



# 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

APPEAL OF CHONG'S  
CORPORATION

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APPEAL NO. BP-073

RFP12-DPW/ED-026

**April 11, 2013**

## **I. SUMMARY OF DECISION**

Chong's Corporation ("Chong's") appeals the decision of the Division of Energy, Department of Public Works ("Energy") to cancel Chong's award and award the project to another bidder based on an amendment to the solicitation. The project was procured by a request for proposals, pursuant to NMIAC §70-30.3-201, Competitive Sealed Proposals. The Office of the Public Auditor ("OPA") has jurisdiction over this appeal as provided by NMIAC §70-30.3-505 because the Department of Finance, Procurement & Supply, failed to act within twenty calendar days or certify the complexity of the matter for more time. NMIAC §70-30.3-505(a); 501(a)(3). OPA finds that an agency may amend solicitation terms of a request for proposals under the section on Competitive Sealed Proposals without canceling a procurement. But, because the amendment of solicitation was not done properly, Energy did not follow the Procurement Regulations. Chong's appeal was properly brought to the extent that it is correct that Energy did not properly amend the solicitation. The contract, however, is reaffirmed because the term of the contract has long since expired and the CNMI has already obtained the benefit of the services provided. As to the bad faith element in the appeal that Chong's was "mistreated," there is not enough evidence for Chong's to meet its burden to overcome the presumption of good faith. The Public Auditor does not attribute improper motives to government officials based on inferences or suppositions. Accordingly, to the extent that Chong's claim of mistreatment amounts to a claim of bad faith, it is denied on this basis.

## **II. FACTUAL SUMMARY**

### **A. Request for Proposals**

This request for proposals for air conditioning units to be installed in CNMI government buildings was one of several solicitations which were made to utilize American Recovery and Reinvestment Act (“ARRA”) grant funding. The particular solicitation at issue here, RFP 12-DPW/ED-026 (the “Tinian and Rota RFP”), was for “Supply, Delivery and Commission of Air Conditioning Systems for Various Buildings on Tinian and Rota” (the “Project”). A similar request for proposals, RFP12-DPW/ED-027, was also issued for Saipan (the “Saipan RFP”), for which the Appellant, Chong’s, bid and was issued a contract. That request for proposals was not challenged and is not at issue on this appeal.

### **B. ARRA Issue**

Before the Tinian and Rota RFP solicitation was issued, on September 15, 2011, the United States Director of the Office of Management and Budget (“OMB”) issued Memorandum M-11-34 which provided that all ARRA funds and projects must be completed and the ARRA funds obligated or paid prior to September 30, 2013, with a requirement that waiver requests be submitted by September 30, 2012. Further guidance was issued by the US Department of Energy (“US Energy”) that individual performance periods for recipients of ARRA State Energy Program (“SEP”) grants would be based on the terms of the specific SEP assistance agreement. SEP Notice 12-001, p. 1. The CNMI ARRA Assistance Agreement, Modification 009, however, which was received March 15, 2012, indicated that the CNMI Assistance Agreement performance and budget period would expire on September 30, 2012. In a May 31, 2012 email from Peter Ashley, Department of Energy Project Officer, it was confirmed that the period of performance for the CNMI ended on September 30, 2012. Mr. Ashley stated that additional time could be requested but there was “no guarantee a period of performance extension will be issued.” A request for an extension was made, but it was not granted until August 29, 2012, by a letter from AnnaMaria Garcia from US Energy, after the contracting issue was already complete and after the Project had already started. A further letter, received on October 12, 2012, from Kathleen B. Hogan, Deputy Assistant Secretary for Energy Efficiency, US Energy, addressed to the Hon. Eloy S. Inos, stated that US Energy had “signed a letter to Ms. Thelma Inos, Director of the CNMI Energy Division, stating that CNMI’s

request for a modification to the period of performance...had been accepted” and “the period of performance...now has a [sic] end date of September 30, 2013.”

