

was: 1) in violation of the regulations requiring the invitation to include all essential contractual terms, and 2) was irrational, arbitrary and capricious for failure to include a “reasoned analysis” for the budget ceiling and, therefore, the cancellation based thereupon.

JURISDICTION

The CUC Procurement Regulations vest OPA with jurisdiction to act as the adjudication body for appeals from decisions of the Executive Director. NMIAC § 50-50-405.¹ Following issuance of the Public Auditor’s decision under these regulations, the appellant or any interested person who submitted comments during consideration of the protest may request reconsideration of the decision. Such request shall contain a detailed statement of the factual and legal grounds and be filed not later than ten days after the basis for reconsideration is known or should have been known. NMIAC § 50-50-405 (i). Fanter filed their request for reconsideration within the time limits and included required factual and legal grounds to establish jurisdiction.

Subsequent to filing this request, but prior to the release of this decision, Fanter filed an appeal to the Superior Court. It is unclear to OPA how Fanter’s interim appeal to the Superior Court will affect OPA’s jurisdiction to render this decision on the ruling requested by Fanter.

DISCUSSION

OPA’s earlier decision in this matter found CUC’s regulation governing cancellation of solicitations to be ambiguous because, as promulgated, it includes language that simply does not make sense in the English language. The provision in question reads “An invitation for bids or

¹ OPA has recently taken the position that the regulations designating the Public Auditor as the adjudication body for the central government under NMIAC § 70-30.3-505 exceed the regulatory authority vested in the Department of Finance. *Micronesian Environmental Services, LLC. V. Kina B. Peter, et al.*, Civ. Nos. 20-0344-CV and 21-0004-CV (consolidated) (Super. Ct. March 8, 2021) (Motion to Dismiss under NMI R. Civ. P. 12(b)(6)). The identical statutory and regulatory arguments applicable in OPA’s position with respect to that collateral matter apply equally to the CUC regulations, however, notwithstanding the position OPA has taken in that matter, the CUC regulations enjoy a presumption of validity until ruled otherwise by a court of law, and OPA is bound to carry out its duties as the designated adjudication body.

request for proposals may be cancelled ... when such action is determined in writing by the Director and approved by the Chairman, Board of Director to be in the best interest of CUC *or* any of the following reasons [enumerated justifications follow].” NMIAC § 50-50-235.

As recognized by the Law Revision Commission with an asterisk, the “or” by itself does not make sense. The oversight is apparently a typographical omission or lapse of grammatical rules. OPA reasoned that two possible intended meanings exist: either an “f” was missing from in front of the “or” making the sentence read “best interest of CUC *for* any of the following” or the word “for” was accidentally removed after the “or” making the sentence read “best interest of CUC *or for* any of the following reasons.” Decision, p. 3. The differences between the two interpretations are great. The first limits CUC’s ability to cancel any procurement to seven enumerated scenarios. The second allows CUC to cancel any procurement whenever it is determined to be in CUC’s best interest.

In its decision, OPA concluded the intent of the regulations were to favor more flexibility to CUC to cancel procurements when it serves CUC’s best interest. OPA arrived at this conclusion based on a review of the Department of Finance regulations, which OPA posited to be the model for CUC and other Commonwealth agencies. In doing so OPA overlooked, as pointed out by Fanter, the timing of the promulgation of the CUC regulations relative to the regulations which OPA compared them to.

As identified by Fanter, the Department of Finance regulations in effect when the CUC regulations were promulgated *did not* include the “best interest” justification to cancel a solicitation. *See*, Commonwealth Register Vol. 7, No. 5, p. 3660-61 (May 21, 1985). The Department of Finance regulations that OPA relied upon in its decision were adopted shortly *after* the CUC regulations containing the ambiguity were adopted. *See*, Commonwealth Register Vol. 12, No. 09 (p. 7296 (September 15, 1990); Commonwealth Register Vol. 12, No. 06 (p. 7086 (June 15, 1990). Indeed the Department of Finance regulations in effect at the time the CUC regulations were promulgated limited cancellation to the same seven enumerated justifications as the CUC regulations. If the CUC regulations were indeed modeled after the Department of Finance regulations in effect at the time, which OPA believes they clearly were, then the ambiguity must be resolved in favor of the

limited reading. Accordingly, OPA must correct its decision in BP-A101 and conclude the CUC regulations only allow cancellation of solicitations when cancellation is based on one of the seven scenarios enumerated in the regulations.

The regulation must be read as follows:

[W]hen such action is determined in writing by the Director and approved by the Chairman, Board of Director to be in the best interest of CUC *for* any of the following reasons:

- (a) Inadequate or ambiguous specifications contained in the solicitation;
- (b) Specifications which have revised;
- (c) Goods or services being procured which are no longer required;
- (d) Inadequate consideration given to all factors of cost to CUC in the solicitation;
- (e) Bids or proposals received indicate that the needs of CUC can be certified by a less expensive good or service;
- (f) All offers with acceptable bids or proposals received are at unreasonable prices; or
- (g) Bids were collusive.

