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April 27, 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 in your April 4 letter to Sablan, P&S; Guerrero, CUC;
Gregory, AGO; O'Connor, for Telesource
Dismissal because not an "actual offeror" with protest rights

Dear Public Auditor Sablan:

In the above-referenced letter you asked: "In the event the Attorney General believes that OPA would not have authority to entertain an appeal related to this RFP or if CUC has been granted other procurement authority other than is set forth in the EO and the CNMI-PR, OPA would ask for immediate notification so as not to delay this matter any further." (Ltr of 4/4/07 fr MS Sablan, OPA, to AC Guerrero, CUC, p 3, last para.)

This is a two-stage procurement to sell CUC's power business to the most qualified offeror, part of the Administration's effort to fix a critical, flawed part of the CNMI's infrastructure. CUC will sell plant, materials, receivables and the contract rights, the "franchise", to sell retail power in the CNMI – all of which have been purchased with Government funds. Due to the complexity and cost of the effort, CUC has divided the process into two principal stages. The first stage determines who is qualified to run the power utility; the second stage determines who has the business plan that is best for the CNMI. Telesource, which runs a power plant with a contract to sell power to CUC, protested the process and declined to file its qualifications with CUC.

I have participated in the Governor's Privatization Task Force, directly and through one of my Assistants, Alan Barak. Thus I have a role in this process, but a role that is independent to some extent. CUC has employed its own able counsel in this effort, Edward Manibusan and Stephen Newman. I am copying your addressees, including counsel for Telesource, and Judge Manibusan..

I would like to respond to the statement in your letter, explain my response, and briefly address other, related matters which your letter suggests. There are, consequently, six sections to my letter. One of the reasons I am providing a lengthy response to your request is that my consideration of this matter has caused me to conclude that the Protest must be dismissed, because Telesource lacks standing to protest because it is neither the actual nor prospective offeror which the P&S regulations require, having voluntarily chosen to forego filing anything substantive in response to the RFP.

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1. You have jurisdiction.

In my opinion OPA has complete jurisdiction, power and authority to address the referenced appeal. The Public Auditor is the next level for appeals of the P&S Director. (70 NMIAC 30.3-505) In this case, the appeal is of an asserted **inaction**. You have jurisdiction over appeals of “failures to act”. (Id.) In this case the “P&S Director” was the CUC Executive Director, or his designee, for the reasons I discuss just *infra*.

2. CUC, which had been given procurement authority, properly conceded the jurisdiction when it applied CNMI procurement regulations.

There was some confusion over who was to respond to the Telesource Protest. One reason that a **formal** response to the protest was not forthcoming was an apparent mis-communication between CUC and P&S over who was to handle the procurement and who was to supervise it. (There was in fact a response to Telesource, which I discuss *infra*.) Apparently, CUC believed that it was to do the work of the procurement, applying P&S’ regulations, but with the general supervision and control of P&S. (See CUC’s attachments to its 4/09/07 letter to you.)

It was proper for CUC to apply CNMI procurement regulations. As a CNMI entity, its procurement regulations must comply with P&S’. (See AG Op 2003-13)

CUC is, by law, the master of its own procurements, but must follow P&S’ regulations:

§ 8152. Procurement and Audits.

(a) **The corporation shall comply with the procurement regulations of the Commonwealth** or such other procurement regulations as may be issued by the executive director and approved by the Secretary of Finance and Attorney General. **The corporation shall receive decentralized procurement status as provided in Section 2-201 of the procurement regulations** and be exempt from the small purchase limitations set forth in Section 3-105; provided, however, that the corporation shall obtain three quotations for any purchase between \$10,000 and \$50,000.

....

Exec. Order 2006-4, 4 CMC § 8152 (Att A, p 9 of the pdf) (Citations are to the pdf copy of EO 2006-4 located on CUC RFP website as Annex A.) (The CUC's RFP website is <http://www.cuccnmi.net>.) (Emphasis added) (The decentralized procurement section referenced, section 2-201, is now codified at 70 NMIAC 30.3-130: "...the P&S Director may delegate in writing, other procurement functions and responsibilities to public agencies...." Of course, the EO took care of this delegation.) The Executive Order reorganizing CUC also provided that it was to be a public corporation, with the Executive Director at its head, (Exec. Order 2006-4, p 1, ordering para. 2). Thus, CUC's Director, for procurement regulation purposes, is the Executive Director or his designee.

Further, CUC committed explicitly in the RFP to apply P&S regulations:

18 This solicitation is made through CUC's Executive Director, pursuant to the provisions of
19 Executive Order No. 2006-4, dated May 5, 2006 (Reorganization Plan No. 2 of 2006),
20 which serves as CUC's organic act (available on CUC's website as Annex A). This
21 solicitation complies with the CNMI Procurement Regulations, 70 NMIAC §§ 30.3-001 -
22 760, specifically § 3-210 (competitive sealed proposals) (sections available on CUC's
23 website as Annex B.)

