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June 14, 2007

*** by fax and email ***

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Re: Procurement appeal by Telesource, CNMI, Inc. regarding the CUC's RFP 07-001
Your question on jurisdiction, etc.
New matter – pl 15-67 amendatory act – and responsive “brief” to Telesource
May 15 reply

Dear Public Auditor Sablan:

On April 30, 2007, I provided you a letter brief on this matter. Telesource replied on May 15, 2007. In the interest of bringing this matter to rapid closure, I did not file a responsive letter brief. But last week's override of the Governor's veto of HB 15-237, PL 15-67, an amendatory act to the PUC Act, PL 15-35, and the first amendment, in PL 15-40, obligates me to address this statutory change.

The new law provides for an “automatic pre-qualification” for CUC RFPs. If Telesource managed to meet the statutory preconditions, it would now seem to acquire the standing it gave up when it refused to pay the required fees or submit any statement of its qualifications to run a retail power business. Without addressing the *ex post facto* nature of the amendatory act in relation to the instant procurement, I offer my legal and factual analysis. I also discuss a line of federal appeals, which Telesource's letter brief actually raises, which supports your dismissing the Protest for lack of standing.

I hereby request leave to file with you this responsive letter brief. The first part addresses solely the change in the law from the amendatory act. The second part responds to Telesource's May 15 filing and the on-point federal procurement case law.

I must observe that this is probably the largest procurement action that the CNMI will ever take. Its success may determine the fate of our children and grandchildren, as the CNMI's energy future becomes subject to the likely high costs of fossil fuels during the

next decades' significant climate changes. Our future lies with the efficiencies and creativity of the private sector. Indeed, this was our promise to the federal government over 20 years ago -- that we would privatize what we could privatize of the \$200-million in utility infrastructure generously contributed to our government-owned power utility.

This Government has carefully and deliberately considered our energy options. We have undertaken the most careful and transparent of procurement processes. We have tried to simplify and make the process cost-effective by splitting the process into manageable pieces. We have been generous in extending deadlines. We believe that Telesource received more than fair treatment. It gave up any role it had in this procurement. It now acts only as a spoiler of the privatization effort. The Federal Circuit has consistently rejected similar spoilers.

I request that you take jurisdiction of the Protest, address the factual and legal issues which it presents, and provide the parties and the courts with your written opinion. In the meantime I ask you to make such interim decisions as will permit the procurement process to continue without delay or interference.

Respectfully submitted,

/s
Matthew T. Gregory,
Attorney General

cc: Herman S. Sablan, P&S; Anthony C. Guerrero, CUC; Robert O'Connor, Telesource; Edward Manibusan, CUC

Table of Contents

PART 1: PL 15-67 AND *DE MINIMIS* IMPACT ON THE PROCUREMENT..... [4](#)

1. **Last week’s amendatory act changes nothing legally**..... [4](#)

 a. **The Act *appears* to give Telesource a pass on “automatically” pre-qualifying**..... [4](#)

 b. **But the Act presents four pre-requisites, two of which Telesource cannot meet**..... [5](#)

 d. **Telesource fails to qualify for “automatic pre-qualification” because it has not paid the second required fee, \$25,000.**..... [6](#)

 e. **Telesource still does not qualify for “automatic pre-qualification” because it is not in a “business that is closely related to the utility service for which [CUC] publishes an RFP” – the integrated retail power business.**..... [6](#)

 f. **The amendatory act is bad public policy, and merely a spoiler**..... [8](#)

 g. **The amendatory act’s benefit is an illusion – any firm, in order to compete for the CUC power business must demonstrate its qualifications in the final review**..... [9](#)

PART 2: RESPONSE TO TELESOURCE MAY 15 LETTER BRIEF..... [10](#)

2. **There is no dispute – the Public Auditor has jurisdiction**..... [10](#)

3. **CUC did timely answer the Telesource Protest as to the non-law arguments, notably the fee issue and the evaluation criteria**..... [10](#)

4. **Telesource lacks standing to protest anything because it is neither an actual nor a prospective offeror.**..... [10](#)

CONCLUSION..... [14](#)

PART 1: PL 15-67 AND *DE MINIMIS* IMPACT ON THE PROCUREMENT

1. **Last week's amendatory act changes nothing legally.**

Telesource brought this Protest apparently to avoid paying the "pre-qualification" fee and to avoid submitting for review its qualifications to run a retail power utility. The firm cited new statutory language, per PL 15-40 (Annex D to the RFP Invitation), that, it claimed, gave it permission to file in the procurement process. In effect, Telesource argued that, after it had repudiated the procedures of the procurement, PL 15-40 gave it standing to protest.

