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May 15, 2007

Michael S. Sablan  
Public Auditor  
1236 Yap Drive, Capitol Hill

**BY FAX AND HAND DELIVERY**

Re: Protest and Appeal Concerning CUC RFP No. 07-001

Dear Mr. Sablan:

The Attorney General, in a letter dated April 27 but sent April 30, has responded to your April 4 inquiry regarding OPA's jurisdiction of Telesource's pending appeal. The Attorney General, while he affirms that OPA has jurisdiction, also goes on to opine about other issues beyond the scope of the April 4 inquiry, such as the merits of Telesource's legal arguments and its standing to protest.

As stated in its May 3, 2007, letter to you, Telesource interprets the Attorney General's letter as (or as analogous to) a report on the appeal within the meaning of CNMI-PR § 70-30.3-505(d)(4). Accordingly (and having received no contrary instruction from your office or objection from any interested party), Telesource hereby submit its comments on the Attorney General's letter.

Telesource, to begin with, agrees with the Attorney General that your office has jurisdiction of this appeal (although not necessarily with his reasoning in reaching that conclusion). It disagrees, however, with the Attorney General's legal arguments regarding the merits of Telesource's protest and Telesource's supposed lack of standing, for the reasons set forth herein.

**Telesource Has Standing to Protest the RFP.**

The Attorney General claims that Telesource has no standing to protest. "Standing," however, is merely "a concept to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented[.]" Tudela v. Superior Court, 2006 MP 7 at ¶ 2 (quoting Borja v. Rangamar, 1 N.M.I. 126, 131 (1990)). Telesource is sufficiently affected, because the

elements of the RFP that Telesource challenges impose a substantial financial burden on Telesource, and potentially affect its ability to be lawfully selected as contractor for a major project.

More specifically, under the applicable rules, any "actual or prospective bidder, offeror or contractor" may protest a request for proposals, CNMI-PR § 70-30.3-501(a)(1), and Telesource is a prospective offeror. "Prospective" means "in the future," "looking forward," or "contemplating the future." BLACK'S LAW DICTIONARY (6<sup>th</sup> ed. 1990). A "prospective offeror" is therefore one who contemplates submitting an offer in the future – one who anticipates submitting an offer, or intends to submit one. The term has been so construed by the federal courts. See, e.g., MCI Telecommunications Corp. v. United States, 878 F.2d 362, 365 (Fed. Cir. 1989) ("The language of [the statute] plainly establishes, by use of the word 'prospective,' that, in order to be eligible to protest, one who has not actually submitted an offer must be *expecting* to submit an offer prior to the closing date of solicitation.") (emphasis in original); ATA Defense Industries, Inc. v. United States, 38 Fed.Cl. 489 (1997) (holding that a party that "intended and fully expected to present a bid to provide the work covered" was a "prospective bidder"); Rapides Regional Medical Center v. Secretary, Department of Veterans' Affairs, 974 F.2d 565, 570-71 (5<sup>th</sup> Cir. 1992) (holding that a party that would have submitted a bid if given the opportunity was a "prospective bidder").

Telesource is now, and was at the time it filed its protest on February 22, 2007, a prospective offeror, because it intended, and continues to intend, to submit a proposal and contend for award of the contract. Indeed, it has already explicitly advised CUC at least twice of its intent to make an offer. See Telesource's letter of March 7, 2007 ("[T]his will confirm that Telesource CNMI, Inc is very interested in the above reference project a intends to participate as a bidder in this procurement process."); Telesource's letter of April 4, 2007 ("[W]e intend to submit a sealed proposal for the upcoming privatization of CUC's power business") (copies of both letters attached as exhibits to Attorney General's letter). Telesource is therefore a prospective offeror with standing to protest.

Indeed, the question of whether one is a prospective offeror can only be resolved by the offeror itself, since only the offeror can know its own intent. The Attorney General cannot arbitrarily declare that Telesource does not have the intent, simply because he finds it "hard to imagine" how Telesource will put that intent into practice. Issues of the sufficiency of the proposal are for later, after the proposal is actually submitted.

### **The Attorney General's Interpretation of PL 15-40 Is Both Wrong and Irrelevant.**

The Attorney General also argues that Telesource does not meet the criteria of Public Law 15-40 that it have been "engaged for at least ten years in a business that is closely related" to the RFP. First of all, the Attorney General errs in assuming that the statutory language imposes a restriction on eligibility. The sentence at issue provides in full as follows:

A business, that is licensed in the Commonwealth and has been engaged for at least ten years in a business that is closely related to the utility service for which the Commonwealth Utilities Corporation published a request for proposals, shall be permitted to submit a proposal upon the payment of the required fees.