Request for Proposal, CUC RFP # 07-001, Part 1: Invitation to Apply for Pre-qualification, and Pre-qualification Requirements for Proposals, for the Privatization of the CNMI's Power Business, February 2007, p 3 of 42)(citation is to the pdf appearing on the CUC website). The RFP attached the P&S regulations to the RFP on its RFP web page, as Annex B.

Thus, the CUC Executive Director, for procurement purposes, fills the role of the Director of P&S. Ordinarily, appeals of his actions or failures to act would come by appeal to the Public Auditor. You have jurisdiction of the appeals under the procurement regulations.

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

If you examine the RFP website materials you will see that CUC did, indeed, answer the Telesource Protest. It simply did not do so with a formal document. CUC's answer was also provided to all the other potential offerors through the website.

(I do not use the term "bidder" or "bid", because this is not an instance of a bid. It is an RFP for competing proposals. Bids tend to address simple matters where a good or service can be easily specified. This procurement is for the ownership and management of a \$85 million-per-year power utility. There are literally thousands of variables to running a utility company. So, bids are inappropriate. See attached RFP website FAQ Printout page 5 line 11.)

I do not believe that you have received these responses to Telesource. As to the controversy before OPA, I understand that CUC has provided the Public Auditor with part, but not all, of the information relevant to the protest. It provided:

- Attachments:
1. Letter dated January 9, 2007 to Director of P&S dated January 9, 2007 re: Privatization of UCC / Request for Competitive Sealed Proposals.
 2. Letter of Protest dated February 22, 2007.
 3. Pre-Qualification RFP Documents.

(Ltr of 4/9/07 fr AC Guerrero, CUC to MS Sablan, OPA, p 2) The last item may be the index of documents attached to the letter, referencing 200 pages of material appearing on the CUC RFQ website. Annex H is the Frequently Asked Questions (FAQ) page. That page presents the Telesource questions and CUC responses. But I am not sure you were given access to the password-protected website.

The RFP website materials are available to you if you have access to the website. The website was created specially for this procurement, in order to facilitate the receipt of voluminous information from remote sites and to provide for an evenhanded way to communicate with offerors. I believe that, in order to fully review this matter, you should be given access to that site. I will leave it to CUC, its webmaster and your office to arrange that. In the meantime, I attach the FAQ page of the website, with the relevant questions and answers boldfaced, and with line and page numbering added for easier reference.

In the instant letter, I would like to touch on two factual matters – the fees for the three stages of the procurement and the evaluation criteria.

Importantly, the materials on the website **did** address the matters raised in the Telesource protest, on or about March 13, 2007. CUC created the "FAQ" web page in to answer all participants' questions in a way to avoid *ex parte* communications. The answers were available to anyone who paid the initial \$1,000 fee, as did Telesource.

Here are the excerpts from the FAQ page that respond to the Telesource factual issues. Telesource protested CUC's charging any fees, and it challenged the evaluation criteria as vague. The dates in the excerpt are from the original posting:

CUC-RFP- 07- 001

[Note: boldface is added by AGO]

Invitation to Apply for Pre-Qualification, for the Privatization of CNMI's Power Business
Questions and Response – March 13, 2007

I. Original Message –

From: webmaster@cucnmi.com
To: rfpinfo@cucnmi.com
Sent: Wednesday, February 14, 2007 3:00 PM
Subject: RFP Information Request from cucnmi.com

Why are you charging us these fees?

Please explain why? A “non-refundable” pre-qualification fee of \$25,000.00 is required to participate in this bid. (djsablan@guam.net)

Then, upon certification that one is “Pre-qualified”, another \$50,000.00 “non-refundable” payment is required just to get the RFP documents. (djsablan@guam.net)

The \$1,000.00 fee just to obtain the pre-qualification is also quite steep, unless there are plans that are part of the pre-qualification documents package, which I serious doubt. (djsablan@guam.net)

Response – There are three reasons for the charges. Any one reason is, in the Committee's view, sufficient to warrant charging the fees in the form we have selected.

(1) We anticipated hiring experts to help us evaluate the qualifications and technical proposals. We believe that the aggregate cost of the process, including all consulting fees, website development, and additional costs related to negotiations, will produce substantial consulting bills. The total fee amounts are calculated to cover those costs.

(2) We wanted to insure that only serious offerors would participate. The “entry fee” of \$1,000 is calculated to provide a cutoff between those persons/firms who might merely “fish” for a response from Committee. The Committee's 's 's dilemma is that we must carefully evaluate all proposals, whether or not the person offering the proposal is serious. So, one use of the \$1,000 fee is to require potential proposers to address the process seriously. The \$1,000 is a relatively modest amount when the 25-year business opportunity for a \$100-million-per-year utility is considered.

Similarly, the \$25,000 fee gives the potential proposer pause before submitting a proposal and requiring the Committee and its consultants to attend carefully to the proposal.

CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 2 of 2

(3) We separated the amounts into three payments in order to save money for the proposers while insuring that some amounts would be collected to cover the initial evaluations. We split the process into three parts in order to save time and resources for potential proposers and for Committee . Thus, the first amount, \$1,000.00, reflects the relatively modest effort to review the Invitation (and some part of the substantial work to develop the RFP). Then, instead of bundling a review of qualifications with a review of technical proposals, and requiring proposers to put in the substantial and detailed work required to assess and plan

the business, we split off the qualifications part into this stage. The Committee's judgment was that assembling the materials to show who the proposers are is relatively easy. In many cases a firm or a team would have the materials already "on the shelf". The \$25,000.00 payment was pegged to the cost of evaluating a Pre-Qualification proposal. This process thereby puts off the detailed technical and "business plan" assessment by the proposers, and the evaluation by Committee, along with a final payment, which we believe will reflect the true cost of total evaluation. This way those deemed unqualified to proceed would not be otherwise burdened with the work and the fee.

By contrast, a "typical" RFP process would would [sic] have required all the detailed work up front and a full \$75,000 to evaluate both the qualifications and the technical proposal.

(4) Thus, the fees as they appear are the result of a careful balancing, the product of substantial committee deliberation.

2. Original Message -----

To: Privatization - CUC
Sent: Tuesday, February 20, 2007 12:37 PM
Subject: about Pre-Qualification
I'm

I would like to know why the payment of \$1,000, \$25,000, \$50,000 is non-refundable.
And I want to know who I should contact when we have some questions as preparing the Pre-Qualification document to submit to CUC.

I look forward to your reply.

CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 3 of 3

Response: Please refer to the preceding response on the reasons why the fees are being collected for the RFP. The fees are non-refundable **because we expect to spend them on the professionals we must hire to review** the proposals.

All questions to be raised in regard to this RFP must be entered in the URL:
<http://www.cuccnmi.com/contact.asp> and submitted in the area for "Comments".

After this first stage, we expect to respond only to specific questions received from persons who have paid the requested fees for the documents and have registered. To respond to all questions, regardless of the source, could unduly tax our limited resources.

3. Original Message -----

From: webmaster@cuccnmi.com
To: rfpinfo@cuccnmi.com
Sent: Tuesday, February 27, 2007 2:20 PM
Subject: RFP Information Request from cuccnmi.com
The information request was sent from cuccnmi.com on 2/27/2007 2:20:17 PM Western Pacific Time.

Name:

Comments: Dear sirs,

We would like to send all the best wishes to CUC.

We . . . received the Pre-Qualification invitation from Joint venture member. . . . We are preparing the Pre-Qualification proposal with Joint venture member as a project developer.

We would like to ask some questions about Pre-Qualification invitation on the following.

3-1. When you refer to "worth" (whether offeror is worth more than \$30million) at page 33, what do you mean "worth"? Do you mean net asset value?

Response - Yes, worth is net asset value, the asset side of your balance sheet.

3-2. Regarding Form 6, **what should we include specifically for addressing electric power business experience?**

CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 4 of 4

Response - Please refer to the breakdowns listed in Form 6 – Technical Requirements – items: 3.2.6.1 TO 3.2.6.9. **Also, please review the detailed evaluation criteria at page 42 of the Invitation.** Please keep in mind that this is your opportunity to present your experience and capabilities. We welcome that you provide more information rather than less, particularly if you are not sure what to say.

. . . .

CUC RFP FAQ web page, <http://www.cucenmi.net>) (Log-in name and password required) (attached).

There are 17 factors on which the Privatization Committee will evaluate the voluminous filings. The FAQ page merely references the summary evaluation criteria, which are presented in the RFP Invitation. This is what was published as the “summary” criteria:

Part 4 Pre-Qualification Evaluation Criteria

2

3 This is a summary of the criteria which CUC intends to use to compare the Offerors' 4 submissions for this Pre-Qualification stage. CUC, of course, reserves the right to 5 modify the criteria.

67

Category and Criteria

Points %

89

Technical qualifications

570 57%

10

11 90 MW+ generation system

140

12 90 MW+ demand on system

150

13 34.5 kV transmission system

45

14 13.8 kV distribution system

45

15 20,000+ customers meter & bill

40

16 3.25 MW+ of renewable energy

150

17

18 Financial qualifications	230	23%
19		
20 Aggregate net assets \$30 million+	100	
21 Generation partner in at 30+% or self	50	
22 T&D partner in at 10+% or self	50	
23 Purchases fuel on its own	30	
24		
25		
26 Business experience	100	10%
27		
28 Location in or close to Marianas	40	
29 Years of experience	60	
30		
31 Other objectives (Weight 10%)	100	10%
32		
33 Approach to the environment	20	
34 Creatively minimize dependence on foreign oil	20	
35 Staffing, including present staff and local recruitment	20	
36 Creative approaches to economic development	20	
37 Likely focus on and investment in the CNMI	20	
38 TOTAL	1000 pts	100%

(RFP Invitation of Feb. 2007 p 42) Of course, Committee members will awards different numbers of points to the offerors based on their particular evaluations. While any good attorney could find something to question about any given criterion, the RFP procedure overall provides a highly objective and understandable basis for review.

You are not, of course, being asked to review evaluations which have not taken place. Nor do these summary criteria necessary reflect the detailed examinations which have not yet taken place. The point of my discussion here is that the 17-factor review protocol was timely communicated to all participants, and it was affirmed on the website after the Protest was filed.