The Attorney General argued that Telesource had no standing to Protest because the firm had failed to meet the RFP's submission and fee requirements AND, further, it had failed to satisfy PL 15-40's prerequisites – Telesource's IPP business was not "closely related" to the RFP'd retail power business, Telesource had not even been in the IPP business for the required 10 years, and it had not paid the required RFP fee.

Now the Public Auditor's decision may need to address an after-the-fact legislative attempt to repair Telesource's lack of standing. This past week the Legislature passed a slight revision of PL 15-40, over the Governor's veto, changing the 10-year requirement to an 8-year requirement, and adding the concept of "automatic prequalification" upon satisfaction of the stated criteria. Presumably Telesource would retain an interest in the procurement if it could qualify under the new amendatory act's "automatic pre-qualification".

Importantly, it is not clear that PL 15-67 can apply to this procurement. Telesource must provide the Public Auditor with the authority that a post-hoc legislative change can affect the qualifications for a procurement, specifically the closed first stage, to the detriment of those already qualifying. But this point need not be argued now.

Rather, within the four corners of PL 15-67, it is clear that Telesource cannot avail itself of the Act. PL 15-67, as did PL 15-40, explicitly requires a firm's paying the "required fees", and requires that the firm be "closely related" to the subject of the RFP – the integrated, retail power business. Because Telesource meets neither of these criteria, it lacks standing to protest.

a. **The Act *appears* to give Telesource a pass on "automatically" pre-qualifying.**

The amendatory act provides that a qualified business "...shall be permitted to submit a proposal **upon the payment of the required fees**" and would thereupon be "automatically prequalified":

(c) Notwithstanding 4 CMC § 8439 and any other provision of law, the Commonwealth Utilities Corporation may: (1) issue a , request for proposals to privatize or transfer ownership, control, management, or operations, in whole or in part, of a utility service and the property relating to that service, and (2) award such contract, contingent upon the contractor obtaining from the Public Utilities Commission a certificate of public convenience and necessity required in 4 CMC § 844I. The Commission's review shall include a determination as to whether the divestiture and the contractor's proposed rates, charges, assessments, and costs are consistent with the public interest. A business, that is licensed in the Commonwealth for at least ten years and has been engaged in the Commonwealth for at least eight years in **a business that is closely related to the utility service for which the Commonwealth Utilities Corporation publishes a request for proposal or solicits bids**, shall be permitted to **submit a proposal upon the payment of the required fees** and automatically pre-qualified as a responsible bidder or offeror for, such request for proposal or bid."

PL 15-67, Section 2 (amending 4 CMC § 8122(c) (June 5, 2007, override of Governor's veto of May 17, 2007). (Emphasis added)

As I discuss *infra*, Telesource failed to meet the criteria that would allow it to enjoy the putative benefit of the amendatory act, the "automatic pre-qualification". Also, as I discuss *infra*, that benefit is illusory.

b. But the Act presents four pre-requisites, two of which Telesource cannot meet.

In order to avail itself of this amendatory act, Telesource had to meet four criteria. It met only two of the criteria. Thus Telesource continues to lack a place in the competition.

The RFP seeks a company to serve as an "integrated" retail power utility – controlling generation, transmission, operations, maintenance, customer service, billing and collections. The RFP also makes clear the scope of the Stage 1, required Pre-Qualification proposal document – essentially a firm resume with financial and operations details appended to it. Finally, the RFP requires a fee of \$25,000, the Pre-Qual submission fee. (In Stage 2 it requires a \$50,000 fee and a business plan.)

