

Executive Coordinator of the NNI Secretariat, Mr. Ron Dewar, and legal counsel to the Board, Ms. Samantha Kernahan – that the commercial business in which Commissioner Lahure is part owner, Baker Lake Contracting & Supplies Limited, had been named as a sub-contractor in the proposal submitted by the Contractor in response to a related public procurement conducted in accordance with RFP 2012-91, Kivalliq Dental Services (“RFP 91”). For the sake of efficiency, the Board had scheduled full hearings for both appeals on September 5, 2013 before the same Board, including Mr. Lahure.

However, once it became known to the Board that Mr. Lahure’s business was named as a sub-contractor in the successful proposal with respect to RFP 91, Mr. Kunuk immediately informed the Board and sought legal advice with respect to conflict of interest management. Upon the advice of legal counsel, the Board took the following steps:

- (a) The Board instructed Mr. Lahure to cease all participation in the appeal hearing and Board deliberations with respect to RFP 92 given the overlap in how the appeal hearings for each of RFP 91 and RFP 92 were heard by the Board;
- (b) The Board requested and received a signed declaration of conflict of interest by Mr. Lahure;
- (c) The remaining members of the Board, Mr. Cornthwaite and Ms. Maniapik, considered Section 18.22 of the NNI Policy which provides:

Decisions of the Board shall be by consensus and failing consensus by a majority vote. The Board shall make a decision as soon as possible after a hearing.

- (d) Based on his and her individual response to the submissions heard at the appeal hearing, as well as preliminary review of the relevant documents arising from RFP 92, Mr. Cornthwaite and Ms. Maniapik recognized consensus between them as to the outcome this appeal. With consensus as their basis, Mr. Cornthwaite and Ms. Maniapik began to craft the Board’s decision and recommendations in accordance with Section 18.21 of the NNI Policy.
- (e) However, in light of Section 18.21 of the NNI Policy, Mr. Cornthwaite and Ms. Maniapik acknowledged and agreed that, if at any point the Board no longer enjoyed consensus when crafting its decision and recommendations, they would advise the Board’s legal counsel and seek further direction on the Board’s obligations under the NNI Policy and in accordance with common law principles.

The Board hereby confirms that consensus between Mr. Cornthwaite and Ms. Maniapik was maintained throughout the Board’s deliberations and during the process of crafting this decision and its recommendations.

3. SUBJECT MATTER OF APPEAL

3.1 Application of the NNI Policy and Scope of Appeal

The Board confirms that, subject to limited exceptions not relevant on the present facts, the NNI Policy applies to the design, award, administration and interpretation of any Contract awarded by the Government of Nunavut.³

Again, pursuant to Section 18.13(a) of the NNI Policy, an appeal from an award [of a contract] by an unsuccessful Bidder or Proponent to the Board may be made on the ground that the Contracting Authority in making the award has erred in the application of the NNI Policy.

3.2 Appellant's Notice of Appeal and Oral Submissions

The relevant portion of the Appellant's notice of appeal to the Secretary of the Board provides as follows:

We are seeking to have the RFP [92] process declared null and void, to have no contracts issued as a result of this RFP [92], and to re-issue a new RFP for these services. We are seeking this because of the application of the NNI [Policy] by the review team,. Specifically:

The score provided for Inuit Firm was poor. No points were awarded even though all firms listed in the proposal were NNI registered firms.

Pursuant to Section 18.12(c)(iv) of the NNI Policy, the Appellant's notice of appeal must set out the issue(s) to be reviewed by the Board including the reasons why the contractor⁴ believes the application of the NNI Policy is incorrect.

However, it is important to note that Section 18.19 of the NNI Policy provides that the Board shall conduct its proceedings in an informal manner and is not required to receive evidence on oath.

As a result of Section 18.19 of the NNI Policy, the Board draws inferential power to hear submissions from an Appellant without strict limitation to only those issues set out in a notice of appeal so long as an Appellant's submissions relate to the issues under the Board's review.

