Office of the Public Auditor

Commonwealth of the Northern Mariana Islands
Internet Address: http://www.opacnmi.com
2nd Floor J. E. Tenorio Building, Middle Road
Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 1399
Saipan, MP 96950

E-mail Address:
mail@opacnmi.com

Phone: 1-670-234-6481
Fax: 1-670-234-7812

IN RE REQUESTS FOR RECONSIDERATION OF OPA APPEAL DECISION FILED BY JWS AIR CONDITIONING & REFRIGERATION AND THE CNMI PUBLIC SCHOOL SYSTEM	)	PSS IFB 97-0019 DECISION ON REQUESTS FOR RECONSIDERATION No. BP-A014.1

BACKGROUND

JWS Air Conditioning & Refrigeration (JWS), represented by its legal counsel, White, Pierce, Mailman & Nutting, and the CNMI Public School System (PSS) filed with this office on April 9, 1998 and April 13, 1998, respectively, requests for reconsideration of the March 31, 1998 decision of the Office of the Public Auditor (OPA). OPA's decision granted the appeal of Torres Refrigeration, Inc. (Torres) from the denial of its protest by the Commissioner of the Public School System (Commissioner) pertaining to PSS Invitation for Bid (IFB) no. 97-0019. PSS IFB 97-0019 was a solicitation of competitive sealed bids for the procurement and installation of 118 split type air conditioners for the Marianas High School (MHS). OPA has jurisdiction of this reconsideration request as provided in Section 5-102(9) of the Public School System Procurement Regulations (PSSPR).

OPA's Appeal Decision

In its March 31, 1998 appeal decision, OPA granted Torres' appeal because OPA's review showed that there were violations of PSSPR Sections 3-102(6) and (9) in that: (1) the evaluation conducted did not adequately consider the selected bidder's compliance with the technical specifications of the IFB, (2) the evaluation considered certain factors not set forth in the bid specifications, and (3) the selected bidder did not fully meet the requirements set forth in the bid specifications. In accordance with PSSPR Section 5-103(2)(a)(ii) and in relation to PSSPR Section 1-107, we recommended that the contract entered into between JWS and PSS be terminated and the A/Cs installed at MHS be removed. In our decision, we also recommended that JWS be compensated for the actual expenses reasonably incurred under the contract prior to termination, plus a reasonable profit, as provided in PSSPR Section 5-103(2)(a)(ii).

JWS's Reconsideration Request

JWS filed its timely reconsideration request with OPA on April 9, 1998. JWS specifically requested that its contract with PSS be ratified and affirmed based on its contention that: (1) the Public Auditor has exceeded his lawful authority in ordering that the A/Cs be removed from MHS, and (2) it would be in the best interest of PSS to ratify and affirm its contract because (a) terminating the contract would have serious adverse financial consequences for PSS, (b) terminating the contract would have serious consequences in terms of time, and (c) there is nothing in the record to indicate that re-bidding the project would produce any advantages to PSS.

PSS's Reconsideration Request

PSS also filed a timely reconsideration request with OPA on April 13, 1998. The request contended that: (1) PSS's procedural errors cited by OPA in its report are not material because JWS's bid fully complied with the bid criteria, (2) OPA lacks jurisdiction to decide on this appeal because Torres Refrigeration is not an interested party, (3) OPA lacks jurisdiction to decide issues which were not raised by Torres in its initial protest to the Commissioner, and (4) removal of the air conditioners from MHS is not the appropriate remedy.