Telesource, in order to avail itself of the amendatory act's benefits, must satisfy all four criteria:

1. Be licensed in the Commonwealth for 10 years;
2. Be engaged in the Commonwealth for at least eight years,
3. In a business that is "closely related to the utility service for which the [CUC] publishes a request for proposal"; and

4. Pay the required fees.

Telesource meets only two of the four criteria.

- c. First two requirements: Telesource has been active in the IPP business for 8 years and has had a business license for 10 years.

One big change which PL 15-67 makes from the law in effect when the offerors submitted their qualifications is that the "closely related business" period has been reduced from 10 years to 8 years. Telesource has been an IPP for 8 years. And Telesource has had a business license for 10 years.

There is no dispute now that Telesource satisfies the two **time periods**. The dispute is still over the other two criteria. If Telesource fails to meet both, it has no arguable interest in this procurement.

- d. Telesource fails to qualify for "automatic pre-qualification" because it has not paid the second required fee, \$25,000.**

Telesource took itself out of the running when it refused to pay the required \$25,000 Pre-Qualification fee.. Telesource protested the fee by letter of February 22, 2007. (Telesource Protest letter) It did pay the \$1,000 fee to obtain the Pre-Qual document/"Invitation". It then had the Month of March to decide whether to pay the fee, pursuant to its request for the extension that took the filing date to April 4, 2007. Now, two months later, Telesource has yet to pay the \$25,000 "required fee" for the Pre-Qual submission.

Because it has failed to pay the fee required by the RFP Telesource continues to lack any legally defensible interest in the procurement. This was the case before PL 15-67 became law. It is still the case.

- e. Telesource still does not qualify for "automatic pre-qualification" because it is not in a "business that is closely related to the utility service for which [CUC] publishes an RFP" – the integrated retail power business.**

As a separate matter, Telesource fails to qualify for the Act's putative benefit of "automatic prequalification" because it is not, and has never been, in a business "closely related" to the full service, integrated retail power utility business. This point cannot be over-emphasized.

CUC is an integrated retail electric utility, identical to those thousands of firms found in the private and public sectors in the US for over 100 years. This utility, like thousands of others, does all of the following:

- generates power, by building, fueling, and operating its own plants
- transmits and distributes power over its own wires
- operates and maintains its system – plants, wires, office buildings, service drops and meters, with its own crews
- bills and collects for service from its customers
- receives, and responds to, its customers' complaints

See, e.g. the websites for the investor-owned utilities ("IOU's"), www.eei.org, and the municipally owned utilities, "public power" or "muni's", www.appa.org. Textbooks have long been written describing this industry and the structure of these firms. *E.g.*, Bonbright, Danielsens & Kamerchen, *Principles of Public Utility Rates*, 2d Ed., Arlington, VA: (Public Utilities Reports, 1988) (cited repeatedly in the Westlaw PUR database)¹ and annual courses provided by industry regulators to the commissioners serving on the 54 state, local and national public utility regulatory commissions, and to industry professionals, www.ipu.msu.edu, sponsored by the National Association of Regulatory Utility Commissioners, "NARUC", www.naruc.org. For instance a short version of the NARUC course, for (simpler) water utilities, produced a manual of approximately one thousand pages, covering the facets of a retail utility firm, including regulatory accounting, engineering, finance, customer service, and revenues.²

Telesource is not a retail electric company. It is not even "closely related" to one. It is an IPP, an independent power producer. Telesource does not service thousands of customers over three islands, or maintain hundreds of miles of distribution lines.

Telesource does but one of the six key things that a retail electric utility does – it generates power in a single power plant.. Indeed, it does less. A typical integrated utility, like CUC, buys its own fuel. Telesource does not buy its own fuel; it takes fuel that CUC buys. This means, for instance, that Telesource employs no one whose job it

¹A copy of the 700-page book is available for review at the Attorney General's Civil Division.

