

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-A095
)	
Appeal of GPPC, Inc.)	CUC-IFB-19-031
)	
Reconsideration Request)	“San Vicente Water Tank”
)	
_____)	RECONSIDERATION REQUEST

On February 28, 2020, OPA issued its decision in the Appeal of GPPC, Inc., Appeal No. BP-AO94 (“Decision”). On March 13, 2020, RNV Construction (“RNV”) submitted a request for reconsideration of OPA’s decision. For a detailed background of this matter and OPA’s factual and legal findings please refer to the Decision.

The CUC Procurement Regulations provide means for the appellant, director, interested party who submitted comments, or any agency involved to request reconsideration of any OPA decision. NMIAC § 50-50-405 (i)(1). Having submitted comments in this matter, RNV may request reconsideration of OPA’s decision. *See, RNV Comments on Appeal and Director’s Report* submitted on January 15, 2020 and *RNV Comments in Response to GPPC Comments*, submitted on January 28, 2020. Any request for reconsideration “shall contain shall contain a detailed statement of the factual and legal grounds specifying any errors of law information not previously considered.” *Id.*

GPPC, Inc. (“GPPC”) submitted an opposition to RNV’s request for reconsideration on March 27, 2020.

RNV offers four grounds for reconsideration of the Decision: 1) The OIC Certificate is not material, 2) CUC may use its discretion to waive the OIC requirement, 3) The [OPA] decision is not reasoned, and 4) the Public Auditor has no statutory right to review CUC’s decisions. OPA will address each claim in turn.

1. The IFB made the OIC Certificate a bid security requirement and therefore material to the bid.

RNV recasts arguments addressed in the appeal decision regarding the materiality of the OIC certificate, however they fail to address the basis for OPA's Decision. Ordinarily, a certificate from the Department of Commerce, Office of Insurance Commissioner, is not a requirement to submit a bid. Bid security is. However, the Invitation for Bids ("IFB") in this matter required bidders to "*submit a clearance from the OIC* [CNMI Department of Commerce, Office of the Insurance Commissioner] *certifying their insurer of choice is in compliance with the CNMI's Insurance Code.*" IFB, p. 2 (emphasis in original, bracketed material added for clarity). By including the OIC Certificate requirement in the IFB, CUC added the OIC Certificate as a "bid security requirement" within NMIAC § 50-50-301 (a)(2)(ii). Though RNV's bid included the appropriate bond amount, they failed to meet the specific "bid security **requirements** and form" required in the IFB by failing to include the OIC Certificate. Accordingly, RNV's bid must be rejected as non-responsive under NMIAC § 50-50-301 (b)(3).

RNV's argument obsesses on the fact that the OIC certificate is not the security itself (i.e. the bond), but instead "merely evidences security" by verifying that the bonding company is in compliance with local law. They go on to suggest (again) that awarding the contract to RNV is acceptable because this "nonmaterial requirement" is satisfied by information outside of the RNV bid package (i.e. the GPPC package because the GPPC bid relied on the same bonding company as RNV). In their rehashing of these arguments already dismissed in the Decision, RNV misses OPA's finding that the OIC certificate is only a material requirement because it is part of the "bid security requirements" as designated by the ITB.

2. The CUC Procurement Regulations do not allow for a waiver of material requirements

RNV's argument for reconsideration fails to address any of the Decision's findings with respect to the invalidity of the CUC waiver included in the ITB as to material imperfections in a bid package. Instead, RNV offers conclusory statements such as "[t]here is no mandatory rejection

requirement in the regulations¹” and “CUC can use its discretion to waive the OIC requirement.” The request for reconsideration then goes on to conclude “[t]he decision is arbitrary and should be reconsidered.” While RNV fails to offer any “detailed statement of the factual and legal grounds specifying any errors of law information not previously considered” as required by NMIAC section 50-50-405 (i)(1) to request reconsideration, OPA will summarize the reasons why the waiver included in the IFB cannot allow CUC to waive material imperfections in bids under the regulations.

The IFB included language reserving CUC the right to “reject any or all bids and waive any imperfection in the bid proposal in the best interest of the government.” IFB, p. 2. However, the CUC Procurement Regulations are rigid on alteration or correction of bids after submission and allowing a waiver of material bid requirements would contravene the stated purposes and policies of the Regulations. *Decision*, p 5-6; *See also*, NMIAC § 50-50-205 (f) - (h) and § 50-50-001 (b). Such a waiver would undermine the fair and equitable treatment of bidders, allowing CUC to overlook imperfections in one bid in favor of another or reject an otherwise viable bid without cause. If improperly used, CUC could reject a conforming bid of one contractor and accept a non-conforming bid of another to arrive at a predetermined contractor of their choice. Such a waiver could also erode the public confidence and eliminate the safeguards to promote quality and integrity in the CUC procurement system.