PL 15-40 § 3(g) (enacting new 4 CMC § 8122(c)). The statute, therefore, requires only that a business meeting the description "shall be permitted to submit a proposal." The statute does *not* provide that *only* such a business shall be permitted to submit a proposal. It does not provide that such a business, *and no other kind of business*, shall be permitted to submit. It certainly does not provide that a business *not* meeting the description shall be *forbidden* from submitting a proposal, or that any proposal submitted by a business not meeting the description shall categorically be rejected. The plain meaning of the statute, based on its actual language, is quite limited. See, e.g., Villanueva v. Tinian Shipping Co., 2005 MP 12 at ¶ 14 ("It is a basic rule of construction that the court look first to the plain meaning of the statutory language."); Commonwealth v. Pua, 2006 MP 19 at ¶ 10 (refusing to construe a statute "in such a way as to negate its plain language"). It merely guarantees that any offeror who has been engaged for at least ten years in a closely related business will be allowed to participate in the RFP. It does not operate to prohibit any other offeror from submitting a proposal, and having that proposal evaluated and acted upon. Thus it does not bar Telesource's offer, regardless of whether Telesource has been engaged for at least ten years in a closely related business.

Even if the statute were to be read, contrary to its explicit language, as imposing a restriction on eligibility, moreover, the Attorney General misconstrues the supposed criteria as excluding Telesource from consideration. In particular, he misconstrues the terms "closely related" and "engaged . . . in a business," arguing that the operation of a small power plant is categorically not "closely related" to the operation of a larger power plant, and that the design of a power plant and preparation of all necessary plans for the construction and operation thereof -- all of which was not just begun but *complete* by December 13, 1996 -- is categorically not part of "engaging in" a power-related business. Both "related" and "engaged in a business," however, are inherently broad and flexible terms, indicating a correspondingly broad and flexible intent on the part of the Legislature. After all, if the Legislature had intended to restrict eligibility to only entities that were already doing exactly the same work called for in the RFP, it could certainly have said so. Since the public law relates to an issue of procurement, moreover, it should be read so as to further the purpose of public procurement law, one of which is to foster fair and open competition for public contracts. The Attorney General's crabbed reading of the statute frustrates, rather than advances, this goal.

Most importantly, however, the Attorney General's legal arguments against Telesource's appeal, in addition to being erroneous, beg the actual questions now before the OPA. The question of whether or not Telesource meets any criteria that might be established for pre-qualification never even arises if, as Telesource maintains, the very existence of a pre-qualification procedure that excludes price as a criterion violates the express command of the Procurement Regulations that price "be included as an evaluation factor in *every* solicitation for

proposals," CNMI-PR § 70-30.3-210(e) (emphasis added), and is thus *per se* unlawful. See Telesource's February 22, 2007, Protest at 2. The Attorney General never so much as addresses this argument. Nor does he address the multiple problems that Telesource identified with the evaluation criteria, particularly CUC's ability to alter those criteria at will, see Telesource's Protest at 3-5, or Telesource's arguments that the pre-qualification criteria violate the Procurement Regulations, or that this procurement should have been done by competitive sealed bids. See *id.* at 5.

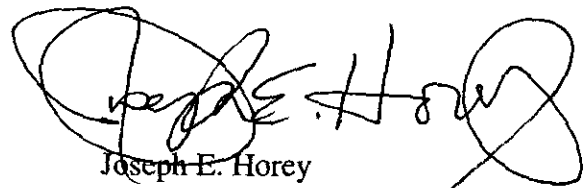
The Attorney General may implicitly address the issue of unlawful taxation and exorbitant fees (see Telesource's Protest at 2-3), by quoting e-mail correspondence from CUC claiming that the fees were supposedly necessary to hire evaluation experts, and to "insure that only serious offerors would participate." The latter of these reasons, however, is patently improper, as it functions as a pure disincentive, rather than anything necessary to defray the costs of the procurement. As for the former reason, the Attorney General provides no support whatsoever for the idea that the enormous fees charged were actually necessary for that purpose, and indeed he is quite careful never to actually endorse or adopt CUC's claim to that effect -- only to quote that claim. It is no answer to say, as the Attorney General does, that the statute uses the language "upon payment of the required fees." That language alone does not authorize CUC to "require" any fees that it may wish to require, without limit, and without any relation to the extent and nature of the services rendered.

### Conclusion

At times in his letter, the Attorney General (with good reason) expresses little confidence in his own arguments against the merits of Telesource's appeal, acknowledging the apparent circularity (in fact the actual circularity) of his standing argument, and writing that Telesource only "arguably" was not engaged in business until 1999. In fact, for the foregoing reasons, and for all the reasons set forth in the original protest of February 22, 2007, those arguments are indeed unavailing, and the instant appeal should therefore be determined in favor of Telesource.

Thank you for your attention to this matter.

Best regards,



Joseph E. Horey

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Edward Manibusan  
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