4. It appears that Telesource had plenty of time to file and pay its fee.

One other issue which you may address is the timing of the website responses and the required response to the Protest. The P&S regulations require the Director to decide the protest within 20 calendar days. 70 NMIAC 30.3-501(a)(3).

Telesource protested by letter of February 22, 2007. (Telesource Protest letter) Twenty days later would have been March 14. My records show that the FAQ page responses to the factual issues were posted 19 days later, on March 13, 2007. The final post was March 19, 2007, with the responses to Mr. Long's five questions. I believe that CUC or the webmaster could verify the dates which appear on the page printout I have attached..

No one would claim that the Executive Director addressed the legal arguments of the protest. Nor would anyone claim that the Director issued a document identified as a response to a formal

protest. He did neither.

On the other hand, the Executive Director's actions effectively dismissed those arguments, as he explained and rejected the factual arguments on the FAQ page and, with respect to the legal arguments, simply continued with the procurement. This is akin to a court's rejecting a motion to dismiss and proceeding with trial.

Just what information the procurement process provided to Telesource becomes relevant as a practical matter in order to determine whether Telesource had a fair opportunity to file its Pre-Qual materials by the designated date. Apparently it did, because the final date for submission and payment of the second fee, for \$25,000, was April 4, 2007, over seven weeks after the FAQ publications. This followed two extensions which CUC gave to the offerors, one in response to requests for more time, the other due to a typhoon. One of firms requesting an extension was Telesource. (Ltr of 3/7/07 fr MN El-Rahi, Telesource, to AC Guerrero, CUC) (Attached)

5. Telesource's statutory argument against the \$25,000 Pre-Qual fee contradicts the unambiguous language of the statute.

Telesource has interposed the Pre-Qual filing fee as the substantive basis for protesting the procurement. But, the claim contradicts the requirements of the very statute on which Telesource relies.

Telesource argued that a recent amendatory act freed it from paying the fee. But the Act's language explicitly requires paying the fee. Further, the Act gives no excuse for filing the substantive materials which an offeror would provide to show it could run the privatized utility.

The Act provides that a qualified business "...shall be permitted to **submit a proposal upon the payment of the required fees**". PL 15-40, Section 3(g) (amending 4 CMC § 8122(c), reproduced in Ltr of 3/16/07 fr MN El-Rahi, Telesource to AC Guerrero, CUC, (Highlighted text boldfaced in cited letter) (attached). The required fee was the \$25,000 Pre-Qual submission fee. Telesource never paid the fee.

But, even assuming for the sake of argument that the Act gave a pass on the fee to a qualified firm, Telesource failed to qualify for this treatment. In order to avail itself of the Act, Telesource needed to be:

...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 [CUC] publishes a request for proposals ...**

PL 15-40, Section 3(g). (Emphasis added) The RFP seeks a company to be a power utility – generation, transmission, operations, maintenance, customer service, billing and collections.

Telesource is not, and has never been a retail utility company. It is a construction firm with experience running only a small power plant. This is not “closely related”.

But, assuming further that running a power plant is “closely related” to such other utility functions as customer service and power line maintenance, Telesource has not been in the power plant business for the required 10 years. The Telesource letter suggests this, referring to a March 6, 1997 “letter of intent” for the subsequent construction of the Tinian power plant. (*See Ltr of 3/16/07 p 2*) I have confirmed with CUC that the final signature on the Telesource independent power producer contract was 9/18/97 and the first payment was 3/31/99. Neither a letter of intent, nor a contract to construct a power plant, is “engaging” in the power business. Arguably Telesource did not enter that business until it started generating power for pay, in 1999 – only 8 years before the April 4 cutoff date (or whatever other date this year would be termed the correct measuring point).

Thus, whatever legal arguments Telesource sought to advance to relieve it from the filing fee, the arguments were wrong on their face. Telesource's maintaining its untenable position for the 7 weeks following the FAQ responses suggests that it simply never intended filing the qualifications materials required of every offeror.

Indeed, Telesource could have easily filed something of substance by April 4, the closing date of the Pre-Qual stage. It could have then simply have asserted its claim against paying the fee, or paid under protest. But it never did file anything other than another letter demanding “automatic” approval.

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

The bottom line, however, is that Telesource has no right under the P&S regulations to file a protest, and you may simply need to dismiss the Protest. This is because Telesource is not an “actual or prospective offeror”. It has no standing.

The P&S regulations give the right to protest 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). In other words, only an actual or prospective offeror has standing to bring a protest.

Telesource is not an actual offeror. It might have been an actual offeror if it had done what the other offerors did by April 4 – file a stack of materials demonstrating its “track record” and its finances. But Telesource failed to file anything substantive. Rather, the entirety of its April 4, 2007, filing was a half-page letter that asserted, without support, that Telesource had met all criteria for “automatic pre-qualification...per Public Law 15-40” and that “we intend” to submit a sealed proposal for the upcoming privatization of CUC’s power business...We are not required to pay the \$25,000 fee.” (Ltr of 4/4/07 fr MN El-Rahi, Telesource to AC Guerrero, CUC)(Attached)

Telesource is not a prospective offeror. It has demonstrated its lack of likely genuine participation by failing to assemble in 7 weeks the materials that could have put its history and abilities in consideration. If it could not fulfill this simple, inexpensive task, it is hard to imagine how it will, in the next RFP phase, spend the substantial resources preparing the equivalent of a business plan for the privatized utility.