### **C. Solicitation Process**

The scope of work for the Tinian and Rota RFP was made available for review on December 13, 2011, with the bid opening occurring on January 23, 2012. The Tinian and Rota RFP stated that the time for performance would be 200 days from the notice to proceed (“NTP”) and late performance would be assessed liquidated damages at \$500 per day. Chong’s was given a notice of intent to award for the Project in May of 2012. In response to a request for a detailed timeline, Chong’s notified the procuring agency, Department of Public Works, Division of Energy (“Energy”), on May 31, 2012 that the project completion would be approximately 200 days as required by the original proposal. More specifically, on June 6, 2012, Chong’s in a letter specified the lead time and production requirements which show it would take approximately 196 days to complete the Project.

Chong’s received the contract for the Project (“Initial Contract”) in June but was asked to hold it. On June 11, 2012, Chong’s was given an addendum to the Initial Contract for the Project which included two unexpected changes: 1. The time for completion had been changed from 200 days to 120 days, and 2. An attachment was added for signature called “ARRA Funding Limitation and Assumption of Risk by Contractor.” A series of meetings, phone calls, and emails followed between Energy and Chong’s.

On June 20, 2012, there were email communications between Chong’s and Energy regarding Buy America, Energy Star, and the date of completion. At 5:19 PM, Chong’s sent an email to Energy stating it was waiting for feedback from a factory regarding its production schedule.

On June 21, 2012 at 9:13 AM, Energy sent an email to Chong’s stating that the Director agreed to wait until 11:30 AM for Chong’s final decision on the new completion time and assumption of risk provision as neither had yet been agreed to by Chong’s. At 11:21 AM, Chong’s emailed that it was still working on its production schedule and that it had yet to receive a response to an email sent the previous day regarding a “ductless split invert type.” At 12:49 PM, an email from Energy to Chong’s stated that if notice of Chong’s decision was not received by 2:00 PM, the contracts with Chong’s would be cancelled for the Tinian and Rota RFP at issue as well as the Saipan RFP. At 1:05 PM, Chong’s sent an email to

Energy requesting a "little more time" for the response for the supplier for the ductless split. At 2:16 PM, Energy stated to Chong's that it was unable to provide more time and had no other recourse but to inform Chong's that it was transmitting an official cancellation memorandum to Procurement and Supply. At 2:53 PM, Chong's emailed that it had just received confirmation for a ductless split and would accept the Saipan RFP. At 3:03pm, Energy emailed Chong's that it would accept the Saipan RFP but that Energy would like something in writing that Chong's did not accept the Tinian and Rota RFP.

On June 23, 2012, Chong's President emailed that, "I have confirmed all equipment and materials from factories to support this project, so we are pleased to inform you that we will be able to accept Tinian Health Center A/C replacement project to completion within the specified time frame."

On June 25, 2012, Energy's Director informed Chong's that due to time constraints as discussed in several meetings with Chong's and after consultation with legal counsel, the decision to move forward and award the project to the second best final offeror remained the same and Chong's should expect an official notice of cancellation from Herman S. Sablan, the Director of Procurement & Supply. The next day, the Director of Procurement & Supply provided a letter which stated that the contract to Chong's was cancelled and JWS Air Conditioning & Refrigeration, Inc. ("JWS") would be awarded a contract for the Project. Chong's protested the cancellation of the award on June 27, 2012.

#### **D. Procedural History**

Procurement and Supply acknowledged receipt of Chong's protest on June 28, 2012 and acknowledged that the protest was timely. On July 10, 2012, Energy issued a memorandum to Procurement & Supply requesting a determination that the contract for the Project be awarded to the second bidder, JWS, even though there was a protest from Chong's (the "Final Contract"). The Memorandum noted that work had to be started without delay as: 1. the funding was coming from a time limited federal source; and 2. the Tinian Health Center air conditioning was out of order and they were using fans, which was a health concern for patients and employees.