NMIAC § 50-50-235. Accordingly, CUC may not simply cancel solicitations when it deems cancellation to be in the corporation's best interest. Cancellation is only proper when it is deemed in CUC's best interest *and* one of the enumerated reasons is present. Should CUC wish to expand their discretion to cancel solicitations when it suits their best interest and conform their regulations to those of the Department of Finance and many other Commonwealth agencies, they must follow the regulatory process and promulgate amended regulations.²

Having concluded the regulations do not allow cancellation in CUC's best interest, absent falling into one of the enumerated reasons in NMIAC § 50-50-235 (a) through (g), OPA must now determine whether any of the enumerated reasons were present to support the cancellation of this solicitation and must consider Fanter's remaining claims brought forth in their appeal.

² If CUC were to pursue such amendments, OPA recommends CUC take the opportunity to remove OPA as the adjudication body over their appeals and bring the regulations in conformity with the NMI Constitution and the recently revised Department of Finance regulations, which has removed OPA from the process.

The CUC Executive Director's justification for the cancellation of CUC-IFB-19-028, Rev. 2 was "The total bid cost of the second lowest bidder – USA Fantar (sic) Corporation, Ltd. exceeded the CUC W/WW Certified Budget threshold for CUC-IFB-19-028, Rev. 2." Notice of Cancellation, p. 2 (March 29, 2021) (attached as exhibit A to Fanter's Appeal). Thus, it is clear from the initial cancellation that CUC relied upon the *cost* of the remaining viable bids as the motive for its cancellation of the solicitation. Though the term "unreasonable" is not stated directly in the notice of cancellation, where all remaining bid prices exceed the certified budget for a project, essentially those bids are "unreasonable" relative to the contracting agency's budget for the project.

Subsection (f) of NMIAC § 50-50-235 allows CUC to cancel a solicitation where all remaining bids are at "unreasonable" prices. Certainly the CUC procurement regulations, which are to be interpreted to "maximize to the fullest extent practicable the purchasing value of CUC funds" would not require CUC to accept a bid and award a contract that exceeded the amount of funds budgeted for any given project. NMIAC § 50-50-001 (b)(3). As noted by the Director in his protest decision and Report, such activities would be fiscally irresponsible. Protest Decision, p. 2 (June 3, 2021); Director's Report, p. 2 (July 14, 2021). Where all remaining bids exceed the agency budget threshold for a project, cancellation based on "unreasonable prices" of those bids would be appropriate.

OPA must now consider Fanter's objections to both the reasonableness of the CUC budget threshold established for this project and that the budget threshold was not included as an essential or material term of the solicitation.

The aggrieved bidder, in this case Fanter, bears the burden of demonstrating the agency action was in violation of regulations or lacked a rational basis. The authority vested in a contracting officer to determine whether to cancel a solicitation is broad. A determination as to the unreasonableness of prices is a matter of administrative discretion and should not be disturbed unless it lacks a reasonable basis or upon a showing of fraud or bad faith. *Overstreet Elec. Co., Inc. v. U.S.*, 47 Fed.Cl. 728, 732 (2000). OPA considers project budgets to be a "business judgement" and will not second guess those decisions of another agency unless they are shown to lack a reasonable basis. OPA affords other matters of administrative discretion in procurement similar deference.

See In re: Resource Management International, BP-A055 p. 3-4 (July 15, 2008) (recognizing that a determination of responsibility is a business judgment).

In the present matter, prior to publishing the solicitation, CUC established a certified budget for the Sadog Tasi Water Clarifier replacement project. The budget was signed off on by Western Knudsen, CUC's Project Engineer for water and wastewater engineering. Exhibit C, p. 5. The Acting Fiscal and Budget Officer and the Executive Director of CUC also approved the budget certification. Mr. Knudsen's certified estimate, along with the project contract documents (final design plans and technical specifications), the requisition voucher for funding certification for the EPA funded project, and the Director's approval for solicitation processing, are all sent to the Procurement and Supply Manager prior to the publication of the solicitation for the project. Exhibit C, p. 4. The budget threshold established for Revision 2 was \$1,250,000. Exhibit C, p. 5. The \$1.25M budget threshold had been increased from \$1.1M after cancellation of the first revised solicitation. Exhibit C, p. 2-3.

This process suggests several things to OPA. First, CUC has a protocol in place to set its budgets in advance of the solicitation, which reduces any risk of CUC using its budget limit to cancel projects selectively or arbitrarily. Second, it indicates that CUC was willing to increase its budget after the first revision did not attract any viable bids below its budget threshold. While the documentation does not detail CUC's basis for arriving at the final number, it does indicate the project specifications were analyzed by an engineer and the engineer based the number on those specifications. The budget number is then signed off on by both the CUC Budget Officer and Executive Director. The process for setting the budget on projects appears reasonable and Fanter has not demonstrated, other than complaining that their bid was in excess of the budget maximum, that the budget ceiling or process to arrive at the budget number was arbitrary.

