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In Re MEGAbyte and Marianas Wireless	APPEAL NO. BP-A065 PSS RFP 10-088 Network Design & Installation of Routing and Switching Equipment for the Public School System

DECISION ON APPEAL

I. SUMMARY

This is a Decision on Appeal from the denials of protests on PSS RFP 10-088, filed by MEGAbyte of Saipan, Inc. (MEGAbyte) and Marianas Wireless for the Network Design and Installation of Routing and Switching Equipment for the Public School System by the Commissioner of Education (the Commissioner). The Public Auditor has jurisdiction over this appeal pursuant to NMIAC Section 60-40-405 of the Public School System Procurement Rules and Regulations (the PSS PR&R). Please see Section III below for a more detailed explanation of OPA's jurisdiction in these two cases.

II. FACTUAL AND PROCEDURAL HISTORY

MEGAbyte and Marianas Wireless timely filed protests with the PSS Commissioner; their protests were denied in PSS Protest Decision 11-001 and PSS Protest Decision 11-002, respectively. The PSS Protest Decisions were dated February 28, 2011 but both PSS and the two appellants agree that the PSS Decisions were faxed and received on March 1, 2011.

Please see Section III below for a detailed explanation of OPA's jurisdiction in these two cases.

III. Jurisdiction

The Public Auditor has jurisdiction over this appeal pursuant to NMIAC Section 60-40-405 of the PSS PR&R.

PSS claimed in a letter dated March 18 and received by OPA on March 21 that the appeals filed by MEGAbyte of Saipan, Inc. and Mariana Wireless on March 16, 2011 are both untimely and therefore should be rejected by OPA. PSS argued OPA's exclusion of Friday, March 11, 2011 from the working days calculation because it was an austerity day would be understandable if the CNMI's Procurement Regulations controlled here, but since the PSS denial letters clearly referenced the PSS Procurement Rules and Regulations (PSS PR&R), and the PSS PR&R give protestors 10 working days of the Public School System to appeal (PSS PR&R Section 60-40-401(d)), OPA's closing was irrelevant.

The facts surrounding receipt of each of the appeals are different and warrant examination.

MEGAbyte initially submitted its appeal on March 15, 2011. In the appeal dated March 14 and received by OPA on March 15, MEGAbyte's letter stated in its entirety:

> I have been instructed by PSS to forward you the protest filed
> By MEGAbyte of Saipan, Inc. for PSS RFP 10-88 for further review.
>
> Please contact my office if you require additional information.

OPA rejected this appeal as not containing the information required in PSS PR&R Section 60-40-405(b)(3), though it may have been sufficient to toll PSS PR&R Section 60-40-402(d). OPA also e-mailed MEGAbyte PSS PR&R Section 60-40-405. MEGAbyte then re-submitted the appeal by e-mail. The OPA e-mail system reflects the time of submission as 8:53 pm, which is after OPA's usual business hours. The PSS PR&R does not define what constitutes a "filing" and does not explicitly allow or disallow filing by e-mail. OPA notes that with the electronic filing now used by the courts, anything submitted prior to midnight is accepted as being filed on the same calendar day it is submitted even though its submission is after the official working hours of the court. While the PSS PR&R were written before the advent of electronic filing, there is nothing in the rules and regulations to justify interpreting it as disallowing electronic filing.

Further, OPA realizes that by rejecting the appeal and providing MEGAbyte with the appropriate section of the regulations, it was reasonable for MEGAbyte to assume that OPA would accept its revision of the appeal. Finally, as noted

previously, the original filing by MEGAbyte was arguably sufficient for purposes of Section 60-40-405.