Procurement and Supply informed bidders in a July 10, 2012 letter that JWS would be awarded the contract for the Project, even though Chong's had previously been chosen and was protesting the award to JWS. The letter explained that "[B]ecause it was necessary to begin the project very soon to meet

the September 30 deadline, the failure by Chong's Corporation to finalize the contract and the Assumption of Risk agreement...made it necessary for the Division of Energy to choose the second best offer, from JWS." The next day, a concurring memo from then-Attorney General Edward T. Buckingham found that the award to JWS may be made because "urgent and compelling circumstances which significantly affect the interest of the Commonwealth exist that will not permit awaiting the decision of the protest from Chong's Corporation before the project is completed." The second bidder, JWS, was awarded the Final Contract for the Project which was fully executed as of July 11, 2012. There is no allegation in the appeal that JWS acted fraudulently or in bad faith at any time during the procurement process.

On July 12, 2012, the Acting Public Auditor sent a letter to Director Sablan in response to the July 10, 2012 letter regarding the award of a proposed contract for the Project ("Letter"). This Letter commented under NMIAC 70-30.3-510(a)(2) on the award of the Final Contract. The same day, a response letter was sent by Director Sablan which explained that negotiations had been conducted with Chong's for both RFP12-DPW/ED-026 (Tinian and Rota) and RFP 12-DPW/ED-027 (Saipan) pursuant to NMIAC 70-30.3-205(m)(3); and that Chong's backed out of the Initial Contract after accepting the assumption of risk agreement for Saipan by not responding for the Tinian-Rota project. In addition, the letter emphasized that the Project was of great importance to the Commonwealth to improve working conditions for employees, save money on utility bills, and remedy detrimental conditions at the Tinian Health Center on patients and medical staff.

On July 16, 2012, the Public Auditor sent a letter to Director Sablan clarifying that the protest by Chong's was not yet decided by the Division of Procurement and Supply, and therefore there was no appeal pending. Chong's filed a "Limited Response to July 12, 2012 Letter from Mr. Herman S. Sablan," stating that Chong's met with Vicente Attao and Thelma Inos on June 20, 2012 and was told there would be no time extension for the Project. While Chong's did not accept the new contract terms on that date, discussions continued and Chong's efforts to line up suppliers based on the new deadline continued. A culmination of those efforts, Chong's argued, was its email of June 23, 2012. After meeting with Mr. Attao and Ms. Inos on June 25, 2012, Chong's received the email of June 25, 2012 stating that the office would move forward to award to the second place offeror, JWS.

Chong's protested the cancellation of the Initial Contract to Chong's before the final award to JWS on June 27, 2012. Chong's then supplemented its protest by submitting a second timely written protest on July 24, 2012 to the Director of Procurement & Supply to protest the July 10, 2012 award to JWS. On July 31, 2012, Chong's submitted a timely written Appeal to the Office of the Public Auditor, based on the fact that the twenty day time limit for deciding the June 27, 2012 protest had passed without a decision. As there was similarly no decision separately issued based on the July 10, 2012 protest, and the July 10, 2012 protest incorporated the June 27, 2012 protest, it is reasonable to consider the issue as consolidated. On September 5, 2012, the Public Auditor sent a letter to Director Sablan requesting notice of the appeal, and copies of the protests and appeal documents be sent to the required parties.

The Public Auditor was never provided a report for this proceeding, despite requests to Procurement and Supply. In addition, because of a conflict, the Office of the Public Auditor first appointed George Hasselback as Acting Public Auditor and he, in turn, appointed outside counsel to handle this matter on October 26, 2012.

Due to the lack of a report from Procurement and Supply, and because the Public Auditor had a number of emails in its file related to one of the exhibits submitted by Chong's, (which it had also obtained separately from Procurement & Supply), it provided copies of those documents for Chong's review and asked that Chong's comment on or before December 3, 2012. Looking specifically at the procurement regulations and process, where the Public Auditor serves as an appellate reviewer of the decisions of Procurement & Supply, it may hold a conference. NMIAC §70-30.3-505(h). In addition, the Public Auditor may request additional information from the appellant or interested parties. NMIAC §70-30.3-505(g). Accordingly, when a report is not provided to the Public Auditor by Procurement and Supply, information contained in a government agency file is proper for the Public Auditor to obtain and make part of its record.

