

3) Project Timeliness – the capacity and ability of the offeror to issue the financial audits for FY 2019, 2020 and 2021 within the specified time of no later than February 28, the following fiscal year (maximum 25 points).

4) Approach to Project - the plan for performing the required services, including the firm's or individuals understanding of the project's potential problems and or any special concern (maximum 10 points).

RFP at p. 3-4.

Three companies submitted timely proposals, Burger and Comer, P.C. ("Burger"), Ernst & Young (CNMI), Inc. ("Ernst & Young"), and Deloitte & Touche (CNMI), LLP ("Deloitte"). *Proposal Opening Minutes*, p. 1 (December 23, 2019).

The source selection committee, consisting of four CUC employees, met on three occasions to review the proposals. *Source Selection Committee Award Recommendation*, p. 2, (February 6, 2020). On January 9, 2020, the committee completed its review. After reviewing and ranking the proposals, the selection committee tallied scores of the competing proposals. The Ernst & Young proposal and Deloitte proposal received a tied ranking at 372 points. *CUC Selection Committee Tally Sheet*, p. 1. The Burger proposal received a ranking of 342.5 points. The Burger proposal suffered the lowest score in the "project timeliness" category, receiving a combined total of only 62.5 out of a possible 100 points. The Deloitte and Ernst & Young proposals received 90 points and 95 points, respectively, in the same category. *Id.*

After completing the review of the proposals and eliminating Burger from the process, the source selection committee contacted Ernst & Young and Deloitte regarding their proposals for clarification and to determine their ability to meet an extended schedule for the FY 2019 audit. *Source Selection Committee Award Recommendation*, p. 2, (February 6, 2020); *Director's Report*, p. 4 (May 20, 2020). The extended schedule altered the due date for the FY 2019 audit from February 28, 2020 to April 1, 2020. *Source Selection Committee Award Recommendation*, p. 2, (February 6, 2020). The Source Selection Committee did not contact Burger regarding the firm's ability to meet an amended due date for the FY 2019 audit work. *Appeal*, p. 2 (April 24, 2020).

On January 15, 2020, CUC requested OPA approval of its ranking of proposals. *CUC Letter to OPA requesting ranking approval*, p. 1 (January 15, 2020). OPA declined on January 20, 2020, citing its role in the procurement process and the need to preserve its independence. *Email from Michael Pai to CUC Director*, (January 20, 2020).

On February 6, 2020, the Source Selection Committee recommended the contract be awarded to Ernst & Young. *Source Selection Committee Award Recommendation*, p. 2, (February 6, 2020).

On February 11, 2020, CUC sent letters to Burger and Deloitte, notifying them that they were not ranked as the top qualified firm for an award of the contract. *CUC Letter to Burger*, p. 1 (February 11, 2020), *CUC Letter to Deloitte*, p. 1 (February 11, 2020).

On February 18, 2020, Burger sent an email to CUC Purchasing Administrator, Manny Sablan, indicating his intent to lodge a protest. *Email from Burger to CUC*, p. 1-2 (February 18, 2020) (submitted as Exhibit 1 to Director's Report).

On February 18, 2020, Burger sent a letter to the CUC Director, designated a formal protest, questioning how any other firm could be more qualified or complete the audit work for a lower price. No substantive legal arguments were put forth. *Burger and Comer Letter to CUC*, (February 18, 2020) (submitted as Exhibit 2 to Director's Report).

On February 19, 2020, Burger sent a second letter to the CUC Director asserting that his firm's proposal was improperly evaluated and received an unduly low score on project timeliness. The protest further argued that Burger's firm was most qualified because they have completed similar audit work for CUC for the previous five years whereas neither of the competing bidders have completed audit work for a utility in Saipan in the past five years. *Burger and Comer Letter to CUC*, (February 19, 2020) (submitted as Exhibit 3 to Director's Report).

On April 21, 2020, the CUC Executive Director denied Burger's protest and affirmed the award in favor of Ernst & Young. *Director's Decision*, p. 2 (April 21, 2020). The decision noted that Burger and Comer's proposal did not sufficiently explain the time table of its work and suffered

in the rating by the source selection committee. *Id.* at 1. This factor, in combination with other scored factors, caused Burger's proposal to earn the lowest score among the submitted proposals and was thus not considered "reasonably susceptible of being selected" and was not contacted for further discussions as were the other more highly ranked proposals. *Id.*

On April 24, 2020, Burger and Comer timely appealed the Executive Director's Decision to OPA. OPA sent a letter to CUC and all interested parties requesting the Executive Director to prepare a report on the appeal.

On April 30, 2020, Public Auditor Michael Pai recused himself from this appeal due to his position as former partner in the firm of Ernst & Young and his personal friendship with David Burger of the firm of Burger and Comer. Ashley Kost was placed as designee of the Public Auditor for purposes of this appeal.

