



Regulations to correct the defective process that occurred. Procurement & Supply is therefore directed to reinstate the solicitation and award the contract to Herman's Modern Bakery.

## **II. FACTUAL SUMMARY**

1. October 13, 2011: Bid opening for ITB11-DOC-059; Herman's Modern Bakery had the lowest cost bid based on the unit price for meals as identified by the ITB's "Performance Specification and Bid Opening Summary Sheet."
2. December 6, 2011: The Department of Corrections issued a letter requesting samples of food to be delivered on December 9, 2011 for evaluation purposes and all of the bidders complied with this request.
3. December 22, 2011: The Department of Corrections determined that the contract should be awarded to MJ Kitchenette.
4. January 5, 2012: Procurement & Supply sent a memorandum to the Department of Corrections explaining that Procurement & Supply determined that Herman's Modern Bakery was the lowest responsible bidder and asked the Department of Corrections for an explanation of its reasons for wanting to award the contract to MJ Kitchenette.
5. January 17, 2012: The Department of Corrections wrote to Procurement & Supply explaining that the rationale for deciding to award the contract to MJ Kitchenette was based on an evaluation of the food samples provided on December 9, 2012.
6. January 27, 2012: Herman's Modern Bakery timely protested the selection of MJ Kitchenette for award of the contract.
7. February 3, 2012: The Department of Corrections sent a second memorandum to Procurement & Supply justifying the award to MJ Kitchenette on the basis of the food sampling evaluation indicating that the Department had acted under the authority granted to it by NMIAC § 70-30.3-205(k) (1).
8. February 13, 2012: The Department of Corrections sent a memorandum to Procurement & Supply canceling the ITB under NMIAC § 70-30.3-240(h) and sent a separate letter to the Public Auditor attempting to explain the

- Department's rationale in evaluating bids, including the added food sampling requirement.
9. February 15, 2012: Procurement & Supply sent a memorandum to Herman's Modern Bakery formally notifying Herman's Modern Bakery of the cancellation of the ITB.
  10. April 30, 2012: The Public Auditor sent a letter to Procurement & Supply requesting that Procurement & Supply rescind all prior decisions and reevaluate bids as they were originally submitted and without the added food sampling requirement.
  11. May 2, 2012: Procurement & Supply sent a memorandum to all bidders notifying them of the protest by Herman's Modern Bakery over the award decision favoring MJ Kitchenette and notifying interested parties that all prior decisions made by Procurement & Supply were rescinded.
  12. May 3, 2012: Procurement & Supply notified all bidders that bids would be re-evaluated without regard for the food sampling requirement imposed by the Department of Corrections.
  13. May 16, 2012: Herman's Modern Bakery filed a request for reconsideration of the Public Auditor's April 30, 2012 letter to Procurement & Supply.
  14. May 22, 2012: Procurement & Supply notified all bidders that the contract with MJ Kitchenette was rescinded due to the failure of MJ Kitchenette to submit a letter from a dietician, as was required by the ITB, and for submitting an ambiguous price and that the award of the contract would be to Herman's Modern Bakery.
  15. May 23, 2012: The Public Auditor dismissed the reconsideration request filed by Herman's Modern Bakery because the award notification had mooted the request.
  16. June 7, 2012: ITB11-DOC-059 was canceled by Procurement & Supply based on Procurement & Supply's review of bids and its conclusion that bids were ambiguous due to defective specifications in the ITB; Procurement & Supply also indicated that the ITB would be re-bid within a week.