Chong's then sought to supplement its appeal orally, and the Public Auditor agreed to meet with Chong's to review its emails on the record. Consequently, on January 8, 2013, Chong's provided an oral supplemental declaration and testimony to further address the emails which are part of the Public Auditor's file. The Public Auditor has the statutory right to investigate, and this encompasses taking testimony. See generally, 1 CMC §2304; 1 CMC §7811 *et seq.* In the context of procurement appeals, it is unclear whether as an appellate adjudicator, it is

appropriate for the Public Auditor to take testimony. If, however, a report is not provided, and an appellant provides documentary evidence which is not complete, and may even be contradicted by other information in government files, it is appropriate for the Public Auditor to accept a supplementary declaration in the form of testimony for the evidence at issue. The Public Auditor is tasked to prevent fraud, waste and abuse in the expenditure of public funds. 1 CMC §2304. “OPA cannot sustain a contention that is unsupported by facts and law.” *In re Appeal of SSFM (Saipan) Engineers, Inc.*, BP-A017, Office of the Public Auditor, May 17, 1999, p. 8. Accordingly, it would be inappropriate for the Public Auditor to take documentary evidence attached to an appeal as true where there is no report submitted without an examination of government files if it appears the evidence is incomplete. In the event additional material is discovered in those files, the appellant should be allowed an opportunity to further supplement its record.

### **III. JURISDICTION AND STATEMENT OF APPEAL**

#### **A. Jurisdiction**

The Public Auditor’s jurisdiction over appeals from a Commonwealth government procurement is provided by NMIAC §70-30.3-505. See *Appeal of Herman’s Modern Bakery*, BP-A070, Office of the Public Auditor, September 18, 2012. A written appeal may be taken to the Public Auditor if the party appealing has first submitted a written protest to the Department of Finance, Procurement & Supply Director (the “Director”), and he has either denied the protest or failed to act within twenty calendar days, unless he has certified that the complexity of the matter requires a longer time. NMIAC §70-30.3-505(a); 501(a)(3). Here, the Director did not provide a decision on Chong’s appeal; did not certify that more time was required; and did not provide a report to the Public Auditor for this appeal. Accordingly, because there was no timely decision by the Director, and the time to make that decision has long run, the Public Auditor has jurisdiction to consider this appeal.

As a related matter, the Public Auditor does not have jurisdiction to decide issues of the cancellation of an executed contract. NMIAC 70-30.3-501(a)(1); *In re Primtek Construction Company*, BP-A068, Office of the Public Auditor, June 19, 2012, p. 3; *In re Appeal of Kautz Glass Co.*, BP-A047, Office of the Public

Auditor, October 27, 2005, p. 9. While the term “cancellation” is used in some of the documents, it appears that the Initial Contract for the Project was never signed by Chong’s, and that the cancellation was of the award; i.e. the Government’s offer was withdrawn and re-offered with a change of terms before the Initial Contract was fully executed. Accordingly, the Public Auditor has jurisdiction to consider the issue of the award here.

## **B. Statement of Appeal**

Chong’s argues that it was mistreated in this procurement process. The government solicited a Project which required a 200 day completion time, and then presented a contract with a performance time of 120 days with an assumption of risk agreement which changed the original liquidated damages provision. Essentially, Chong’s states that it was mistreated by: “1. The government pulling the rug out from underneath it by attempting to change the terms of the procurement and the contract at the last minute; and 2. Even after Chong’s Corporation agreed to the last minute changes and was ready, willing and able to go forward, it was still rejected.” *In re the Appeal of Chong’s Corporation*, filed July 31, 2013 p. 2.

