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<b>In re:</b>	)	<b>APPEAL NO. BP-A093</b>
	)	
<b>Appeal of International</b>	)	<b>CUC RFP 18-019</b>
<b>Bridge and Construction, Inc.</b>	)	
	)	<b>“Original Equipment Manufacturer Requirement”</b>
	)	

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## FACTUAL BACKGROUND

On June 25, 2018, CUC Acting Executive Director requested CUC Procurement to issue CUC RFP 18-019, Supply and Services for Installation & Commissioning of 2 X 8-13 MW of Diesel Generating Plant System.

On December 14, 2018, CUC Executive Director Gary Camacho signed a letter to IBCM, which was not mailed until January 22, 2019, stating that the Source Selection Committee (SSC) had rejected their proposal finding them a non-responsible proposer.

On December 31, 2018, IBCM lodged a protest of the SSC’s determination, challenging the requirement in the RFP that proposers be Original Equipment Manufacturers (“OEM’s”) as unreasonable.

On January 29, 2019, in a letter captioned “Response to Protest Letter from IBCM, Inc.” the CUC Executive Director denied IBCM’s protest justifying their requirement that proposers be OEM’s and additionally informing IBCM that they would also fail on responsiveness grounds as they failed to meet the bid bond requirements.

On January 30, 2019, IBCM filed an additional “further protest” repeating many of the arguments appearing in their earlier protest.

On February 8, 2019, IBCM filed an appeal of the Executive Director’s denial of their protest to OPA. On the same date, OPA sent notice to CUC regarding the appeal and requesting the

Executive Director prepare a report to include all items specified in NMIAC § 50-50-401(a)(4) and distribute the report to all interested parties as required by NMIAC § 50-50-405 (d)(3).

On March 26, 2019, OPA received a letter from CUC Executive Director stating reasons for denying IBCM's protest and justifying the inclusion of the OEM requirement in the RFP. The letter did not indicate any record of distribution to interested parties as required under the CUC regulations. OPA exchanged telephone calls and emails with CUC staff seeking to verify whether the report was distributed to interested parties and to obtain the documentation required from CUC. OPA provided citation to CUC's regulation that requires disclosure of the documents and distribution of the report to all interested parties.

On March 28, 2019 OPA sent a letter to the CUC Executive Director explaining that OPA did not receive all the documents with the Director's decision as required by regulation. Further, it appeared CUC had also not complied with their regulations by failing to send a copy of the report to the interested parties.

On March 29, 2019, CUC requested an opinion from Assistant Attorney General Christopher Timmons regarding disclosure of the documents and report to interested parties.

Several months passed and during that time OPA was never informed of an opinion from AAG Timmons on whether CUC was required to follow their regulations. Consequently, during that time CUC failed to distribute the required documents to all interested parties, thereby preventing commenting period to begin running.

After further follow up, OPA received copies of two letters from CUC. The first was dated May 23, 2019 addressed to Wartsila North America, an interested party, informing them of the appeal by IBCM to OPA as required by regulation. The second, dated May 24, 2019, was addressed to OPA and stated that the Executive Director prepared a letter addressing the merits of the appeal on March 26, 2019 and that CUC's position has not changed since.

To date, OPA has never been provided any assurance that CUC has followed its own regulations that require it to provide a copy of the Executive Director's report and all other documents relevant to the protest to the appellant and all other interested parties. Indeed, with respect to the present appeal, CUC has demonstrated a complete misunderstanding of what is required by their own procurement regulations.

Though it is unclear when or whether all parties were provided a copy of the Executive Director's report or other required items, no interested parties submitted any comments pertaining to this appeal.

OPA has jurisdiction to decide this appeal pursuant to NMIAC § 50-50-405(a).

## DISCUSSION

Despite the confusion in handling this appeal and required notice, the issue that controls the merits of this appeal is quite simple: whether CUC can reasonably restrict proposals for certain contracts under competitive sealed bidding to Original Equipment Manufacturers (OEM's)?

