

5. Hawaiian Rock was selected as the intended awardee on March 18, 2013.
6. The Director's Decision Number 13-003 on GPPC's protest was issued on April 30, 2013 and denied the protest.
7. GPPC appealed to OPA on May 14, 2013.
8. On May 31, 2013, Hawaiian Rock filed comments on GPPC's appeal.

III. ISSUES, ANALYSIS and DECISION

LOCAL BIDDER PREFERENCE

On federal government-funded capital improvement projects, such as this one, there is no compliance required for any local bidder preferences. CNMI Public Law 15-118 states that such preferences do not apply in this situation. Additionally, OPA previously ruled that the preference does not apply to any CNMI procurements because regulations have not been promulgated by the Secretary of Finance as were required by the law for the preference to be valid. Thus what is typically called the Local Bidder Preference law is not in effect in the CNMI due to the absence of regulations as are required by the underlying statute. GPPC references Addendum I to the IFB that, among other things, reminds bidders to submit an application for the Local Bidder's Preference. IFB Addendum I @ pg. 2. This statement in the Addendum is on a standard form used by DPW and states thereon that it is for reference only. The use of this form did not change the original IFB's notice that no local bid preference would be used in evaluating bids on this procurement nor did it change the requirement to comply with P.L. 15-118. In any event, regulations have yet to be published by the Secretary of Finance and therefore, until such regulations are published, no local bidder preference requirement exists in the CNMI regardless of what type of contract is involved or what agency supplies funding.

GPPC's claim that Hawaiian Rock's bid was not responsive because it lacked such a preference is incorrect. Compliance with this type of preference program was not required by this IFB. GPPC's appeal on this issue is DENIED.

IMPROPER USE OF GPPC PRICING INFORMATION

GPPC complains that Hawaiian Rock did not comply with NMIAC §70-30.3-001 which reiterates CNMI public policy for its procurements. GPPC claims that when the prior solicitation was canceled, following the publication of OPA Appeal decision A-069 on July 10, 2012, Hawaiian Rock had access to and used bid pricing information, some of which may have been proprietary to GPPC, from that procurement to its unfair advantage in this one. GPPC asks OPA to reverse Director's Decision 13-003 and disqualify Hawaiian Rock from receiving the

award on the basis of its alleged knowledge of GPPC's bid pricing in the prior procurement.

As acknowledged in OPA's Appeal Decision No. A-051, cancellation of a procurement after bid opening may allow other vendors to "have an unfair advantage if later permitted to compete again for the same procurement." Appeal Decision A051 @ p. 4. Instances, however, do exist when cancellation is appropriate and allowable. Pursuant to NMIAC § 70-30.3-240, "[a]n invitation for bids or request for proposals may be canceled, and any and all bids or proposals may be rejected, when such action is determined in writing by the official with expenditure authority and approved by the P&S Director to be in the best interest of the government" for any of a variety of reasons, including:

- (a) Inadequate or ambiguous specifications contained in the solicitation;
- (b) Specifications which have been revised;
- (c) Goods or services being procured which are no longer required;
- (d) Inadequate consideration given to all factors of cost to the government in the solicitation;
- (e) Bids or proposals received indicate that the needs of the government can be satisfied by a less expensive good or service;
- (f) All offers with acceptable bids or proposals received are at unreasonable prices;
- (g) Bids were collusive; or
- (h) Cancellation is determined to be in the best interest of the government.

NMIAC § 70-30.3-240.

If cancellation is in the best interests of the CNMI government, the cancellation is valid. The decision to cancel is one made by the Director of Procurement in conjunction with the Expenditure Authority. OPA will not overturn such a decision absent fraud or evidence of an impropriety or unreasonableness, none of which has been shown here by GPPC. It is up to the owner of proprietary information to protect that information. If GPPC believes that Hawaiian Rock has violated any laws relating to its proprietary information that may have been in GPPC's bid for the canceled procurement, it needs to review the procedures provided for in NMIAC §70-30.3-280(a)(3) or pursue the matter in a forum other than at OPA. Therefore, this issue is DISMISSED.

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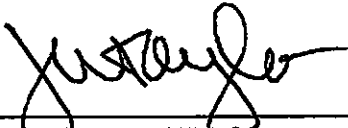
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OPA DECISION

The issues before OPA are decided as follows:

1. The allegation that Hawaiian Rock's bid was materially defective for failing to submit a Local Bidder Preference form is DENIED. There was no such requirement for Hawaiian Rock to comply with under this IFB.
2. The allegation that Hawaiian Rock improperly used GPPC's bid pricing information following the cancellation of the previous version of the solicitation is DISMISSED as the decision to cancel the prior procurement was not unreasonable and no actions warranting OPA's reversal of the Director's decision have been shown. In any event, the owner of proprietary data is responsible for the protection of such data and any protection sought by GPPC should be in a forum other than OPA.

The appeal of GPPC is DENIED in part and DISMISSED in part.



JAMES W. TAYLOR
OPA Legal Counsel

CONCUR



MICHAEL PAI, CPA
PUBLIC AUDITOR

Interested Parties:

Mark Hanson: mark@saipanlaw.com

Marcia Shultz: mschultz@marianaslaw.com

Catherine Cachero: ccachero@marianaslaw.com

Herman Sablan: procurement@pticom.com

Nancy Gottfried: gottfried.ago.procurement@gmail.com

Gil Birnbrich: gbirnbrich@gmail.com

Martin Sablan, Secretary of DPW via FAX 235-6346

Sonya Dancoe, DPW Federal Highway Administrator via FAX 235-6346

Thomas Nielsen, President, Maeda Pacific Corp. via FAX 322-6733

Michael Stewart, Vice President, A1C Marianas via FAX 234-2441