



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

Website: <http://opacnmi.com>

1236 Yap Drive, Capitol Hill, Saipan, MP 96950

Mailing Address:
P.O. Box 501399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: (670) 322-6481
Fax: (670) 322-7812

In re:) **APPEAL NO. BP-A091**
)
Appeal of USA Fanter Corp.,) **CUC-IFB-17-024**
Ltd.)
) **"Kailing Drive waterline replacement"**
)
)

FACTUAL BACKGROUND

In May of 2017, the Commonwealth Utilities Corporation ("CUC") issued Invitation for Bids number 17-024 ("the IFB"), for replacement of waterlines along Kailing Drive in Saipan ("waterline replacement project"). *See*, IFB. The waterline replacement project was to be entirely funded by a federal grant from the U.S Environmental Protection Agency ("EPA"). *Id.* In due course, bids were collected and evaluated by a CUC bid review committee.

On June 19, 2017, the Acting Executive Director of CUC notified AIC Marianas of its intent to award the contract to them as the lowest responsible bidder on the project. *Director's Letter to AIC*, p. 1 (June 19, 2017). On the same date, CUC notified USA Fanter Corp., Ltd. ("Fanter") that their bid did not rank as the lowest, most responsible bid and of its intent to award the contract to competing bidder. *Director's Letter to Fanter*, p. 1 (June 19, 2017).

On June 30, 2017, Fanter filed a timely protest ("Protest") to CUC disputing its decision to award the waterline replacement project to another bidder. Fanter's protest took issue with the language in the denial letter, disputed the non-responsibility decision as lacking due process, and claimed the decision was a *de facto* debarment of Fanter as a bidder. *Protest*, at pp. 1-4. On July 21, 2017, AIC Marianas, the declared awardee of the waterline replacement project, submitted a response to Fanter's protest. *AIC Response to Protest Letter to Director*, (July 21, 2017). CUC never rendered a decision on Fanter's protest. *Appeal by Fanter*, pp. 1-2; *Director's Report*, p. 1 (November 9, 2017).

On August 31, 2017, the grant funding authorization from the EPA for the waterline replacement project lapsed despite efforts by CUC to extend its availability. *Director's Report*, p. 1 (November 9, 2017).

On September 21, 2017, Fanter filed the present appeal with the Office of the Public Auditor ("OPA"). OPA timely solicited a report from CUC pursuant to NMIAC § 50-50-401(a)(4).

On October 24, 2017, CUC cancelled the IFB for lack of funds to pay for the waterline replacement project resulting from the expiration of the grant funding authorization from the EPA.

On November 9, 2017, the CUC Acting Executive Director issued its report pursuant to NMIAC § 50-50-401(a)(4) and § 50-50-405(d)(3) asserting Fanter's pending appeal is rendered moot by the cancellation of the underlying IFB. *Director's Report*, p. 2 (November 9, 2017).

On November 27, 2017, Fanter submitted comments on the CUC report, rejecting the issue of mootness and challenging CUC's finding of non-responsibility, which formed the basis for its rejection of Fanter's bid in the cancelled project. Fanter contends the actions of the CUC bid review committee and its findings of non-responsibility were arbitrary and capricious and the manner in which Fanter discovered the basis of CUC's decision (by pursuing the present appeal) showed disregard for Fanter's procedural due process rights. Fanter's comments suggest that a justiciable issue remains and that OPA may craft a remedy by ordering CUC reverse its finding that Fanter is "not considered responsible." *Fanter Comments to Director's Report*, (November 27, 2017).

On November 29, 2017, CUC Legal Counsel James Sirok dispatched a letter to all interested parties addressing challenges raised by Fanter to CUC's mootness argument.

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 50-50-405(a) based on CUC's failure to act on Fanter's protest within the time specified in NMIAC § 50-50-401(a)(3).

DISCUSSION

As recognized by CUC in its comments, the courts of the CNMI are not constrained by the “case or controversy” requirements set forth in Article III of the United States Constitution, but operate under similar policy concerns. *See Govendo v. Micronesian Garment Mfg.*, 2 N.M.I. 270 (1991). OPA, in its role overseeing administrative appeals, is limited to awarding the remedies it is authorized by regulation to dispense. There has been no contention in any filing before OPA to suggest this matter advanced beyond the “pre-award” stage, as no contract had been executed between CUC and AIC Marianas prior to the protest lodged by Fanter. Accordingly, the remedies available for OPA to administer are limited to: cancellation of a proposed award or solicitation or, revision of the same to comply with law or regulation. NMIAC § 50-50-410(a).

The IFB was cancelled on October 24, 2017 due to lapse in the grant fund authorization by EPA for the funding of the project. There have been no claims to suggest the cancellation was done in bad faith or any other invitation for OPA to question the basis for CUC’s decision to cancel the IFB.

OPA has recognized that lawful cancellation of an invitation renders pending underlying appeals moot. *In re: Appeal of Rosario B. Aldan*, OPA Appeal No. BP-AO23, p. 8 (January 25, 2001). OPA’s position with respect to mootness after lawful cancellation is in line with the decisions of the Comptroller General of the United States. GAO decisions are non-authoritative in the CNMI but OPA commonly relies on them for guidance purposes. *In re: Appeal of KUTH Energy*, OPA Appeal No. BP-AO75, p. 6 (July 26, 2013). The GAO decisions on the matter suggest that cancellation of a solicitation renders pending appeals moot. *See generally, International Computaprint Corp.*, B-189016, p. 5 (January 11, 1978); *Young Engineering Systems*, B-189322, p. 1, (July 11, 1977).

While Fanter’s appeal and comments in response to CUC’s report go to great depths to challenge the basis for CUC’s determination of their non-responsibility, nothing stated can resuscitate the underlying IFB and therefore no remedy at law is available to them. A finding of responsibility of a bidder, or lack thereof, is defined by regulation and is clearly distinct from an action for

debarment. An inquiry of a bidder's responsibility is done on a contract by contract basis depending on the details of the project and the technical and financial demands of the project. NMIAC § 50-50-240. A bidder who is found responsible for one project might be found non-responsible for a similar project of a different magnitude. A finding of non-responsibility for any one project will not follow the contractor for future projects. By contrast, a debarment is a proceeding which occurs separate from any underlying procurement and prohibits consideration of any debarred contractor for **any** projects in a period of up to three years from the debarment. NMIAC § 50-50-560.

OPA will note, in dicta, that some issues raised by Fanter in the responsibility determination process of this matter might, in an active procurement, present concerns. However, any such concerns were rendered moot by the cancellation of the invitation for bids. Any similar concerns in the future could be remedied by a proper protest under an active invitation.

DECISION

For the reasons set forth above, the appeal by USA Fanter Corp. Ltd. is dismissed.

Dated this 15th Day of February, 2018.

BY:



JOSEPH J. PRZYUSKI
OPA Legal Counsel

CONCUR:



MICHAEL PAI, CPA
Public Auditor

CC: Interested Parties and Counsel:

Edward Manibusan, Attorney General, OAG
Gary Camacho, Executive Director, CUC
James S. Sirok, Chief Legal Counsel for CUC
Robert T. Torres, Attorney for Fanter
Rexford C. Kosack, Attorney for AIC Marianas
Hong Ye Construction

(attorney_general@cnmioag.org)
(gary.camacho@cucgov.org)
(james.sirok@cucgov.org)
(rttlaw@pticom.com)
(rex.kosack@kosacklaw.com)
(hongye_mei@hotmail.com)