



# 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](mailto:mail@opacnmi.com)

Phone: (670) 322-6481  
Fax: (670) 322-7812

<b>In Re:</b>	)	<b>APPEAL NO. BP-A085</b>
	)	
<b>Appeal of Mary's Security Services</b>	)	<b>DPW 12-RFP-004</b>
	)	
	)	"Security Services for Marpi Solid Waste Facility"
	)	
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## BACKGROUND

DPW12-RFP-004 (the "RFP"), published on October 9, 2012, solicited proposals for security services at the Marpi landfill on Saipan. Following evaluation of the proposals and discussions with offerors pursuant to NMIAC § 70-30.3-210(e) & (g), Contract Number 556417-OC with Mary's Security Services ("Mary's"), was routed for signature and approval on January 15, 2013. Due to objections and questions about the selection of Mary's by the Office of the Attorney General (the "OAG"), the routing process was halted and the not-yet-formed contract was canceled on May 15, 2013 after which funds for Contract Number 556417-OC (the "Mary's Contract") were de-obligated by the Department of Finance. Subsequently, on May 16, 2013, Contract Number 561372-OC with Island Protection Services ("IPS") was circulated among the required CNMI governmental agencies for approval. Contract Number 561372-OC (the "IPS Contract") was certified as complete by the Director of Procurement & Supply ("P&S") on June 7, 2013.

On June 7, 2013, IPS signed Contract Number 561372-OC and, on the same date, P&S notified the CNMI Department of Public Works ("DPW") that the contract was complete and authorized DPW to issue a Notice to Proceed. DPW issued a Notice to Proceed to IPS on June 17, 2013. Having all required signatures and a notice to proceed, the IPS Contract was presumptively valid as of this date. Thereafter, P&S notified all of the unsuccessful offerors of the award to IPS on June 19, 2013 and Mary's protested the award on June 24, 2013.

Several months later, on August 22, 2013, P&S denied Mary's protest from which Mary's timely appealed to OPA on August 27, 2013. On September 25, 2013, P&S cancelled the RFP. The position taken by P&S was that because DPW notified the other offerors after the contract had been awarded, the contract was invalid. Mary's wrote to OPA on September 30, 2013 requesting that OPA retain jurisdiction over Mary's appeal, rather than dismissing it as moot, due to the cancellation action being taken by P&S. Nonetheless, on October 8, 2013, OPA dismissed Mary's appeal and instructed Mary's to first file a protest with P&S if it wanted to complain about the cancellation of the RFP.

Mary's timely protested the cancellation of the RFP to P&S on October 9, 2013. IPS also filed a protest over the cancellation on October 4, 2013. P&S denied Mary's and IPS' protests over the cancellation issue on October 16, 2013, stating that a protest over the cancellation of a solicitation was not provided for in the CNMI Procurement Regulations. Mary's timely appealed the denial of its protest over the cancellation to OPA on October 30, 2013. IPS did not appeal.

### **Detailed Chronology:**

10/9/12: Solicitation DPW12-RFP-004 Issued by DPW for Security Services at the Marpi Solid Waste Facility.

1/15/13: Memorandum from DPW to the P&S Director recommending approval of Mary's for award of the contract following discussions with six (6) offerors and determination that Mary's price was fair and reasonable.

1/18/13: P&S approves DPW's recommendation to award to Mary's.

1/25/13: P&S begins approval routing of the Mary's Contract with contract package.

2/21/13: Letter from OAG to DPW requesting an explanation of why DPW re-ranked Mary's from fifth to first; why DPW asked Mary's and IPS for a lower rate via price negotiations and why documentation was missing in the contract package.

3/11/13: Letter from DPW to OAG responding to OAG inquiry of 2/21/13 and acknowledging that OAG has disapproved the Mary's Contract.

3/12/13: OAG letter to DPW regarding the Mary's Contract wherein the OAG asks DPW to explain the re-ranking and provide documentation.

