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Commonwealth of the Northern Mariana Islands

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In re:

Appeal of IP&E Saipan

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) **APPEAL NO. BP-A084**

)
) **CUC-RFP-13-015**

)
) **“CUC Fuel Supply”**
)

BACKGROUND

This is an appeal by Marianas Acquisition Corporation IP&E Saipan (“IP&E”) over two procurement-related matters: the cancellation of RFP-13-015 (“RFP”) by the Commonwealth Utilities Corporation (“CUC”) and the amendment of a pre-existing supply contract with Mobil Oil Mariana Islands, Inc. (“Mobil”) that extended Mobil’s contract (PG-07-C021) to provide fuel to CUC until April 30, 2014. IP&E complains that both were improper. IP&E protested these issues but its protest was not decided by CUC. Instead, CUC alleged that a protest was inappropriate because the amendment to the Mobil contract did not involve IP&E and the cancellation of a solicitation cannot, claims CUC, be protested. Instead, CUC claims the complaint by IP&E must be filed with the Commonwealth Public Utilities Commission (the “PUC”).

Chronology

May 1, 2010: Contract No. CUC-PG-07-C021 with Mobil became effective for a three (3) year period for the supply of fuel to CUC.

February 8, 2013: CUC issues RFP-13-015 for supply and delivery of fuel for power generation in CUC’s Saipan, Tinian, and Rota power plants.

April 17, 2013: Notice of Cancellation Letter from CUC regarding RFP-13-015 sent to IP&E indicating that the RFP’s specifications were inadequate or ambiguous and that the specifications would be revised.

April 18, 2013: Email from Charles Warren, CUC, to Robert Torres of IP&E, explaining the cancellation.

April 18, 2013: Letter from CUC Legal Counsel to Richard Johnson, Counsel for Mobil, notifying Mobil of the extension of contract PG-07-C021.

April 22, 2013: Letter from CUC Acting Executive Director to the President of Mobil.

April 26, 2013: Protest filed by IP&E.

April 30, 2013: Amendment to Mobil contract signed.

May 7, 2013: CUC's response to IP&E protest over the cancellation of RFP-13-015 and the award of a contract extension to Mobil.

May 21, 2013: Appeal filed by IP&E with OPA ("Appeal").

May 22, 2013: Letter from OPA to CUC requesting documents pertaining to RFP-13-015.

June 6, 2013: Letter from CUC to OPA questioning the validity of IP&E's protest and appeal, indicating that CUC believed OPA did not have jurisdiction, refusal and to provide a report or documents, and requesting that OPA justify its authority.

June 10, 2013: Email from attorney Sheila Trianni, Counsel for IP&E, requesting a conference on the appeal and explaining other matters.

June 17, 2013: Letter from attorney Trianni to OPA explaining the basis of IP&E's appeal.

July 26, 2013: Email from OPA to counsel requesting documents and inquiring about a conference.

August 8, 2013: Email from OPA to CUC Procurement Manager requesting documents.

August 9, 2013: Email from CUC Legal Counsel in reply to OPA's document request indicating that OPA lacks jurisdiction and stating that CUC will not provide a Report or documents.

September 12, 2013: The parties met for a conference with OPA.

September 18, 2013: Email from CUC to OPA indicating that CUC and IP&E were entering into discussions to settle the appeal outside of the appeals process. OPA requested an update not later than October 7, 2013 regarding the status of any settlement.

October 7, 2013: Email from CUC to OPA informing that an agreement to settle the appeal had been reached; that CUC would draft the agreement, coordinate with IP&E, and submit a draft to OPA.

October 23, 2013: Email from CUC to OPA explaining that the settlement agreement was being drafted and that it would be sent to IP&E by close of business on October 24, 2013.

November 7, 2013: OPA requested a status update meeting/conference on November 14, 2013.

November 14, 2013: OPA, CUC and IP&E met at the CUC conference room. OPA was informed that the agreement between IP&E and CUC was not going to be entered into due to disagreements over its terms.