3. OPA’s Decision that sources outside the bid package cannot supplement the bid package is appropriate.

RNV again recasts its feckless argument that CUC could rely upon its own knowledge of RNV’s insurance company and/or the OIC Certificate in *GPPC*’s bid package to supplement RNV’s incomplete bid package. The Decision concluded “[t]he issue of responsiveness must be determined by the contents of the bid submission, not by reference to outside sources like other competing bids or knowledge or experience of the procurement officials.” Decision p. 6-7. It further cautioned that “[a]llowing exploration outside of the individual bid submissions to

¹ As noted above, there is a mandatory rejection requirement when a bid fails to meet the “bid security requirements” specified in the ITB. NMIAC § 50-50-301 (b)(3).

determine the responsiveness of the bids would create bad precedent and a minefield of procurement litigation.” *Id.* p. 7. RNV, without more than a conclusory statement “[t]here is no other cases [sic] that resemble to [sic] the current case,” suggests OPA’s Decision is not reasoned and lacks foundation. RNV Reconsideration p. 2-3. It may well be true that no current case parallels the present, but it does not require much imagination to envision future disputes where procurement decisions are based on bid review committee members’ personal knowledge of bidders or bid packages are able to “borrow” forms from competing bids. Allowing such a practice would run counter to nearly all stated purposes and policies set forth by the CUC Procurement Regulations. NMIAC § 50-50-001 (b).

4. OPA has jurisdiction over appeals from CUC procurement decisions.

After participating in the present litigation and submitting two rounds of comments to OPA regarding this matter, RNV now in its third submission first raises the issue of OPA jurisdiction over appeals from CUC procurement protest decisions. RNV bases its argument on a lack of direct legislative grant of authority to OPA to review CUC procurement decisions.² RNV Reconsideration, p. 3. GPPC suggests RNV has waived its right to dispute jurisdiction by not raising this issue in their initial opposition to GPPC’s appeal. GPPC opposition to reconsideration p. 2. Though RNV’s timing in challenging jurisdiction is suspicious, OPA will address the issue as it goes to subject matter jurisdiction, which cannot be waived. *See generally, Seman v. Aldan*, 3 CR 0152, p. 3 (Aug. 11, 1987) (finding subject matter jurisdiction cannot be waived); *Sullivan v. Tarope*, 2006 MP 4 ¶ 41, 42.

The issue of OPA jurisdiction over appeals from CUC procurement protest decisions was addressed by OPA in *In re: Appeal of IP&E Saipan*. *In re: Appeal of IP&E Saipan*, OPA Appeal No. BP-AO84 p. 5 (March 31, 2014). In that decision, OPA determined that its

² In footnote 1 of its request for reconsideration, RNV raises “as a separate matter,” a claim that the 2007 version of the CUC Regulations are invalid for issues with publication requirements as cautioned by the CNMI Law Revision Commission in the preamble to the regulations. Without deciding the issue, OPA notes that application of the previously published 1991 version of the CUC Regulations would reach the identical result as the present decision. *See, e.g., In re: Appeal of Island Business Systems & Supplies*, OPA Appeal No. BP-AO57 (Feb. 10, 2009) (Jurisdiction not affected by which version of regulations applies where same result is reached under both sets of regulations).

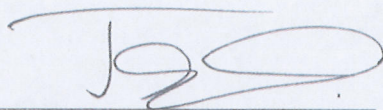
“Constitutional and statutory mandates are broad enough to include the appellate oversight created by CUC procurement regulations. OPA’s Constitutional authority includes “other duties provided by law” and OPA’s legislated duties include the duty to prevent fraud, waste, and abuse in the collection and expenditure of public funds.” *Id.* at 5; N.M.I. Const. Art. III, § 12; 1 CMC § 2304. Given the broad oversight authority granted to OPA by the Legislature to detect and prevent fraud, waste, and abuse in the expenditure of public funds in the Commonwealth and authority to recommend policies and provide assistance to agencies “involved in the expenditure of public funds for the purpose of procurement of supplies,” it is entirely appropriate for CUC (and for the Department of Finance and the Public School System) to designate OPA as the appellate authority over their procurement functions. 1 CMC § 2304 (b).

DECISION

For the reasons set forth above, the request for reconsideration made by RNV Construction is hereby denied. This matter is remanded to the CUC Executive Director for appropriate action.


Dated this 7th day of April, 2020.

BY:



JOSEPH J. PRZYUSKI
OPA Legal Counsel

CONCUR:



MICHAEL PAI, CPA
Public Auditor

CC: Interested Parties and Counsel:

Edward Manibusan, Attorney General
Gary Camacho, Executive Director, CUC
Michael Dotts, Counsel for RNV Construction
Mark Hanson, Counsel for GPPC, Inc.
AIC Marianas, Inc.

attorney_general@cnmioag.org
gary.camacho@cucgov.org
mdotts@dottslaw.law
mark@saipanlaw.com
saipan@aicconstruction.com