In this appeal, the Board permitted the Appellant to rely on its introductory submissions made earlier on September 5, 2013 with respect to the related appeal, RFP91, Kivalliq Dental Services. These introductory submissions summarized the Appellant's view of part of the shared history of RFP 91 and RFP 92, starting with the Contracting Authority's First Notices of Award and the errors therein. The Board recognized that the Appellant's introductory submissions on this history, while not specifically addressing issues set out in the notice of appeal, were related to the issues under the Board's review. In other words, the Appellant's introductory submissions were heard by the Board as illustrative of the overarching argument that the Contracting Authority was likely to have made errors when applying the NNI Policy to the Appellant's proposal.

³ Section 5.1 of the NNI Policy.

⁴ Although the word "contractor" appears in Section 18.12(c)(iv) of the NNI Policy, reference is clearly being made to the unsuccessful Bidder or Proponent as Appellant.

Further, the Board allowed the Appellant to rely on its introductory submissions with respect to the timing and application of a legal opinion sought by the Contracting Authority from external legal counsel to the Government of Nunavut. The Board recognized that the Appellant's introductory submissions on this legal opinion from external legal counsel to the Government of Nunavut, while not specifically addressing issues set out in the notice of appeal, were related to the issues under the Board's review. In other words, the Appellant's introductory submissions were heard by the Board as suggestive of lack of procedural fairness on the part of the Contracting Authority when applying the NNI Policy to the Appellant's proposal.

The Board shall comment further later in this decision with respect to the topics raised by the Appellant's introductory submissions.

However, in accordance with the specific issues set out in the Appellant's notice of appeal, the Board accepts that the subject matter of the appeal is limited to the following:

- (a) That the Contracting Authority erred in its application of the NNI Policy to the Appellant's proposal by failing to award points for Inuit Firm representation within the Appellant's proposal.

Briefly summarized, the Appellant's oral submissions were as follows:

- (1) That the NNI Business Directory, maintained by the Government of Nunavut's NNI Secretariat ("NNI Business Directory"), and the Inuit Firm Registry, maintained by Nunavut Tunngavik Inc. ("NTI Inuit Firm Registry") may not accurately reflect all businesses that qualify for entry on such lists. Therefore, a Contracting Authority may not award the appropriate NNI Policy points;
- (2) That the NNI Business Directory, as well as the NTI Inuit Firm Registry, may list the proper legal name of a qualifying business. However, such business may be known in the community by a trade name. If a Contracting Authority does not recognize a trade name provided in place of a proper legal name, that Contracting Authority may not award the appropriate NNI points;
- (3) The Appellant's proposal in response to RFP 92 listed the following businesses as subcontractors: Qikiqtani First Aviation, Arctic Bay Tangmaarik Inn; Cape Dorset Huit, Clyde River Qammaq Hotel, Grise Fiord Inns North; Hall Beach Co-op Hotel; Igloolik Tujormivik Igloolik Inn, Iqaluit Frobisher Inn, Iqaluit Capital Suites, Kimmirut Co-op Hotel, Pangnirtung Auyuittug Lodge/Inns North, Pond Inlet Sauniq Hotel/Inns North; Qikiqtarjuaq Tulugak Hotel/Inns North, Resolute Bay Quusuittuq Inns North;
- (4) The Appellant's proposal in response to RFP 92 further stated values for "meals in Nunavut except Iqaluit", "Meals in Iqaluit only" and "Taxis in Nunavut";
- (5) Knowledge regarding the business environment in Nunavut would include recognition that the vast majority of restaurants are located within places of lodging. In many Nunavut communities, there are no other options than to take meals at the restaurants located within such places of lodging. If a Contracting Authority does not recognize

“meals in Nunavut” as indicating that additional business will be transacted at places of lodging registered on the NNI Business Directory and the NTI Inuit Firm Registry, respectively, that Contracting Authority may not award the appropriate NNI points;

- (6) Knowledge regarding the business environment in Nunavut would include recognition that there are limited choices for taxi services in many Nunavut communities. If a Contracting Authority does not recognize “taxis in Nunavut” as indicating that business will be transacted through taxi service providers registered on the NNI Business Directory and the NTI Inuit Firm Registry, respectively, that Contracting Authority may not award the appropriate NNI points.