The case relied upon by Fanter to suggest that CUC has an obligation to demonstrate that Fanter's bid was unreasonable is distinguishable.³ In *Brickwork Contractors, Inc.*, the Navy cancelled an

³ OPA notes the facts are distinguishable, in addition to the regulatory landscape. While OPA often looks to federal procurement decisions for guidance or persuasive authority, the federal acquisition regulations differ from the CUC regulations.

IFB after several other unsuccessful efforts to change the nature of the project, claiming the cancellation was based on “all otherwise acceptable bids received are at unreasonable prices,” among several other grounds. 49 Fed.C. 148, 160 (2001). In *Brickwork*, there was no budget ceiling upon which the “unreasonable” prices were based, but instead it was clear that other motivations existed, as the Navy did not mention the unreasonableness of the bid prices or that bid price motivated their desire to cancel the solicitation. *Id.* at 160-161. Additionally, the Navy had failed to follow the procedures detailed in the federal acquisition regulations to cancel a solicitation or convert the sealed bidding into a negotiated procurement. *Id.* at 162. Instead, the Navy attempted to use the “unreasonable prices” justification well after they had exposed their true motivations to cancel the procurement. Conversely, in the present matter, CUC set its bid ceiling prior to the solicitation and relied upon the pre-existing budget to assess the reasonableness of the bids. Fanter’s suggestion that CUC should simply grab at some of the many millions of dollars in grant money floating around CUC to make up the difference between CUC’s established budget ceiling for the project and Fanter’s bid price is outrageous.

Fanter next objects to CUC’s budget ceiling on the grounds that it was, in effect, one of the IFB’s “essential terms and conditions” and should have been included in the invitation under NMIAC § 50-50-205(a)(9).⁴ Fanter is correct that CUC must include all essential and material terms of any competitive sealed proposal project in the invitation for bids. These essential terms and conditions are the criteria used to judge the responsiveness of the offers. However, Fanter is mistaken that a price ceiling qualifies as such a term or condition. While the price ceiling defines *per se* what is “unreasonable” in terms of price, the ceiling itself is not itself an essential or material term of the solicitation. Typically to determine whether a term of a solicitation is material, OPA analyzes whether the term affects “price, quality, quantity, or delivery of goods or services” or the “legal obligations” of a contracting party. *In re: GPPC and Hawaiian Rock*, OPA Appeal No. BP-A069, p. 7-8 (July 10, 2012). Moreover, an essential term is one that is “indispensably necessary to accomplish the purpose of the procurement.” *In re: Appeal of All Around Security*, OPA Appeal No. BP-A021 p. 8 (April 4, 2000). Determining whether terms are essential or material requires

⁴ Fanter incorrectly cites to NMIAC § 50-50-405(i), however OPA recognizes they are making an argument under NMIAC § 50-50-205(a)(9).

inquiry into whether they are necessary in *performance* of any given project, not those necessary in *securing* the contract.

It would be ill-advised from a contracting standpoint for an agency to disclose a bid ceiling in an invitation for bids. The CUC Regulations are to be interpreted in a way so as to “provide increased economy in CUC procurement activities and to maximize to the fullest extent practicable the purchasing value of CUC funds.” NMIAC § 50-50-001 (b)(3). Disclosing the budget for any project gives potential bidders the upper hand in submitting proposals that come as close to the budget ceiling as possible while still remaining competitive among other bidders. In other words, while a budget ceiling might be good for bidders who may choose to maximize their bids, or to bidders who may opt out from preparing a bid for a project if the ceiling is not high enough, it does not operate to CUC’s advantage in any scenario.

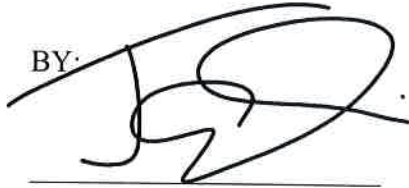
Setting a budget ceiling for any project represents sound procurement practice for CUC, provided it is done in advance, with consideration for the reasonable costs of the project, and applied objectively and consistently. OPA finds that setting a budget ceiling for a project is neither a material nor an essential contract term for competitive sealed bidding under NMIAC § 50-50-205 (a)(9).

DECISION

For the reasons set forth above, the Office of the Public Auditor modifies its September 16, 2021 decision in the appeal by USA Fanter Company, Ltd. with respect to the interpretation of NMIAC § 50-50-235. With respect to the alternative arguments presented, the Office of the Public Auditor denies USA Fanter Company, Ltd.’s claim that the budget ceiling was arbitrary, capricious or an abuse of discretion and denies USA Fanter Company, Ltd.’s claim that the budget ceiling was a material or essential term that should have been included in the invitation for bids.

Dated this 2nd day of November, 2021.

BY:



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