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In re:) **APPEAL NO. BP-A090**
)
Appeal of MJ Kitchenette) **ITB 16-DOC-162-CNMI**
& Catering)
) **"DOC Food Service Program"**
)

FACTUAL BACKGROUND

On September 9, 2016, the Director of Procurement and Supply ("the P&S Director" or "the Director") and the Commissioner of the Department of Corrections ("Commissioner") solicited sealed bids for food services for the Department of Corrections ("the ITB"). Pursuant to the ITB, bids were due no later than October 12, 2016 and bid opening was scheduled for October 21, 2016. ITB at pp. 1-2. The ITB included five pages of bid specifications, a bidder's checklist, and numerous documents relating to nutritional guidelines and food safety. *Id.*

On October 10, MJ Kitchenette & Catering ("Kitchenette") submitted a sealed proposal in response to the solicitation. *MJ Kitchenette Proposal*, (October 10, 2016). On October 12, 2016, Kayalaan, Inc. ("Kayalaan") submitted a sealed proposal in response to the solicitation. *Kayalaan Proposal*, (October 12, 2016). On the same date, bids were opened at the Division of Procurement and Supply. *Bid Opening Summary*, pp. 1-3 (October 12, 2016). On October 18, 2016, the Commissioner informed the P&S Director that Kitchenette was the lowest bidder but deemed their bid non-responsive for failing to provide adequate financial resources to perform the contract and for having a history of providing meals to the Department of Corrections in an untimely manner. *Commissioner's Letter to Director*, p. 1 (October 18, 2016). In the same letter, the Commissioner notified the Director that Kayalaan was the lowest responsive and responsible bidder. *Id.* On October 24, 2016, the Director notified Kitchenette by letter that their bid was rejected as non-responsive to the ITB. *Director's Letter to Kitchenette re: Bid Rejection*, p. 1 (October 24, 2016). On the same date, the Director notified Kayalaan that they were the intended awardee of the food services contract. *Director's Letter to Kayalaan*, p. 1 (October 24, 2016).

On November 7, 2016, Kitchenette lodged a timely protest (“Kitchenette Protest”) with the Director claiming, among other things, that providing evidence of adequate financial resources was not part of the original ITB requirements and that the purported history of tardy performance was not documented or addressed during the existing contract and amounted to an insufficient basis to reject their bid. *Kitchenette Protest*, pp. 1-4 (November 7, 2016). On December 27, 2016, the Director vacated his decision rejecting Kitchenette’s bid because the Department of Corrections could not substantiate the alleged substandard performance by Kitchenette. *Director’s Letter to Kitchenette re: Vacating Bid Rejection*, p. 1 (December 27, 2016). The Director, however, pursuant to NMIAC § 70-30.3-245, ordered Kitchenette to submit certain information to support their financial ability to perform the contract, their ability to comply with the delivery and performance schedule, and to demonstrate their satisfactory performance record. *Id.* The Director gave Kitchenette five (5) working days to provide the requested information. *Id.*

Kayalaan filed a protest (“Kayalaan Protest”) on January 3, 2017 following the Director’s decision to vacate his decision to reject Kitchenette’s bid and to conduct a responsibility determination. *Kayalaan Protest*, p. 1 (January 3, 2017). The Kayalaan Protest alleged Kitchenette’s bid was non-responsive for several issues unrelated to the present appeal and that Kayalaan was aggrieved by the Director’s decision to vacate his previous rejection of Kitchenette’s bid and sought reconsideration of that decision to vacate. *Id.* Kayalaan’s Protest was never addressed by the Director prior to his February 10, 2017 decision to reject Kitchenette as a non-responsible bidder. The decision to reject Kitchenette as non-responsible rendered the issues raised in the Kayalaan Protest moot.

On January 3, 2017, Kitchenette submitted a cover letter and separate sealed envelope to the Director. *Kitchenette Letter to Director*, p. 1 (January 3, 2017). The cover letter mentioned documents responsive to the Director’s December 27 request for information. *Id.* The cover letter referenced the appropriate ITB number, but the separate sealed envelope referenced in the letter was labeled with an incorrect ITB number. *Id.*; *Hand Delivered Envelope*, (January 3, 2016). On January 18, 2017, the Director rejected Kitchenette’s bid as non-responsible based on

Kitchenette's failure to provide the financial statements as requested in the December 27 letter. *Director Letter to Kitchenette re: Bid Rejection based on non-responsibility*, p. 1 (January 18, 2017). Kitchenette was informed at that time that they had only ten (10) days to appeal the Director's decision to the Public Auditor. *Id.*

The following day, on January 19, 2017, two employees of Kitchenette went to Procurement and Supply to meet with the Director to argue that responsive documentation was submitted in a timely manner. *Director's Report*, p. 1 (February 23, 2017); *Declaration of Sandra Bartolome Jakosalem*, p. 2 (February 17, 2017); *Declaration of Maria Leila G. Galang*, p. 2 (February 17, 2017). During the meeting the Director indicated he was not aware of the substantive submission delivered by Kitchenette on January 3, 2017 in the incorrectly marked envelope. *Declaration of Sandra Bartolome Jakosalem*, p. 2 (February 17, 2017); *Declaration of Maria Leila G. Galang*, p. 2 (February 17, 2017). The Director made a notation on the incorrectly marked envelope of his meeting with the two employees from Kitchenette. *Hand Delivered Envelope*, (January 3, 2016).

