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IN RE APPEAL OF JOETEN MOTOR COMPANY, INC. represented by its General Manager) RFP 97-10) DECISION ON APPEAL) No. BP-A013

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This is an appeal by Joeten Motor Company, Inc. (JMC), represented by its General Manager, from the denial of its protest by the Director of Procurement and Supply (P&S) pertaining to the Commonwealth Judicial Branch's (Judiciary) Request for Proposals (RFP) No. 97-10. The Office of the Public Auditor (OPA) has jurisdiction of this appeal as provided in Section 5-102 of the Commonwealth of the Northern Mariana Islands Procurement Regulations (CNMI-PR). JMC filed its timely appeal with OPA on December 16, 1997.

As advertised in the newspaper, RFP 97-10 was a solicitation of proposals from vendors of motor vehicles for the purchase of 3 to 5 units of 1997 mini vans. The Scope of Work[1] under this RFP stated that additional vans may be purchased depending on the availability of funds. Section 4 of the Scope of Work stated that the Judiciary was interested in procuring new Class J, 7-passenger vans with certain mechanical/performance features, such as: engine size of 4 cylinders or greater, displacement of 2.4 or greater, 138 horsepower or greater, automatic transmission, power steering, power front disc/rear drum brake system, air-conditioning, AM\FM radio cassette, and safety glass windshield/window.

The Scope of Work also required that vehicles must be CIF (Commonwealth Courts, Susupe, Saipan) and must have the manufacturer's extended warranty agreement for parts and labor for not less than 2 years. Additionally, vehicles must be rust proofed, safety inspected, and registered at the Bureau of Motor Vehicle, naming the Judiciary as the new owner prior to delivery of the vehicles. The criteria for the evaluation of the proposals were: (1) time frame for delivery - 20%, (2) quality and warranty of vehicles - 20%, (3) on-island service, repair and maintenance - 15%, and (4) price - 45%.

The RFP was advertised for the period of two weeks in the Marianas Variety and the Saipan Tribune on September 5, 8, 10,12, 15, 17 and 19, 1997. The closing date for the submission

[1]Mentioned in the advertisement as a document that an interested vendor may obtain from the Judiciary.

of proposals was September 19, 1997. Only one vendor, Microl Corporation, submitted a proposal on this RFP.

Basis of Award

There was no documented evaluation by either the P&S or the Judiciary of the proposal received in this RFP (perhaps because only one vendor responded on RFP 97-10).

Because only one proposal was received by the Judiciary and because the Judiciary determined that the sole proposer met the specifications, and was considered responsive and responsible, the award on RFP 97-10 was given to the sole proposer, Microl Corporation. Accordingly, the CNMI Supreme Court made a contract award of 8 units of mini vans to Microl Corporation on October 22, 1997. On the same date, the CNMI Superior Court awarded a contract for 4 units of mini vans to the same vendor.

The Protest and Subsequent Appeal to OPA

In its October 30, 1997 protest, JMC stated that it is "strongly protesting the Judiciary's acquisition of 12 units of mini vans without fair Invitation to Bid (ITB) and RFP." JMC alleged that it was not aware of the ITB or RFP that was published by the Judiciary. JMC stated that although JMC found out later that there was an RFP published, such publication was not known to the majority of the auto dealers and was allegedly designed to mislead other auto dealers. On December 4, 1997, the Director of Courts provided a written response to the P&S Director regarding JMC's protest of the Judiciary's purchase of mini vans. On December 12, 1997, the P&S Director denied JMC's protest on this RFP.

On December 16, 1997, JMC filed with the Public Auditor a timely appeal of the Director of Procurement and Supply's adverse protest decision. On December 17, 1997, the Public Auditor informed the P&S Director about JMC's appeal and requested him to provide the required notice of the appeal and copies of the protest and appeal documents to the required parties. The P&S Director was also requested to provide the Public Auditor a complete report on the appeal as expeditiously as possible, and furnish a copy of his report to the appellant and other affected parties as provided in CNMI-PR Section 5-101(1)(d) and 5-102(4)(c).

