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DATE : July 22, 2008

To : Robert J. O'Connor, Attorney for Telesource - 234-5683
: Antonio S. Muna, Executive Director for CUC - 235-5131

From : Lynette M. Camacho for Michael S. Sablan, Public Auditor
Fax No. : 322-7812

No of Pages : 10, including cover sheet

Subject : Appeal No. BP-A056, Decision on Appeal CUC RFP 07-015



MESSAGE

Please see the attached appeal decision regarding the above subject matter.



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IN RE APPEAL OF
TELESOURCE CNMI, INC.

)
)
) APPEAL NO. BP-A056
) DECISION ON APPEAL
) CUC RFP 07-015

I. SUMMARY

This is a Decision on the appeal filed by Telesource CNMI, Inc. (Telesource), through attorney Robert J. O'Connor, from the denial of Telesource's Protest by the Executive Director (Director) of the Commonwealth Utilities Corporation (CUC) regarding CUC Request for Proposals No. 07-015 (RFP).

The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in § 50-50-405 of the Commonwealth Utilities Corporation's Procurement Regulations (CUC-PR) codified in the Northern Mariana Islands Administrative Code (NMIAC) in Title 50, Chapter 50-50.¹

Pursuant to 1 CMC § 2305(c), this Appeal was delegated to management for determination.

¹ The CUC-PR were originally promulgated under the authority of 4 CMC 8122 and 8123. Subsequently, the CUC-PR were suspended. Executive Order 2006-4 then amended provisions of Title 4 and gave the Executive Director power over procurement and applied the Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR) to CUC procurement. In June 2007, the Executive Director, with the approval of the Attorney General and Secretary of Finance, "adopted as permanent" the CUC-PR, which were previously codified in NMIAC Chapter 50-50. The adoption was published in 29 Comm. Reg. 6, page 26582. This adoption did not follow typical regulation adoption requirements, such as publication for comment. The Law Revision Commission made comment on the method of adoption. Previously, on October 8, 2003, the Acting Attorney General issued Attorney General Legal Opinion No. 03-13 (Opinion 03-13) regarding the constitutional authority and duties mandated in Article X, Section 8 of the CNMI Constitution. Opinion 03-13 concluded, inter alia, that "both the Constitution and intent of the framers clearly establish that the Department of Finance is the sole agency granted broad authority to control and regulate expenditures and any statutes or regulations that are in conflict with this authority would be invalid." Opinion 03-13 at 8. At this time, however, as the validity of CUC-PR, as potentially questioned in Opinion 03-13 or otherwise, has not been ruled on by a court of competent jurisdiction, nor have CUC-PR or relevant CNMI statutes been revised, OPA will apply CUC-PR in interpreting this appeal.

II. PROCEDURAL AND FACTUAL BACKGROUND

On December 4, 2007, CUC issued RFP No. 07-015 entitled "Grid Supply Renewable Energy Generation Projects for the CNMI" under the CUC-PR. *See* Protest Decision at 3. On December 17, 2007, Telesource wrote to the Director with questions and requesting clarification regarding the RFP. *See* Protest Decision at 3; *see also* Protest Decision - Attachment B. Those questions and CUC's answers thereto are posted on CUC's website, www.cucnmi.com.

On December 20, 2007, Telesource filed its Protest with the Director.² The Director issued his Protest Decision, dated February 8, 2007, and found that Telesource did not have standing to file its Protest as it was not an aggrieved party and its Protest was untimely. *See* Protest Decision at 16-17. The Director also found that the evaluation criteria in the RFP complied with CUC-PR § 50-50-225(e). *Id.* at 17.

By letter dated February 25, 2008, Telesource, through its attorney Robert O'Connor, filed its Appeal with OPA. Analyst Manager Imelda Barcinas of OPA notified the Director of the Appeal by letter dated February 26, 2008.³ On March 4, 2008, OPA received a binder of documents, accompanied by a very short transmittal letter addressed to Analyst Manager Imelda Barcinas, from the Director. The transmittal letter did not include a response to any of the issues raised in the Appeal. In addition, the transmittal letter did not indicate that Telesource or any of the other interested parties were provided a copy of the documents in the binder. OPA awaited further response or report on the Appeal from CUC. When no report was received, on April 29, 2008, Analyst Manager Imelda Barcinas wrote to the Director and requested confirmation that the parties had been provided notice of the Appeal and that copies of the documents in the binder provided to OPA had been provided to the other parties to the Appeal. In addition, OPA requested additional information and clarification from CUC.⁴

On May 8, 2008, OPA received a response from CUC, which was dated May 6, 2008. That letter confirmed that the binder that OPA had previously received had not been provided to Appellant.

