Petroleum but not mailed until May 8. Pacific Petroleum states that they received the letter on May 15. CUC records also reflect that an attempt was made to fax the letter dated April 24 on May 8 and the fax transmission was unsuccessful. Subsequently, attempts were made to contact Pacific Petroleum by phone and these also failed. ..."

² July 9, 2003 letter from PP to OPA: "As you can see from the attached 100 or so pages of documents surrounding this transaction, the RFP, the bid evaluation process and the decision to sign a supply contract was fraught with anomalies and irregularities. Please see our attached Protest letter and its Addendum."

contacted our Attorney and he said ‘We mean both: Appeal and Investigate.’”

CUC-PR § 5-102(2) governs the form of an appeal to the Public Auditor. This sub-section of the CUC-PR states:

Form of Appeal. No particular form of pleading is required for filing an appeal to the Public Auditor. The appeal, shall, however:

- (a) Include the name and address of the appellant;
- (b) Identify the number of the solicitation or contract;
- (c) Contain a concise, logically arranged, and direct statement of the grounds for appeal; and
- (d) Specifically request a ruling by the Public Auditor.

CUC-PR § 5-102(2)

This sub-section of the CUC-PR requires that certain information be set forth in an appeal to OPA. CUC-PR § 5-102(2)(c) specifically requires that the appeal “contain a concise, logically arranged, and direct statement of the grounds for appeal.” None of the documents delivered by PP contained such a statement. OPA was, therefore, required to sift through all of the pages of information and documents provided by PP to ascertain the issues to be addressed on appeal. In addition, although PP’s July 11, 2003 letter stated that PP wished to appeal the award of the contract to Mobil, all other documents, arguments, and allegations in the package delivered by PP and in the Decision focus not on CUC’s award of the contract to Mobil, but on CUC’s rejection of SK’s proposal set forth in the Director’s April 24, 2003 letter. Prior to addressing those issues, however, OPA must determine if PP had standing to bring the protest and appeal on its own behalf or on behalf of SK.

V. STANDING

A) PP is not a Prospective Contractor under CUC PR 5-101(1)(a)

As stated above, CUC-PR § 5-102(2)(a) requires that the appeal “[i]nclude the name and address of the appellant.” Although the letter dated July 9, 2003, which was delivered to OPA on July 10, 2003, did mention SK, it did not name SK as the appellant, states that PP was representing SK as appellant or set forth SK’s address. The letter was on PP stationery and was signed by Richard Reddy, CEO. In addition, the two letters that followed dated July 10th and July 11th, also on PP stationery signed by Richard Reddy, did not set forth the

information required under the regulation.

Obviously, there was a question as to PP's standing at the protest level, as the Director, in a letter dated June 25, 2003, requested clarification as to whether PP had submitted the "protest on its own behalf, or on behalf of the SK Shipping." In addition, the Director requested that in the event PP was filing the protest on behalf of SK, that PP provide CUC "with an authorization from SK Shipping specifically authorizing Pacific Petroleum to proceed as SK shipping's representative in the protest matter." Although this issue was not resolved, as discussed more fully below, the Director determined in the Decision that:

... CUC has accepted Pacific Petroleum's protest as Pacific Petroleum may be deemed a "prospective contractor" who is aggrieved in connection with this solicitation and award. CUC PR 5-101(1)(a).
Decision at 2.

CUC-PR § 5-101(1)(a) dictates which parties may protest. The applicable portion of the sub-section reads:

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 Director.

CUC-PR § 5-101(1)(a)(Emphasis added).

As the procurement in question is a request for proposals and not an invitation for bids, there are no bidders, actual or prospective, only offerors. Further, as there were only two proposals submitted in response to the RFP, one from SK and one from Mobil, there could be only two prospective offerors, or contractors, SK and Mobil. As PP was neither a bidder or an offeror, it could not be awarded a contract under the RFP and, therefore, could not be a contractor, actual or prospective. As such, the Director's determination in the Decision that PP may be deemed a prospective contractor was not correct. As a result, if PP was not an actual or prospective bidder, offeror, or contractor, it would not have had standing to bring the protest to the Director or an appeal to OPA.