5/10/13: Letter from DPW to OAG recommending award of the contract to IPS.

5/15/13: Memorandum from DPW to P&S requesting cancellation of the Mary's Contract stating that the OAG rejected the proposed contract and requesting that funding be de-obligated.

5/16/13: P&S approved the cancellation of the Mary's Contract and began routing the IPS Contract for approval.

5/24/13: The Department of Finance de-obligated funding on the Mary's Contract.

6/3/13: OAG approved the IPS Contract on the routing approval document and signed the contract certifying it as to form and legal capacity. The Lt. Governor signed the IPS Contract on behalf of the Governor on 6/3/13.

6/7/13: IPS signed the contract.

6/7/13: Memorandum from P&S to DPW providing notice that the IPS Contract processing was complete and that DPW may proceed with contract implementation.

6/17/13: DPW issued a Notice to Proceed to IPS (projected start date of 7/1/13 and an ending date of 6/30/15).

6/19/13: Letter from DPW to IPS notifying IPS of award selection.

6/19/13: Letter from DPW to Mary's notifying Mary's of IPS selection for award.

6/24/13: Mary's protest of IPS' selection for contract award.

8/22/13: P&S decision denying Mary's protest over the selection of IPS.

8/27/13: Mary's appeal to OPA of P&S protest decision regarding the selection of IPS.

9/5/13: P&S Director's Report regarding Mary's protest and appeal.

9/25/13: DPW memorandum to P&S requesting that the RFP be canceled.

9/25/13: P&S issues cancellation notice of the RFP.

9/30/13: Mary's letter to OPA requesting that OPA retain jurisdiction pending determination of the cancellation of the RFP.

10/4/13: IPS protest letter to P&S protesting cancellation of the RFP and requesting that it be reinstated.

10/8/13: OPA decision BP-A082 dismissing Mary's appeal stating that Mary's must protest any new issue, such as the cancellation of the RFP, to P&S prior to appealing to OPA.

10/9/13: Mary's protest letter to P&S protesting the cancellation of the RFP.

10/16/13: P&S decision denying Mary's and IPS' protests over the cancellation of the RFP.

10/30/13: Mary's appeal to OPA over cancellation of the RFP.

## OPA JURISDICTION

The Director of P&S takes the position that a protest (and thus an appeal) over the cancellation of a solicitation is not provided for in the CNMI procurement regulations. OPA disagrees.

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 P&S and file a timely written appeal with OPA based on the Director's decision to deny the protest or the lack of a decision by P&S. *See* NMIAC §§ 70-30.3-501 & 505.

There is no dispute that Mary's lodged two timely protests with P&S or that two timely appeals were submitted to OPA. *See First Protest*, (June 24, 2013); *Second Protest*, (October 9, 2013), and; *First Appeal*, (August 27, 2013); *Second Appeal*, (October 30, 2013). Generally, Mary's first protest and appeal concerned the selection of IPS for award of the contract and disputed the type of solicitation used to solicit the services. *See First Protest; First Appeal*. The second protest and appeal concerned the cancellation of the RFP by P&S. *Second Protest; Second Appeal*.

Mary's first protest and appeal were resolved when OPA issued its decision dismissing the appeal on October 8, 2013. *In re: Appeal of Mary's Security Services*, OPA Appeal No. BP-AO82 (October 8, 2013).

OPA obtained jurisdiction over Mary's second protest and appeal concerning the cancellation of the RFP after P&S denied Mary's protest over the cancellation of the RFP. Mary's timely appealed that decision to OPA on October 30, 2013. P&S denied the protest on the basis that cancellation of solicitations could not be protested (and hence, not appealed). P&S erred in its analysis of OPA's jurisdiction and of whether or not the cancellation of a solicitation can be protested.