3.3 The Contracting Authority’s Oral Submissions in Response

In response to the Appellant’s renewed submissions, the Contracting Authority, represented by Mr. McCulloch, as Senior Manager Procurement, and Mr. McLean, as legal counsel, made its submissions.

Briefly summarized, the oral submissions made on behalf of the Contracting Authority were as follows:

- (1) To clarify, the legal opinion provided to the Government of Nunavut by its external legal counsel was not sought by the Contracting Authority specifically with regards to RFP 92. Instead, this legal opinion provided advice on the subject of bid repair within the context of public procurement law in general. The Contracting Authority sought to understand its rights and obligations when faced with questions of bid repair;
- (2) In other words, the Contracting Authority sought legal advice on whether and how it is permitted to ‘fix’ errors on the face of a bid or proposal so as to award evaluative points that otherwise would not be awarded. The Contracting Authority underscored that it recognized its obligations under general public procurement law as well as Article 24 of the Nunavut Land Claims Agreement (“NLCA”);
- (3) When the proposals submitted in response to RFP 92 underwent evaluation at the first instance, a strict approach to bid repair was applied by the Contracting Authority. That is, no bid repair was conducted by the Contracting Authority regardless of whether the proponent was ostensibly eligible to receive some amount of NNI Policy adjustment. Errors on the face of proposals (including the Appellant’s proposal) were not addressed in accordance with the legal advice provided;
- (4) However, once the Contracting Authority realized that the First Notices of Award contained errors, the Contracting Authority reconvened the RFP 92 evaluation committee for the Second Review. It was during this Second Review process that some extent of ‘bid repair’ was performed on the proposals;

(5) It is helpful to provide a limited portion of the minutes of this appeal hearing in order to summarize the actions taken by the Contracting Authority during the Second Review. As described by Mr. McCullough:

“...[I]n these circumstances where particularly when the vendor claims that there is a company that is on the list or not on the list and we can't find it on the list, we then go and send an email to the NNI Secretariat and to NTI and we ask them can you please confirm that this company is or isn't on the list

However, it was confirmed by the Contracting Authority during oral submissions that in the particular circumstances of RFP 92, the first review of the proposals took place several months following the closing of RFP and the second review even later.

During the course of the Contracting Authority's oral submissions, Mr. Dewar, as representative of the NNI Secretariat, was asked to comment on the process for entering and maintaining a business within the NNI Business Directory. Based on Mr. Dewar's comments, it became clear to all parties that the NNI Business Directory is not a static document and that its data is not comprehensive so as to allow for confirmation of status when using imprecise search terms.

3.4 The Contractor's Written Submissions

Mr. Bowman, legal counsel to the Contractor, made written submissions with respect to RFP 92. Briefly summarized, the oral submissions made on behalf of the Contracting Authority were as follows: the successful Contractor, made both written submissions to the Board as well as oral submissions at the hearing.

Briefly summarized, the written submissions made on behalf of the Contractor were as follows:

- (1) In order to qualify for NNI Policy adjustments, information included in the proposal documents speaking to the NNI Policy incentives must be accurate;
- (2) A Contracting Authority, when evaluating proposals, must act in accordance with the general principles of public procurement law regardless of the existence of the NNI Policy. Bid repair is not permissible by a Contracting Authority;
- (3) Upon first and second evaluation of the proposals submitted in response to RFP 92, the Contractor was awarded the highest total points. Therefore, the Contractor is the duly successful proponent.

3.5 Relevant Documentation

Following the hearing, the Board took steps to review all documentation relevant to this appeal. In order to complete its review of relevant documentation, the Board sought and secured disclosure of the informal notes (including hand-written marginalia) created by the Contracting Authority's evaluation committee when reviewing the proposals submitted in response to RFP 92.