²The MSU/IPU Course Schedule and curriculum were as follows: Introduction and overview; water industry perspectives; legal framework and the regulatory process; basics of utility rate setting; regulatory accounting; developing the rate base; small group session; ratemaking issues for electric and gas utilities; small group session; income statement; small group session; the utility industries compared; cost of capital and corporate finance issues; small group sessions; economics of rate design; cost allocation methods; rate design alternatives; mock rate case summation; small group sessions; evaluating regulatory and ratemaking options; integrated water resource management; analysis and discussion of group solutions. (34th Annual Eastern NARUC Utility Rate School, September 10-15, 2006, Clearwater Beach, FL....Course Materials and Mock Rate Case (MSU IPU 2006). (Review copy available at the Office of the Attorney General.) Water is simpler to run and regulate than is power.

is to monitor oil, and other fuel prices, negotiate contracts and, as required by CNMI PL 15-23, look to alternative sources of energy to power its customers.

Put a bit differently, Telesource is as “closely related” to the business to be sold through the RFP as is a janitorial company, or an accounting firm, or a company that digs ditches for laying cables. CUC does all of these things, but doing only one of them fails to capture the “close relationship” that the RFP envisions.³

A closely related company to CUC's power business would be one with the experience and capability of procuring its raw materials, creating the product, delivering the product, running the distribution system, billing and collecting for service and addressing retail customer service needs. There are lots of these in the US, Japan and Australia. Here in the CNMI the closest such companies are the other public utilities – CUC's water business, PTI's telecom services and MCV's cable television services. Indeed, the Legislature has recognized this similarity because it enacted a comprehensive Public Utility Commission statute to regulate all of these businesses as public utilities – power, water & sewer, telecom and cable.

The alternative view, which Telesource advances, is untenable. For, if mere generation of power were held to be “closely related” to the privatized, regulated, integrated, electric public utility, then, literally, a janitorial firm could argue that it qualified for the same status because CUC employed staff to clean up its offices and power plants.

But the Public Auditor need not determine which pieces of a “deconstructed” public utility are so similar to the whole that they are “closely related”. The Legislature has already made that determination by identifying four other businesses to be so closely related in form to the power business that they must be regulated – water and sewer; telecom; and cable. Telesource cannot meet this “closely related” precondition to the automatic pre-qualification which the amendatory act appears to offer. Telesource therefore lacks any stake, any standing, in the procurement process. It cannot maintain this protest.

f. The amendatory act is bad public policy, and merely a spoiler.

It is fortunate that the amendatory act, which appears to have been passed for the benefit of Telesource, turned out to have been worded to exclude Telesource from any

³Herein lies the “close relationship” that the Legislature may have been addressing: If CUC had once again put out for competitive proposal the supply of power from one power plant, as it had done twice in recent years, Telesource would have met the criterion. Telesource runs a power plant and it recently won an RFP competition to provide another one. In the case of an RFP for generation the amendatory act would have made perfect sense – Telesource should not, in fairness, have to again prove its qualifications to run a power plant for CUC. But the instant procurement is **not** for a power plant.

preferential procurement status. The act is bad policy, for two reasons.

First, it sends a destructive message to the international business community. At a time when the CNMI economy is hemorrhaging it tells the business world to avoid the CNMI because the Legislature plays favorites in the marketplace, and it does so unfairly, by changing our procurement rules in the middle of the process. This is hardly the stable, American commercial system which the CNMI Executive Branch weekly describes to potential foreign investors.

Second, the amendatory act appears to be an effort to reinstate a procurement that Telesource thought it had "won" just a few years ago to provide another power plant to Saipan. Perhaps Telesource believed that by encouraging special interest legislation, and "scaring" away suitors for CUC, it would kill the privatization. This would presumably leave the government utility too financially weak to fix its system, so that it would have to reinstate the (expensive) Telesource IPP deal.

This would leave CUC's customers chained to the oil-fired power plant that Telesource would build and operate, and for which CUC customers would have to "take or pay" anyway for unneeded and overly expensive power.

g. The amendatory act's benefit is an illusion – any firm, in order to compete for the CUC power business must demonstrate its qualifications in the final review.

Even if Telesource met the criteria "automatically pre-qualifying" it, the firm would still have to prove its ability to provide the complete, integrated retail power utility service that the RFP requires. As a practical matter, the Stage 2 evaluation grid must include the criteria addressed in the pre-qualification stage.