17. June 7, 2012: Herman's Modern Bakery submitted rebuttals to the allegations in the June 7, 2012 letter from Procurement & Supply regarding ambiguities in the bids and attempted to illustrate that Herman's Modern Bakery was the lowest cost bidder.
18. June 11, 2012: Herman's Modern Bakery submitted a timely written protest to Procurement & Supply regarding the cancellation of ITB11-DOC-059.
19. June 28, 2012: Procurement & Supply again notified Herman's Modern Bakery of the cancellation of ITB11-DOC-059 and indicated that a re-bid would occur within one week.
20. July 9, 2012: Herman's Modern Bakery filed an appeal with the Public Auditor over the cancellation of ITB11-DOC-059 by Procurement & Supply. The appeal stated that the formal notification from Procurement & Supply on June 28, 2012 was deemed to be a denial of the bid protest filed by Herman's Modern Bakery on June 11, 2012 and the failure of Procurement & Supply to decide the protest formed an alternate basis for appeal.
21. July 19, 2012: The Public Auditor requested comments from all bidders and interested parties on two questions pertaining to the Public Auditor's jurisdiction in this appeal.
22. July 25, 2012: The Director of the Division of Procurement & Supply recused himself from any further action in this procurement due to a conflict of interest.
23. August 3, 2012: Herman's Modern Bakery filed comments and documents responding to the Public Auditor's request of July 19, 2012.
24. September 9, 2012: The Public Auditor inquired of Procurement & Supply via email regarding an explanation of how meal services are presently being handled at the Department of Corrections.
25. September 11, 2012: Procurement & Supply replied via email to the Public Auditor that the original contractor for the food services (MJ Kitchenette) was continuing to provide the services based on a series of Change Orders under its original contract with the CNMI.

### III. ISSUES, ANALYSIS and DECISION

#### JURISDICTION

The Public Auditor's jurisdiction in this matter is derived from NMIAC § 70-30.3-505(a) and § 70-30.3-510(a) and (b). The breadth of the Public Auditor's jurisdiction, as the appellate body in bid protest appeals, is acknowledged in the CNMI Procurement Regulations as applicable to protests *before or after award*. This acknowledgement is without limitation in the regulations. NMIAC § 70-30.3-501(a) (4).

The status of this matter is that a protest was filed prior to the award of any contract and the protest was not decided by Procurement & Supply. The cancellation of the ITB, by itself, does not rise to the level of a decision by the Director of Procurement & Supply pursuant to NMIAC 70-30.3-501(a) (3) on the protest submitted by Herman's Modern Bakery. Therefore, the authority of NMIAC § 70-30.3-510(a) applies to this appeal. In canceling the ITB on June 7, 2012, it appears that the Director of Procurement & Supply canceled the proposed award under NMIAC § 70-30.3-510(a) (1) believing that the ITB's specifications were defective. The ITB has not been re-solicited since it was canceled even though Procurement & Supply wrote, several months prior to this appeal, that it would be re-bid the ITB within a few days to a week.

This appeal asks the Public Auditor to take the following actions:

1. Reverse the cancellation of the ITB, and/or
2. Reinstate the ITB, and/or
3. Award the contract to Herman's Modern Bakery or, in the alternative, re-evaluate the bids in strict compliance with the ITB thus restoring the bid proposals.

This appeal concerns the second cancellation of the ITB on June 7, 2012 since the first cancellation of the ITB was rescinded.<sup>1</sup> For a remedy from this appeal, the Public Auditor may revise the solicitation and/or award to comply with CNMI law and regulatory requirements. NMIAC § 70-30.3-510(a).

This matter is factually convoluted and involves an ITB first issued in 2011. As the factual timeline, above, indicates, Herman's Modern Bakery has filed two protests over the cancellation of the solicitation (January 27 and June 11, 2012), a request for reconsideration over a letter from the Public Auditor (May 16, 2012) and this appeal (July 9, 2012). The reconsideration request of May 16, 2012 was dismissed by the Public Auditor because Procurement & Supply notified the parties that Herman's Modern Bakery was selected for award thus making the reconsideration request moot. Following the dismissal of the reconsideration request, the ITB was canceled a second time. The appeal of July 9, 2012 involved the June 11, 2012 protest over the cancellation of the ITB and the subsequent inaction by Procurement & Supply in responding to the protest. Nonetheless, Herman's Modern Bakery considered the formal notification by Procurement & Supply of the cancellation on June 28, 2012 to be a denial of its protest.

After the first cancellation was rescinded, Procurement & Supply re-evaluated bids. Following this re-evaluation, Herman's Modern Bakery was selected for award of the contract. However, on June 7, 2012, the ITB was canceled a second time, this time by Procurement & Supply, and Herman's Modern Bakery protested the cancellation on June 11, 2012. On June 28, 2012, Procurement & Supply again notified the parties of the cancellation but took no other action on the protest. In its appeal of July 9, 2012, Herman's Modern Bakery states that it deemed the June 28, 2012 letter from Procurement & Supply notifying the parties of the cancellation of the ITB to be a denial of its protest but also complains about the fact that there was no action taken on its protest. Herman's Modern Bakery errs in relying on the cancellation notice as a response to its protest. Procurement & Supply did not decide the bid protest and by not

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<sup>1</sup> The ITB was initially canceled by the Department of Corrections as the expenditure authority on February 13, 2012.

deciding it, gave Herman's Modern Bakery standing to appeal. NMIAC § 70-30.3-505(a).