The P&S Director submitted his report to OPA on January 6, 1998. He stated that his decision dated December 12, 1997 constituted his statement pursuant to CNMI-PR 5-101(1)(d)(vi), which provides that the Chief include in his report a signed statement setting forth his findings, actions and recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. OPA has received no comments on the P&S Director's report from the appellant or any other affected parties, except the one submitted by Microl Corporation, the sole proposer on this RFP. Microl Corporation expressed disbelief regarding JMC's allegation, and concurred with the P&S Director's decision dated December 12, 1997. OPA is issuing its decision on this appeal pursuant to CNMI-PR Section 5-102(8)(c)(i), which provides that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received.

ANALYSIS

The P&S Director's denial of JMC's protest on the Judiciary's procurement of mini vans under RFP 97-10 is the issue of this appeal. The following discusses the arguments by JMC, the Director of Courts and the P&S Director as they were presented in the protest and appeal process, including OPA's comments on the merits of the arguments.

JMC's Argument in its Protest to the P&S Director

JMC's argument in its protest letter to the P&S Director focused on three main issues, namely: (1) the misleading publication of the solicitation; (2) difference in actual versus advertised purchase quantity; and (3) failure to obtain competitive price. Following are the details of the three main protest issues (for presentation purposes, we numbered them as Grounds A, B, and C and supplied the titles based on the substance of the arguments):

Ground A: Defective Announcement

JMC claimed that it did not notice the newspaper announcement on the Judiciary's purchase of mini vans under RFP 97-10. JMC added that the majority of the auto dealers on island were also not aware of the publication. JMC argued that the content of the ad was misleading because RFP 97-10 was mixed with job announcements and the ad was intentionally designed to mislead auto dealers by placing an ad that differed from previous practice.

Ground B: Difference in Actual Versus Advertised Purchase Quantity

JMC mentioned that the RFP solicited 3 to 5 mini vans when the actual purchase totaled 12 units.

Ground C: Failure to Obtain a Competitive Price

JMC raised concern about the result of the solicitation in which only one auto dealer submitted a proposal on this RFP. JMC questioned why proposals were not requested via fax or letter from other dealers, and why an Invitation to Bid was not issued when only one proposal was received on this RFP. JMC added that this would allow more vendors to participate in the RFP, result in more choices for the Judiciary, and lead to lower cost for the CNMI government. JMC explained that as shown by previous procurements, JMC and other auto dealers on island have vans that are comparable, if not greater in specification, and priced at a lower amount. JMC added that the CNMI Government would have saved at least $4,700 per unit had JMC been given the opportunity to fairly compete.

Argument on the Protest by the Director of Courts

In his comments to JMC's protest, the Director of Courts stated the following view on the three main arguments above.

Ground A: Defective Announcement

The Director of Courts argued that he found no prohibition against grouping or combining job vacancy announcements, requests for proposals, or invitations to bid. He also said that the announcements were printed and published clearly in seven issues of the Saipan Tribune and the Marianas Variety. The Director of Courts also argued that the practice of combining announcements is not a departure from previous practice. He added that other agencies often group their announcements to save costs and maximize the limited funds available on their printing and/or advertising budget. He also added that the Judiciary has gone beyond the requirements of the P&S by having the RFPs printed in two local papers for seven issues. The Director of Courts concluded that JMC's protest on the RFP announcement was improper, without merit or substance, and should be denied.

Ground B: Difference in Actual Versus Advertised Purchase Quantity

Regarding JMC's allegation that the Judiciary misled the vendors by announcing a request for 3-5 units when it actually purchased 12 units, the Director of Courts responded that the RFP announcement clearly states that the specifications and Scope of Work for the RFP are available for pickup at the Supreme Court in Susupe, and that Section 1 of the Scope of Work states that "additional vans may be purchased depending on availability of funds." The Director of Courts added that the Judiciary sought the opinion of P&S prior to the execution of the contract, and P&S agreed that the additional mini vans could be purchased based on the said provision of the Scope of Work.