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. *See generally In re: Appeal of IP&E*, OPA Appeal No. BP-A084, pp. 4-5 (March 31, 2014); *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 (Sept. 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).<sup>1</sup> While such review is appropriate under applicable regulations, deference to the agency decision to cancel is respected and such decisions are generally not second-guessed by OPA absent a demonstration of bad faith by the appellant. *See id.*

OPA has jurisdiction to decide Mary's appeal over the cancellation of the RFP.

## DISCUSSION

Mary's chief complaints in its protest and appeal of the cancellation of the RFP is that Mary's will be unduly prejudiced by cancellation after bid opening and that the P&S Director failed to show any compelling reason to cancel the RFP. *Second Protest*, p. 1; *Second Appeal*, pp. 2-3. In support, Mary's cites *Great Lakes Dredge & Dock Co. v. United States*, in which a federal court found cancellation after bid opening undermined the integrity of the procurement process and allowed cancellation at this stage only where a compelling reason exists. *See* 60 Fed. C. 350, 360 (2004). While OPA agrees that cancellation of a solicitation after bid opening is disfavored and can prejudice parties whose bid information becomes public, the procurement regulations grant wide discretion to procurement officials in making such determinations. *See* NMIAC § 70-30.3-240(h). In this instance a determination was made by the Secretary of Public Works that cancellation of the RFP was in the best interest of the CNMI government. *Memorandum by DPW to P&S*, p. 1 (September 25, 2013). Pursuant to NMIAC § 70-30.3-240(h), the Director of P&S concurred with this decision and issued an immediate notice of cancellation to all bidders. *Notice of Cancellation*, p. 1 (September 25, 2013).

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<sup>1</sup> While NMIAC §§ 70-30.3-501 (a)(1) appears 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. *See generally FTF 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).

There exists no “compelling reason” requirement in the CNMI procurement regulations to cancel a solicitation after bid opening and OPA will not second-guess the decisions of the procurement officials absent a showing of fraud or bad faith in the decision to do so. *See generally, In re: Appeal of IP&E*, OPA Appeal No. BP-A084, pp. 4-5 (March 31, 2014); *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 (Sept. 19, 2012). Mary’s has made no claim that the actions of the DPW Secretary or the P&S Director were fraudulent or done in bad faith.

The P&S Director made clear in both the September 25, 2013 cancellation notice<sup>2</sup> and the decision denying Mary’s second appeal<sup>3</sup> that the government intended to re-issue the cancelled solicitation as an invitation for bids. Ironically, this is precisely the alternative remedy sought by Mary’s in their initial appeal to OPA. *See First Appeal*, p. 4 (August 27, 2013). Unfortunately, as set forth below, the action by the P&S Director in canceling the RFP, was insufficient to vitiate the presumptively valid contract with IPS.

As stated above, after routing of the Mary’s Contract was halted in early 2013, the IPS Contract was circulated among the required CNMI governmental agencies for approval on May 16, 2013. On June 7, 2013, the IPS contract was certified as complete by P&S, signed by IPS, and on that same date, P&S authorized DPW to issue a Notice to Proceed pursuant to NMIAC § 70-30.3-115(g)(1). DPW issued the Notice to Proceed to IPS on June 17, 2013. On June 19, 2013, P&S notified all unsuccessful offerors of the award to IPS. For competitive sealed proposal solicitations, a notice of award to unsuccessful offerors must be provided within three working days of the award. NMIAC § 70-30.3-210(h). Having acquired all necessary signatures and a notice to proceed, the contract between IPS and DPW was presumptively valid as of June 17, 2013.

It is clear the purpose behind the Secretary of Public Works and the Director of P&S actions to cancel the RFP after executing a contract with IPS was to re-issue the solicitation and resolve

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<sup>2</sup> “[T]he parties are given Notice that DPW intends to re-issue this solicitation in the near future as an IFB.” *Notice of Cancellation*, p. 1 (September 25, 2013).