Chong’s argues that when the government agency realized it had taken so long to conduct the procurement process that it had jeopardized its funding source, the Tinian and Rota RFP should have been cancelled. In addition, Chong’s argues that after it protested initially and requested that the Director not award the contract to another proposer, the Director should not have gone forward. Finally, Chong’s argues that the government’s claim that it had to move forward with the second place company because of time constraints could not have been the real reason because Chong’s said it could do the work on June 23, 2012 and was ready to sign the revised contract on June 25, 2012. The implication here appears to be that the government acted in bad faith or arbitrarily and capriciously when it cancelled the award to Chong’s and instead made an award to the second highest bidder, JWS.

## **IV. ANALYSIS**

The Commonwealth Procurement Regulations were established among many purposes to “insure the fair and equitable treatment of persons who deal with the procurement system of the Commonwealth.” 70-30.3-301 (b)(4). In addition, the Regulations seek to “maximize to the fullest extent practicable the purchasing value of public funds.” 70-30.3-301 (b)(5). At the outset, this appeal raises



troubling issues. First and foremost is how the procurement system can provide competition and benefits to the government when there is a lack of planning or an emergency due to unanticipated, unknown or changing grant funding deadlines. Second, and equally compelling, is to what extent the government has the ability to make its own decisions to either cancel a procurement which is contingent on expiring grant funds, when this means the government will lose out on the benefit of those grant funds, or amend a solicitation, even if this means it will be done at the last minute.

**A. An agency may amend solicitation terms of a request for proposals under the Competitive Sealed Proposal requirements without canceling the procurement.**

1. There are circumstances when a government agency may change the solicitation terms of a request for proposals under the Competitive Sealed Proposal requirements of the Regulations without canceling the procurement.

Under the Competitive Sealed Proposal (“CSP”) requirements of the CNMI Procurement Regulations (the “Regulations”), which provide for issuance of a request for proposals (“RFP”), the government may conduct discussions with responsible offerors and accept revised proposals. NMIAC §70-30.3-201(g). There is no specific provision for correction or withdrawal of bids under the CSP section, unlike the section on competitive sealed bidding, because a request for proposals process inherently allows for negotiation and revisions. See NMIAC §70-30.3-205; NMIAC §70-30.3-205(l). The Regulations do provide for cancellation of a CSP if there are inadequate or ambiguous specifications, specifications which have been revised, goods or services no longer needed, or other determinations made in the best interest of the government. See NMIAC §70-30.3-240.

Typically, however, when there is a change in government requirements either before or after receipt of an RFP, an agency may change its specifications and issue an amendment to notify all offerors of the changed requirements and allow them a chance to respond. *M.K. Taylor, Jr. Contractors, Inc.*, B-291730.2, April 23, 2003. See *In re Appeal of Mariana Pacific Inc.*, BP-A010, Office of the Public Auditor, September 10, 1997. “Amending the solicitation provides offerors an opportunity to submit revised proposals on a common basis that reflects the agency’s actual needs.” *Global Computer Enterprises, Inc.; Savantage Financial*

*Services, Inc.*, B-404597; B-404597.2; B-404597.3, 2011 CPD P 69, 2011 WL 896345, March 9, 2011, p. 8, citing *Multimax, Inc.*, et al., B-298249.6, Oct. 24, 2006, 2006 CPD ¶ 165 at 6.

An original request for proposals is not the only binding document in a procurement: a request for proposals may be amended instead of cancelled. *In re Appeal of SSFM (Saipan) Engineers, Inc.*, BP-A017, Office of the Public Auditor, May 17, 1999. While *Appeal of SSFM* was analyzed under the architect-engineering provisions of the Regulations, the Public Auditor at that time found that the main issue regarding an amendment of a request for proposals is whether its purpose was reasonable and whether it complied with the Regulations. *Id.* In addition, while the Public Auditor recognized that the Regulations do not have specific provisions regarding solicitation amendments, it has been recognized that guidelines from other jurisdictions may be followed. See *In re Appeal of SSFM (Saipan) Engineers, Inc.*, BP-A017, Office of the Public Auditor, May 17, 1999, citing to the Federal Acquisition Regulations (“FAR”) 15.206(a); *Appeal of Herman’s Modern Bakery*, BP-A070, Office of the Public Auditor, September 18, 2012, p. 9 (Office of the Public Auditor follows the guidance of the Comptroller General of the United States). The FAR provides directly that if the government has a change in requirements for a request for proposal, the solicitation shall be amended. FAR 15.206(a). If time is of the essence, the amendment can be made orally. *AVL Books.Com, Inc.*, B-295780, 2005 CPD P 46, 2005 WL 711622, March 28, 2005; FAR 15-206(f).