Ground C: Failure to Obtain a Competitive Price

The Director of Courts did not specifically address this protest issue. However, on JMC's request to have the RFP re-announced, the Director of Courts argued that the procurement of mini vans was announced within the period required by law and regulations. The Director of Courts also argued that Microl was the only vendor who responded to the RFP within the period specified in the RFP, and that Microl's proposal was responsive, responsible and met all the requirements of the Scope of Work. The Director of Courts concluded that JMC's request for cancellation of the contract agreement with Microl should be denied.

Decision on the Protest by the P&S Director

In his decision dated December 12, 1997, the P&S Director denied the protest in its entirety. The P&S Director commented on the protest arguments as follows:

Ground A: Defective Announcement

The P&S Director stated that CNMI-PR Sections 3-106(3) and 3-102(2) require that "adequate public notice" be given for invitations for bids and requests for proposals [emphasis added]. The P&S Director also stated that the standard method for giving such notice, and the method sanctioned by the Regulations, is publication of a synopsis in general circulation newspapers. He added that the regulations create an irrebuttable presumption that publication once per week over a period of 30 days provides adequate public notice. The Director mentioned that P&S has established a practice of permitting a shortened notice of two weeks when there is a good cause for doing so. In this RFP the notices, according to the Director, were published seven times over a two-week period, which is three more than the minimum of once each week over a four-week period.

In addition, P&S explained that the Judiciary initiated the procurement through its office of Director of Courts. P&S added that they were not aware of the full circumstances underlying the decision as to the time period for publication of the notice. However, P&S asserted that it took note of the fact that the procurement was initiated and completed shortly before the end of the fiscal year and if the advertisement ran for a longer period, the procurement was unlikely to be completed prior to the time that available funds lapsed. P&S found that this was good cause for shortening the period for publication.

Regarding the format of the announcement, the P&S Director ruled that the procurement notices were clearly separated from the job vacancy announcements, and were grouped together under a prominent heading "REQUEST FOR PROPOSALS." The P&S Director added that the format of the announcement should not have been confusing to a reasonable reader. The P&S Director suggested that vendors wishing to do business with the Commonwealth must make reasonable efforts to review public notices of procurement. The P&S Director also ruled that there was nothing misleading in publishing a list of procurement projects for which proposals were requested. The P&S Director added that it was obvious that numerous separate items were listed in the announcement, and that the items were separately numbered with brief descriptions.

Ground B: Difference in Actual Versus Advertised Purchase Quantity

With regard to the number of units purchased, the published notices of procurement notified the public that specifications and scope of work were available for pick-up by interested parties. The P&S Director explained that the scope of work for RFP 97-10 clearly and prominently advised that additional vans might be purchased depending on availability of funds. The P&S Director ruled that potential vendors interested in the published procurement are responsible for obtaining the full solicitation package. The P&S Director found that the advertisement provided sufficient notice of the nature of the procurement and the availability of the additional solicitation documents.

The P&S Director ruled that the appellant did not offer any evidence of intentional misconduct, but rather relied on unsupported insinuations. The P&S Director also said that those claims of intentional misconduct are very serious and can have adverse effect upon the persons who are claimed to have acted wrongfully. The P&S Director said that great care

should be taken before making such allegations, and added that in any event mere allegations can never form the basis for reversal of procurement. The P&S Director contended that the appellant missed out on this procurement not by government error but due to insufficient diligence in monitoring procurement notices.