Finally – and I recognize that this may be viewed as a circular argument – the time for demonstrating that Telesource would be a “prospective offeror” was the period prior to the formal closing date, April 4, in which it had an opportunity to present its qualifications to run a utility company. If you agree that CUC could legitimately break the RFP submission into two stages, for the reasons stated, Telesource’s last chance to demonstrate its bona fides as a prospective offeror was April 4, 2007.

I don’t believe, however, that I have just presented a circular argument. The courts tend to defer to government agencies’ rational decisions on how to implement their organic acts. *Tenorio v. Superior Court*, 1 N.M.I. 1, 18-19 (1989). The Competitive Sealed Proposal regulation, 70 NMIAC 30.3-210, provides for an RFP, § (b), using evaluation factors, § (e), determining a competitive range for further participation, § (e)(1), rejection of proposals with no reasonable chance of success, § (e)(2), an assessment of ability to accomplish the technical requirements, § (e)(2)(i) and (ii), and assignment of qualified technical evaluators, §(e)(4). So CUC had the power to set up an evaluation process that examined in its first phase the technical ability of offerors to deliver the required services. CUC’s decision is due some deference.

Another reason to conclude that Telesource lacks any prospect of participating as an offeror is the irrational nature of the Protest. There appears to be a damned-if-you-do-damned-if-you-don’t approach to the split process and the split charges – \$1,000 registration, \$25,000 Pre-Qual submission, \$50,000 RFP submission. As a preliminary argument in its protest, Telesource complains of the high cost of responding to privatization RFPs, in general:

“When CUC periodically opts to entertain proposals for the privatization of its utility business, the various offerors are required to spend hundreds of thousands of dollars preparing their offers....”

(Telesource Protest letter of Feb. 22, 2007, p 2)

CUC had consciously tried to address this issue by splitting the process, and the related calculated fee, into three manageable parts. The procurement does not require an offeror to wager everything before it receives a copy of the RFP – the first charge is only \$1000. Nor must it wager the heftiest amount if it fails to be found qualified to manage a power utility after merely assembling resumes and financial information – the second charge is only \$25,000. Only at the final stage, in which an offeror submits the equivalent of a carefully crafted business plan, would a party pay another \$50,000.

Apparently Telesource considered this measured approach to be unfair. It decided not to avail itself of this multi-stage, money- and effort-saving method. But the approach is rational and well within the P&S regulations.

Thus, as of the closing of offers, on April 4, 2007, Telesource had not made an offer and presented no prospect of doing so. It was not the required “actual or prospective offeror”. Consequently, it lacked standing to bring a protest.

The Protest must be dismissed for lack of standing.

Summary

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, you could find that CUC timely addressed the Telesource Protest's factual claims through the medium of the RFP-FAQ website page. And you may find that CUC was not required to provide a legal rebuttal of Telesource's patently incorrect legal claims. You would thereby find that CUC acted appropriately.

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.

IF, for instance, you determine that the Protest should not be dismissed, and, further, that CUC's conduct prejudiced Telesource, I urge you to require that we all address immediately the substance of Telesource's claims, rather than wait months for the procurement process to end and an award to be made. This may require Telesource to prove its standing, by filing by a date certain its response to the Pre-Qual RFP. Also, Telesource, CUC and all interested parties would file simultaneous briefs. I also believe that the parties to the procurement should be given an opportunity to supplement their filings by Telesource's filing date.

My conclusion, however, is that Telesource lacks standing under the P&S regulations to protest and that its Protest must be dismissed.

Very truly yours,

Matthew T. Gregory,
Attorney General

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

Attachments:

1. FAQ page to RFP website, <http://www.cucnmi.net>.
2. Ltr of 3/7/07 fr MN El-Rahi, Telesource, to AC Guerrero, CUC (1 p)
3. Ltr of 3/16/07 fr MN El-Rahi, Telesource to AC Guerrero, CUC (5 pp)
4. Ltr of 4/4/07 fr MN El-Rahi, Telesource to AC Guerrero, CUC (1 p)

All referenced attachments are being provided electronically, as well as in hard copy/fax)

1 CUC-RFP- 07- 001 [Note: boldface is added by AGO]
2 Invitation to Apply for Pre-Qualification, for the Privatization of CNMI's Power Business
3 Questions and Response – March 13, 2007
4

5 1. Original Message –
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8 To: rfpinfo@cucnmi.com
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10 Subject: RFP Information Request from cucnmi.com
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21 plans that are part of the pre-qualification documents package, which I serious doubt.
22 (djsablan@guam.net)
23

24 **Response – There are three reasons for the charges.** Any one reason is, in the
25 Committee’s view, sufficient to warrant charging the fees in the form we have selected.
26