Separating the RFP process into two stages was simply a convenience for both the CUC and the offerors. It saves everyone time and money – a firm that simply cannot make the cut to run an \$85-million-per-year integrated public utility with thousands of retail customers need not pay the final \$50,000 fee and need not spend weeks of staff time drawing up the required business plan. Similarly, the CUC evaluators need not spend the considerable time and consultant expense reviewing the business plans of well-intentioned, but technically- and financially-incapable, offerors.

The Telesource Protest, if allowed, would get the firm nowhere. Telesource would still have to file its qualifications for the integrated retail power business AND pay the complete fee, totaling \$76,000. It would still have to be evaluated against other firms, presumably those offering experience in the retail utility business.

Telesource was a "no-show" – it never submitted the initial paperwork, and it certainly

never paid the \$25,000 fee. There is no reason to think it will do so now, or indeed file a business plan and a \$50,000 fee. As a no-show, Telesource has no standing to protest the procurement. The amendatory act makes no change in that status, because Telesource cannot meet the criteria that would make it a stakeholder, and "automatically prequalified".

PART 2: RESPONSE TO TELESOURCE MAY 15 LETTER BRIEF

2. **There is no dispute – the Public Auditor has jurisdiction.**

In my opinion OPA has complete jurisdiction, power and authority to address the referenced protest. You are the "appellate court" for administrative appeals taken under the CNMI procurement regulations. (70 NMIAC 30.3-505) Telesource disputes neither of these propositions.

Please note this contrast between our "state" and the cited federal procurement systems: The Public Auditor's jurisdiction proceeds from the Procurement Regulations' requirement that a "party" timely file a written protest. (70 NMIAC 30.3-505). In the federal system, by contrast, the Court of Claims must dismiss for want of jurisdiction if a party is found to be "not interested"; because the relevant statute provides for jurisdiction over "an action by an *interested* party objecting to a solicitation by a Federal agency for bids or proposals". *Rex Service Corp. v. U.S.*, 448 F.3d 1305, fn. (Fed.Cir. 2006) (emphasis in original) As discussed *infra*, because the parties in the cited federal procurement cases failed to file anything except protests – i.e. no bids or proposals – they were found to be "not interested.", and without standing.

3. **CUC did timely answer the Telesource Protest as to the non-law arguments, notably the fee issue and the evaluation criteria.**

Telesource fails to respond to my observation that CUC **in fact** answered all its claims. CUC simply did not do so with a formal document.

4. **Telesource lacks standing to protest anything because it is neither an actual nor a prospective offeror.**

Telesource strongly disputes the Attorney General's argument that it lacks standing. Its argument is that it must be found to be a "prospective offeror". It argues for a subjective test – "the question...can only be resolved by the offeror itself, since only the offeror can know its own intent." Telesource Reply Letter, p 2, 3rd full paragraph. But the federal courts of appeal employ an objective test, and, indeed, **the very cases that Telesource cites demonstrate that the firm's failure to file anything other than its**

Protest requires that it be dismissed for lack of an interest.

The bottom line is that Telesource has no right under the P&S regulations to file a protest because Telesource is not an "actual or prospective offeror". It has no standing to Protest, or to further disrupt this procurement. Only the P&S regulations give the right to protest, and only to an actual or prospective offeror:

§ 70-30.3-501 Protests to the P&S Director

(a) General

(1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the P&S Director....

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

The federal circuit court of appeal which reviews US Government procurements, and with a very similar fact pattern before it, upheld the dismissal of a disgruntled competitor for lack of standing. *MCI Telecom. Corp. v. U.S.*, 878 F2d 362 (Fed. Cir. 1989), cited at Telesource Reply Letter p 2, first full para.:

This case, then, poses the question whether a would-be protestor wishing to bring about a resolicitation on which it says it intends to bid has the necessary status, even though it failed to either bid in response to the original solicitation or to protest before the close of the proposal period for the original solicitation. The government argues that "[t]he plain language of the statute does not provide that there can be any 'prospective' offeror after the time has passed for submitting proposals in response to a solicitation." In its view, the solicitation must be outstanding when protested in order for those having not yet submitted bids to be considered prospective bidders on the proposed contract. We agree.