Ground C: Failure to Obtain Competitive Price

On the issue of price quoted by Microl Corporation, the P&S Director ruled that JMC and all other potentially interested vendors had seven separate opportunities to take note that the Judiciary was soliciting proposals for mini vans. The P&S Director explained that all had equal opportunity to obtain solicitation documents and submit proposals. The P&S Director stated that Microl Corporation was awarded the contract and that, as specified in JMC's letter, Microl's price is now public. The P&S Director argued that if the Commonwealth were to reopen this procurement to permit JMC an opportunity to respond, Microl would be damaged as its price is the mark to beat and the procurement would become an auction. The P&S Director added that such action would deprive Microl of the fair and equitable treatment guaranteed by Section 1-101(2)(d) of the CNMI-PR. The P&S Director also ruled that allowing such action would compromise the integrity of the Commonwealth's procurement system by providing an opportunity for vendors to game the system by waiting to see the prices of the competitors and then submit slightly lower offers. If this is done, the P&S Director said that few contractors will participate in the competitive system.

JMC's Arguments in its Appeal to the Public Auditor

JMC's appeal to OPA requested that the purchase of seven mini vans be declared in violation of the CNMI-PR. The seven mini vans questioned by JMC apparently referred to the additional units purchased under this RFP which exceeded the five unit purchase that was advertised in the newspaper. JMC presented eight arguments to support its appeal. For presentation purposes, we have grouped the eight arguments into four main appeal grounds, namely: (1) defective announcement of the RFP, (2) actual units purchased being different from the advertised purchase quantity, (3) use of funds subject to lapse as justification for issuing RFPs, and (4) failure to follow regulations. Following are the details of the arguments in each ground (we supplied the titles below based on the substance of the arguments):

Defective Announcement

JMC claims that the P&S Director erred when he ruled that the purchase of 12 mini vans can be mingled with other court ads. JMC adds that the tiny letter print constitutes inadequate notice for competitive bidding purposes. JMC also argues that the P&S Director erred when he decided not to consider evidence that the Director of Courts had telefaxed the RFP solicitation to other vendors (perhaps, the appellant meant to point out that the RFP solicitation was not sent to interested vendors). JMC adds that the P&S Director allowed the Judiciary to do its own advertisement in the local media without following Government standard public notice procedures.

Difference in Actual Versus Advertised Purchase Quantity

JMC claims that the P&S Director erred when he ruled the 3-5 mini van purchase requirement as advertised in the newspaper can be read to mean more than 5 units.

Use of Funds Subject to Lapse

JMC claims that the P&S Director erred when he ruled that one of the major considerations in an RFP request is the need to ensure that public funds do not lapse.

Failure to Follow Regulations

JMC states that the P&S Director failed to follow P&S regulations in the procurement of the 12 Toyota Previa mini vans. JMC adds that the P&S Director erred when he failed to not only follow regulations but also failed to administer and oversee the solicitation process including the taking of reasonable steps to accomplish the purposes of the contract to protect the public interest. There were no other details provided in the appeal.

P&S Director's Report on the Appeal

The P&S Director mentioned in his letter dated December 31, 1997 that his decision dated December 12, 1997 constituted his statement required under Section 5-101(1)(d)(vi) of the CNMI-PR.

OPA's Comments

We first discuss the threshold issue of whether or not JMC has standing to protest this RFP. Although, JMC's standing to protest was not raised as an issue in this appeal, we believe that we need to address this issue because of JMC's status as a non-offeror in this RFP and to help enhance better public awareness of the procurement protest process. In filing bid protests, CNMI-PR Section 5-101(1)(a) states that "any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Chief (P&S Director)." Appellant is not an actual bidder because it did not submit any bid on RFP 97-10. As for qualifying as a prospective bidder, JMC could not be a prospective bidder after the closing date for submitting bids had already passed. Once a bid proposal period ends, a firm which has not submitted a bid can no longer qualify as a prospective bidder. It must have filed a proper bid protest or have become an "actual" bidder by submitting a bid (*Waste Management of North America v. Weinberger*, 862 F.2d 1393 (9th Circuit 1988).