As for the receipt of Mariana Wireless' appeal on March 16, 2011, the General Manager of Mariana Wireless called OPA on Thursday, March 10, 2011 and spoke with OPA's Legal Counsel. The General Manager asked about submitting the appeal on the following day. OPA's Legal Counsel countered that this was not possible since OPA was not open the following day because it was a government austerity day. Since OPA was the agency to receive the appeal, OPA's counsel found it incongruous that the working days to calculate a filing date for an appeal would be the working days of PSS. While it is arguable that Mariana Wireless was not harmed by OPA's closing on Friday, March 11, OPA's Legal Counsel did inform Mariana Wireless that it had until March 16 to submit the appeal. Courts have acknowledged that equitable tolling is available "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period. . . ." *See*, e.g., *Henderson v. Shinseki*, 589 F.3d 1201, 1208 (Fed. Cir. 2009), quoting *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 96 (1990). Since the General Manager of Mariana Wireless relied on OPA's representation it had until March 16 to submit its appeal, OPA will not now reject that appeal as untimely.[1]

In both instances, the appellants had taken steps to comply with the requirements of PSS PR&R Section 60-40-405. One of the purposes of the procurement regulations is to instill in potential bidders confidence in the integrity of the process, which is ill-served by denying appeals based on technicalities.[2] While OPA understands the need to comply with the procedural requirements of the process, there are extenuating circumstances here that militate against a strict interpretation of the filing requirements.

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[1] In addition to the representation by OPA that filing on the 16th would be timely, given the timing of the appellant's original contact, the appellant cannot be said to have failed to comply with the mandates set forth in the regulations.

[2] PSS PR&R Section 60-40-001(b): Purposes and Policies. The underlying purposes and policies of the regulations in this chapter are:
(1) To provide for public confidence in the procedures followed in public procurement;
(2) To insure the fair and equitable treatment of all persons who deal with the procurement system of the Public School System;
(3) To provide increased economy in Public School System procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds;
(4) To foster effective broad-based competition within the free enterprise system; and
(5) To provide safeguards for the maintenance of a procurement system of quality and integrity.

In sum, OPA is accepting both appeals to decide them based on the merits. OPA does not need PSS to submit a report because OPA is able to analyze the issues raised sufficiently with the information it has been provided by the appellants.

IV. Issues and Analysis

The appeals raise the following issues,[3] followed by OPA's analysis:

1. Did PSS err when the successful bidder did not have a business license at the time of proposal submission?

PSS contends that both PSS and the CNMI, through its Division of Procurement and Supply, only require a valid business license at the time of the signing of, and beginning performance pursuant to, the contract. PSS Protest Decision 11-001 at page 1. OPA agrees with this assertion, though sometimes a copy of a valid business license is required to be submitted with a bid or proposal. Requiring a business license only just prior to the signing of a contract or beginning performance pursuant to it encourages off-island bidders. While the encouragement of off island bidders may displease on-island bidders, it does serve the interests of the government to obtain the best price possible.

2. Did PSS err when it awarded the contract to the same vendor who did a "Network Health Assessment" giving rise to the RFP currently under appeal?

PSS stated that there was nothing in the PSS or CNMI procurement regulations that prohibited this, though it acknowledged that there were differing opinions about this in the field. PSS Protest Decision 11-001 at page 2. As PSS correctly pointed out, the danger herein lies when the contractor who wrote the Scope of Work has written it in such a way as to deter true competition or so it is the only contractor that can bid on the project. PSS Protest Decision 11-001 at page 2. By virtue of having four qualified proposers for this RFP, the Scope of Work was clearly not written solely for the contractor who wrote the Scope of Work nor does it appear to have given that contractor a distinct advantage.

[3] Some of the issues were raised by both appellants and the remaining were raised by only one or the other; OPA need not distinguish which appellant made the allegation in the recitation of the issues.

3. Did PSS err when it solicited the "best and final offer" from only two of the four proposers?

Both of the appellants raise this issue. Both seem to have confused an Invitation For Bid with that of a Request for Proposals. In the former, bidders submit a bid in response to specifications and the lowest bidder who meets the specifications (i.e., is responsive) is awarded the contract, unless that contractor is determined not to be responsible. In the latter, the proposals are ranked, discussions (negotiations) may or may not ensue, and those in the competitive range are asked to provide their best and final offer. All proposers are not asked to provide their best and final offer.