ANALYSIS

JWS's and PSS's arguments in their respective reconsideration requests have not persuaded us that our appeal decision contained errors of fact or law which would warrant a complete reversal of our decision. The government has the right to avoid contracts made in violation of a statute or regulation having the force and effect of law. However, on reconsideration of the matter, OPA has determined in this particular case that the violations noted in the procurement are not of sufficient magnitude as to warrant the drastic remedy of removing the A/Cs installed at MHS by JWS. Accordingly, while sustaining Torres' protest, OPA has determined that the contract between JWS and PSS should be ratified. Since we have decided to modify our earlier directive on the disposition of the 118 A/Cs as set forth above, we see no need to comment on the other arguments presented by JWS and PSS justifying their position that MHS should keep the A/Cs instead of returning them to JWS. As to the other arguments in the reconsideration requests, however, we believe that there is a need to respond to the threshold issues raised by PSS - the argument that Torres is not an interested party, and the issue on OPA's jurisdiction of the subject appeal. Regarding these two threshold issues, we have determined that OPA has jurisdiction to decide on Torres' appeal because (1) Torres is an interested party in this procurement, and (2) issues need not be raised in the initial protest to the Commissioner as long as there was a valid protest. Following are the details of OPA's comments:

1. The Government has a Right to Avoid Invalid Contracts But OPA Recommends Ratifying JWS's Contract in this Instance

A Contract in Violation of the PSSPR is Invalid

PSSPR Section 1-107 provides that no contract covered by the PSSPR shall be valid unless it complies with those regulations. Furthermore, PSSPR Section 5-103(2)(a)(ii) provides that if after an award the Commissioner or the Public Auditor determines that a solicitation or an award of a contract is in violation of law or regulation, and if the person awarded the contract has not acted fraudulently or in bad faith, the contract may be *terminated* and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination. No definition of termination has been provided in the PSSPR. We believe, however, that "termination" can mean either of two things: First, when used in conjunction with PSSPR Section 1-107 which provides for the invalidity of a contract that does not comply with the PSSPR, "termination" can mean invalidating the contract entered into between JWS and PSS, equivalent to a contract cancellation. Because there was no valid contract, there would be no legal basis for installing the 118 A/Cs at MHS, and therefore the A/Cs should be removed. This was the approach taken in our earlier appeal decision. Second, the word "termination" can mean the act of ending a contract whereby work performed up to the point of termination is accepted as valid, and no more work is to be performed after the termination date.

The Government has the Right to Avoid Invalid Contracts

The government, and OPA by extension, has the right to avoid a contract that is made in violation of a statute or regulation having the force and effect of law; such contracts have been variously described as void ab initio, invalid, or illegal[1]. In *Prestex, Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963), the United States Court of Claims held that a contract was *invalid* and not binding on the government where the contractor's bid with attached sample materially varied from the advertised cloth specifications, as shown by later laboratory tests. There, the government was held not liable for the contractor's expenses incurred in manufacturing the cloth, when immediately after testing the sample and discovering that it deviated from the advertised specifications, the government avoided the contract and did not accept or use any part of the order. Also, in *United States v. Amdahl*

[1] OPA has the authority to avoid such a contract, under the first interpretation of the termination provisions in both the PSSPR and the CNMI-PR. It shares this power with the Commissioner of Education, under the PSSPR, and the Director of Procurement and Supply, under the CNMI-PR. This authority is implicit in the regulations because it is essential to avoid rendering meaningless the procurement appeal process. If OPA were only able to *recommend* termination, as argued by PSS, an agency could completely ignore the procurement regulations and in so doing waste public funds and abuse the procurement process, secure in the knowledge that it could later choose to disregard OPA's ruling on appeal. OPA must have the authority to act directly to rectify procurement violations, if it is to perform its mandated special duty to *prevent* fraud, waste and abuse in the expenditure of public funds, under 1 CMC §2304(a).

Corp. 786 F.2d 387 (Fed. Cir. 1986), the contracting officer's failure to comply with statutory requirements in making the award rendered the contract null and void. In that case, the contractor was permitted to recover at least on a quantum valebant (value of goods provided) or quantum meruit (as much as is deserved) basis as to the conforming goods and services received by the government prior to rescission of the contract for invalidity. The contractor was not compensated under the contract, which was invalid, but under an implied-in-fact contract instead.