A similar situation occurred in a procurement where the Army reopened negotiations because of a substantial change in its requirements. *Simulators Ltd., Inc.*, Comp. Gen. Dec. B-208418, 82-2 CPD P 473, 1982 WL 27586, Nov. 23, 1982. In *Simulators*, a protest caused a change in the Army’s originally planned schedule, and so it reopened negotiations based on a new, longer schedule. *Id.* If there is a significant change in the government’s requirements, it is necessary to amend the request for proposals and notify the other offerors to give them a chance to respond. See *Management Sys. Designers, Inc.*, Comp. Gen. Dec. B-244383.8, 92-1 CPD ¶ 496, 1992 WL 135364 (June 8, 1992).

In essence, what it appears that Energy did in this procurement was to amend its solicitation, albeit at the last possible moment. Looking at the facts, it appears that there was some confusion as to whether the ARRA funding was going to expire in September, 2012 or September, 2013. As late as May 31, 2012, the email from Peter Ashley confirmed that the period of performance for the CNMI ended

on September 30, 2012. This was not long after Energy made its award for the Project and shortly before it presented the new time frame and assumption of risk document. It appears that the needs of the government changed in that it had not realized that the time period for its ARRA grants was over in 2012, not 2013 as suggested by earlier correspondence. By making a change in the solicitation requirement from 200 days to 120 days, and requiring an assumption of risk agreement which would put the entire burden of a failure to perform on the contractor, Energy made significant changes to the solicitation. When making changes to a solicitation, it is necessary to notify all the bidders in the competitive range and give them an opportunity to address the new specifications.

What appears to have been done improperly is the last minute re-negotiation based on new solicitation requirements with Chong's only. Energy should have made the amended offer to all bidders in the competitive range once it determined that the solicitation terms had to be changed. For example, where an agency finds that it has an urgent need which would be negatively affected by a resolicitation, it is reasonable to conduct a limited competition in a narrow subset of offerors. *Trison Construction, Inc.*, B-401537.2, 2009 CPD P 227, 2009 WL 3747431, Nov. 9, 2009. The requirement, however, is still that the offerors in that subset be contacted and engaged if possible. By first offering Chong's the opportunity to, in essence, re-bid considering the amendment, Energy did not properly notify all parties in the competitive range and therefore the way this amendment to the solicitation was pursued was improper under the Regulations.

2. Chong's offer to meet the new solicitation terms two days later than the cut off time requested by Energy was part of an improper methodology and as a result is not addressed.

Energy offered to execute a contract for the Project if Chong's agreed to the further time term and assumption of risk. Chong's was unable to agree to the further amendments to the project requirements within the strict parameters provided by Energy. On June 21, 2012 Energy agreed to provide until 11:30 AM for Chong's final decision. At 12:49 PM, an email from Energy to Chong's stated that if notice of Chong's decision was not received by 2:00 PM, the award to Chong's would be cancelled. On Saturday, June 23, 2012, Chong's emailed that, "I have confirmed all equipment and materials from factories to support this project, so we are pleased to inform you that we will be able to accept Tinian Health Center A/C replacement project to completion within the specified time frame."

Initially, the Public Auditor has found that the process used by Energy in its amendment to the solicitation was improper. If an agency believes it must amend a solicitation, it cannot do so with only one bidder and not notify and open the further bidding to all offerors in the competitive range. Therefore, all further proceedings in this procurement were improper, and it is not appropriate to address the particulars of whether a discussion of an amendment with only one bidder was reasonable or whether that bid should have been awarded late. The Public Auditor wishes to make it clear, however, that nothing about this faulty process can be related to Chong's, which acted properly and diligently in all regards.