December 24, 2013: CUC indicated that the appeal could still be resolved between CUC and IP&E and OPA established December 31, 2013 as the deadline for entering into an agreement outside of the appeals process and having IP&E withdraw its appeal.

December 31, 2013: IP&E wrote to OPA indicating that no resolution of the appeal had been reached between IP&E and CUC.

February 5, 2014: OPA sent the appeal file to Mobil, an interested, party.

February 7, 2014: Mobil submitted input regarding the question over OPA's jurisdiction.

February 19, 2014: Shell Oil submitted input regarding the question over OPA's jurisdiction.

February 20, 2014: Mobil submitted rebuttal comments to Shell Oil's submission on February 19, 2014.

March 6, 2014: Due to a request from Shell, OPA notified the parties that they could submit final documents and argument not later than March 14, 2014.

March 14, 2014: Comments submitted by Mobil regarding CUC Report.

March 17, 2014: Comments submitted by IP&E regarding CUC Report.

March 21, 2014: Rebuttal comments submitted by Mobil regarding IP&E comments on CUC Report.

OPA JURISDICTION

OPA has jurisdiction to decide this appeal. NMIAC § 50-50-405(a) vests OPA with jurisdiction to hear and decide appeals from procurement protest decisions of the CUC Executive Director. To properly trigger OPA's jurisdiction, "any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract" must first lodge a timely protest with the CUC Executive Director and submit a timely written appeal to OPA based on the Executive Director's decision, or lack thereof. NMIAC §§ 50-50-401 & 405.

There is no dispute that IP&E lodged a timely protest to the CUC Executive Director or that IP&E submitted a timely appeal to OPA based on the Executive Director's failure to act on the protest within thirty (30) calendar days as provided in NMIAC § 50-50-405. Instead, CUC claims OPA lacks jurisdiction to decide this appeal because the disputed actions by CUC, namely the cancellation of an RFP, is not an "appealable" grievance under the CUC procurement regulations. *CUC Letter to OPA*, p. 2 (June 6, 2013); *Director's Decision*, pp. 2-3 (February 21, 2014). CUC suggests that Public Law 16-17, section 8158 (codified at 4 CMC § 8158) requires such grievances be filed before the Commonwealth Public Utilities Commission. *Id.*

Mobil agrees that OPA lacks jurisdiction over the present appeal, but relies on different theories. First, Mobil agrees with CUC that Public Law 16-17 removed OPA from the review process for the present appeal. *Mobil Email to OPA* (February 7, 2014). Mobil takes this theory one step further, opining that the PUC is the sole body to review *any* CUC procurement dispute, removing OPA from the procurement appeals process all together. *Id.* Second, Mobil argues that nothing in OPA's Constitutional or legislated powers provide the authority to decide procurement appeals. *Id.* Finally, Mobil argues that nothing in CUC's enabling legislation grants them authority to delegate appellate oversight of their procurement function outside of CUC, thus the regulatory delegation in NMIAC § 50-50-405 is *ultra vires*. *Id.*

OPA has consistently found that cancellation of an invitation to bid or request for proposal can be the proper basis for a protest and appeal under both the CUC and CNMI Department of Finance procurement regulations. *See generally, In re: Appeal of KUTh Energy*, OPA Appeal No. BP-A075, p. 6 (July, 26 2013); *In re: Appeal of Herman's Modern Bakery*, OPA Appeal No. BP-A070, p. 10 (September 19, 2012); *In re: Appeal of Primtek Construction Company*, OPA Appeal No. BP-A068, p. 4 (June 19, 2012); *In re: Appeal of Reaction Co.*, OPA Appeal No. BP-A051, p. 5 (April 2, 2007).¹ While such review is appropriate under applicable regulations,