B) PP as SK's Representative in the Protest

As more specifically stated above, the Director, by letter dated June 25, 2003, requested PP to provide CUC with an "authorization from SK Shipping specifically authorizing Pacific Petroleum to proceed as SK shipping's representative in the protest matter." PP responded

to the Director's request, by letter dated June 27, 2003, stating that PP had "requested SK Shipping this PM to provide Pacific Petroleum with an additional letter that is separate and outside of our "Letter of Representation" for the specific benefit of CUC's files at this time, clarifying [PP's] position relative to SK Shipping, in this "Protest" issue." The letter went on to state that PP would "send CUC SK Shipping's response as soon as we receive it, most likely next week, as this is late Friday 27 June, 2003." In reviewing the documents received from both PP and CUC, OPA was unable to locate any further authorization from SK as was requested by the Director on June 25th or as referenced in the June 27th letter from PP.

On October 22, 2003, OPA received a letter from CUC Legal Counsel confirming that CUC "did not receive any additional response from either SK Shipping or Pacific Petroleum regarding any authorization from SK Shipping to Pacific Petroleum to act on its behalf with regard to the protest."

OPA requested that PP either provide a copy of the letter or confirm that the letter does not exist. On October 30, 2003, OPA received a letter from PP dated October 28, 2003, with an attached e-mail dated October 28, 2003, from Hongyeon Kim of SK. The e-mail stated:

We already provided a Letter of Representation stating Pacific Petroleum was our representative on Saipan with the Bid. So, we don't need to provide any other documents but pleased (sic) to confirm that there were not any additional letters on it.

Although neither SK nor PP has provided confirmation that PP had authority to represent SK in the underlying protest and this appeal, an agency relationship of some sort did exist at the RFP level, as is indicated by the Letter of Representation and the statement in SK's proposal. SK, as an offeror, would have had standing to file a protest with CUC and an appeal from that protest to OPA. Therefore, OPA will assume that, despite the nature of the protest, addendum, appeal and other documents submitted by PP, which taken together lead a reader to believe that PP is acting on its own behalf, SK has granted PP the authority to file the protest and appeal. Such a delegation of authority does not appear to be prohibited under CUC-PR. OPA will further assume, based on the e-mail dated October 28, 2003, that SK has not withdrawn any authority given to PP to act on SK's behalf.

VI. ISSUES

As stated previously, the documents submitted by PP did not “contain a concise, logically arranged, and direct statement of the grounds for appeal” as required by CUC-PR § 5-102(2)(c). Therefore, the following are the issues addressed in the Decision that OPA surmises are issues in the appeal:

1. Did CUC-PR require that discussions be held with SK?
2. Did CUC-PR prohibit rejection of a proposal that does not conform to the RFP requirements?
3. Did SK’s proposal conform to the RFP?
4. Did the delay in notification regarding rejection of SK’s proposal violate the CUC-PR?

VII. ANALYSIS

A. Discussion Not Mandatory

(1) Competitive Sealed Proposals: CUC-PR 3-106

Competitive sealed proposals are fully covered in CUC-PR in seven paragraphs that comprise CUC-PR § 3-106. Although the language found in CUC-PR § 3-106 exists in CNMI-PR § 3-103, the revised CNMI-PR are much more extensive in this area. Among other differences, CNMI-PR § 3-103 includes an extensive sub-section on evaluation factors, including competitive range, technical evaluation, and notification of offers excluded from the competitive range or further consideration. These requirements and guidelines are not found in the CUC-PR. In addition, the CNMI-PR’s sub-section on award, CNMI-PR § 3-103(8), includes a notification to unsuccessful offerors that is also not present in the CUC-PR. However, as stated above, OPA will apply CUC-PR in interpreting this appeal. Therefore, issues such as establishing a competitive range and notification provisions not found in the CUC-PR, but which would be applicable in an appeal under the CNMI-PR, will not be applied in this decision.