The protest should have been decided within 20 calendar days after receipt of comments from interested parties or, at the earliest, by July 1, 2012. The only thing that happened was that on June 28, 2012, Procurement & Supply repeated the notification of cancellation it first issued on June 7, 2012. This notification on June 28, 2012 was either the response to the protest filed by Herman's Modern Bakery or there was never a response by Procurement & Supply to the protest. In any event, it is without significance since this appeal was filed with the Public Auditor on July 9, 2012 and was timely based on either scenario. *See* NMIAC § 70-30.3-505(c).

At the time of bid opening, the incumbent contractor, who also submitted a bid under the ITB, was MJ Kitchenette. Based on information received from Procurement & Supply, following the cancellation of the ITB, the contract (Number 479411) with MJ Kitchenette was extended on a bi-monthly basis at a cost of \$140,400 via a series of Change Orders which equate to a cost of \$70,200 per month. Most recently, Change Order #8 was issued covering a two-month period up to and including July 31, 2012 and Change Order #9 is in progress for the period up to and including September 30, 2012. Based on the most recent Change Order that covers the period up to and including July 31, 2012, the total contract obligation amounts to \$3,017,485.00. It is not known whether these Change Order extensions to the MJ Kitchenette contract exceed the six-month limitation on such contract extensions. NMIAC § 70-30.3-410(d).

## **ANALYSIS**

### The Addition of the Food Sampling Requirement

The Department of Corrections added an evaluation requirement – food sampling – after bids had been opened. This requirement was for the submission of samples by bidders of the types of food and serving size proposed by each bidder. Based on this

post-bid opening requirement, the Department of Corrections determined that the award should be made to MJ Kitchenette. The rationale for this decision was that since Herman's Modern Bakery failed to submit food samples that were in compliance with the ITB (its food samples exceeded the portion size requested in the ITB), the Department of Corrections thought it had authority to reject the bid submitted by Herman's Modern Bakery based on NMIAC § 70-30.3-205(k) (1). That section of the regulation states that a bid may be rejected for failure to conform to an essential ITB requirement. The problem with the use of this section of the regulation as justification for rejecting Herman's Modern Bakery is that the food sampling requirement was not included in the ITB. It was added after bids had been opened.<sup>2</sup>

Even though the Department of Corrections rejected the bid submitted by Herman's Modern Bakery, Procurement & Supply determined that the award should be made to Herman's Modern Bakery since Procurement & Supply found material defects in the MJ Kitchenette bid. Although the Department of Corrections, as the expenditure authority, has certain powers conferred by law or regulation in awarding contracts and canceling solicitations, it is the Director of Procurement & Supply (as well as the Public Auditor) that has ultimate, final authority to cancel or revise a solicitation or proposed award. NMIAC § 70-30.3-510(a) and (b). The action taken by the Department of Corrections in rejecting Herman's Modern Bakery based on a post-bid requirement was invalid.

Under the cancellation provision that provides the expenditure authority with the ability to cancel a procurement, found at NMIAC § 70-30.3-240, the Director of Procurement & Supply must agree with the action taken. This means that where the Director of Procurement & Supply initially agrees with the cancellation but then becomes aware of facts that cause the Director to disagree with it later, the prior agreement with the cancellation action can be rescinded by the Director of Procurement & Supply. The regulations do not provide a contrary view. This is what happened here – the cancellation of the ITB on February 13, 2012, at first agreed to by the Director, was

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<sup>2</sup> The post-bid request for food samples is not an issue of vendor responsibility for which post-bid information may be sought by the procuring agency. Such information must be obtained, and a responsibility determination made, prior to award of a contract and it normally occurs following bid opening and bid evaluations. NMIAC § 70-30.3-245(b).



rescinded by him on May 2, 2012. By rescinding his concurrence, the Director of Procurement & Supply voided the cancellation action taken by the expenditure authority. Thus, on May 3, 2012, the playing field was as it had been following bid opening. Namely, the bids would be re-evaluated without the post-bid opening food sampling requirement. The ITB did not contain in it a requirement for the sampling of food or portion size. Bidders were under no requirement to submit any such samples.