² Telesource raised four issues in its Protest, which are set forth in the section headings as follows: (1) competitive sealed bidding should be used in preference to an RFP; (2) the relative importance of evaluating criteria is not stated in the RFP; (3) RFP 07-015 goes beyond the limits of § 50-50-240(a); and, (4) this is an improper use of the RFP regime.

³ The letter requested information on the Protest and Appeal, copies of all relevant documents, and the Director's report on the Appeal. In addition, OPA requested that the notice of the Appeal and copies of the Protest and Appeal documents be provided to the required parties with instructions that they communicate directly with OPA. Further, OPA requested the names of, and contact information for, the interested parties.

⁴ The April 29th letter from OPA informed CUC that OPA had received the binder, but no separate report on the Appeal. The letter also requested: (1) confirmation that the appellant and other parties were provided a copy of the documents that were provided to OPA on March 4th; (2) a list of interested parties to the Appeal; (3) confirmation that CUC provided notice of the Appeal and copies of the protest and appeal documents were provided to all required parties; and, (4) a copy of all addendums and CUC's status of the procurement.

The Director also stated that the "documents and the transmittal letter of March 4, 2008 constituted the entire report on the protest and appeal filed by Telesource." CUC took the position that there were no other parties to the Appeal "as no person or firm participated or joined in either the protest or the appeal of the RFP in question." See Director's May 6, 2008 letter at 1. On May 19, 2008, Mr. O'Connor, counsel for Telesource, wrote to OPA and informed OPA that he had received a copy of the binder. The letter also stated:

The documents in the binder are not a "report" in any meaningful sense of the word. There is no comment, either positive or negative, on any of the arguments raised by Telesource on its appeal. There is merely a random compilation of RFP documents, previous filings in the protest (including a reprint of the Decision and Order appealed from), and copies of various public laws and regulation. CUC makes no attempt to relate any of this material to the issues raised in Telesource's appeal, and the reader is left to draw his own conclusion as to what, if anything, CUC is trying to say. Nothing is immediately apparent.

Telesource Response, May 19, 2008, at 2.

OPA did not receive any further information or response from CUC.

III. PRELIMINARY ISSUE

The Director found in his Protest Decision that "Telesource lacks standing to bring the present protest because it is not an 'aggrieved' party and its 'Letter of Protest' was untimely." Protest Decision at 9. The Director found that "Telesource does not assert that it has been 'aggrieved.'" *Id.* The Director found that the Protest was untimely and "should have been filed within ten days of the date that the RFP was published, by January 14, 2008."⁵ *Id.* at 10. Despite finding that Telesource did not have standing and that its Protest was untimely, the Director went forward with determining the issues in the Protest.

In the instant case, Telesource filed a written Protest with the Director on December 20, 2007. The Director denied the Protest in the Protest Decision dated February 8, 2008, which appears to have been issued on February 11, 2008.⁶ See Appeal at 1; see also Protest Decision Transmittal Letter. Telesource filed a written Appeal from the Protest Decision with OPA on February 25,

⁵ Telesource filed its Protest prior to January 14, 2008. Therefore, it appears that this date is a typographical error.

⁶ The typed transmittal letter for the attachments to the Protest Decision from the Director to Mr. O'Connor was dated February 8, 2008. The date, however, was changed by hand to "11" and was initialed. The received stamp for the Law Offices - O'Connor Berman Dotts & Bancs is dated February 11, 2008. No evidence to dispute the date of the transmittal of the Protest Decision was submitted to OPA.