27 **(1) We anticipated hiring experts** to help us evaluate the qualifications and technical
28 proposals. We believe that the aggregate cost of the process, including all
29 consulting fees, website development, and additional costs related to negotiations,
30 will produce substantial consulting bills. The total fee amounts are calculated to
31 cover those costs.
32

33 **(2) We wanted to insure that only serious offerors would participate.** The “entry fee”
34 of \$1,000 is calculated to provide a cutoff between those persons/firms who might
35 merely “fish” for a response from Committee. The Committee’s ‘s’s ‘s dilemma is
36 that we must carefully evaluate all proposals, whether or not the person offering
37 the proposal is serious. So, one use of the \$1,000 fee is to require potential
38 proposers to address the process seriously. The \$1,000 is a relatively modest
39 amount when the 25-year business opportunity for a \$100-million-per-year utility
40 is considered.
41

42 Similarly, the \$25,000 fee gives the potential proposer pause before submitting a
43 proposal and requiring the Committee and its consultants to attend carefully to
44 the proposal.
45

46 CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 2 of 2
47

48 **(3) We separated the amounts into three payments in order to save money for the**
49 **proposers while insuring that some amounts would be collected to cover the initial**
50 **evaluations.** We split the process into three parts in order to save time and
51 resources for potential proposers and for Committee . Thus, the first amount,
52 \$1,000.00, reflects the relatively modest effort to review the Invitation (and some

1 part of the substantial work to develop the RFP). Then, instead of bundling a
2 review of qualifications with a review of technical proposals, and requiring
3 proposers to put in the substantial and detailed work required to assess and plan
4 the business, we split off the qualifications part into this stage. The Committee's
5 judgment was that assembling the materials to show who the proposers are is
6 relatively easy. In many cases a firm or a team would have the materials already
7 "on the shelf". The \$25,000.00 payment was pegged to the cost of evaluating a
8 Pre-Qualification proposal. This process thereby puts off the detailed technical
9 and "business plan" assessment by the proposers, and the evaluation by
10 Committee , along with a final payment, which we believe will reflect the true cost
11 of total evaluation. This way those deemed unqualified to proceed would not be
12 otherwise burdened with the work and the fee.

13
14 By contrast, a "typical" RFP process would would [sic] have required all the detailed
15 work up front and a full \$75,000 to evaluate both the qualifications and the technical
16 proposal.

17 **(4) Thus, the fees as they appear are the result of a careful balancing,** the product of
18 substantial committee deliberation.

19
20 2. Original Message -----

21
22 To: Privatization - CUC
23 Sent: Tuesday, February 20, 2007 12:37 PM
24 Subject: about Pre-Qualification
25 I'm

26
27
28 **I would like to know why the payment of \$1,000, \$25,000, \$50,000 is non-refundable.**
29 And I want to know who I should contact when we have some questions as preparing
30 the Pre-Qualification document to submit to CUC.

31
32 I look forward to your reply.
33 CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 3 of 3

34
35 Response: Please refer to the preceding response on the reasons why the fees are being
36 collected for the RFP. The fees are non-refundable **because we expect to spend them on**
37 **the professionals we must hire to review** the proposals.

38
39 All questions to be raised in regard to this RFP must be entered in the URL:
40 <http://www.cuccnmi.com/contact.asp> and submitted in the area for "Comments".

41
42 After this first stage, we expect to respond only to specific questions received from
43 persons who have paid the requested fees for the documents and have registered. To
44 respond to all questions, regardless of the source, could unduly tax our limited
45 resources.

46
47 3. Original Message -----

48
49 From: webmaster@cuccnmi.com
50 To: rfpinfo@cuccnmi.com
51 Sent: Tuesday, February 27, 2007 2:20 PM
52 Subject: RFP Information Request from cuccnmi.com

1 The information request was sent from cucnmi.com on 2/27/2007 2:20:17 PM Western
2 Pacific Time.
3 Name:

4
5 Comments: Dear sirs,

6
7 We would like to send all the best wishes to CUC.

8
9 We. . . received the Pre-Qualification invitation from Joint venture member. . . We are
10 preparing the Pre-Qualification proposal with Joint venture member as a project developer.
11 We would like to ask some questions about Pre-Qualification invitation on the following.

12
13 3-1. When you refer to "worth" (whether offeror is worth more that \$30million) at page 33,
14 what do you mean "worth"? Do you mean net asset value?

15 Response - Yes, worth is net asset value, the asset side of your balance sheet.

16 3-2. Regarding Form 6, **what should we include specifically for addressing electric power**
17 **business experience?**

18
19 CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 4 of 4

20
21 Response - Please refer to the breakdowns listed in Form 6 – Technical Requirements –
22 items: 3.2.6.1 TO 3.2.6.9. **Also, please review the detailed evaluation criteria at page 42**
23 **of the Invitation.** Please keep in mind that this is your opportunity to present your
24 experience and capabilities. We welcome that you provide more information rather
25 than less, particularly if you are not sure what to say.