Because a contractor may be entitled to compensation for work performed under an invalid contract, it is necessary that the agency seek a mutual agreement with the contractor to suspend performance on a no-cost basis when it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the agency's interest. In this instance, we believe that the PSS Commissioner and other responsible PSS and MHS officials should not have allowed the contract to continue when Torres filed its timely protest after the contract award.

Need to Suspend the Performance of a Contract Pending Protest

In protests after award, PSSPR Section 5-101(3) provides, in pertinent part, that when it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Public School System's interest, the Commissioner should consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis. This particular provision is intended to prevent any liability that may arise in case a contract is continued despite a pending protest, where such contract is subsequently terminated for violation of statute or regulation, among other valid reasons.

As stated in our earlier appeal decision, completing the installation of the 118 A/Cs in order to make them operational is dependent on the final completion of the upgrade of the electrical system of MHS (**Exhibit A** shows the A/Cs installed by JWS at MHS without power connection). The Commonwealth Utilities Corporation (CUC) Electrical Engineer has recently projected that the upgrade of the electrical system of MHS will be completed in August 1998 before the start of the next school year. Accordingly, we believe that there was no compelling reason to proceed with the delivery of the 118 A/Cs. The Commissioner should have sought a mutual agreement with the winning contractor to suspend performance on a no-cost basis, since it appeared that a delay in installing the A/Cs would not have been prejudicial to the Public School System's interests. Our interview with the winning contractor on April 23, 1998 showed that the Commissioner did not consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis in the interest of the Public School System. Instead, the winning contractor was advised by its legal counsel and the legal counsel of PSS to proceed with performance under the signed contract.

Because PSS allowed JWS to deliver and install the A/Cs at MHS pending resolution of this protest, PSS has put itself in a position where it could be liable to the winning

contractor for whatever work has been performed under the contract, in line with the second view mentioned earlier in our "Analysis." It should also be noted that the protest by Torres was filed with the Commissioner on October 6, 1997, only 6 calendar days after the signing of the contract on September 30, 1997, giving PSS ample opportunity to seek a contract suspension before much work had been performed. PSS also failed to consider the pending completion of the electrical upgrade of MHS when it provided a contract term of 90 days for the delivery and full installation of the A/Cs. As it turned out, the winning contractor was not able to meet the requirement for delivery and full installation of the A/Cs within 90 days because of the still uncompleted upgrade.

OPA believes that the interests of the CNMI Government need to be protected at all times. When a protest is filed after contract award, performance of the contract should be suspended pending the resolution of the protest where such suspension is not prejudicial to the best interests of the CNMI Government, pursuant to PSSPR Section 5-101(3). In that way the government would not be precluded from initiating proper remedies in case the contract award is later determined to involve a significant violation of applicable laws or regulations.

Violations of the PSSPR were Not Sufficiently Significant to Warrant the Earlier Remedy

As previously stated, we are not persuaded by JWS's and PSS's arguments in their respective reconsideration requests that our appeal decision, including our findings of fact, contained errors of fact or law which would warrant a complete reversal of our decision. However, OPA in this particular case has determined that the violations noted in the procurement are not of such significance as to warrant the drastic remedy of removing the A/Cs installed at MHS by JWS. We have no reason to believe that the award should have been made to any other bidder, based on our review of the bidding process; if that were the case, ratifying JWS's contract when the award should have been made to another bidder would certainly have resulted in unfair treatment. In contrast to the Judiciary's purchase of mini-vans [Joeten Motor Company, RFP 97-10, March 11, 1998], we believe that there was adequate competition in this procurement because four bidders responded to the IFB. In addition, JWS offered the second lowest price - higher only than the price presented by a bidder which was not eligible for award because PSS determined it to be non-responsive and non-responsible. It appears, therefore, that PSS got the best value for its money despite its non-compliance with the PSSPR.