2008. CUC did not dispute that the Protest Decision was issued on February 11th and did not claim that Telesource's Appeal to OPA was untimely. As such, it appears that the Appeal was timely filed and that the base requirements for OPA to have jurisdiction under CUC-PR § 50-50-405(a) were fulfilled.⁷

The Director's findings that Telesource was not an aggrieved party and that its Protest was not timely are based upon CUC-PR § 50-50-401(a)(1), which states in pertinent part:

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 Director. The protest shall be received by the P&S Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto.

NMJAC § 70-30.3-501(a)(1).

Protests based on alleged improprieties in a solicitation or request for proposals that are apparent prior to the date set for submission of proposals, as in this case, typically must be filed prior to that date. It is OPA's understanding that, at that time Telesource filed its Protest, proposals were not yet due and no proposals had been submitted. Therefore, there were no actual proposers on the date the Protest was filed. Telesource, like others interested in the RFP, however, acted as a prospective offeror and participated in the RFP process through the time of filing its Protest.⁸ Indeed, after the Protest, it appears Telesource continued to participate in the process. Any impropriety or deficiency in a solicitation or request for proposals imposes a burden on all prospective proposers, including the one filing a protest. As such, in order to ensure the integrity of the procurement process, OPA has generally accepted that a prospective bidder or proposer has standing to protest when the protest involves alleged improprieties or deficiencies in a solicitation or request for proposals and the protest is filed prior to the date set for bid opening or proposal submission.

⁷ The appellate jurisdiction of the Public Auditor is addressed in the CUC-PR in § 50-50-405(a), which states:

A written appeal to the Public Auditor from a decision by the Director may be taken provided that the party taking the appeal has first submitted a written protest to the Director as provided in section § 50-50-401 of these procedures, and the Director has denied the protest or has failed to act on the protest within the time provided for in § 50-50-401(a)(3) above.

⁸ In Attachment A to CUC's May 6th response to OPA's request for additional information, Telesource is listed as an interested party. Prior to the time for expression of interest, Telesource had requested clarification and submitted questions to the Director. Those questions and responses are posted on CUC's website, www.cuccnmi.com.

The Director relies on CUC-PR § 50-50-401(a) requiring that a protest "be received by the Director in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto." The Director interprets this to mean that any protest regarding the RFP should have been filed within ten days of issuance date of the RFP. See Protest Decision at 10. OPA, however, uses the general standard that protests involving alleged improprieties in a solicitation or request for proposals typically must be filed prior to the date set for bid opening or proposal submission. It would be unjust to calculate the ten days to run from issuance of an invitation to bid or request for proposals.⁹ As Telesource filed its Protest well before the date set for submissions, OPA disagrees with the Director's finding that the Protest was untimely.¹⁰

IV. ISSUES

In addition to claiming that its Protest was filed timely and that it has standing to protest, Telesource argued that competitive sealed bidding should have been used in lieu of the RFP and that the RFP was inherently flawed. See Appeal at 3-5.

The CUC PR, set forth the remedies available in pre-award protests and appeals in § 50-50-410(a), as follows:

Remedies Prior to Award. If prior to award the Director or the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation, then the solicitation or proposed award shall be:

- (1) Cancelled; or
- (2) Revised to comply with law or regulation.

NMLAC § 50-50-410(a).

As such, OPA will review the Appeal to determine if the solicitation is in violation of law or regulation.

⁹ OPA believes there is no certain way to calculate on what date every prospective proposer "should have known of the facts giving rise" to a protest based on alleged improprieties or deficiencies in a solicitation, advertisement, or request. As such, OPA will not, absent facts presented to the contrary, use the issuance date as the starting date for the ten day period set forth in CUC-PR § 50-50-401(a).

¹⁰ Both the Director and Telesource go to great lengths to calculate the timeliness of the Protest based upon the dates of issuance of the RFP and actual dates of publication of the notice in the local newspapers. See Protest Decision at 10; see also Declaration of Joseph E. Horey; see also Appeal at 2. The parties also discuss Telesource's request for clarification and CUC's response thereto. OPA, however, will abide by the general guideline that such protests, in the event of a request for proposals, must be filed by the date set for proposal submission or by bid opening in the event of an invitation for bid. The publication of a request in a newspaper typically never includes the complete request, only notice thereof. In addition, in the case of this RFP many documents were included or incorporated by reference in the RFP. Therefore, even the date a prospective proposer received the entire package may not be a just date to begin the calculation time.