However, in determining if a non-bidding vendor has standing to protest, this office considers whether or not there was a failure on the part of the Government to publicly announce the solicitation, including inadequate or defective advertisements that reasonably could have caused a vendor to be unaware of the solicitation, whereas, with adequate public notice, the

vendor would have known of the solicitation and would have submitted a bid. In this instance, there was an allegation that the newspaper advertisement of the RFP was defective.

JMC's appeal claims that the P&S Director allowed the Director of Courts to do his own advertisement in local media without following standard public notice procedures. Specifically, JMC's protest claimed that the newspaper ad for this RFP was misleading. Additionally, the P&S Director's protest decision ruled that the shortened time period for advertising (two weeks instead of four weeks) provided sufficient notice of the RFP solicitation.

Because the protest and appeal process in this procurement contain issues of insufficient or defective notice, we have determined that JMC has standing to protest this procurement although it is not an actual or prospective offeror. Since JMC has standing to protest this RFP, we now discuss the merit of the substantive issues in JMC's appeal.

Defective Announcement

The appellant presented three points relating to the issue of defective notification, as follows:

- JMC claims that the P&S Director allowed the Judiciary to do its own advertising in the local media without following Government standard public notice procedures.

- JMC claims that the P&S Director erred when he ruled that the purchase of 12 units of mini vans could be mingled with other court ads. JMC adds that the tiny print constitutes inadequate notice for competitive bidding purposes.

- JMC argues that the P&S Director erred when he decided not to consider evidence that the Director of Courts telefaxed the RFP solicitation to other vendors (perhaps, the appellant meant to point out that the RFP solicitation was not sent to interested vendors).

On the first issue, we found specific violations of the CNMI-PR based on our review of applicable provisions of the CNMI-PR. As to the claim that the P&S Director allowed the Judiciary to do its own advertising, our review indicates that the Judiciary processed this procurement -- from the publication of the RFP, submission of proposals, and opening of proposals -- without an approved delegation of procurement authority pursuant to CNMI-PR Section 2-201. In a letter dated December 12, 1997, the P&S Director confirmed that the Judiciary initiated the procurement through the Office of the Director of Courts. Certain staff members of P&S also said that P&S began its participation only when the contract was routed through P&S.

Before the Judiciary started processing this RFP, it was already informed by OPA and P&S that it has no authority to administer its own procurement functions. On May 19, 1997 in response to an inquiry on the propriety of allowing the Judiciary to perform procurement functions, OPA determined that based on the CNMI Procurement Regulations and the statutes that define the duties and responsibilities of the Department of Finance, the Judiciary is currently

without authority to administer its own procurement functions. Also, through a June 11, 1997 memorandum from the P&S Director, the Judiciary was informed that all of its procurement actions are not currently being processed through P&S and that it is not operating under an approved delegation of procurement authority pursuant to CNMI- PR Section 2-201. The P&S Director requested the Judiciary to advise him of any specific statute or authority which exempts the Judiciary from compliance with the regulations. As of March 10, 1998, P&S informed OPA that the Judiciary had not responded on this issue.

Under CNMI-PR Section 2-201, any government agency which adopts the CNMI-PR may be authorized by the Department of Finance (DOF) to administer its own procurement functions, except that purchases under sole source, emergency, and expedited procurement may only be carried out by P&S. For other procurement methods such as request for proposals and invitation for bids, a government agency may be delegated procurement authority provided the following three conditions are met:

- The DOF Secretary has approved the delegation of procurement authority.

- The CNMI-PR have been duly adopted pursuant to the procedures required for adopting official business of such agency, the agency has adequate staff capability to carry out the functions of the P&S Director, and the agency has certified that it is in compliance with these requirements.

- The P&S Director has issued a written delegation of procurement authority to the agency after the first two conditions have been satisfied.

Although the Judiciary has been administering its own procurement functions in the past, our review indicates that the DOF Secretary authorized the P&S Director on December 2, 1996 to delegate procurement functions to certain autonomous agencies, including the Judicial Branch. To date, however, there has been no written delegation issued by P&S.