We also emphasize that the circumstances in this matter are different from those in OPA's appeal decision related to the Judiciary's purchase of mini-vans. Unlike the situation involving the 118 MHS A/Cs, OPA found significant violations of applicable laws and regulations in the procurement of the Judiciary's mini-vans, specifically those pertaining to inadequate public notice in violation of CNMI-PR Subsections 3-106(2) and (3), and the unauthorized reprogramming of funds subject to lapse in violation of the 1997 Appropriations Act.

Furthermore, in connection with our special duty to*prevent* fraud, waste and abuse in the expenditure of public funds as mentioned in footnote 1, we analyzed whether the violations of the PSSPR in this procurement resulted in a waste of public funds. In addition to our view that PSS got the best value for its money, we believe that there has not been a waste of public funds. Even though the A/Cs cannot be used for the next three months (until August 1998 as projected by the CUC Electrical Engineer), there will be no significant damage to the idle units during completion of the electrical upgrade, and since the A/Cs will eventually be used as intended, there has not been a waste of public funds. Our conclusion, however, would have been different had there been any indication that the waiting period before use would result in significant damage to the units. It is therefore critical that PSS and other responsible agencies ensure that the Engineer's projected completion date for the upgrade of the electrical system is met, and that the A/C units are protected from physical damage until they become usable.

It presently appears that the current work on the electrical upgrade has been moving along in accordance with the projected time frame. The contract for the design of the electrical upgrade at MHS was awarded on April 14, 1998 and required the contractor to complete the design in six weeks time, i.e., by the end of May 1998. During a meeting with the contractor, we were informed that about 90 percent of the work hasbeen submitted for agency review, and that the design will be completed within the time called for in the contract. We were told that after completing the design, proposals will be solicited and another contract will be awarded for the actual upgrade.We have recently been advised by the CUC Electrical Engineer that the entire electrical upgrade (both design and actual work) will be completed in August 1998, which will make the A/C units fully operational before the start of the next school year. The design contractor agreed that completion of the entire electrical upgrade can be accomplished before the start of the next school year.

Need to Modify the Remedy Provided in the Appeal Decision

While sustaining Torres' protest, OPA is modifying its previous remedy of terminating the contract and at the same time directing the removal of the A/Cs installed by JWS at MHS. As stated above, the procurement violations in this case are not of such significance as to warrant the drastic remedy of removing the A/Cs. Accordingly, OPA has determined that the contract between PSS and JWS should be ratified. As a matter of fairness, however, Torres may be entitled to reimbursement for the cost of preparing its proposal and pursuing its protest and appeal. In the administrative adjudication of appeals, the PSSPR provide for certain remedies in cases where the Public Auditor determines that a solicitation or proposed award of a contract is in violation of law or regulation; however, no authority has been given to the Public Auditor to award monetary damages in such cases. If Torres chooses to pursue compensation for its proposal, protest and other costs, it may submit its claim in a judicial setting which would determine the nature and extent of any PSS liability.

Although we are modifying our earlier decision with regard to the disposition of the 118 A/Cs, we would like to emphasize that inappropriate actions or inactions of certain PSS and MHS personnel should not be tolerated because the integrity of the procurement process is at stake. We therefore recommend that the PSS Commissioner consider imposing administrative disciplinary sanctions against the persons responsible for the violations of the PSSPR mentioned in our appeal decision, and for allowing JWS to continue performance of its contract after the protest was filed. Additionally, the Attorney General's Office should consider the possibility of seeking reimbursement, under PSSPR Section 1-108, from any employee(s) responsible for the violations of the PSSPR in the event a case against PSS is pursued and PSS is determined to be liable as a result of those violations.