V. DISCUSSION AND ANALYSIS

A. Negotiated Procurements Allowed Under CUC-PR

The CUC-PR do provide that, unless otherwise authorized by law or regulation, all CUC contracts must be awarded by competitive sealed bidding. NMIAC §50-50-201. Six exceptions to this requirement, however, including competitive sealed proposals, are specifically set forth in the CUC-PR.¹¹ The conditions for use of competitive sealed proposals is set forth in CUC-PR § 50-50-225(a), which reads:

When the Director determines in writing that the use of a (sic) competitive sealed bidding is either not practical or not advantageous to the government and receives the approval of the Board of Directors, a contract may be entered into by competitive sealed proposals.

NMIAC § 50-50-225(a).

The Director issued a memorandum on September 7, 2007, regarding the issuance of the RFP. Attached to the memorandum was a draft of the RFP. The Director asserts that this memorandum is his "written determination that competitive sealed bidding would not be practical and that the appropriate procurement method should be a Request for Proposals." Protest Decision at 7. The Director also asserted that the "RFP was mandated by Public Law 15-23 as amended by P.L. 15-87." *Id.* The Director, however, concluded that "the Memorandum dated September 7, 2007 is sufficient to constitute a written determination for the purposes of Section (sic) § 50-50-225(a) [of] the CUC's Procurement Rules & Regulations." *Id.* at 8.

The Director has determined that the September memorandum is sufficient to meet the CUC-PR requirement. That memorandum, however, does not explicitly state "that competitive sealed bidding is either not practical or not advantageous to the government" as recited in § 50-50-225(a). The CUC-PR provide that "[w]hen the Director determines in writing . . . a contract may be entered into by competitive sealed proposals." *See* § 50-50-225(a). As the requirement is worded in this manner, however, OPA cannot find that CUC violated this provision.

¹¹ CUC-PR § 50-50-201 reads:

Unless otherwise authorized by law or by regulation, all CUC contracts shall be awarded by competitive sealed bidding, except as provided in:

- (a) § 50-50-210 (Small Purchases);
- (b) § 50-50-215 (Sole Source Procurement);
- (c) § 50-50-220 (Emergency Procurement);
- (d) § 50-50-225 (Competitive Sealed Proposals);
- (e) § 50-50-230 (Professional Services);
- (f) § 50-50-305 (Architect-Engineer Services).

Further, competitive sealed bidding requires that a contract must be awarded to the lowest responsive bid made by a responsible bidder. See NMIAC § 50-50-205(i)(1). The most common reason for using competitive proposals, which allow for negotiation, is the need to make award, at least in part, on the basis of non-price-related factors. There appears to be little controversy as to the discretion of agencies to use negotiation procedures in those circumstances. Competitive sealed proposals provide a method of providing for full and open competition in such instances. As such, OPA further does not agree with Telesource's assertion that procuring alternative or renewable energy must be done by competitive sealed bidding.

B. RFP's Stated Evaluation Factors Fail to Comply with CUC-PR

The CUC-PR require that the RFP "state the relative importance of price and other evaluation factors." NMAIC § 50-50-225(e). The Director found that "Telesource' (sic) arguments that the RFP fails to set forth the relative importance of the evaluation factors is without merit." Protest Decision at 11. The Director stated that "the nature of this RFP is designed to comply with Public Law 15-23 and as amended by Public Law 15-87." *Id.* The Director interprets the laws to require that CUC "be open to a wide range of project possibilities that the RFP for 'Grid Supply Renewable Energy Generation for the CNMI' be as inclusive as possible in order to obtain the greatest number of interested proposers and solicit the most qualified and varied vendors capable of providing the renewable energy for the CNMI as intended when Public Law 15-24 as amended by Public Law 15-87 was enacted." *Id.* at 11-12. Although CUC must follow the laws, it does not appear that the CUC-PR, specifically regarding evaluation criteria, are superceded.