IBCM contends the OEM requirement is nefarious, stating it is included for the purpose to ensure the one qualified bidder can receive the nineteen million dollar contract. *Appeal*, p. 2. IBCM alleges the inclusion of an OEM requirement in RFP 18-019 was not made in good faith and is out of CUC's ordinary practice as indicated in other requests for proposals. *Id.* at 3. IBCM suggests that CUC could be afforded all protections and benefits available from an OEM by any contractor by demanding warranties, thus rendering the OEM requirement unnecessary. Finally, IBCM contends that because the RFP's OEM requirement was not included in good faith, it should be revised under NMIAC § 50-50-015 to remove the OEM requirement. *Id.*

CUC provides several reasons for their inclusion of the OEM requirement in the purchase of this large-scale generation equipment. First, CUC states the OEM requirement will guarantee inclusion of original manufacturer parts and service (not after-market). *Executive Director's*

*Report*, p. 2 (March 26, 2019). CUC further contends an OEM, with its reputation on the line, will ensure the engine will be delivered, installed, and maintained in the remote location of Saipan without issue. *Id.* With respect to any concerns about warranty problems, CUC contends contracting directly with the OEM protects CUC from any warranty disputes between layers of contractors and subcontractors. Finally, CUC suggests that dealing direct with the OEM will benefit CUC by motivating the OEM to perform to the highest standard with the hope that good performance might lead to future projects with the utility. *Id.*

IBCM's appeal hinges on whether CUC's OEM requirement is reasonable or whether it is a decision made in bad faith to restrict competition. With respect to IBCM's allegation of a lack of good faith on CUC's part, OPA finds nothing substantive to analyze. As demonstrated in its decisions in *KUTH Energy*, a protesting party must demonstrate more than mere conjecture and instead demonstrate actual instances of bad faith conduct. *See generally, In Re: KUTH Energy*, OPA Appeal No. BP AO-75 (July 26, 2013), *In Re KUTH Energy Reconsideration Request*, OPA Appeal No. BP-A075.1 (October 2, 2013). IBCM has not done that. Instead IBCM's lack of good faith argument relies solely on CUC's past conduct which did not require OEM contractors in similar projects. CUC's reasons for including the OEM requirement appear rational and well-founded. Dealing directly with the manufacturer might offer advantages in a large procurement to ensure availability of approved parts and qualified service and direct access for warranty claims. Finally, while IBCM is not an original manufacturer of engines, certainly there exists more than one OEM for the size and type of generator being procured, thus the inclusion of the OEM requirement does not necessarily eliminate all competition.

OPA finds decisions of the Comptroller General of the United States persuasive authority in resolving procurement disputes. In reviewing such decisions, OPA discovered support for agencies requiring OEM's as participants in the procurement process. In *iMed Biomedical*, the procuring agency awarded a sole source contract based on the availability of only one vendor who was certified to maintain medical equipment by the OEM of that equipment. *iMed Biomedical, Inc.*, B-416195 (July 3, 2018). A competing maintenance company protested, arguing the sole source award based on certification was unnecessary and meaningless and lacked a rational basis because the company was capable of performing on the contract notwithstanding its lack of OEM

certification. *Id.* at 2. The award based on the requirement of being an authorized OEM representative or distributor was upheld stating “the agency has the discretion to define the requirement for the maintenance of that equipment to achieve the highest possible reliability and effectiveness, and we find the requirements here to be reasonable.” *Id.* at 3. In *Simplex Aerospace*, a contractor challenged a solicitation as overly prescriptive and unduly restrictive on competition because, among many other things, it required awardees to employ the OEM as a subcontractor to approve and support work of the contractor. *Simplex Aerospace*, B-414566.2 (August 7, 2017). The contractor agreed the OEM’s participation in the process was appropriate but objected to the requirement as part of the contractual relationship between the contractor and agency. Recognizing the agency has the discretion to determine its needs and the best methods to accommodate them, the OEM requirement was upheld as reasonable. *Id.*

While the goals of the CUC procurement regulations and competitive sealed proposals is to promote fair and open competition, CUC is not duty bound to craft requests for proposals in a manner that neutralizes the competitive advantages of certain contractors. A contracting agency, in this case CUC, must enjoy some discretion to determine its needs and the best means to accommodate them.

### DECISION

For the reasons set forth above, the appeal by International Bridge and Construction, Inc. is hereby denied.

**Dated this 12<sup>th</sup> Day of July, 2019.**

BY:

CONCUR:



JOSEPH J. PRZYUSKI  
OPA Legal Counsel



MICHAEL PAI, CPA  
Public Auditor

CC: Interested Parties and Counsel:

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