The Judiciary has not adopted its own Procurement Regulations, and, according to the Director of Courts, the Judiciary has been using the CNMI-PR in its procurement activities. However, in this RFP, we found that certain requirements of the CNMI-PR were not followed, specifically the manner in which the RFP was advertised. The Judiciary published the RFP for only two weeks in violation of CNMI-PR Section 3-102(2), which requires that "*Adequate public notice* of the Invitation to Bids shall be given a reasonable time prior to the date set for forth for the opening of bids. Publications of notice in a newspaper of general circulation in the Commonwealth *once in each week over a period of 30 calendar days* shall be deemed to be adequate notice. [Emphasis added.] As further provided in Section 3-102(3), a bidding time of at least 30 calendar days shall be given, unless the Chief (P&S Director) determines a shorter period is reasonable and necessary. In this RFP, there was no evidence showing that the P&S Director had approved the two-week advertisement. The P&S Director stated in his December 12, 1997 letter that P&S was not aware of the full circumstances underlying the decision as to the time period for publication of the notice. We do not agree

with the P&S argument that a more frequent advertisement during a two-week period justifies shortening the publication period from the required 30 days.

In addition, P&S allowed the Judiciary to issue an RFP instead of an Invitation to Bid (ITB) without a written justification and approval from the P&S Director that the use of competitive sealed bidding was not either practical or advantageous to the government. This is in violation of CNMI-PR Section 3-106 which requires that "When the official with expenditure authority determines in writing that the use of a competitive sealed bidding is either not practical or not advantageous to the government and receives the approval of the Chief (P&S Director), a contract may be entered into by competitive sealed proposals." Our review of P&S files showed that most, if not all, vehicle purchases processed at P&S were procured using ITBs.

On the second issue, although we do not find specific violation of the CNMI-PR, we believe that the public notice given for RFP 97-10 appears to be misleading. JMC protested the manner in which the solicitation for the mini vans was advertised in the newspapers. First, it was commingled with other Judiciary ads such as personnel requirements and other services needed by the Judiciary. Second, the subject RFP was printed in tiny print which is not easily noticeable (this may have resulted because the RFP was combined with many other advertisements). Although the CNMI-PR does not provide any particular standard for the format or style of solicitation announcements, we believe that RFP announcements in the newspapers should be easily noticeable and not concealed by combining them with unrelated announcements or in other ways that may hide the RFP. The better practice would be to advertise significant RFPs separately and prominently.

On the third argument, we found that the Judiciary had not sent the RFP solicitation to other automobile dealers on Saipan, even after receiving only one proposal. In our meeting dated January 22, 1998, the secretary of the Director of Courts who had allegedly telefaxed the RFP to the automobile dealers confirmed that she did not send the RFP. Although the CNMI-PR do not require that copies of RFP solicitations be sent to known vendors, reasonable prudence should have prompted the Judiciary to contact other automobile dealers on Saipan when it learned that only one of the five known dealers submitted a proposal on this RFP. Had it contacted the other known vendors, the Judiciary might have discovered its defective announcement and taken corrective action. As it turned out, the Judiciary accepted the sole proposal and executed a contract with Microl Corporation.

The P&S Director, for his part, should have also verified why there was only one proposal for this RFP before approving the contract with Microl Corporation. Our review of the P&S files indicates that the Special Assistant for Youth (SAY) requested the same Class J mini van using an ITB. The bids on this ITB were opened on September 26, 1997, three days after the P&S Director learned about the result of Judiciary's RFP for the same class J mini van. We find it unusual that another solicitation of a similar vehicle that was made during this time revealed that all five known vehicle dealers on Saipan submitted bids. The result of the SAY ITB should have prompted the P&S Director to review the subject Judiciary procurement. As it turned out, the P&S Director agreed to sign the contract with Microl Corporation, and records showed that he never questioned the subject RFP .