¹ While NMIAC §§ 50-50-401 (a)(1) and 70-30.3-501 (a)(1) appear to limit protests (and thus appeals) to "solicitation or award of a contract", the preceding words "in connection with" expand the scope to include cancellations of solicitations prior to an award. *See generally, FFTF Restoration Co., LLC v. United States*, 86 Fed. Cl. 226 (2009) (Federal case interpreting similar language of federal regulation governing jurisdiction over bid protests to cover procurement cancellations holding that in order to show a violation of a regulation or procedure, the disappointed bidder "must show 'a clear and prejudicial violation of applicable statutes or regulations'" in order to succeed. *Id.* at 236 - 240).

deference to the agency decision exists and such decisions are generally not second-guessed by OPA absent a demonstration by the appellant of bad faith or fraud in the decision to cancel. *See, id.* Accordingly, CUC's objection to OPA jurisdiction over the present appeal is without merit.

Similarly, each of Mobil's jurisdictional challenges are without merit. First, the plain language of the PUC dispute resolution scheme applies to customer grievances, not procurement disputes by potential vendors. The PUC complaint process specifically deals with CUC customers pursuant to 4 CMC § 8448(a). IP&E in this instance is not a rate-paying customer, but a potential vendor to CUC so that CUC may provide end services to actual customers. In effect, CUC is a potential customer of IP&E, not the other way around. The Legislature exhibited no intent whatsoever that the PUC dispute resolution would replace the CUC procurement regulations regarding protests and appeals. Second, OPA's 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. *See*, N.M.I. Const. Art. III, § 12; 1 CMC § 2304. Finally, Mobil's reliance on the legal principal that agencies may not delegate duties to outside agencies or parties absent legislative authority to do so misses the point that the NMI Legislature did imbue broad authority to OPA over the procurement of goods and services in the Commonwealth, sufficient to justify CUC (and for that matter the Department of Finance and the Public School System) to designate OPA as the appellate authority over their procurement function.

DISCUSSION

The Public Auditor will not object to an agency's corrective action, including the cancellation of a solicitation, unless there is evidence of fraud or a failure to follow applicable regulations. *In re Primtek Construction Company*, OPA Appeal No. BP-A068, p. 4 (June 19, 2012). OPA will not "engage in second-guessing ... the necessity of the changes made to the specifications or scope." *See In re Appeal of Reaction Co.*, OPA Appeal No. BP-A051, p. 6 (April 2, 2007). Contracting officials have broad discretion to take corrective actions regarding contracts and solicitations. *In re Primtek Construction Company*, OPA Appeal No. BP-A068, p. 4 (June 19, 2012). The

decision of the procuring agency will not be disturbed unless the Public Auditor finds fraud or a failure to follow applicable regulations. *Id.*

OPA's position with respect to cancellation of solicitations 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. The GAO's guidance regarding the cancellation of a procurement is that it is an agency decision which, if not made on the basis of bad faith or fraud, etc., rests with the agency's discretion. In deciding whether to cancel a solicitation, the GAO has held that a contracting officer has broad discretion and need only advance a reasonable basis for a decision to cancel a procurement solicitation. *Sunshine Kids Serv. Supply Co.*, B-292141, p. 2 (June 2, 2003). The GAO has held that where a reasonable basis exists to cancel a solicitation, an agency properly may cancel a solicitation no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not canceled until after proposals have been submitted and evaluated and protesters have incurred costs in pursuing the award. *MedVet Development LLC*, B-406530, p. 2 n.3 (June 18, 2012).

In this case, IP&E responded to the RFP with its proposal for the provision of fuel to CUC. However, CUC canceled the RFP stating that its specifications were incorrect and that they would be revised. IP&E objected to the cancellation stating that the RFP should have been amended if its specifications were incorrect. OPA finds that CUC had sufficient authority to cancel RFP-13-015.

Procuring agencies have a wide discretion in canceling procurements prior to contract award. It appears that here the specifications were changed and CUC had little choice but to cancel the RFP. CUC determined that the specifications for the RFP were in error and that they required revision. Specification revisions are a specific, regulatory reason for the cancellation of a solicitation under CUC's procurement regulations. NMIAC § 50-50-235(b).