CUC distributed the Executive Director's Report ("Director's Report") on the appeal OPA and all interested parties on May 22, 2020. The Report was dated May 20, 2020.

No interested parties submitted comments on the Report prior to the expiration of the due date.

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 50-50-405(a).

DISCUSSION

Burger and Comer's appeal suggests they are clearly the most qualified firm and deserving of an award of the audit services contract. They contend their low ranking in the "Project Timeliness" portion of the evaluation was based on a misunderstanding by the selection committee and their subsequent exclusion from further discussion concerning a modified deadline for the FY 2019 audit was unfair business practice. *Appeal*, p. 2.

While Burger's Appeal urges OPA to conclude they are clearly the most qualified firm, that question is not properly before OPA.¹ Rather, it is OPA's first duty to review the record and determine whether the evaluation made by the Source Selection Committee was reasonable and consistent with the terms of the solicitation. *See, In re: Success International Corporation*, OPA Appeal No. BP AO-87, p. 3 (Dec 11, 2014) (Determinations made by evaluation committee will not be reviewed absent bad faith, fraud, or lack of a reasonable basis for determination) (reviewing award under CNMI Department of Finance procurement regulations, identical in relevant respects to the CUC procurement regulations). This view is consistent with review of agency evaluations conducted under federal procurement rules. *See, Unisys Corp.*, B-406326, p. 8, (Apr. 18, 2012) (In reviewing protests challenging an agency's evaluation, the GAO will not reevaluate proposals; rather, we will review the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation). Accordingly, it is OPA's job not to re-evaluate the proposals, but instead to determine whether the evaluation conducted by CUC was reasonable under the circumstances.

The focus of substantive argument in the appeal goes to the "Project Timeliness" component of the evaluation. While the appeal relies heavily on Burger's experience performing audit services for CUC for the previous five years to suggest they are the most qualified firm, the core of Burger's challenge to the selection process in the appeal is that several evaluators misunderstood the timeline included in the Burger proposal, resulting in an incorrect ranking in that category. *Appeal*, p. 2-4. Accordingly, it is necessary to review the Burger proposal relative to the competing proposals as to the project timeliness category.

The Burger proposal commits to a sixty-day period to conduct the fieldwork and issue a draft report. *Burger Proposal*, p. 9. It further sets a deadline for CUC to produce all requested schedules

¹ The Appeal dedicates several pages to argue they are the most qualified firm based solely on their experience auditing CUC for the past five years. *Appeal*, p. 4-5. Their argument suggests this experience alone sufficiently distinguishes them from the competition as the only firm who has recently conducted audits of a public utility in the CNMI. OPA notes that while **local** experience might be viewed as a positive factor for several criteria, it is not listed in the ranking criteria, and the ranking category "experience on similar projects" (which does not mention **local** experience) only accounts for 15% of the total ranking points. Essentially, the Appeal drastically overstates the importance of Burger's status as incumbent contractor and contracting agencies should, as CUC did here, evaluate all proposals based on their contents and should not afford any special consideration, outside the ranking criteria, of firms based on their status as incumbent contractors.

and a trial balance by December 30 of each year. *Id.* The “Budgeted Hours” section of Burger’s proposal breaks the audit into three phases, each with a range of time to complete the phase. The sum of the times allotted for all phases is ten weeks, however, the proposal provides “due to the timing of the engagement and the reporting deadline, the work in the phased detailed above will have to overlap.” *Burger Proposal*, p. 20. According to the debriefing with CUC, there was some confusion surrounding the “Budgeted Hours” section and time frame committed to in the Burger proposal. *Appeal*, p. 3; *Director’s Report*, p. 2. Of particular concern to evaluators was the impossibly tight time between the due date for the proposals (December 23, 2019) and the deadline for CUC to provide trial balance and all schedules (December 30, 2019) to keep the audit on schedule. *Director’s Report*, p. 2-3. In addition to the tight time schedule, CUC felt the Burger proposal hedged their ability to meet the report due date on CUC’s ability to provide timely documentation and responses. *Id.*

The Ernst & Young proposal included a “transition” explanation, which covered the FY 2019 audit and making a transition from the incumbent auditor followed by a timeline for completing the audit by the February 28 deadline. *Ernst & Young Proposal*, p. 20-28. The transition timeline did not include a due date for documentation from CUC to meet the audit deadline, but contemplated a swift contract award (December 31), which would be followed with entrance meetings, stakeholder interviews, and site visits for the first several weeks of January. *Id.* at 20. Following the transition description, the Ernst & Young proposal included over eight pages of written explanation and visual diagrams showing the proposed audit process while demonstrating a clear and firm commitment to meet the February 28 deadline. *Id.*

The Deloitte proposal commits to producing a draft audit report no later than January 31 of each year and meeting the February 28 deadline. *Deloitte Proposal*, p. 4. Though no due date is stated for CUC’s production of the trial balances and schedules, the proposal does recognize that its “earliest date of availability” is contingent on their timely production. *Id.* at 7. Notwithstanding, the proposal states that Deloitte will commit a significant amount of time and resources to issuing final reports before the February 28 deadline. *Id.* Following the firm commitment to meeting the deadline, the Deloitte proposal includes five pages of charts and explanation on the proposed audit process and how the deadline will be met. *Id.* at 7-11.