MCI*, 878 F2d at 364-65. Four panels of the Federal Circuit Court of Appeals have followed the MCI decision. *Rex Service Corp. v. U.S.*, 448 F.3d 1305 (Fed.Cir. 2006). A party which could have bid before the close of the relevant period, but chose not to, is "not a prospective bidder" for standing purposes. *Id.

Telesource is not an actual offeror, and offers no prospect of being an offeror. It might have been an actual offeror if it had done what the other offerors did by April 4 – file its firm resume and answer the questions on financials and operating experience. Stage 1 has closed.

Telesource, presents a definition of "standing" recognized in the CNMI. But its argument confuses the status of the Commonwealth's Constitutional law enforcer with the required action of a party to a case. Telesource cites the well-publicized *Malite* case's holding that the Attorney General had standing to sue to stop an allegedly illegal land compensation program award, for the proposition that standing is the courts' tool to determine if a party is sufficiently affected to insure that a justiciable controversy is presented.. Telesource Reply Letter p 1, last para., citing *Tudela v. Superior Ct.*, 2006

MP 7, 2006 WL 995296, at para. 2 (CNMI 2006), which itself cited *Borja v. Rangamar*, 1 N.M.I. 126, 131 (N. Mar. I.1990).

The cited *Borja* decision supports my analysis – the purpose of standing is to exclude a party from blocking a procurement when it has no real interest in the procurement. *Borja* had held that the parties asserting an interest in a property dispute lacked capacity to participate because they were trespassers, and that the trial court had properly excluded them, but mistakenly applied the concept of standing. *Borja*, 1 NMI at 131. Rather, the *Borja* court pointed out, “[t]he purpose of the law of standing is to protect against improper plaintiffs.” *Id.*, citing K. Davis, *Administrative Law Text* 427 (1972). Standing is a threshold issue, and must be addressed before determining if the protesting person had an “economic interest” in a bid. *McRae Industries, Inc. v. U.S.*, 53 Fed. Cl. 177 (Fed.Cl. 2002).⁴

⁴McRae rejected a bid protest because the protestant had declined to file a bid. The McRae court also disposed of a case on which Telesource relies, *ATA Defense Industries, Inc. v. U.S.*, 38 Fed. Cl 489 (Fed. Cl. 1997):

The ATA Court expressly distinguished the factual situation before it from *MCI* (and therefore McRae):

[T]he *MCI* court indicated no more than if a party had an opportunity to bid on a contract but did not bid within the allowed time frame, then that party cannot be considered an “actual or prospective bidder.” The court did not have before it, much less address, the instant situation where the contracting officer precluded a party from submitting a bid allegedly in violation of controlling statutes and regulations.

Id. at 496-97. Here, no action by the government precluded McRae from submitting a bid. Rather, McRae had an opportunity to bid but chose not to do so. Therefore, McRae lacks standing under § 1491(b)(1).

McRae Industries, Inc. v. U.S., 53 Fed. Cl. at 181. The other case which Telesource cites is not on point. By its express terms it is not a procurement case – a VA hospital was going to sole-source its “sharing”, for a fee, of its new, expensive linear accelerator with a private hospital, and not bid out the deal, over the objections of Rapides Regional Medical Center, which owned two of the machines and had been making 20% of its revenues on VA patient referrals. The Fifth Circuit held that Rapides had proven its cognizable interest in blocking the deal, but the deal was not a procurement:

Implicit in the district court's holding that Rapides was denied the opportunity to participate in the sharing agreement is the recognition that Rapides would have done so if given the chance. There is sufficient evidence in the record that Rapides stood ready and willing to participate in the sharing program had it been offered the opportunity to do so. In suggesting otherwise, appellants ignore not only the **specific allegations in Rapides' verified complaint**, but the **affidavit of its president, James T. Montgomery, who stated that “[h]ad Rapides Regional been given the opportunity, Rapides Regional would have submitted a proposal** to VAMC in connection with consideration of submissions under the 1990 Advanced Medical Equipment Share Acquisition Program....” [fn omitted] While appellants point to some evidence that might be interpreted as disproving Rapides' intent to participate in the sharing agreement with the VAMC if offered

In the instant case, Telesource is an improper plaintiff. It had to earn its right to standing to protest. While the Attorney General had standing to sue in *Tudela/Malite* by reason of her Constitutional and statutory role as the Commonwealth's chief law enforcement officer, here Telesource **lacks** standing by reason of its **inaction** – it refused to file even the basic paperwork, a firm resume, to show how it could enter the retail power business. Telesource possesses no *a priori* status that gives it a right to protest.