<sup>3</sup> “The tortured history of this procurement makes any award at this point suspect. This solicitation should have been an IFB, and it will be so upon its reissuance.” *Director’s Decision*, p. 2 (October 16, 2013).

problem issues they identified with the selection and award process under the RFP. *See* fn. 2 & 3 (above); *see also Director's Decision*, p. 2 (September 5, 2013). There are several ways for procuring officials to cancel an existing contract; however, canceling the underlying RFP is not one of them.

Under the CNMI procurement regulations if the P&S Director finds that a solicitation or award of a contract is in violation of law or regulation, he may terminate the contract. NMIAC § 70-30.3-510(b)(1)(ii). To exercise this option, the Director must have a valid protest before him. Had the Director determined some error in the selection process during review of Mary's first protest or the protests of the cancellation by Mary's or IPS, he could have terminated the contract under this provision. Of course, this remedy is also available to OPA in the present appeal, but no such violation has been identified by any interested parties, and OPA declines to do so.

Under the terms of the IPS Contract, it may be terminated for convenience or for any violation of the CNMI Procurement Regulations. Section 1 provides that: "This contract is null and void if either the procurement processes or contract execution fails to comply with the CNMI Procurement Regulations." *IPS Contract*, (June 7, 2013). Section 13 provides: "The Director of Procurement may, when the interests of the Commonwealth so require, terminate this contract in whole or in part, for the convenience of the Commonwealth." *Id.*

The contract terms specify that it is effective upon issuance of a notice to proceed, which DPW provided June 17, 2013. The contract scope of work incorporates the RFP by reference. A subsequent cancellation of the RFP is ineffective to terminate the underlying contract. If the Director wishes to terminate the contract with IPS, it must be done by alternate available means.


## DECISION

For the reasons set forth above, OPA denies Mary's Security Services' Appeal of the cancellation of DPW12-RFP-004. If the Department of Public Works or the Director of Procurement and Supply wishes to terminate Contract Number 561372-OC, it must be done pursuant to the terms of the contract or the CNMI Procurement Regulations.

Dated this 14<sup>th</sup> day of April, 2014.

BY:

CONCUR:

  
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JAMES W. TAYLOR  
OPA Legal Counsel

  
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MICHAEL PAI  
Public Auditor

CC: Interested Parties and Counsel:

VIA EMAIL ATTACHMENT:

Gil Birnbrich, Deputy Attorney General  
Herman Sablan, Procurement & Supply  
Nancy Gottfried, Asst. Attorney General  
Joseph Horey, Counsel to Mary's  
Steve Nutting, Counsel to IPS  
Martin Sablan, Secretary of DPW  
Peter Priestly, Asst. Attorney General  
Ms. Ma. Rizallie S. Punzalan, Global Security  
Mr. Xiao Sanches, 24-7 Security  
Mr. Manzural Alam, RANA Security  
Mr. Hermie Ipwan, IPWAN Security  
Mr. Rakibul Islam, ASIA Adventure Corp.  
Mr. Zahid Islam, Island Protection Services  
Mr. Anthony Gomez, GS4 Secure Solutions

(gbirnbrich@gmail.com)  
(procurement@pticom.com)  
(gottfried.ago.procurement@gmail.com)  
(josephhorey@Pacific-Lawyers.com)  
(snutting@saipan.com)  
(dpw.secretary@gmail.com)  
(ppriestly@gmail.com)  
(triplekcorporation@yahoo.com)  
(lssluckyls@gmail.com)  
(alamtsd@gmail.com)  
(naptun77@yahoo.com)  
(rakibul.islam175@yahoo.com)  
(zahid.islam66@yahoo.com)  
(tony.gomez@gu.g4s.com)

VIA FACSIMILE:

Mr. Rex Moses, Moses Security

(670) 234-2874

VIA FIRST CLASS MAIL:

Mr. MD Abdul Bashar, MDA Enterprises, Inc.

P.O. Box 505651, Saipan, MP 96950