4. BOARD'S DECISION AND RECOMMENDATIONS

4.1 Decision

It is the decision of the Board that the Contracting Authority erred in its application of the NNI Policy during the administration and award of RFP 92 and with respect to the evaluation of the Appellant's proposal.

4.2 Reasons

The reasons for the Board's decision are as follows:

- (a) The Board considers the most important section of the NNI Policy to be Section 10, Relationship to the Nunavut Land Claims Agreement ("NLCA"). Section 10.2 of the NNI Policy expressly provides that "the Policy shall be interpreted so as to respect the letter and intent of the NLCA";
- (b) The Board acknowledges that the objective of Article 24 of the NLCA, Government Contracts, is that the Government of Canada and the Territorial Government shall provide reasonable support and assistance to Inuit Firms to enable them to compete for government contracts;
- (c) Based on the parties' submissions and review of the relevant documents, the Board has concluded that the Contracting Authority's approach to the evaluation of the Appellant's proposal did not reflect a consistent interpretation of the NNI Policy as an instrument to assist Inuit Firms. That is, it appears to the Board that the Contracting Authority was at times strict in its approach to errors or omissions made in the Appellant's proposal and other times, with respect to the related subject matter of RFP 91, willing to reach out beyond the document review process to seek clarification regarding same from a similarly situated proponent, Kiguti Corporation;
- (d) The Board acknowledges the complicated history of RFP 92 and the willingness on the part of the Contracting Authority to conduct the Second Review when it realized errors had been made in the First Notices of Award. Nonetheless, it appears clear that the Contracting Authority took an unduly strict approach to the interpretation of the Inuit Firm content within the Appellant's proposal in response to RFP 92. Therefore, less than full points were awarded to the Appellant;
- (e) In reaching its decision that the Contracting Authority erred in its application of the NNI Policy, one finding has been particularly influential on the Board. This finding was made as a result of the Board's review of RFP 91. That is, based on the parties' submissions and upon review of relevant documentation, the Board found that the Contracting Authority contacted Kiguti Corporation (the Appellant proponent with respect to RFP 91) following the close of RFP 91 to clarify the subject matter of 'weather days' in that Appellant's proposal. In contrast, the Contracting Authority did not contact VRK Dental Services Inc., the Appellant proponent in this appeal, following the close of RFP 92 to the to clarify the status of Inuit businesses named as Inuit Firms, nor the subject matter of "Meals in Nunavut" and "Taxis in Nunavut";

- (f) In the Board's view, this inconsistency in approach is in fact an error in the application of the NNI Policy. Whenever clarification is sought on any part of a proposal in order to accurately assess its NNI Policy content, then all parts of such proposal should be clarified if such clarification may lead to the award of NNI Policy adjustments;
- (g) In the Board's view, there should be some acknowledgement by the Contracting Authority of the local conditions and context of meals and taxi service in Nunavut. In other words, there should be an acknowledgement by the Contracting Authority that money spent on meals and taxi service in Nunavut will almost entirely be spent at Inuit businesses. However, the Contracting Authority did not seek to clarify the subject matter of "Meals in Nunavut" or "Taxis in Nunavut" by contacting the Appellant in this appeal. The result of this inconsistent approach to clarification is that the Appellant was not awarded full NNI Policy adjustments arising from services provided by Inuit Firms;
- (h) Moreover, it appears to the Board that the Contracting Authority took an inconsistent approach to 'bid repair' within and between RFP 91 and RFP 92 (despite the related content of both procurements). It is accepted by the Board that 'bid repair' may be generally defined as the process of amending a proposal after closing of an RFP;
- (i) Based on the parties' submissions and review of relevant documentation, it is unclear to the Board how the Contracting Authority applied the legal advice on bid repair received from external counsel to the Government of Nunavut. Again, the complicated history of both RFP 91 and RFP 92 may be to blame for this lack of clarity. But, in the result, it appears to be certain that the Contracting Authority took an inconsistent approach to clarification and bid repair at different points in the evaluation of proposals within and between RFP 91 and RFP 92 despite their related content;
- (j) The Board finds that given the objectives of Article 24 of the NLCA and the NNI Policy, a Contracting Authority should consistently permit bid repair where such repair would result in an increase to NNI Policy adjustments;
- (k) Further, it appears that the Contracting Authority evaluated the Appellant's proposal several weeks after the closing of RFP 92 and used a version of the NNI Business Directory and the NTI Inuit Firm Registry that post-dated closing of RFP 92;
- (l) The Board wishes to underscore that it considers the length of time taken by the Contracting Authority to commence its review of proposals following the closing of RFP 92 to be excessive and inherently unfair to all of the proponents. However, as discussed below, such delay clearly appears to have prejudiced the Appellant with respect to the award of NNI Policy adjustments;
- (m) Based on the parties' submissions, it appears that the NNI Business Directory and the NTI Inuit Firm Registry are not static documents. Rather, these respective documents are in flux due to procedural requirements for being listed on same and a history of data loss upon transfer to one or more storage systems;

