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Client/Matter: 3173-08/Telesource

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Letter dated June 26, 2007 to Michael Sablan.	4

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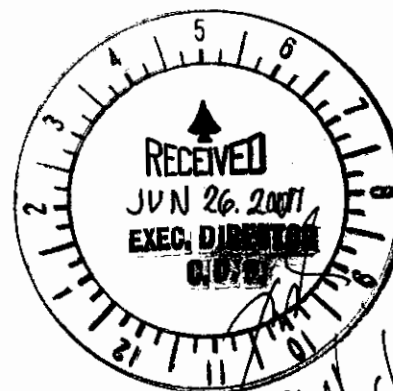
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June 26, 2007

BY FACSIMILE AND HAND DELIVERY

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

Dear Mr. Sablan:

Telesource responds as follows to the Attorney General's brief submitted on June 14, 2007:

The CNMI Procurement Regulations were established for the purpose of ensuring the just, speedy and orderly disposition of procurement disputes. To the extent those regulations are disregarded, with anyone who wishes commenting at will on anything at any time, the process degenerates into a free-for-all – something which can only frustrate the salutary purpose of the regulations. The AG has already once submitted comment on this procurement going beyond the scope of the regulations, to the extent that his April 30, 2007, letter went beyond the Public Auditor's inquiry regarding jurisdiction, and commented on the merits of Telesource's protest, and Telesource's standing to protest at all. He has now done it again, submitting an unsolicited brief setting forth his views on the legal effect of Public Law 15-67, and going on to present further, must belated, argument against Telesource's standing. This practice confuses the process and should be discouraged by the Public Auditor. If the Public Auditor decides to consider the Attorney General's irregularly-filed brief, Telesource has the following comments:

The AG Has No Apparent Standing To Be Heard Regarding This Appeal.

The AG claims that Telesource lacks standing, but in fact it is the AG's own standing that is questionable. In his initial letter of April 30, 2007, he justifies his

involvement by noting that he has "participated in the Governor's Privatization Task Force," and thus has "a role in this process, but a role that is independent to some extent." CUC, he further notes, "has employed its own able counsel in this effort, Edward Manibusan and Stephen Newman." In other words, the AG does not represent CUC, the relevant agency in this matter. On the contrary, by his own admission, he represents only himself, as a "participant" in the "Governor's Privatization Task Force," a body whose nature, status or purpose he never ventures to explain. It is not clear, for example, if the AG is even a member of the "Privatization Task Force," or, if he is, who the other members are, what their opinions might be, or what interest any of them individually, or even all of them collectively, have in this matter. As matters stand, there is no reason to consider the AG's opinion as having any greater weight than that of the Secretary of Labor, the Commissioner of Public Safety, or the Mayor of Saipan. He is, at most, a kind of self-appointed *amicus curiae*, and his submissions should be read in that light, if at all.

The AG's Interpretation of PL 15-67 Is Motivated By His Political Purpose of Making that Law Ineffective, Thus Undoing the Legislature's Veto Override.

The question of who the AG actually represents becomes more acute when we consider that the bulk of his brief consists of his interpretation of Public Law 15-67. With whose voice, and in whose interest, is he speaking in offering this interpretation? CUC's? No, he has already disclaimed that. The CNMI's as a whole? Hardly, since it becomes evident in Part 1(f) of his brief that he is actually arguing against a duly enacted Commonwealth law. Public Law 15-67, he claims, is "bad policy" that "sends a destructive message to the international business community." AG Brief at 9. It is "fortunate," says the AG, "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 preferential procurement status." *Id.* at 8-9. In other words, it is "fortunate" that the legislature (supposedly) defeated its own plain purpose. It could not be more glaringly obvious that the AG, under the guise of dispassionate (albeit gratuitous) analysis, is simply taking the Governor's side in an intra-governmental political disagreement, and seeking, on the Governor's behalf, to succeed in this forum where he failed in the political arena - i.e., to use the Public Auditor's Office as an instrument to "over-override" the Legislature's override of the Governor's veto. The AG's analysis should be read with this partisan, political end in mind, if at all.

PL 15-67 Should Be Construed To Accomplish, Not Defeat, Its Plain Purpose.

The historic context and legislative history of PL 15-67 demonstrates that it can and does apply to this procurement. Indeed, the Governor himself vetoed it for that very reason, writing: "I believe that this bill is both *untimely* and inappropriate . . . *The CUC power bid has been in the works since February 12, 2007... Altering the procurement process or requirements at this late date may well have adverse legal consequences.*" Governor's Veto Message to Legislature of May 17, 2007 (attached as Exhibit A) (emphasis added). If the Legislature did not intent for PL 15-67 to apply to this procurement, it would have responded to the Governor's veto by amending the bill to clarify that point. By overriding the veto instead, the Legislature indicated its clear intent

that the act apply to this procurement, notwithstanding the Governor's objection. The AG scuttles his own argument on this point when he admits that the act "appears to have been passed for the benefit of Telesource." AG Brief at 8. Having admitted that the legislative intent was to benefit Telesource, he cannot then credibly argue that the act be construed, directly contrary to the legislative intent, to exclude Telesource. Such an argument is contrary to the most fundamental principle of statutory construction, namely that a statute be construed so as to effectuate the legislative intent, and certainly not so as to directly defeat it.