It is important to note the "Project Timeliness" rating component is more than a mere statement of a timeline: it also rates the "capacity and ability" of the proposing party to meet the deadlines set forth in the RFP. RFP scope of work, p. 3. Though OPA is without any evidence of the basis for the raw scores generated by the selection committee, it is appropriate to review information in the proposals relevant to "capacity and ability" to assess the reasonableness of the committee's review. The Burger proposal states: "work will be staffed primarily by four individuals in the CNMI office. Additional staff will be assigned as needed." *Burger Proposal*, p. 11.² By contrast, Ernst & Young commits a team of eleven to the CUC team. *Ernst & Young Proposal*, p. 18. Deloitte commits three designated partners and two designated managers to the engagement. *Deloitte Proposal*, p. 12.

Reviewing the proposals at face value, the selection committee's ranking of the Burger proposal in the project timeliness category due to concerns of meeting the deadline relative to the competing proposals appears entirely reasonable. OPA will not supplant its own opinion for that of the contracting agency when the agency evaluation is reasonable and consistent with the terms of the solicitation. Accordingly, OPA finds the ratings conducted by the source selection committee to be reasonable under the circumstances.

However, following the ranking and recommendations by the source selection committee, CUC contacted the competing firms for "clarification" of their ability to meet an extended timeline for the FY 2019 audit. Burger's appeal suggests these exclusive discussions between CUC and the competing firms constitute an unfair business practice. *Appeal*, p. 2. CUC contends it is permissible under the regulations to exclude a firm from further discussions if its proposal is not reasonably susceptible of being selected for an award. *Director's Report*, p. 4.

The CUC regulations permit discussions between CUC and:

responsible offerors who submit proposals determined to be reasonably susceptible of being selected for an award for the purpose

² The Burger proposal does display a five-member team consisting of one partner, one audit manager, one senior auditor and two staff auditors later in its presentation. *Burger Proposal*, p. 14-17.

of clarification and to insure full understanding of, and responsiveness to, solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers.

NMIAC § 50-50-225(f).

CUC suggests the source selection committee's rating of Burger nearly thirty points below the tied scores received by Deloitte and Ernst & Young placed them outside the competitive range and not reasonably susceptible of being selected for an award.

A proposal may be designated outside the "competitive range" and excluded from further discussions and consideration if, in comparison with other proposals, it has no reasonable chance of being selected for award. *In re: Appeal of Pacific Marine and Industrial Corp.*, OPA Appeal No. BP-AO16 p. 14 (June 18, 1998).³ When excluding proposals from the competitive range, agencies should not rely on arbitrary "cut off" scores or simple comparison of raw rankings, but instead should evaluate the competing proposals strengths and weaknesses. *Id.* at 13-14. In *Pacific Marine*, CUC solicited proposals for construction of an 80 Megawatt power generation facility on Saipan. CUC received thirteen proposals, which were evaluated by a four-member selection committee. Following evaluation, CUC selected the six top raw scores as their competitive range and informed the remaining proposers that they would not be further considered for an award. Pacific Marine and Industrial Corp. protested the decision to CUC and later appealed the matter to OPA. OPA held, among other things, that CUC's arbitrary "cut off" score method of determining the competitive range violated its procurement regulations. Instead, proposals must be compared based on their strengths and weaknesses instead of raw rankings or an arbitrary cut off score. *Id.* at 14.

Burger and Comer's proposal should not have been excluded from the competitive range for several reasons. The Burger proposal was actually ranked ahead of, or tied to, competitors in the

³ It appears the CUC regulations have changed slightly since the 1998 decision in *Pacific Marine and Industrial Corp.*, dropping several sections that elaborate on the *procedure* for determining the "competitive range" and conducting technical evaluations, however the key language "reasonably susceptible of being selected for an award" remains unchanged.

total raw score tally by two of the four evaluators, indicating the strengths of the proposal was at the very least competitive, if not ahead in score among half of the selection committee. *Source Selection Committee Points Tally*, p. 1 (ranking totals by Cristina Butac and Cristina Tuazon). Additionally, Burger's proposal actually received higher total raw scores than the competitors in two of the four ranking categories. *Selection Committee Points Tally*, p. 1 (ranking totals for "Approach to Project" - worth 10 points, and "Experience on Similar Projects" - worth 15 points). Lastly, Burger's lowest score was in "Project Timeliness" due to a belief Burger could not meet the deadline which CUC later extended while in discussion with the other two offerors. *Director's Report*, p. 2-3.