- (n) Given the changing nature of these documents, it is inherently unfair to the Appellant to evaluate its proposal using anything but NNI and NTI documents that existed at the time of closing of the RFP;
- (o) Based on the parties' submissions and review of relevant documentation, it appears that the NNI Business Directory and the NTI Inuit Firm Registry maintain standards for describing parties registered on respective lists that may not reflect the 'business' or 'trade' name under which the party is known in the community;
- (p) Based on the parties' submissions and review of relevant documentation, it is clear that the errors were made during the administration of RFP 92 leading to the Second Review and Second Notices of Award. While the Board recognizes that errors happen, the Board is concerned with the nature of these errors and the overall impression that such errors have on participants in the process. The Second Notices of Award contained increased scores for NNI Policy content in general. The question remains as to why NNI Policy content points were not awarded in the first review after closing of RFP 92;
- (q) The Board acknowledges the submission by the Contracting Authority that it is aware of how its NNI Policy processes can be improved. However, the Board is concerned by the Contracting Authority's submission that it is reluctant to address these issues until the comprehensive review of the NNI Policy is complete;
- (r) The Board suggests that lower NNI Policy content points may influence the Contracting Authority's evaluation of non-NNI Policy criteria within proposals submitted by Inuit firms.

4.3 Further, the Board feels compelled to note that members of the Contracting Authority's evaluation committee tasked with review of medical content within RFP 92 proposals were not Nunavut residents. Again, in keeping with the spirit of the NNI Policy and the goals sought to be achieved by it, the Board suggests that familiarity with the Nunavut community be a pre-requisite for members of any evaluation committee. This familiarity with the Nunavut community is especially important when members of an evaluation committee may exert higher levels of influence as evaluators.

4.4 Recommendations

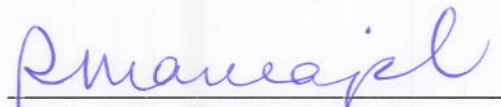
- (a) The Contracting Authority should reduce the term of the contract awarded pursuant to RFP 92 to one (1) year in total and then reissue an RFP for Baffin dental services;
- (b) The Contracting Authority should use print-based standardized forms and document control processes to ensure that there is clarity around how NNI Policy Content is scored. This is especially important if bid repair is allowed in order to capture higher NNI Policy adjustments;
- (c) It is the Board's view that print-based standardized forms would:
 - (i) Allow the Contracting Authority to consistently apply the NNI Policy adjustments and compare same for each proponent;

- (ii) Allow the Board to understand how information provided by proponents was approached by the Contracting Authority when applying the NNI Policy; and
- (d) The Contracting Authority should be required to print and date stamp both the NNI Business Directory and the NTI Inuit Firms List at the time closing of an RFP. The Contracting Authority should evaluate all proposals based on only those lists; and
- (e) The NNI Secretariat and NTI should move toward a vendor identification system that does not permit discrepancies between proper legal name and trade name as such are known in the community.

Dated at Iqaluit, Nunavut on the 25th day of November, 2013.



BARRY CORNTHWAITE



SARAH MANAIPIK