(2) Discussions with Offerors are not Mandatory under CUC-PR

The CUC-PR allow discussions with certain responsible offerors, but such discussions are not mandatory. Specifically, CUC-PR § 3-106(6) provides:

Discussion with responsible offerors and revisions to proposals. As provided

in the request for proposals, 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 insure 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 offerors. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.
CUC-PR § 3-106(6)(Emphasis added)

The provision is clear: discussions may only be conducted with a responsible offeror if the proposal submitted is determined to be “reasonably susceptible of being selected for award.” In negotiating the RFP, “CUC did not engage in discussions with either of the offerors for the purpose of revising proposals or obtaining best and final offers, as SK Shipping’s proposal was determined not [to] be susceptible to award.” Decision at 4.

B. CUC-PR Do Not Prohibit Rejection of a Non-conforming Proposal

The RFP contained two specific requirements:

1. Payment terms shall be NET SIXTY DAYS FROM INVOICE DATE.
2. Fuel to be supplied must be warranted to meet specifications.

The RFP further stated that “[p]roposals will be evaluated and selections be made based on CIF Cost (60 points), and Reliability of Supply (40 points).” CIF Cost is cost including insurance and freight. The RFP Specifications set forth the fuel specifications and required testing methods. The RFP specifications also set forth the following requirements under the scope of work:

1. Proposing parties must be prepared to commence deliveries upon commencement of contract.
2. Company must be able to deliver to all three islands of the Commonwealth. Measurement shall be at 60 degrees.
3. All Six (6) CUC power plants operate on gas-oil and the average total consumption is approximately 3,000,000 gallons per month. All proposals must allow for timely delivery of the quantity required.
4. With respect to pricing methods; irrespective of the method used, the proposal shall also include a pricing method **based on Singapore**

Mid-Platts plus fixed mark-up.

(Emphasis in original).

On April 23, 2003, the Committee submitted its Committee's Findings to the Director. The Committee's Findings stated that SK's proposal was non-responsive to the RFP and was not susceptible to evaluation for two reasons:

1. Delivery of fuel to Rota, Tinian Power Plant III and IV was not addressed or priced in the proposal. SK specifically states that additional costs would be incurred for delivery to Rota.
2. CUC stated in the scope of work that the payment terms "shall be" sixty days from the invoice date. The payment terms SK proposes requires CUC to obtain a Letter of Credit (LOC), due and payable sixty days after the bill of lading and invoices are issued.

See Committee Findings.

A proposal is an offer. A request for proposals, however, may set terms that are mandatory. A deviation from those mandatory terms results in an offer that is non-conforming to the request for proposals. In negotiated procurements, a proposal that fails to conform to the material terms and conditions of the solicitation may be considered unacceptable. In addition, there is no provision in the CUC-PR that prohibits rejection of a non-conforming proposal. As such, if SK's proposal was non-conforming and not susceptible to evaluation, CUC was not prohibited from rejecting the proposal.

C. SK's Proposal Did Not Conform to the RFP

(1) CIF (Cost Insurance Freight) Not Provided

The RFP stated that "[p]roposals will be evaluated and selections be made based on CIF Cost (60 points), and Reliability of Supply (40 points)." The RFP specifications also had a special provision which provided that "irrespective of the method used, the proposal shall also include a pricing method **based on Singapore Mid-Platts plus fixed mark-up.**" *See RFP specifications.* (Emphasis in original). SK's proposal does include CIF pricing for "one safe port, Saipan, CNMI."³ SK's proposal, however, goes on to state the following:

³ Paragraphs 4 and 5 of SK's proposal address diesel pricing for two and five year supplies respectively for Saipan, CNMI.