**B. The presumption that Government officials act in good faith has not been overcome by the evidence or arguments presented in the appeal.**

The Regulations require that all parties to a public procurement, including government employees, act in good faith. NMIAC 70-30.3-015. Public procurement decisions are reviewed by the courts on the basis of an "arbitrary and capricious" standard under the Administrative Procedure Act. *Pacific Security Alarm, Inc. v. CPA*, 2006 MP 17, Par. 14; 1 CMC §9112. Arbitrary action is characterized as a "willful and unreasonable action without consideration or in disregard of facts or without determining principle." *In re Blankenship*, 3 N.M.I. 209, 217 (1992).

Government officials are presumed to act in good faith, and a claim that contracting officials are motivated by bias or bad faith must be supported by convincing proof. *Matter of Jean-Paul O'Brien*, B405668; B405669, 2011 CPD P 276, 2011 WL 6164502, December 12, 2011. Proof of wrongdoing must be based on actual facts, and not on "suspicion or innuendo." *Cybertech Group, Inc. v. United States*, 48 Fed. Cl. 638, 650-51 (Fed. Cl. 2001), quoting *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1569-82 (Fed.Cir.1983). The Public Auditor will not attribute improper motives to government officials based on inferences or suppositions. *In re Appeal of SSFM (Saipan) Engineers, Inc.*, BP-A017, Office of the Public Auditor, May 17, 1999, p. 8, citing *L. Washington & Associates, Inc.*, B-276556, B-276556.2, B-276556.3, 97-1 CPD P 229, 1997 WL 351074, June 26, 1997. Actions of an agency's procurement official are typically not disturbed unless there is evidence of fraud or a failure to follow regulations. *Appeal of Herman's Modern Bakery*, BP-A070, Office of the Public Auditor, September 18, 2012, p. 9; *Pacific Security Alarm, Inc. v. CPA*, 2006 MP 17, Par.

15 (agency actions entitled to a presumption of regularity). In addition, and more specifically, amending a solicitation must be done “in good faith without a specific intent of changing a particular offeror’s technical ranking or avoiding an award to a particular offeror.” *EP Productions, Inc. v. United States*, 63 Fed. Cl. 220, 225 (Fed. Cl. 2005) aff’d, 163 F. App’x 892 (Fed. Cir. 2006), quoting *Federal Sec. Sys., Inc.*, B-281745.2, 99-1 C.P.D. ¶ 86, at 5, 1999 WL 292729 (Comp.Gen.1999).

In *Herman’s*, the duty of good faith for an Invitation to Bid was violated by the addition of a food sampling requirement after bid opening. In part, the issue hinged on the fact that the Director of Procurement & Supply rescinded his cancellation action. *Appeal of Herman’s Modern Bakery*, BP-A070, p. 8. As a general matter, the Public Auditor does not object to corrective actions such as a cancellation or termination of a solicitation if the agency has determined that a contract award was the result of a flawed procurement process. *Hermans*, p. 9, citing *Rockville Mailing Serv., Inc.*, B-270161.2, April 10, 1996, 96-1 CPD ¶ 184 at 4. Contracting officials have broad discretion to take corrective actions regarding contracts and solicitations. *In re Primtek Construction Company*, BP-A068, Office of the Public Auditor, June 19, 2012, p. 4. Unless the Public Auditor finds fraud or a failure to follow applicable regulations, however, the decision will not be disturbed. *Id.*

Chong’s comments on the length of time that Energy took to conduct the RFP do not meet the standard required to show bad faith. In addition, the issue of whether Chong’s should have been able to enter into a contract after Energy’s cut off time is not considered because of the improper procedure employed to amend the solicitation as discussed above. While it is troubling that Energy presented completely new terms to Chong’s after the notice of award was already issued, the Public Auditor does not have evidence to find that any individual employee of Energy acted in bad faith based on the record before it.