A contracting agency need only establish a reasonable basis to support a decision to cancel a procurement. *SMF Systems Technology Corporation*, B-292419.3, p. 4 (November 26, 2003).

“So long as there is a reasonable basis for doing so, an agency may cancel a solicitation, no matter when the information precipitating the cancellation first arises, even if it is not until offers ... have been submitted and evaluated.” *Id.*; see also, *In re: Appeal of Rosario B. Aldan*, OPA Appeal No. BP-A023, p. 7 (January 25, 2001).

Here, IP&E claims that CUC cancelled the RFP and entered the one year supply contract extension with Mobil only after an initial effort by CUC for a ninety (90) day extension was met with a counteroffer for one year and threat of protest. *Appeal*, p. 4. IP&E is referencing a statement made by Mobil in its April 15, 2013 response to CUC’s request for a ninety (90) day extension, which identifies several possible defects in the RFP process, to include: requiring the successful proposer to retire an existing debt in excess of \$500,000 (allegedly) in violation of CNMI law, negotiating with only one qualified bidder (allegedly) in violation of CUC procurement regulations, and that a delay in the proposed start date of the contract would disrupt an integral part of the RFP and require revision. *Mobil Letter to CUC*, p. 1 (April 15, 2013). If a protester alleges that an agency’s rationale for cancellation is pretextual, and motivated either by avoidance of awarding a contract on a competitive basis or avoidance of a resolution of a protest, then the reasonableness of the agency’s actions will be closely examined. *SMF Systems Technology Corporation*, B-292419.3, p. 4 (November 26, 2003). Bad faith may be established if it is shown that agency officials “intended to injure the protestor.” *Matter of KAES Enterprises, LLC*, B-402050.4, p. 3 (Feb. 12, 2010). Federal court decisions are consistent. The decision to cancel a negotiated procurement may be set aside if ultimately found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” See *FFTF Restoration Co., LLC v. United States*, 86 Fed. Cl. 226, 244 (2009). The agency's cancellation decision must, therefore, be supported by a rational basis. See e.g., *id.* at 245; see also, *Wetsel-Oviatt Lumber Co. v. United States*, 43 Fed.Cl. 748, 753 (1999).

OPA takes no position on whether any of the purported deficiencies pointed out by Mobil in the letter referenced above were legitimate, since they are not the subject of this appeal. However, if CUC believed those reasons or others to be legitimate, then CUC had adequate authority to cancel the RFP under NMIAC § 50-50-235(b). IP&E’s further claim that a contract extension was unnecessary under the terms of the 2010 supply contract between Mobil and CUC due to a

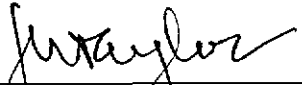
provision allowing for the original contract to continue in force after April 30, 2013 and become terminable by either party upon thirty (30) days notice also exposes no bad faith or wrongdoing by CUC. It is well-within CUC's discretion to determine whether a negotiated short term contract is in their better interests than a continuing contract terminable on thirty (30) days notice. Finally, IP&E stresses the last-minute timing of the cancellation and the fact that they were engaged in negotiations with CUC at the time of the cancellation as particularly troubling. *Appeal*, pp. 5-6. However, the timing of a cancellation by itself is not evidence of bad faith. *Matter of KAES Enterprises, LLC*, B-402050.4, p. 4 (Feb. 12, 2010). Additionally, while it is always in the interest of fair procurement to avoid exposing bidder prices, where there is no indication that a protestor was prejudiced more than other offerors, that point will not be grounds for sustaining a protest. *Id.*

DECISION

OPA DENIES the appeal of IP&E as to the cancellation of RFP-13-015 based on the broad discretion of CUC over such matters as well as the authority granted to CUC by its Procurement Regulations to cancel a procurement where specifications must be revised. IP&E failed to identify any bad faith or wrongdoing by CUC in its decision to cancel the RFP.

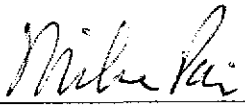
Dated this 31st Day of March 2014.

BY:



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