

NNI CONTRACTING APPEALS BOARD

DECISION IN APPEAL REGARDING GOVERNMENT OF NUNAVUT REQUEST FOR PROPOSALS 2012-91, KIVALLIQ DENTAL SERVICES

Appeal pursuant to Section 18.13 of the Nunavummi Nangminiaqtunik Ikajuuti ("NNI Policy") by Kiguti Corporation ("Kiguti") to the NNI Contracting Appeals Board ("Board") regarding evaluation of Kiguti's proposal in response to RFP 2012-91, Kivalliq Dental Services ("RFP 91"), and subsequent award to Nunavut Innovative Health Solutions Inc.

Date of Appeal Hearing: September 5, 2013

Members of the Board Present at the Appeal Hearing:

Chairperson: Mr. Barry Cornthwaite

Commissioners: Mr. Al Lahure
Ms. Sarah Maniapik

Parties Present at the Appeal Hearing:

Appellant: Kiguti Corporation
Mr. Victor Tootoo, President

Contracting Authority:

Government of Nunavut, Department of Community and Government
Services

Mr. John MacLean, Government of Nunavut, Department of Justice,
Legal Counsel
Mr. Mark McCulloch, Senior Manager Procurement

Contractor: Nunavut Innovative Health Solutions Inc.
Mr. Geoff Bowman, Bull Houser & Tupper LLP, Legal Counsel
(by telephone)

DECISION OF THE BOARD:

1. INTRODUCTION

1.1 Board Jurisdiction and Powers

The Board's jurisdiction to hear an appeal is granted by Section 18.13(a) of the NNI Policy which states:

An appeal from an award by an unsuccessful Bidder or Proponent to the Contracting Appeals Board may be made on the ground that the Contracting Authority in making the award has erred in the application of NNI Policy.

As a result of 18.13(a) of the NNI Policy, the Board's jurisdiction when hearing an appeal is limited to questions concerning the application of NNI policy by a Contracting Authority when evaluating bids or proposals prior to the award of a contract. It is accepted that the Board does not have jurisdiction to consider other evaluative criteria applied by a Contracting Authority prior to the award of a contract.

After hearing an appeal, the Board may take the following actions pursuant to Section 18.21 of the NNI Policy:

- (a) dismiss the appeal; or
- (b) allow the appeal and recommend to the Contracting Authority that remedial action, consistent with sound procurement policy and practice, be taken by the Contracting Authority, which may include:
 - (i) requiring the contractor to undertake additional measures;
 - (ii) providing the contractor with specific information as to Inuit or Inuit firms who are available and qualified;
 - (iii) paying compensation to an unsuccessful Bidder or Proponent;
 - (iv) putting the proposed contract in abeyance until the dispute is resolved, except in cases of urgency;
 - (v) changing any procedure or policy followed by contracting authorities;
 - (vi) in exceptional circumstances involving long term contracts, terminating a contract in whole or in part, and a reassessment or re-issue of tenders.

1.2 Engaging the Board's Jurisdiction and Powers

Section 18.11(a) of the NNI Policy provides the following:

- (a) An unsuccessful Bidder or Proponent who wishes to challenge an award of a tender or RFP must do so in writing within five (5) business days of the award announcement. The challenge must be directed to the Contracting Authority and copied to the GN NNI Policy Advisor, and must set out the following information:
 - (i) the name, address, telephone and if available fax number and email address of the party challenging the award;
 - (ii) the tender or RFP number and/or title;
 - (iii) the issue(s) to be reviewed by the Contracting Authority; and
 - (iv) the remedy sought by the contractor.¹

Further, Section 18.12 of the NNI Policy provides the following:

- (a) If, after a further 5 business days have elapsed, and the unsuccessful Bidder or Proponent is not satisfied with the response of the Contracting Authority, or if no response has been received from the Contracting Authority, the unsuccessful Bidder or Proponent may appeal the award to the Board.
- (b) An appeal to the Board must be in writing and directed to the Secretary of the Appeals Board within 15 business days of the award announcement.
- (c) The appeal must set out the following:
 - (i) the name, address, telephone and if available fax number and email address of the party challenging the award;
 - (ii) the name of the Contracting Authority that issued the tender or RFP;
 - (iii) the tender or RFP number and/or title;
 - (iv) the issue(s) to be reviewed by the Board including the reasons why the contractor believes the application of the NNI Policy is incorrect; and
 - (v) the remedy sought by the contractor.²

¹ Although the word "contractor" appears in Section 18.11(a) of the NNI Policy, reference is clearly being made to the unsuccessful Bidder or Proponent as Appellant.

² Although the word "contractor" appears in Section 18.12(c)(iv) and (v) of the NNI Policy, reference is clearly being made to the unsuccessful Bidder or Proponent as Appellant.

As a result of Sections 18.11 and 18.12 of the NNI Policy, an unsuccessful Bidder or Proponent (hereinafter referred to as the "Appellant") must satisfy both substantive and procedural requirements in order to engage the jurisdiction and powers of the Board.