When one reviews the initial evaluation of the proposals in PSS RFP 10-088, the proposals are clearly grouped together, two at the top and two on the bottom. There is a natural division between the two groups; PSS did not make an arbitrary distinction.

If the contracting officer has any doubts about whether to exclude a proposal from the competitive range, the contracting officer should leave it out. In the past, agencies generally included any proposal in the competitive range that had a reasonable chance of receiving award. With the FAR rewrite in 1997, the drafters intended to permit a competitive range more limited than under the "reasonable chance of receiving award" standard. See *SDS Petroleum Prods.*, B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59.

To prevail in a challenge that it was excluded from the competitive range, a protester must show that the decision to exclude it was: (1) clearly unreasonable; or (2) inconsistent with the stated evaluation factors. See *Mainstream Eng'g Corp.*, B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307. The protesters here have made no such showing.

4. Did PSS err when it failed to provide complete "complete results" for the numerical tabulation?

PSS gave the total numerical results in one Decision (PSS Protest Decision 11-001 at page 3) and permitted the other appellant to review the file. OPA does not know what else the appellants expect, nor can OPA make any kind of assessment on the scores awarded in a particular category without the appellants making a more specific allegation.

An agency may adopt any method it desires, provided the method is not arbitrary and does not violate any statutes or regulations. See *BMY, A Div. of Harsco Corp. v. United States*, 693 F. Supp. 1232 (D.D.C. 1988).

In addition, while procuring agencies are required to identify the significant evaluation factors and subfactors, they are not required to identify the various aspects of each factor which might be taken into account, provided that such aspects are reasonably related to or encompassed by the RFP's stated evaluation criteria. *NCLN20, Inc.*, B-287692, July 25, 2001, 2001 CPD ¶ 136.

5. Did PSS err when it allowed the successful proposer to change its price at the end of the negotiations?

The nature of an RFP allows for price modifications at the time of an explicit "best and final offer." The purpose of discussions or negotiations is to understand and evaluate proposals and determine whether a proposal is in the competitive range. See FAR 15.306(b)(2) and (3). The communications help to resolve ambiguities so both parties have the same understanding of the proposal. The contracting officer solicits the best and final offers from those in the competitive range. One usually expects the best and final offer to go down, which is clearly in the best interests of the government, but in this case, the price was apparently raised in order to include the local taxes that had not been taken into account.

6. Did PSS err when it accepted the proposal of a vendor who had a previous PSS contract but no business license at the time of award of that previous contract and did not pay CNMI taxes on that contract?

This is the most serious allegation raised by the appellants. PSS has acknowledged the issue and has replied that the winning contractor is "in the process of evaluating [its] tax liability with outside tax counsel. If it is determined that there is tax liability on the Network Health Assessment contract, [it] will remit payment on taxes owed to the CNMI government." PSS Protest Decision 11-001 at page 1.

While OPA is giving the benefit of the doubt to PSS and is reluctant to find that PSS acted improperly in awarding the contract to a contractor with a possible outstanding tax liability, OPA urges PSS to make its own determination of the contractor's liability or forward it to the Office of the Attorney General to make that determination and follow up to ensure that any tax liability has been satisfied.

V. Decision

The Public Auditor finds that PSS did not err in awarding the contract to PacStar. OPA urges PSS to make its own determination of PacStar's tax liability on the Network Health Assessment (or forward the issue to OAG) and ensure that any monies owed to the CNMI government are paid.

A Reconsideration of the Decision of the Public Auditor may be requested by the appellants, any interested parties who submitted comments during consideration of the protest, the Commissioner of Education, and any agency involved in the protest. The Request for Reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. PSS PR&R Section 60-40-405(i)(1). The Request for Reconsideration of a decision of the Public Auditor shall be filed not later than ten days after the basis for reconsideration is known or should have been known, whichever is earlier. The term filed as used in this section means receipt in the Office of the Public Auditor. PSS PR&R Section 60-40-405(i)(2).

Dated this 6th day of April, 2011.

Mike Pai

Michael Pai, CPA
Public Auditor