Difference in Actual Versus Advertised Purchase Quantity

The appellant claims that P&S erred when it ruled that the 3 to 5 mini vans advertised in the newspaper can be interpreted to mean 12 mini vans. The Scope of Work on this RFP, the content of which was not published in the newspaper, stated that "additional vans may be purchased depending on availability of funds." This statement in the Scope of the Work was used by the Judiciary to justify the purchase of 12 units of mini vans -- 7 units more than the maximum purchase quantity advertised in the newspaper. We find that the "3 to 5 units" purchase quantity that was advertised in the newspaper was deceiving when the Judiciary in fact purchased more than twice the published quantity. We conclude that the number of units advertised has an impact on a prospective proposer's decision whether or not to participate in a bid. In this case, the newspaper advertisement is inconsistent with the Judiciary's intent to purchase more than 5 units (depending on funds availability), and such intent appears to be hidden since even the Scope of Work fails to define how many additional units may be authorized. The additional 7 units should have been re-solicited to afford the other prospective proposers an opportunity to participate in the procurement and to ensure that the Judiciary obtained competitive prices.

Use of Funds Subject to Lapse

JMC claims that the P&S Director erred in ruling that one of the major considerations in an RFP request is the need to ensure that funds do not lapse. Mere availability of funds does not justify a purchase. Instead, a procurement should be determined from the agency's actual needs. Moreover, the lapse of public funds at the end of a fiscal year does not justify any short-cut in the requirements of the CNMI-PR and other applicable laws and regulations. In other jurisdictions, such as the U.S. Government with its Competition in Contracting Act (CICA) of 1984, competition is required to the maximum extent possible, and the Government is not allowed to justify contracting without providing for full and open competition on the basis of either (1) lack of advance planning, or (2) the fact that *funds will expire*.

Although the CNMI-PR does not specifically prohibit procurement actions intended to prevent lapse of public funds, the CNMI-PR and applicable CNMI law specify that funds be available before a contract requiring expenditure of public funds is awarded.1 CMC §7401 provides that no expenditure of Commonwealth funds shall be made unless the funds are appropriated in a currently effective Annual Appropriation Act. Our review showed that Public Law No. 10-41, also known as the Appropriation and Budget Authority Act of 1997, provided funds to the Judiciary for vehicle purchases amounting to $123,000, which would only cover the cost of four mini-vans (based on Microl Corporation's proposal). In a meeting with the Director of Courts, we learned that additional funding for the 12 mini vans was allegedly made through reprogramming of personnel funds about to lapse. We found, however, that Section 513(b) of Public Law 10-41 provides that "no funds from any object class shall be reprogrammed for vehicle purchases." Accordingly, the use of those reprogrammed funds to pay for the vehicles purchased under this RFP is illegal.

Additionally, our review indicates that the Judiciary was granted unlimited reprogramming authority through an amendment to Public Law 10-41. Public Law 10-69 amended Section 513 of Public Law 10-41 by adding a new subsection (h) which provides, in pertinent part, that the Chief Justice of the Supreme Court and the Presiding Judge of the Superior Court may reprogram funds over which each respectively has expenditure authority up to 100% cumulative and in total by line item. Public Law 10-69, however, did not repeal Public Law 10-41, Subsection 513(b). Accordingly, the Judiciary is still bound by the restriction in Public Law 10-41 that no funds from any object class shall be reprogrammed for vehicle purchases. In interpreting any statute, analysis begins with the language of the statute, and, absent any clear showing of contrary legislative intent, the plain meaning analysis of the statutory language should prevail. Our plain meaning analysis of the above mentioned Public Laws leads us to conclude that the Judiciary's use of reprogrammed funds to pay for the vehicles purchased under this RFP is illegal.