Based on the meeting, the two Kitchenette employees believed that the Director would review the submitted documents to assess whether Kitchenette was a responsible bidder. *Declaration of Sandra Bartolome Jakosalem*, p. 2 (February 17, 2017); *Declaration of Maria Leila G. Galang*, p. 2 (February 17, 2017). On February 10, 2017, the Director sent a letter to Kitchenette affirming his position stated in the January 18, 2017 letter, that Kitchenette failed to submit documentation in a timely manner. *Director Letter to Kitchenette re: Protest Decision*, p. 1 (February 10, 2017). The February 10, 2017 letter did not discuss the substance of the documents submitted by Kitchenette or address the merits of the responsibility inquiry. *Id.*

On February 16, 2017, Kitchenette appealed the Director's protest decision to the Office of the Public Auditor. *Appeal*, p. 1 (February 16, 2017). On February 23, 2017, the Director submitted his report on the appeal by Kitchenette. *Director's Report*, p. 1 (February 23, 2017). OPA distributed the Director's Report and solicited comments by interested parties on March 2, 2017 pursuant to NMIAC § 70-30.3-505(d)(4). *OPA Letter to Interested Parties*, p. 1 (March 2, 2017). Kayalaan submitted comments on the Director's Report on March 14, 2017. *Comments by*

Kayalaan, (March 14, 2017). OPA received rebuttal comments by Kitchenette on March 20, 2017. *Rebuttal Comments by Kitchenette*, (March 20, 2017).

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 70-30.3-505(a).

DISCUSSION

As the background facts indicate, the present appeal arrives with an unusual and awkward history. What started as a pre-award protest based on a bid rejection for non-responsiveness morphed into one based on rejection for non-responsibility, which was ultimately decided on a technicality instead of on its merits. In the interim, there was a second protest from the presumptive awardee based on the Director's decision to rescind the original rejection for non-responsiveness. The second protest was never decided because the initial protest was ultimately unsuccessful. OPA's jurisdiction over the present appeal does not include matters raised in the second protest.

Kitchenette's appeal focuses solely on the issues of timeliness of their appeal and lack of a substantive review by the Director on the issue of responsibility.

An appeal from the P&S Director's decision must be received by the Office of the Public Auditor not later than ten days after the appellant receives the decision of the P&S Director. NMIAC § 70-30.3-505(c). The present scenario is not simple, but instead awkward and unusual again. The Director initially rendered his decision on Kitchenette's protest on January 18, 2017. However, the following day the Director met with employees of Kitchenette and discovered an envelope whose contents were allegedly responsive to the Director's request for information relevant to a responsibility determination. The envelope was marked with an incorrect ITB number but the letter which accompanied it had the correct ITB number. Both were initially received within the time frame ordered by the Director. During the meeting, the Director acknowledged receiving the envelope and initialed it. The Director then rendered a decision on February 10, 2017 affirming his January 18 decision.

Based on actions of both Kitchenette and the Director and the unusual circumstances present, fairness requires that the February 10, 2017 letter from the Director be construed as his final decision. Had the Director, after the meeting with Kitchenette, felt the January 18 letter was truly his final decision on the protest, he would have no reason to send the February 10 letter. Similarly, had Kitchenette left the January 19 meeting with the belief that the Director was not reconsidering his earlier responsibility determination given the financial information, they presumably would not have waited for a response to file their appeal. Furthermore, such a determination is appropriate to “insure the fair and equitable treatment of persons who deal with the procurement system”, an overarching policy goal in applying the CNMI Procurement Regulations. *See*, NMIAC § 70-30.3-001(b)(4). Accordingly, the present appeal is timely having been filed within five business days of the February 10, 2017 decision.

Having determined that the actions of the Director and the unique circumstances surrounding the submission of the responsibility documentation resulted in the February 10, 2017 communication being the final determination, the question becomes whether the Director’s decision should have been on the merits? In other words, do the unique circumstances and notions of fairness require the Director to consider the contents of the envelope when making his determination on whether Kitchenette is a responsible bidder? In the present situation, OPA believes they do.

The Director ordered Kitchenette to submit certain documents bearing on their responsibility as a bidder for the contract. Kitchenette responded in a timely fashion, submitting a cover letter which described the supporting documents and referenced the correct ITB number, but submitting the supporting documents in a sealed envelope which bore the incorrect ITB number. Then, after rendering a summary decision based on a mistaken belief that Kitchenette had not submitted the required documentation, the Director attended a meeting with the employees of Kitchenette where the incorrectly marked envelope was discovered and identified by the Director. The envelope was originally stamped received by the Division of Procurement and Supply on January 3, 2017 and included a notation reading “01-16-17, 12:00 N 2 emp. from MJK” apparently acknowledging the meeting with two employees from Kitchenette. Therefore, the Director possessed the information

he requested to conduct the responsibility determination and had received it on time, albeit in an incorrectly labeled envelope. After the Director discovered that he had the information, he rendered a decision on the issue. Given all circumstances present, that decision should have been a substantive decision on the merits of Kitchenette's responsibility.


Having found the protest timely and the Director's determination on Kitchenette's responsibility lacking, the matter must be remanded to the Director for a substantive evaluation of the documentation submitted by Kitchenette. Prior to addressing the issue of Kitchenette's responsibility, however, the Director must first rule on the lingering protest made by Kayalaan as to his decision to rescind the initial rejection of Kitchenette's bid for non-responsiveness.

DECISION

For the reasons set forth above, the appeal by MJ Kitchenette and Catering is hereby granted. This matter is remanded back to the Director of Procurement and Supply for a substantive determination of the responsibility of MJ Kitchenette and Catering based on the documents submitted pursuant to the Director's December 27, 2016 request. Prior to addressing the responsibility issue, however, the Director shall rule on the protest lodged by Kayalaan, Inc. on January 3, 2017.

Dated this 19th Day of April, 2017.

BY:



JOSEPH J. PRZYUSKI
OPA Legal Counsel

CONCUR:



MICHAEL PAI, CPA
Public Auditor

CC: Interested Parties and Counsel:

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