Telesource Meets the "Closely Related" Requirement.

With marvelous sophistry, the AG argues that the generation of electrical power is not "closely related" to the generation and distribution of electrical power. He defines "closely related" so narrowly as to exclude every business in the CNMI except CUC itself. In the AG's view, only an "integrated retail electric utility" will suffice, and, while it may be true that "[t]here are lots of these in the US, Japan and Australia," AG Brief at 8, there are none in the CNMI, and to construe the term "closely related" to categorically exclude all companies now doing business in the CNMI would be defeat the legislative purpose in establishing the local pre-qualification (either the original or the amended version) in the first place – to give preferential treatment to local businesses. It also contradicts the Legislature's finding that "there are several companies that have been licensed to do business in the Commonwealth for at least ten years that may qualify to undertake the privatization of a utility service," and its express intent to "level the playing field for many companies that would otherwise qualify as a responsive bidder to any such request for proposals or bid." PL 15-67 (attached as Exhibit B), Section 1. If the Legislature meant by "closely related" what the AG contends, it could not have found that there were any potentially eligible companies doing business in the CNMI, must less "several" or "many."¹

Telesource Does Not Need To Pay the \$25,000 Fee To Be Evaluated For A Status that the Law Grants It Automatically.

Telesource is not required to pay the \$25,000 pre-qualification fee. Since it meets the statutory criteria, it is "automatically pre-qualified" – i.e., pre-qualified without submitting any materials, and without paying any fees. The "required fees" mentioned in the statute are those required to "submit a proposal," not to be evaluated for pre-qualification. Even under the unamended statute, a company meeting the terms of the local preference for pre-qualification was not required to pay the pre-qualification fee, or be evaluated for pre-qualification. Those fees and procedures were, and are, for proposers that are not licensed to do or doing a closely related business in the CNMI for the required periods of time. Companies such as Telesource that fall within the terms of

¹ The AG suggests that PTI or MCV is more "closely related" to the electric power business than is Telesource. One can easily imagine, however, what the AG would say if one of those companies had actually submitted a proposal in this procurement – that it does not know anything about electricity, and thus has no "standing."

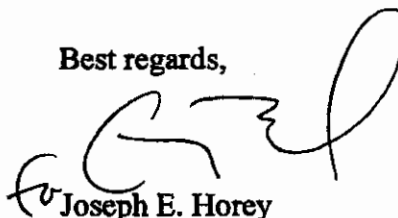
the statutory pre-qualification are, and always have been, entitled to skip the pre-qualification stage altogether and proceed directly to the evaluation of the proposal on its merits. Telesource wrote to CUC to confirm that this was indeed the case (see March 27, 2007, Letter of Michel N. El-Rahi to CUC Executive Director, attached as Exhibit C (“We would like to inquire IF a pre-qualified company as per the law is required to pay the \$25,000.00 pre-qualification proposal fee . . .”)), but received no reply. Having failed to say anything in response to Telesource’s inquiry, CUC cannot be heard to construe the requirement differently now.

Telesource Protested Before Even the Pre-Qualification Submittal Period Closed.

The AG argues against Telesource’s standing on the ground that Telesource has not yet submitted a proposal, and that the period for submitting one has closed. First of all, however, the time for submitting proposals has not yet closed, only the time for submitting pre-qualification information, which Telesource was not required to submit in the first place. Secondly, Telesource protested on February 22, 2007, before even the time for submitting pre-qualification information had closed. For both of these reasons, Telesource maintains its standing as a prospective offeror under the rule of such cases as MCI Telecommunications Corp. v. United States, 878 F.2d 362, 364-65 (Fed. Cir. 1989), and McRae Industries, Inc. v. United States, 53 Fed.Cl. 177, 180 (2002) (cited by the AG), which would deny standing only to a party that “failed to *either bid in response to the original solicitation or to protest before the close of the proposal period for the original solicitation*” (emphasis added).²

Thank you for your attention to this matter.

Best regards,



Joseph E. Horey

faxc / e-c:

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|------------------|---------------------|
| AG Matt Gregory | AAG Alan Barak |
| Edward Manibusan | Anthony C. Guerrero |
| Herman S. Sablan | Sheila Trianni |
| AAG Dana Emery | Steve Nutting |

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² The AG’s other cited case, Rex Service Corp. v. United States, 448 F.3d 1305 (Fed.Cir. 2006), appears to hold that a pre-closure protest is insufficient to maintain standing, but this is contrary to the rule of MCI, and is also supported only by a citation to Fed. Data Corp. v. United States, 911 F.2d 699 (Fed.Cir. 1990), a case in which the protestor (unlike Telesource) actually withdrew from the bidding prior to filing its protest.