While Burger's proposal ranked lower in raw score points when added across all members of the source selection committee, it ranked higher or equal in total raw score among half of the committee and received higher rankings in half of the categories among all of the committee members. *See above*. Reviewing the competing proposals relative strengths and weaknesses within the score tally among the selection committee, it would be difficult to conclude that Burger and Comer's proposal would not be reasonably *susceptible* of receiving an award. It is important to note the regulations careful use of the word "susceptible" and its meaning: "*capable* of submitting to an action, process, or operation." Merriam-Webster Dictionary (online, 2020) (emphasis added). This is distinguishable from "likely" or "probable." This interpretation is in line with previous OPA decisions and with decisions by the GAO under comparable federal regulations concerning the competitive range. *See e.g., In re: Appeal of Pacific Marine and Industrial Corp.*, OPA Appeal No. BP-AO16, p. 10-14 (June 18, 1998). Accordingly, Burger's proposal should have been included in the competitive range and included in further discussions.

CUC's amendment of the due date for the FY 2019 requires revision of the solicitation and allow all firms to revise their proposals. When an agency makes changes to the scope of work for a solicitation after conducting evaluations or selections, but prior to award of a contract, the government must revise the solicitation and allow all proposers to revise their proposals. *In re: Appeal of Mariana Pacific Inc.*, OPA Appeal No. BP-AO07, p. 19 (April 4, 1997). In *Mariana Pacific, Inc.*, the Department of Public Works and the Public School System jointly solicited sealed proposals for the design and construction of additional classroom space for Saipan, Tinian, and

Rota schools. *Id.* at 1. The RFP included specifications on the size, location, and number of classrooms and included technical specifications on architectural, electrical and civil requirements of the project. *Id.* at 2. A source selection committee consisting of five employees of DPW and PSS ranked the proposals, shortlisting three contractors, and finally selecting one firm. *Id.* at 3. Following selection, negotiations began between the selected firm and the contracting agencies. *Id.* at 6. During those negotiations, revisions were made reducing the number and locations of classrooms, and changes to the technical specifications of the classrooms. *Id.* at 7. The selected firm was asked to revise its proposal. *Id.* Upon learning of a pending award to the selected firm, a competitor lodged a formal protest, and subsequently an appeal of the award. OPA found⁴ the revision of the specifications after selection improper because competing proposers were excluded from further competition. *Id.* at 19. The procurement regulations require fair and equal treatment of offerors when revision of proposals is necessary. *Id.* (interpreting provision identical to NMIAC § 50-50-225 (f), found in an earlier version of the procurement regulations promulgated by the Department of Finance).

The extension of the due date for the FY 2019 audit constitutes an amendment to the scope of work. CUC changed the due date for the FY 2019 audit from 2/28/2020 to 4/1/2020 after the source selection committee's ranking of the proposals. While this change did not alter technical requirements of the audit engagement or the total amount of work to be done, it drastically changed the urgency of the project and no doubt affected the rankings conducted by the source selection committee. The key criteria resulting in the Burger proposal's low ranking was concern surrounding their ability to meet the tight timeline in the RFP.

The appropriate remedies available to OPA under NMIAC 50-50-410 where a solicitation or award is in violation of the procurement regulations include either (1) revision of the solicitation and allowing all contractors to revise proposals, or (2) cancelling the solicitation.

⁴ OPA also found that the "shortlisting" whereby the competitive range was reduced to the top several proposers was improper under regulations, among other errors in ranking the proposals. *In re: Appeal of Mariana Pacific Inc.*, OPA Appeal No. BP-AO07, p. 16 (April 4, 1997).

Given the delay in award of the contract due to the protest and appeal process, further exacerbated by government disruptions resulting from COVID 19, OPA recommends revising the current solicitation and allowing all proposers to revise their submissions. This would avoid the need to advertise and begin the process anew.

DECISION

For the reasons set forth above, the appeal by Burger & Comer, P.C. is hereby granted. CUC is directed to pursue either of two remedies: (1) revise the solicitation and allow *all* proposers on this RFP to revise their proposals based on a revised due date, or (2) cancel this RFP. OPA will leave it to CUC's discretion as to selection of the preferred remedy.

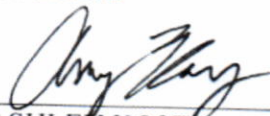
Dated this 8th day of July, 2020.

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