Furthermore, our review of the legislative intent of Public Law 10-69 confirms that the granting of 100% reprogramming authority to the Judiciary pertained to the Judiciary's request to use lapsed funds from the Supreme Court and Superior Court to finance 29 additional Full Time Employees (FTEs) only. According to a letter dated July 7, 1997 from Chief Justice Marty W. K. Taylor to the Speaker of the House, the request for additional FTEs was for the security and administration of the new Guma Hustisia building. There was no mention in the letter request by the Chief Justice about the need for additional vehicles. Also, the House Journal and Senate session tapes on Public Law 10-69 dealt mainly with the Judiciary's request for additional FTEs, and there was no discussion on the funding of vehicle purchases.

Failure to Follow Regulations

JMC did not provide detail in its argument that the P&S Director failed to follow its regulations and administer and oversee the solicitation proposals. Since the appeal was broadly stated, OPA cannot rule without knowing the specific details of this argument. We do, however, find that P&S failed to perform its procurement function or properly delegate this responsibility, as set forth herein.

DECISION

The Office of the Public Auditor **grants** the appeal of JMC. Accordingly, based on the remedies provided in the CNMI-PR, we direct that Microl Corporation's contract nos. 303745-OC and 303743-OC covering the purchase of four units and eight units of mini vans, respectively, be terminated. Section 5-103(2) of the CNMI PR [Remedies After an Award] provides, in pertinent part, that if after an award, the Chief (P&S Director) or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then, if the person awarded the contract has not acted fraudulently or in bad faith:

- the contract may be ratified and affirmed provided it is determined that doing so is in the best interest of the Commonwealth, or

- the contract may be terminated and the person awarded the contract shall be compensated the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination.

We believe that, in this case, the appropriate remedy is the second remedy which is termination of Microl Corporation's contract because we found significant violations of applicable laws and regulations, specifically those pertaining to unauthorized procurement actions by the Judiciary in violation of CNMI-PR Section 2-201, failure to give adequate public notice in violation of CNMI-PR Subsections 3-106(2) and (3), and unauthorized reprogramming of funds subject to lapse in violation of Public Law 10-41. We believe that the remedy contained in this decision will have the lasting effect of ensuring public confidence in the procurement system which, in our view, outweighs any additional cost of terminating Microl Corporation's contract.

CNMI-PR Section 1-107 provides that no government contract shall be valid unless it complies with the CNMI-PR, and therefore, Microl Corporation's two improperly procured contracts under this RFP (303745-OC and 303743-OC) are invalid. In any event, these two contracts should be terminated by the CNMI Government. As a suggestion for claims settlement, the use of the 12 vehicles can be converted to a lease term and the vendor may be paid its regular lease fee for the period the vehicles were held by the Judiciary.

As for the need to re-solicit bids for vehicles, the Judiciary may request P&S to solicit bids through the customary ITB method, using the P&S procedures for processing vehicle procurement. The exact number of units to be procured should be determined based on the Judiciary's available funds for vehicle purchases. To help ensure that the next solicitation complies with applicable laws and regulations, we strongly recommend that P&S and the Judiciary take into consideration our findings and comments presented in this appeal decision.

Furthermore, the P&S Director, the Director of Courts, and other government officials may be personally liable for allowing the purchase of 12 mini vans in violation of the provisions of the CNMI-PR and the Appropriation and Budget Authority Act of 1997. As provided in CNMI-PR Section 1-108:

> Any procurement action of an employee of the government or its agencies or political subdivisions in violation of the Procurement Regulations is an *action outside the scope of his or her employment*. The government will seek to have any liability asserted against it by a contractor which directly results from improper acts to be determined judicially to be the *individual liability of the employee who committed the wrongful act*. [Emphasis added].

In the event a case is pursued against the CNMI Government arising out of the issues of this appeal, we recommend that the CNMI Attorney General's Office file a cross claim against any officials and employee(s) who were responsible for the violations presented in this decision.

Section 5-102 of the CNMI Procurement Regulations provides that the appellant, any interested party who submitted comments during consideration of the protest, the P&S

Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than **ten (10)** days after the basis for reconsideration is known or should have been known, whichever is earlier.

ORIGINAL SIGNED

Leo L. LaMotte
Public Auditor, CNMI

March 11, 1998