7. Tinian and Rota:

The additional cost(s) associated with delivery to Rota should be discussed later. SK Proposal at 3.

The Committee's Findings stated that "[d]elivery of fuel to Rota, Tinian Power Plant III and IV was not addressed or priced in the proposal." The Committee further stated that "SK specifically states that additional costs would be incurred for delivery to Rota." As such, the Committee reasoned that SK's proposal was non-responsive to the RFP and was not susceptible to evaluation. It appears that the Committee was correct in that SK's proposal did not include CIF Cost for Tinian or Rota.

CUC reasoned in the Decision that "CUC's solicitation is clear that the price of the fuel supply is intended as the major factor in evaluating the proposals." Decision at 2. It further reasoned that "in order to be evaluated, the total cost including insurance and freight must be submitted using the method stated." *Id.* (Emphasis in original). CUC held that "SK Shipping's failure to submit a complete fixed price for the delivered fuel supply, as required, renders its proposal non-responsive to CUC's request for a delivered price for the fuel using fixed mark-up to the Platt's pricing figure." *Id.* (Emphasis in original). SK did specifically state in its proposal that "additional cost(s) associated with delivery to Rota should be discussed later." The Director concluded that "[i]t seems abundantly clear that CUC could not evaluate based on price when price was not completely stated in the bid as required in the proposal." *Id.* SK's statement that "[t]he additional cost(s) associated with delivery to Rota should be discussed later" would render it impossible to determine final CIF Cost, and thus evaluate the proposal based upon cost, given the information provided in SK's proposal.

(2) Payment Terms Varied

Regarding the payment terms offered by SK, its proposal stated that:

The payment terms shall be net sixty days from invoice date, which should be secured by providing a Usance L/C (Letter of Credit) issued by Bank of Guam, due and payable 60 days after signed Bill of Lading and invoice issued or any international first bank guarantee to SK Shipping.
SK Proposal at 1.

CUC determined that "[s]ecuring the letter of credit is a requirement over and above the terms stated and also a requirement that would create an additional cost to CUC." Decision at 3. CUC reasoned that "the addition of the security requirement to the stated payment terms is not responsive to the payment term as set out in the solicitation." *Id.*

CUC also reasoned that “[w]hile SK Shipping may have attempted to persuade CUC at some time to accept other terms, CUC had made its decision regarding terms at the time the solicitation was issued and is required to make its award based on those terms.” *Id.* (Emphasis in original). Lastly, CUC reasoned that “the terms of the solicitation gave the proposer a choice as to whether to accept the terms or to forego offering a proposal if the proposer found the terms to create too much risk.” *Id.*

Although CUC used language that is not technically correct when stating that SK’s payment term provision was “not responsive”, the concept was accurate. CUC determined that SK’s payment term provision was non-conforming to the RFP requirements as it added the security requirement. Although CUC may have chosen to discuss the matter with SK, if CUC determined that SK’s proposal was capable of being made acceptable and reasonably susceptible of being selected, its decision not to hold discussions and allow revisions of the offer is clearly within its discretion given the language of CUC-PR § 3-106(6), as discussed above.

In addition to being on notice of the terms of the RFP, prior to submitting its proposal, SK had knowledge that the payment terms it intended to offer would probably not be acceptable to CUC. This is reflected in correspondence from PP to SK dated March 17, 2003, which states:

10. CUC wants 60 day terms. Mobil has a 40 year credit history with CUC and has no problem with those terms. If SK is to require Bank Guarantee, LC or Site Draft, it will not be attractive to CUC because CUC need (sic) 60 days to collect its revenues so it can pay for its fuel.

Further, in an even earlier correspondence dated February 26, 2003, PP acknowledges that PP and SK managers “met with the Executive Director, the Comptroller and the GM of CUC to discuss credit terms and credit rating.” In this letter PP further acknowledges that “SK asked CUC to put up either a bank guarantee, site draft or LC against TCD’s [CUC] has on deposit” and that “CUC did not seem very enthusiastic about this idea.”