Requesting such samples was an *ultra vires* act<sup>3</sup> by the Department of Corrections and should not have influenced the selection of a vendor under the ITB. Thus, the selection of MJ Kitchenette for award of a contract was flawed because of the actions taken by the Department of Corrections in using food sampling as an evaluation tool. If the Department of Corrections was concerned about portion size and quality, and if the selected vendor failed to provide what the ITB required while performing under the contract, the Department of Corrections could have terminated the contract either for default or convenience. There is a duty to act in good faith in the CNMI Procurement Regulations and this duty was violated by the addition of the food sampling requirement after bid opening. NMIAC § 70-30.3-001, 70-30.3-010 and 70-30.3-015.

Instead of rescinding the proposed award to MJ Kitchenette, the ITB was canceled in a way that seems to indicate bias in favor of MJ Kitchenette by the Department of Corrections since no subsequent ITB was issued even though this was the expectation set by Procurement & Supply on May 3, 2012 and on June 7, 2012. As of the date of this appeal decision, no re-bid has occurred. In addition, MJ Kitchenette's original contract has been continued by Change Orders at a cost of approximately \$70,200 per month. This implies favoritism by the Department of Corrections as the expenditure authority since a re-bid could have occurred within days of the June 7, 2012 cancellation. Instead, MJ Kitchenette continues to provide the food services at its original contract rates.

Contracting officials, such as expenditure authorities and the Director of Procurement & Supply, have broad discretion in taking corrective action regarding contracts and

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<sup>3</sup> An *ultra vires* act is an act done in excess of legal authority. <http://www.merriam-webster.com/dictionary/>

solicitations. The Office of the Public Auditor follows the guidance of the Comptroller General of the United States and will not object to corrective actions, such as the termination of a solicitation, that are taken by an agency that has concluded a contract award was tainted by a flaw in the procurement process. See Rockville Mailing Serv., Inc., B-270161.2, April 10, 1996, 96-1 CPD ¶ 184 at 4. If the procurement official decides on a course of action, unless there is evidence of fraud or a failure to follow the applicable regulations, the decision will typically not be disturbed by the Office of the Public Auditor. Likewise, where a reasonable basis for the cancellation of a solicitation exists, the Office of the Public Auditor also will typically not object. See A-Tek, Inc., B-286967, Mar. 22, 2001, 2001 CPD ¶ 57 at 2.

Here, there is evidence that regulations were not followed by the Department of Corrections when a food sampling requirement was added after bid opening. Additionally, Procurement & Supply at first indicated that Herman's Modern Bakery was the intended awardee, then agreed to the cancellation of the ITB, then rescinded its agreement with the cancellation and the cancellation itself, then indicated that MJ Kitchenette was the intended awardee and then found defects in MJ Kitchenette's bid and again indicated that Herman's Modern Bakery was the intended awardee and then canceled the procurement a second time claiming deficiencies in the specifications. This represents a great deal of confusion in handling the procurement process as well as a violation of regulatory provisions.

Thus, the actions of the Department of Corrections as well as Procurement & Supply are suspect. Where is the government's interest in all of this? Certainly, MJ Kitchenette benefited by the confusion in that if it did submit a defective bid, as was determined by Procurement & Supply, it was allowed to continue to provide the services without having to compete for a contract or adjusting its pricing. If the bid by MJ Kitchenette was defective, then it was not entitled to perform under a new contract but it has continued to perform under its original contract due to the failure of the Department of Corrections and Procurement & Supply to award a valid contract for the food servicing.

The reasons given for the cancellations were primarily ‘in the best interests of the government.’ NMIAC § 70-30.3-240(h). Was it? All of what happened following bid opening resulted in a highly irregular process that did not comply with CNMI procurement regulations. Although procurement officials have wide discretion in canceling procurements, that discretion has limitations. Here, the limitations on that discretion were exceeded first by the Department of Corrections and then by Procurement & Supply. When there is possible favoritism or unfairness shown or the regulatory scheme was not followed, as may be the case here, the Public Auditor may intercede and direct an action that protects the integrity of the procurement process. NMIAC § 70-30.3-510(a) (2); (b) (1) (ii) and (b) (2) (i). The Public Auditor will intercede here due to the suspicious actions of the Department of Corrections and the inconsistent actions of Procurement & Supply.