26
27 3-3. Regarding Form 6, what type of plants at NO. 3.2.6.1 do you mean? Do you mean diesel
28 engine power plant which is the same type as Saipan power plant?

29
30 Response - Any form of thermal generating units are acceptable. Again, if you refer to
31 page 42 and the evaluation criteria, you can see that we are interested in understanding
32 your experience in running power generation facilities that would be used to meet loads
33 experienced on our system. Here is a hypothetical situation: Presently we run certain
34 oil fired units. You, as a potential offeror, might suggest that, as the new utility
35 company, you phase those units out and substitute different kinds of units. We would
36 want to know what experience you had with both types of units.

37
38 3-4. When in comes to "these individuals" at NO. 3.2.8.2 (showing the relationship of these
39 individuals), what do you mean "these individual"? Do you refer to individuals mentioned
40 above 3.2.8.1?

41
42 Response -Yes

43
44 3-5. We received the Pre-Qualification invitation from our Joint Venture member and we are
45 preparing the Pre-Qualification proposal as a project developer. Are we eligible for
46 submitting the Pre-Qualification proposal of Joint venture as an offeror?

47
48 Response - Without reviewing the details of your joint venture, the answer would
49 probably be "yes". Refer to Part 4 , Evaluation Criteria for the composition
50 requirement and section 3.2.7 – Form 7 – Responsibilities of joint venture members.
51 And, without fully understanding your question, we expect that, for a joint venture, one
52

1 of the parties would be the principal, or lead for the team, who would submit the
2 proposal. The joint venture, however, is the offeror.

3
4 4. Original Message

5 From:

6 To: 'Privatization - CUC'

7 Sent: Thursday, March 01, 2007 4:26 PM

8 CUC-RFP-07- 001 Questions and Response – March 13, 2007 Page 5 of 5

9 Subject: RE: CUC-RFP-07-001 - INQUIRY

10 Attn: Privatization Pre-Qualification

11 C/o Mr. Anthony C. Guerrero

12 Executive Director

13 Commonwealth Utilities Corporation

14
15
16 Dear Sir,

17 **We would like to request for clarification with regards to the payment of US\$25,000.00;** the
18 RFP other than stating wire transfer is applicable does not give exact date by which the
19 US\$25,000.00 is to reach CUC's account; **is this payment** should be in CUC account on
20 March 12, 2007 **when electronic filing is done** OR within 7 days from March 12, 2007 when
21 hard copies are to be delivered.
22

23
24 Your clarification to the above matter will be appreciated.

25
26 Response - The amount of \$25,000.00 wire transfer should be credited to the CUC
27 account no later than the deadline for receipt of the electronic copy. Thus, **for this**
28 **stage, April 2, 2007 would be the deadline.**
29

30 5. Original Message

31 From:

32 Sent: Thursday, March 01, 2007 4:21 PM

33 Subject: RE: Local preference law

34
35 5-1. Also, how are the aggregate net assets determined? Can the aggregate net assets be the
36 combined total of all the partners submitting in joint venture for the bid?
37 Please advise.
38

39 Response – It's the aggregate of the joint venture's members' assets. The "Offeror" is
40 the team, so the assets are the team's assets. In order to report these, please refer to
41 Part 3.2.3, and to Form 3 – "Aggregate minimum net asset value and/or market
42 capitalization".
43

44 6. Original Message

45 From:

46 Sent: Thursday, March 01, 2007 4:15 PM

47
48 Subject: RE: Local preference law

49
50 5-2. How is "experience" measured for a company who is submitting a bid? Can the experience of
51 "teaming partners" working in joint venture for the bid, be accounted for by the main proponent's
52 experience?

2
3 Response – We evaluate the team. But, of course, we can only know the team’s
4 capabilities by seeing what is proposed as the knowledge, education, training and
5 experience of its members. Please refer to the Section 3.2.6 – Form 6 – “Technical
6 requirements” Also, please see the breakdowns of experience listed in 3.2.6.1 to 3.2.6.9.
7 Team partners are termed joint venture members. Please see the details requested in
8 3.2.7 – Form 7 – Responsibilities of joint venture members.
9

10
11 7. Original Message

12 From:

13 Sent: Wednesday, March 07, 2007 5:28 PM

14 Subject: CUC Privatization:

15
16 **Q: Your procurement regulations mention bids. Are we trying to pre-qualify for a “bid”?**

17
18 Response: **No.** The pre-qualified persons would be invited to **submit a competitive**
19 **proposal, per regulation 70 NMIAC 30.3-210.** Bids are more likely to be sought when
20 the good or services offered are identical. In this case CUC will have to compare
21 proposals ultimately that compete both as to price (including rates, fees and charges)
22 and as to services in running a power utility.
23

24 Q: How many hard copies are required to be submitted after we have sent the electronic filing on the
25 scheduled closing date?