## V. DECISION

The Public Auditor believes this appeal reveals problems with the procurement process at issue; however due to the lack of remedies for what has been presented, OPA denies the appeal. An agency may amend solicitation terms of a request for proposals under Competitive Sealed Proposal requirements without canceling the procurement. OPA finds that while agencies may amend an RFP

under the Regulations, however, the amendment here was not done properly. It is not possible to make a determination of whether Chong's would have won the procurement had Energy done a proper solicitation amendment. Accordingly, Chong's appeal was properly brought to the extent that it was correct that the contract procurement was irregular. Ultimately, however, this finding may only provide some form of relief at the Superior Court as OPA reaffirms the Final Contract.

As to the bad faith element in the appeal, there is not enough evidence for Chong's to meet its burden to overcome the presumption of good faith. The Public Auditor does not attribute improper motives to government officials based on inferences or suppositions. While it appears from the Public Auditor's record that Chong's was not treated well as a result of the last minute amendments and cancellation, this does not rise to a level of bad faith on the part of the agency. Accordingly, Chong's appeal is denied on this basis.

## **VI. REMEDIES**

The Public Auditor has discretionary authority to ratify or affirm; terminate, or declare null and void any contract awarded in violation of law or regulation. NMIAC 70-30.3-510(b). See *In re Appeal of Allied Construction Corporation*, BP-A053, Office of the Public Auditor, July 2, 2008, p. 11 (remedies analysis under substantially similar public school system regulations). In *Appeal of Allied Construction Corporation*, the Public Auditor found that its remedies were limited to, if the person awarded the contract had not acted fraudulently or in bad faith: 1. ratification and affirmation, or 2. termination. These provisions are substantially similar to the CNMI Procurement Regulations. The Regulations state:

(b) Remedies After an Award. If after an award the P&S Director or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor may:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(i) Ratify or affirm the contract provided it is determined that doing so is in the best interest of the Commonwealth; or

(ii) Terminate the contract and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination.

NMIAC §70-30.3-510(b).

Here, there is no allegation that the awardee of the Final Contract, JWS, acted fraudulently or in bad faith. In addition, due to the delay inherent in engaging outside counsel after a claim was raised that the Public Auditor was conflicted, consideration of this appeal could not begin until late October, 2012. At that time, the Project was already substantially completed.

Because the term of the Final Contract has long since expired and the CNMI has already obtained the benefit of the services provided, OPA elects the option set forth in section (i). As such, Contract No. 547247-OC is hereby affirmed.

If there was a way for Chong's to be reimbursed the costs of its bid as well as filing and pursuing this protest, including reasonable attorney fees, the Public Auditor would consider this. The Public Auditor believes, however, that any further remedies for Chong's would need to be pursued at the Superior Court, as the OPA is limited to the remedies set forth in the Regulations.

## **VII. RECOMMENDATION**

The Office of the Public Auditor recommends that if solicitation amendments are made in the future to a Request For Proposals pursuant to the Competitive Sealed Proposals section, the agency follow a proper process. An amendment to an RFP solicitation requires notice to all bidders in the competitive range before award.

## **VIII. CONCLUSION**

Based on the foregoing, OPA finds that the remedies in the Appeal are limited to those found in NMIAC 70-30.3-510(b). While OPA is disturbed by what appears to be a reckless procurement practice of a last minute change to accommodate a grant funding deadline, it does not reach a finding of bad faith. Finally, OPA reaffirms the Final Contract awarded to JWS on the basis that it was in the best interest of the CNMI to award and conclude the contract.

The Appeal is denied.

The CNMI Procurement Regulations provide that Appellant, any interested party who submitted comments during consideration of the protest, or any agency

involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than (ten) 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. NMIAC §70-30.3-505(i).

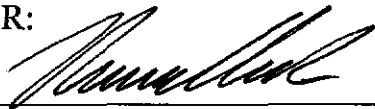



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DEBORAH E. FISHER

Legal Counsel

CONCUR:

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GEORGE HASSELBACK, ESQ.

Acting Public Auditor