The cancellation of the ITB on June 28, 2012 was not in the best interests of the government due to the flawed process that existed following bid opening and the possible favoritism shown to MJ Kitchenette, the beneficiary of such actions. Herman’s Modern Bakery had standing to protest the two cancellations of the ITB. NMIAC § 70-30.3-515. The cancellation of February 13, 2012 was rescinded by the Director of Procurement & Supply on May 2, 2012 and the cancellation of the ITB on June 28, 2012 is dealt with in this appeal decision.

#### ITB Requirement for Per-meal Pricing

The ITB requested per-meal pricing since the total number of meals was unknown due to the varying inmate population. Bidders were to provide a dietician-approved representative menu. Bid Specifications @ p. 1. Herman’s Modern Bakery provided a compliant bid with per-meal pricing. All bidders bid in this fashion – the cost per meal. Some bidders added these figures together to calculate a total number but that number would seem not to represent a realistic total cost, other than on a per-day basis, for inmate meals. If the bid from Herman’s Modern Bakery had been calculated in this fashion, when compared to the other bidders, it was the lowest as pointed out by its counsel on June 7, 2012.

The total number of inmate meals changes daily such that estimating the total cost to the CNMI for inmate meals on one day will be different from that of another day. The total cannot be established in advance of the provision of actual meals. Thus, the evaluation criterion in the ITB was reasonable – basing the evaluation on a per-meal basis for purposes of determining the lowest cost bidder.

The ITB requested a daily total of per-meal pricing and Herman’s Modern Bakery provided this level of bid pricing. It’s pricing was lowest and its bid was otherwise responsive.<sup>4</sup> The ITB did not indicate the total number of meals that would be provided since that number varies day-by-day and was not known at the time of bid opening. The ITB foresaw this and asked only for per-meal pricing. The ITB’s Performance Specification states that the bid pricing is on a per-day (per-meal) cost. ITB Performance Specification @ p. 2.

## **DECISION**

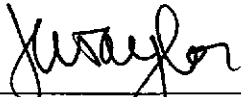
Public bidding requires the imposition of objectivity and fairness in the process that leads to the award of a contract that spends taxpayer dollars. This is the single most important aspect of public bidding – the avoidance, in the selection process, of favoritism. The CNMI Procurement Regulations follow this model and authorize the Public Auditor to revise the award of a contract in order to comply with law or regulation. NMIAC § 70-30.3-510(a) (2). Due to this authority, and since the process followed in this procurement was flawed by the actions of the Department of Corrections and by Procurement & Supply, the Public Auditor makes the following determinations:

1. The appeal of Herman’s Modern Bakery is SUSTAINED.
2. The cancellation of the ITB on June 28, 2012 is rescinded.

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<sup>4</sup> There has never been an issue raised about the responsibility of Herman’s Modern Bakery in this procurement.

3. The Public Auditor determines that Herman's Modern Bakery was responsive to the ITB's pricing requirements and it submitted the lowest cost bid based on the ITB's evaluation criteria and requirements.
4. Herman's Modern Bakery is determined to be the lowest cost, responsive, responsible bidder for ITB11-DOC-059.
5. Herman's Modern Bakery shall be awarded the contract for meal services solicited by the ITB as soon as possible.
6. Until a contract award is made to Herman's Modern Bakery, the incumbent contractor, MJ Kitchenette, may, at the discretion of the expenditure authority in conjunction with Procurement & Supply, continue food servicing at the Department of Corrections with bi-monthly Change Orders. This arrangement is necessary due to the obligation of the CNMI to provide for the health and welfare of inmates. However, such Change Order extensions are limited to a period of six months under NMIAC § 70-30.3-410(d). Should this period be exceeded, Procurement & Supply is directed to notify the Public Auditor.



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JAMES W. TAYLOR  
Legal Counsel

CONCUR



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MICHAEL PAI  
PUBLIC AUDITOR