2. OPA Allegedly Lacks Jurisdiction to Decide on Torres' Appeal Because Torres is Not an Interested Party

PSS contends that OPA lacks jurisdiction to decide on Torres' appeal because Torres, as the highest bidder, was not in line for award and therefore was not an interested party in this procurement. PSS takes the position that the language of PSSPR Section 5-101(1)(a) on the definition of who can file a protest is almost identical with the definitions provided in the Federal Competition in Contracting Act (CICA) and the General Accounting Office (GAO). We disagree. The provisions of the PSSPR and CICA on who can file a protest are significantly different.

CICA allows a protest by an "interested party," defined as an actual or potential bidder whose direct economic interest would be affected. Under CICA, then, if Torres could not qualify for an award, its economic interest would not be impacted and it would not be an "interested party."

By contrast, PSSPR Section 5-101(1)(a), while not giving a specific definition of "interested party," does provide 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 Commissioner." [Emphasis added.] Torres, having submitted a bid on PSS IFB 97-0019, was an actual bidder of the IFB; he was aggrieved because there were flaws in the evaluation of the proposals which did not adequately consider the selected bidder's compliance with the technical specifications of the IFB, and because the evaluation also considered certain factors not set forth in the bid specifications.

Under the PSSPR, one's direct economic interest need not be affected so long as one has a grievance. Someone who is solicited to submit a proposal under the assumption that the award will be made on the basis of the announced specifications certainly has a grievance if the award is not made in accordance with those specifications. He is aggrieved if the underlying announced purposes and policies of the PSSPR are not met, e.g., to insure the fair and equitable treatment of persons who deal with the procurement system and to foster effective broad-based competition. And even if Torres would not be eligible for an

award under this solicitation, he might qualify for selection if the contract were terminated and re-solicitation is announced.

Torres' situation may be contrasted with a previous OPA appeal decision [Carrier Guam, Inc. Saipan Branch, 118 MHS A/Cs, PSS IFB 97-0019, February 26, 1998] where OPA ruled that Carrier was not an actual bidder because it failed to submit a bid on PSS IFB 97-0019, and since the closing date for submitting bids had already passed, it was also not a prospective bidder. Unlike Torres, Carrier was neither an actual nor a prospective bidder, and lacked the standing to protest as provided for in PSSPR Section 5-101(1)(a).

3. OPA Allegedly Lacks Jurisdiction to Decide on Issues Which were Not Raised by Torres in its Initial Protest to the Commissioner

PSS contends that OPA lacks jurisdiction to decide on issues which were not raised by Torres in its initial protest to the Commissioner. We again disagree. PSSPR Section 5-102(1) provides, in pertinent part, that "a written appeal to OPA from a decision by the Commissioner may be taken provided the party taking the appeal*has first submitted a written protest to the Commissioner*". [Emphasis added]. The PSSPR does not specifically require that each ground must be protested to the Commissioner to justify the relief requested by the appellant.

In a previous request for reconsideration of an appeal decision [AJ Commercial Services, Division of Corrections (DOC) Food Service Program, March 31, 1995], a bidder who had not previously protested the conduct of the procurement objected to OPA's review of the responsiveness of its bid, arguing that the procurement regulations set out a formalized process that a bid must go through before OPA could review it. In deciding the reconsideration request, OPA affirmed its previous decision that all the bidders were not responsive to the bid specifications. OPA concluded that "the CNMI Procurement Regulations do not restrict the Public Auditor from taking all relevant matters into consideration when reviewing an appeal. By being able to review all facts and not just the documents related to the appellant, the Public Auditor can render a decision that serves the best interest of the CNMI Government and all interested parties." This has been OPA's consistent view in its previous appeal decisions, e.g., the appeals filed by Felipe Atalig [PSS 1996-1997 School Breakfast and Lunch Program, PSS RFP 96-004, January 8, 1997], JWS [Delivery of A/Cs and Riding Mower, PSS IFB 97-005, August 22, 1997], and Merced V. Reyes [PSS 1997-1998 School Breakfast and Lunch Program, PSS RFP 97-005, November 19, 1997].

In administrative proceedings, a reviewing agency's powers are quite broad.