Despite this knowledge, SK chose to submit a single proposal with credit terms that CUC deemed varied from those set forth in the RFP. Lastly, PP acknowledged that SK’s proposal was non-conforming to the credit terms in the RFP, as is shown in an e-mail correspondence from Richard Reddy of PP to Mr. Kim of SK dated Monday, May 19, 2003 that states: “Regarding the 60 day terms, we can cancel CUC’s statement that we were non-compliant on their terms if we say: we can give you terms.” OPA found no evidence that SK was willing to offer credit terms other than those set forth in its proposal.

(3) SK's Proposal Specifications Varied from RFP Specifications

Although the technical specifications were not reached by the Committee as it found SK's proposal not susceptible to evaluation after determining that it did not comply with the payment terms of the RFP and it did not include pricing for Tinian and Rota, the Director revisited the proposal in a review prior to issuing the Decision. The Director addressed SK's variances from the technical specifications in the Decision and determined that "the specifications submitted by SK Shipping in their proposal for the fuel oil do not meet the minimum requirements of the specifications set out in the solicitation." Decision at 7. (Emphasis in original). Further, the Director determined that "several of the test methods specified by CUC are not found in SK Shipping's proposal." *Id.* The Director in the Decision concluded that:

This failure to meet specification was not addressed in the original letter of non-selection as the committee's focus was on the price and payment issues which were non-responsive to the solicitation. However, this failure to meet the basic fuel specifications is clearly failure which eliminates SK Shipping from any consideration of award, regardless of the protest outcome. Decision at 7.

Although there is one error, possibly a typographical or clerical error, in one of the comparisons set forth in the Decision⁴, such variations from the technical specifications and required testing methods, are sufficient to warrant upholding the finding in the Director's Decision that SK failed to meet the technical specifications of the RFP. OPA could not locate any information in PP's submission that contradicted the Director's findings in the Decision regarding SK's variance from the technical specification or required testing methods.

(4) Delivery on Commencement of Contract Uncertain

It is noteworthy that, although PP stated in its letter dated October 28, 2003, that it could deliver to Saipan within a short period of time, other documents seem to represent that the "first delivery of fuels would have to be scheduled about 2-3 months after the contract was

⁴ The Decision states in section 3, on page 7: "5. SK Shipping's flash point specification of 35 degree minimum does not meet the 55 degree minimum required in CUC's specifications." The numbers in this statement do not match the numbers in the specification and the proposal. However, it does appear that the Director is correct that SK's minimum for flash point does not meet the CUC minimum specification.

awarded” in order to give any new supplier time to deliver the fuel.⁵ The Director addressed this issue in the Decision by stating in the conclusion that “SK Shipping’s proposal submission is an assurance that SK Shipping was in a position to make timely deliveries of fuel to the three islands.” It goes on to conclude that “[i]f this was not true, the proposal would not have been submitted in good faith.” In addition, CUC-PR § 3-301(1)(b) specifically requires that a prospective contractor “be able to comply with the required delivery or performance schedule” in order to be determined responsible. Therefore, if SK was not in a position to make delivery as scheduled SK could have been deemed not responsible under this provision of the regulations.

D. CUC-PR Do Not Require Notification to Offerers

The Director stated in the Decision that “[w]hile CUC routinely notifies unsuccessful proposers that their firm has not been selected, there is no specific requirement and, consequently, time frame in the regulations for notification.” As stated previously, many requirements found in the current CNMI-PR are not found in the CUC-PR. The CUC-PR do not contain the notification of offerors provision found in CNMI-PR §3-103(6). Therefore, any delay in notification did not preclude the protest or this appeal nor did it violate the CUC-PR.

VIII. OTHER MATTERS

Three other matters seemed to be addressed repeatedly in the documents submitted and are, therefore, briefly addressed herein.