26
27 Response: We require One (1) original + Seven (7) copies to be received within 7
28 working days of e-filing deadline. Hence based on the current working days in the
29 month of April the hard copies must be received at the address below by the close of
30 business (4.30pm, Saipan local time, 13th April, 2007). Each copy shall be marked Copy
31 1, Copy 2 ... and so on. The documents shall be marked “Invitation to Apply for Pre-
32 Qualification, for the Privatization of CNMI's Power Business - CUC RFP # 07 – 001”
33 and addressed to
34

35 “ c/o ANTHONY C. GUERRERO Executive Director Commonwealth Utilities
36 Corporation P.O. Box 501220 3rd Floor, Joeten Dandan Building Saipan, MP –96950.”
37

38 Q: Can we request additional time to submit our documentation?

39
40 The closing of the prequalification was extended by 21 days due to the fact that many of
41 the prospective offerors requested for time extension. In addition there had been delays
42 reported, in downloading of the documents and clearing of the wire transfer. The
43 committee wanted to provide sufficient time to the prospective offerors to review the
44 documents and ask questions and also to ensure that they have sufficient time to
45 consider the response provided to the questions. The committee feels that the 21 days
46 extension is sufficient time to submit the requested pre-qualification documentation.
47

1 From: Phillip Long, Senior Consultant - Asia Pacific Region
2 To: 'Anthony C. Guerrero'
3 Sent: Wednesday, March 14, 2007 12:25 PM
4 Subject: RE:
5

6 Question 1 - 1. How are we doing on the QUESTIONS AND ANSWERS statement
7 from CUC???

8
9 Response 1-1 – The questions regarding this RFP need to be submitted in the web
10 page as noted in our communication, specifically:
11 <http://www.cuccnmi.com/contact.asp>
12

13 This would ensure that they are logged and attended to without delay. All
14 prospective offerors are requested to kindly take note of this procedure. It is critical
15 that you NOT send your questions via other email addresses. Please use only the
16 website for your questions.
17

18 Question 2 –1. How is the net aggregate assets measured?
19

20 Response 2 –1. Please refer to our previous response on similar questions from
21 proposers (Questions and Response – March 13, 2007 – Ref # 3-1 and 5-1). Also,
22 your question is not really clear. A financial professional will probably be able to
23 present your data correctly. Finally, if you are asking a regulatory question, then
24 the answer is that a company with a holding company/regulated company structure
25 should probably give us both sets of figures if it wants us to understand its
26 capabilities.
27

28 Question 3 –1 How are the current CNMI IPP's treated in the RFP agreement?
29

30 Response 3 –1 – The current IPP agreements will be turned over to the new
31 franchisee which takes on the CUC's power utility business. The IPP contracts have
32 termination provisions. Our counsel advise us that the provisions could be
33 exercised if needed in order to provide the most appropriate business environment
34 to effect the privatization process. In other jurisdictions, particularly during
35 "restructuring", such contracts have been bought out after negotiations. This would
36 be an item which would be discussed with the winning proposer.
37

38 CUC-RFP-07- 001 Questions and Response – March 19, 2007 Page 2
39

40 Question 4 - 1 How is the fuel agreement done by CUC treated with the new operator?
41

42 Response 4-1 The prequalification proposal requires the franchisee to secure its own
43 fuel. The new owner could negotiate with the present supplier or find another.
44

45 Because a new CUC fuel supply contract may likely be in effect at the time
46 ownership is transferred, the buyer of CUC's power business may have to take on
47 the contract. A copy of the contract will be provided to prospective RFP
48 respondents as part of the next stage of this RFP process.
49

50 Question 4 – 1 What pipeline assets belong to CUC? What components of fuel delivery
51 are CUC's?
52

1 Response 4 –1

2
3 Saipan - CUC owns the three (3) bulk storage fuel tanks, 101, 102 and 103 at Power
4 Plants 1 and 2, with total capacity of approximately 1.6 million gallons. CUC owns
5 the 8-inch pipe line which runs from the port to Power Plants 1 and 2 on Saipan.
6 Fuel delivery to Power Plant 4, across Middle Road, is by tanker truck delivery.
7

8 Tinian – Mobil Oil has built the 6 -nch pipeline from the port to the power plant. It
9 owns the line and is responsible for the maintenance of the line. The fuel tank, with
10 a capacity of 420,000 gallons, was built along with the power plant by the current
11 IPP. The IPP, Telesource, owns the fuel tank.
12

13 Rota - Fuel is delivered to the CUC power plant by truck. CUC owns two bulk
14 storage tanks at the power plant of 230,000 gallons and 20,000 gallons capacities,
15 respectively.
16

17 ----- Original Message -----

18 From: Phillip Long, Senior Consultant - Asia Pacific Region

19 To: 'Anthony C. Guerrero'

20 Sent: Wednesday, March 14, 2007 11:49 AM

21 Subject: RE:
22

23 Question 5 –1 How much undeveloped land is available around your CUC site in Lower
24 Base? We would need this estimate to determine if there is enough space for the solar
25 array of panels.
26

27 Response 5 –1 Attached is the drawing which indicates the assigned land for CUC at
28 the Lower Base area in Saipan. Other, adjoining land is controlled by the Marianas
29 Public Land Authority (MPLA). The RFP stage will include evaluating supply of
30 energy from renewable sources.
31

32 0 AGs response to OPA jurisdiction question.wpd