> When an agency reviews an initial decision, it has all the powers it would have had if it had made the initial decision, except as it may limit the issues on notice or by rule . . . Agencies are not bound to the role of reviewing courts who sustain fact findings of courts of the first instance

> unless such findings are clearly erroneous, or contrary to the very substantial preponderance of the evidence. Instead, an agency may reverse a hearing officer whenever the preponderance of the evidence before it indicates that the examiner's decision is incorrect . . .2 Am Jur 2d Administrative Law §372 (1994).

Even in the judicial system, issues not raised at a lower level may be considered on appeal.

> The rule that a reviewing court will address only issues raised in the trial court is not absolute...there are numerous situation in which a reviewing court may reach an issue notwithstanding the fact of its being presented for the first time on appeal . . . an issue may be treated by an appellate court, although not raised below, where it is one of sufficient public concern . . . 5 Am Jur 2d Appellate Review §691(1995).

Accordingly, we conclude that OPA *has jurisdiction* to consider all grounds of Torres' appeal.

DECISION

PSS's and JWS's arguments in their respective reconsideration requests have not persuaded us that our appeal decision contained errors of fact or law which would warrant a complete reversal of our decision. The government has the right to avoid contracts made in violation of a statute or a regulation having the force and effect of law. However, OPA has determined that the violations in this particular procurement were not of such significance as to warrant the drastic remedy of directing the removal of the A/Cs installed at MHS by JWS. Accordingly, while sustaining Torres' protest, OPA has determined that the contract between PSS and JWS should be ratified. As a matter of fairness, however, Torres may be entitled to reimbursement for the cost of preparing its proposal and pursuing its protest and appeal. However, Torres may have to submit such claim in a judicial setting because OPA has no authority under the PSSPR to award protest costs and other related costs in an appeal decision.

Contrary to PSS's position, OPA has jurisdiction todecide on all the issues raised in Torres' appeal, including issues which were not raised by Torres in its initial protest to the Commissioner, because Torres is an interested party in this procurement and filed the requisite protest. Additionally, we strongly recommend that in future procurement, the Commissioner should consider seeking a mutual agreement with the contractor to suspend performance of a contract on a no-cost basis when a protest is filed after award, where it appears likely that the award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Public School System pursuant to PSSPR Section 5-101(3).

Although we have concluded that the violations were not of such magnitude as to justify removal of the A/Cs, we still believe that inappropriate actions or inactions of certain PSS and

MHS personnel should not be tolerated because the integrity of the procurement process is at stake. Accordingly, we also recommend that the PSS Commissioner consider imposing administrative disciplinary sanctions against the persons responsible for the violations of the PSSPR mentioned in our appeal decision, and for allowing JWS to continue performance of its contract after the protest was filed. Additionally, the Attorney General's Office should consider the possibility of seeking reimbursement, under PSSPR Section 1-108, from any employee(s) responsible for the violations of the PSSPR in the event a case against PSS is pursued and PSS is determined to be liable as a result of those violations.

Since we have decided that MHS may keep the 118 A/Cs in this instance, itis not necessary to terminate JWS's current contract. We take the view that it is no longer practical to change a contractor at this point when performance under the contract is about 90% complete. In this instance where the contract is almost completed, the effect of a termination would be substantially similar to a ratification under the second view mentioned in our "Analysis" above.

PSSPR Section 5-103(3) provides that "a determination of an issue of fact by the Public Auditor under these Procedures shall be*final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous*." [Emphasis added]. Although we have modified our decision as to the disposition of the 118 A/Cs and the current contract of JWS, the findings of fact presented in our appeal decision remain the same. We note that JWS and PSS in their respective reconsideration requests did not take issue with those findings.

Leo L. LaMotte
Public Auditor, CNMI

May 18, 1998

EXHIBIT A

PICTURES OF THE A/Cs INSTALLED BY JWS AT MHS WITHOUT POWER CONNECTIONS