To the extent that PP may now be attempting to object to the solicitation’s specifications, such an argument is untimely. Protests based on alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of proposals should be filed timely. Any such objections that were not raised previously at the protest level that were apparent even prior to solicitation closing, are not, therefore, addressed herein.

It must also be noted that PP frequently states how much money CUC would save and would have already saved by contracting with SK. However, based on SK’s proposal, final cost could not be calculated; therefore, any claim regarding savings is not readily calculable and is unsubstantiated. In addition, a proposal is not a bid, and, therefore, is not solely evaluated and awarded on the bid amount. Award is made as set forth in CUC-PR § 3-106(7), "to the responsible offeror whose proposal is determined in writing to be most

⁵ See PP letter to Joseph P. Guerrero, Chairman on Committee of Public Utilities, Transportation and Communication dated March 25, 2003.

advantageous to CUC taking into consideration price and the evaluation factors set forth in the request for proposals."

Lastly, two requests for extensions for filing proposals were received by CUC. Although a protest of the denial of those request was not filed, to OPA's knowledge, nor was it raised in this appeal, the issue of adequate public notice arises. It is obvious that pre-RFP discussions were occurring with PP and potentially other interested parties. However, the RFP is dated March 7, 2003, and the proposals were due under the RFP on March 28, 2003. Therefore, a question arises as to whether such a short time is adequate public notice for such a major undertaking. Understandably, however, CUC felt it must have a closing date prior to the expiration of its contract with Mobil, its supplier at the time. CUC-PR § 3-106(3) states:

Public notice. Adequate public notice of the request for proposals shall be given in the same manner as provided for in competitive sealed bids.

The provision regarding sealed bids, CUC-PR § 3-102(2) reads:

Public Notice. Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth for the opening of the bids. Publication of notice in a newspaper of general circulation in the Commonwealth once in each week over a period of (30) calendar days shall be deemed to be adequate notice.

OPA would suggest that the notice cannot be "deemed to be adequate" pursuant to the language of CUC-PR § 3-102(2). OPA, however, will not make a determination as to whether or not the notice was not given a reasonable time prior to the closing of the solicitation as the issue was not raised in the underlying protest. OPA does, however, strongly urge CUC to consider the size and complexity of the solicitation when determining how much time is reasonable for publication of public notices.

IX. CONCLUSION

Based on the foregoing, the Public Auditor concludes that:

1. Pacific Petroleum is not an actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award;
2. Pacific Petroleum did not have standing to bring a protest or appeal on its own behalf under the RFP;
3. SK is an actual or prospective bidder, offeror, or contractor who is aggrieved in

- connection with the solicitation or award and would have had standing to bring a protest under the RFP;
4. CUC-PR do not preclude SK from having a representative pursue its rights under a protest or appeal;
 5. PP did not conform to the requirements of CUC-PR § 6-102(2) in filing an appeal on behalf of SK;
 6. CUC-PR do not include determinations of competitive range or notification to offerors requirements as do the CNMI-PR;
 7. Discussions pursuant to CUC-PR § 3-106(6) are not mandatory;
 8. Discussions need not be conducted with an offeror that is determined non-responsible or with offerors who submit proposals determined not to be reasonably susceptible of being selected for award pursuant to CUC-PR § 3-106(6);
 9. CUC-PR do not prohibit rejection of a non-conforming proposal;
 10. SK's proposal was non-conforming to the RFP and the RFP specifications;
 11. Any delay that may have occurred in notifying PP that SK's proposal was rejected did not result in a violation of the CUC-PR by CUC; and,
 12. CUC did not violate the CUC-PR by rejecting SK's proposal after the determination was made that SK's proposal was not reasonably susceptible to award.

The Public Auditor, therefore, denies the appeal.

Section 5-102(9) of the CUC-PR 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.



Michael S. Sablan, CPA
Public Auditor

December 12, 2003