More specifically, the RFP places no “financial burden on Telesource”, Telesource Reply Letter p 2, first para., until and unless Telesource sought to submit the paperwork which the RFP required – the firm resume and other qualifications materials. Until it made some effort to participate in the RFP Telesource had no role in the procurement any different from any person reading the newspaper containing the initial RFP announcement.

As in the federal procurement cases, *MCI* through *Rex*, the Protest must be dismissed for lack of standing.

the chance, the district court's implied factfinding is not clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Had the district court been convinced that Rapides' real motive was to block the VA-Cabrini deal rather than to make a competing offer, it would have had to deny standing, because Rapides would not then be an actual or prospective bidder. This conclusion was not compelled by the evidence, and we decline to overturn the court's finding. [fn 13]

[fn 13] **We need not and do not here decide that any prospective or actual bidder necessarily has standing to challenge a government procurement decision arguably governed by CICA.** Compare *Waste Management of N. America v. Weinberger*, 862 F.2d 1393, 1397-98 (9th Cir.1988). Affirmance of the district court is based on **Rapides' evidence that it could and would participate in the program if offered the opportunity** and that its self-interest dictated such a decision **because of its previous arrangement to supply other radiation therapy services to the VA.** Cabrini also argues that Rapides waived its claim by failing to file a timely protest with the Comptroller General, the federal official charged with hearing bid protests at the administrative level. This argument wrongly assumes that the Comptroller General has exclusive jurisdiction to hear CICA protests. In fact, the statute expressly provides otherwise. See [31 U.S.C. § 3556](#) (stating that administrative remedies under CICA are non-exclusive).

Rapides Regional Medical Center v. Secretary, Dept. of Veterans' Affairs, 974 F.2d 565, 570-71 (5th Cir. 1992) (emphasis added). The Circuit Court held, however, that the sharing deal was not a procurement.

CONCLUSION

Telesource lacked standing when it filed its protest. It continues to lack standing after the past week's legislative override. A 15-year line of US appellate cases supports the conclusion of no standing.

This amendatory act, PL 15-67, changes nothing in the conduct of this procurement.. Its damage to the procurement process – and it does serious damage to public confidence in the process – is by its external effect on the perceptions of the businesses the RFP was intended to draw to our shores. It is very important that the Public Auditor make clear that the statute does nothing to the outcome of this procurement. Indeed, it appears that Telesource, through its inaction, may have guaranteed that the amendatory statute has no effect.

The schedule of the first stage of the RFP process allowed Telesource to file something substantive – its qualifications. The Company did not, thereby rejecting the opportunity to be the required “actual or prospective offeror” required for standing under the P&S regulations.

As for the narrow procedural issue which the protest presents, the record allows you to find that CUC timely responded to Telesource's factual claims, through the RFP-FAQ website page. I urge you to conclude that CUC was not required to provide a legal rebuttal of Telesource's incorrect, unsupported legal claims.

You have the jurisdiction and power to address these issues. I urge you to address them in such a way that will facilitate the Commonwealth's timely and lawful execution of this critically important procurement.

I also request that you issue a written opinion and order, and if time is required to prepare it, issue a partial and immediate order clarifying procedures so that the procurement may proceed deliberately. Ultimately, I urge you to dismiss the Protest, on the ground that Telesource lacks standing under the P&S regulations to protest.

Respectfully submitted,

/s
Matthew T. Gregory,
Attorney General

cc: Herman S. Sablan, P&S; Anthony C. Guerrero, CUC; Robert O'Connor, Telesource; Edward Manibusan, CUC; CUC RFP website