The Director states in the Protest Decision that the RFP sets forth "the relative importance of evaluating criteria in compliance with [CUC-PR] § 50-50-225(e)." Protest Decision at 10. The Director further states that the RFP specifically "sets forth the relative importance of price and other evaluation factors in Section 4." *Id.* The Protest Decision quotes from Section 4.2 of the RFP, pages 19 and 20, which set forth the Evaluation Criteria.¹² Section 4.2 of the RFP, entitled Evaluation Criteria, states:

The following evaluation criteria, not necessarily listed in order of significance, will be used to evaluate proposals, based on the type of response received for the RFP and the technology application. There will be no ranking of the proposers but only the determination of their capability to be a potential participant and proceed with further process for the RFP and the contract negotiation.

- 4.2.1 The contractor's general approach and plans to meet the requirements of the RFP.
- 4.2.2 The contractor's detailed approach and plans to perform the services required by the scope of work of this RFP.
- 4.2.3 The contractor's documented experience in successfully completing contracts of a similar size and scope to those required by this RFP or as proposed.

¹² Page 11 of the Protest Decision included the quote of Section 4.2 of the RFP, pages 19-20. However, the quote omits subsection 4.2.10. See Protest Decision at 11; see also RFP at 19-20.

- 4.2.4 The overall ability of the contractor, as judged by the evaluation committee, to gear-up, undertake and successfully complete the contract within the fastest required schedule or on time.
- 4.2.5 The cost of the power delivered to CUC (cents per kWh delivered at the point of delivery).
- 4.2.6 The output and capacity of the project, in MWhs and MWs.
- 4.2.7 The environmental attributes of the proposed technology (defined in Section 4.3 below).
- 4.2.8 The timeframe for construction/startup of the project.
- 4.2.9 Feasibility.
- 4.2.10 Verified performance of the technology.

RFP at 19-20.

Merely listing factors that will be evaluated in an RFP with no statement of their relative importance is typically a questionable technique for disclosing the relative importance of the factors. An offeror, in such a case, would be expected to assume that all of the evaluation criteria are of approximately equal importance. In this instance, however, this does not appear to be the case.¹³ OPA cannot, therefore, agree with the Director's finding in the Protest Decision that the RFP sets forth the relative importance of evaluating criteria in compliance with CUC-PR § 50-50-225(e).

C. Other Matters

OPA proceeded slowly and with caution in this Appeal as it did not appear that the Appellant was provided with the CUC documents that were provided to OPA, although the documents appear to have been provided at a much later date. In addition, OPA did not receive a separate report on the Appeal from the Director, as has become typical in appeals, but received only a binder of documents related to the RFP. OPA is concerned that CUC did not provide adequate notice to all of the parties to the Appeal, which OPA believes should include all of the prospective proposers. It appears that CUC is attempting to have open access through its website for the purposes of its procurements. A review of that website, however, did not show that the Appeal or notice of the Appeal was posted. OPA will attempt to work more closely with CUC on any future appeals and will ensure that CUC confirms the names of all parties provided notice of an appeal and that they are copied with all correspondence.

VI. CONCLUSION

Based on the foregoing, the Office of the Public Auditor finds that:

1. Telcsource had standing to file its Protest and Appeal;

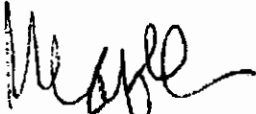
¹³ The Protest Decision does not discuss the criteria being equal or near equal. In addition, the criteria, taken with the introduction, do not lead OPA to believe that they are equal or will be treated as such.

2. The Telesource Protest was filed timely;
3. Use of competitive sealed proposals in instances when price is not the only factor is within the discretion of the Director;
4. OPA cannot find that the Director had violated CUC-PR § 50-50-225(a); and,
5. The evaluation criteria set forth in the RFP did not comply with the requirements set forth in CUC-PR § 50-50-225(e).

As such, the Appeal is denied in part and granted in part. The RFP should, therefore, be reviewed and modified to comply with the CUC-PR, specifically § 50-50-225(e).

So Ordered.

The CUC-PR § 50-50-405(i) provides that Telesource, CNMI, Inc., any interested party that submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than ten (10) days after the date of this decision.



Michael S. Sablan, CPA
Public Auditor

July 22, 2008