1.3 Analysis of Threshold Facts

With respect to the substantive and procedural requirements imposed on an Appellant by Sections 18.11 and 18.12 of the NNI Policy in order to engage the jurisdiction and powers of the Board, the Board accepts the following threshold facts:

- (a) On April 24, 2013, the Contracting Authority issued notices to proponents who participated in RFP 91 advising of the result. For the purposes of this analysis, the notices dated April 24, 2013 shall be referred to as the "First Notices of Award";
- (b) On or before May 8, 2013, the Contracting Authority realized that the First Notices of Award contained multiple factual errors due to incorrect editing of the documents;
- (c) On May 8, 2013, the Contracting Authority issued notices to proponents who participated in RFP 91 advising of the errors found in the First Notices of Award. The Contracting Authority further advised the proponents that the Contracting Authority would review each proposal to ensure that the "evaluation scores match the proposals submitted and that the evaluation scores match the new Letters that will be issued." For ease of reference, this activity on the part of the Contracting Authority shall be referred to as the "Second Review".
- (d) On May 17, 2013, the Contracting Authority issued notices to proponents who participated in RFP 91 advising of the results of the Second Review. For the purposes of this analysis, the notices dated May 17, 2013 shall be referred to as the "Second Notices of Award";
- (e) The Second Notices of Award expressed the Contracting Authority's award announcement for RFP 91 as such award announcement is required by Section 18.11(a) of the NNI Policy;
- (f) By letter dated May 24, 2013, the Appellant submitted a formal challenge to the Contracting Authority with respect to the application of the NNI Policy as part of the evaluation (and review) of RFP 91;
- (g) May 24, 2013 was the fourth business day following the issuance of the Second Notices of Award and therefore complies with the procedural time limitation stated in Section 18.11(a) of the NNI Policy;
- (h) The Appellant's letter dated May 24, 2013 further satisfies the content requirements as stated in Section 18.11(a) of the NNI Policy;
- (i) By letter dated June 3, 2013, the Contracting Authority responded to the Appellant's challenge by attempting to answer the Appellant's specific challenge allegations.

- (j) With respect to subject matter addressed later in this decision, it is important to note that in its June 3, 2013 letter to the Appellant, the Contracting Authority stated that the Appellant's scores for Inuit Labour and Inuit Firm did change after the Second Review. Further, the Contracting Authority expressly stated "[t]hese changes were the result of consultation with outside legal counsel".
- (k) According to the procedural time limitation found in Section 18.11(b) of the NNI Policy, the Contracting Authority was required to provide this response within five business days following the receipt of the Appellant's challenge letter. It should be noted that June 3, 2013 was actually the sixth business day following May 24, 2013. However, this fact is of no consequence to the Appellant's ability to seek to engage the jurisdiction and powers of the Board;
- (l) Pursuant to Section 18.12(a), the Appellant is able to seek to engage the jurisdiction and powers of the Board if it does not receive a response from the Contracting Authority within the specified time limitation or if it is unsatisfied with such response once received. It is unclear from which ground the Appellant chose to proceed, but again, such fact is of no consequence;
- (m) However, in order to engage the jurisdiction and powers of the Board, the Appellant is required pursuant to 18.12(b) of the NNI Policy to submit an appeal to the Secretary of the Board within fifteen days of the award announcement. For the purposes of this analysis, the Board accepts that the Second Notices of Award expressed the Contracting Authority's award announcement. Again, the Second Notices of Award were made by letter dated May 17, 2013.
- (n) By letter dated June 10, 2013, the fifteenth business day following the Contracting Authority's award announcement, the Appellant submitted a formal appeal to the Secretary of the Board with respect to the application of the NNI Policy as part of the evaluation (and review) of RFP 91. The Appellant's notice of appeal therefore complies with the procedural time limitation stated in Section 18.12(b) of the NNI Policy;
- (o) The Appellant's notice of appeal dated June 10, 2013 further satisfies the content requirements as stated in Section 18.11(c) of the NNI Policy.

As a result of the foregoing, the jurisdiction and powers of the Board have been duly engaged by the Appellant.

The Board confirms that upon notice of the Appellant's June 10, 2013 letter to the Board, the Board made a preliminary determination that the content of such letter fell within the jurisdiction of the Board. Therefore, the Board proceeded to schedule the appeal for hearing in accordance with the NNI Policy.

2. CONDUCT OF APPEAL HEARING AND MAKING OF BOARD'S DECISION

2.1 Procedure Leading to and at Appeal Hearing

In accordance with the general procedures, including timely notice, as stated in the NNI Policy, the Secretary to the Board issued a letter to the Appellant on June 13, 2013 confirming receipt of the Appellant's notice of appeal. However, the Secretary to the Board advised the Appellant that, due to scheduling issues, the Board would not be able to convene until early July 2013 at the earliest.

In accordance with Section 18.17 of the NNI Policy, the Board convened by conference call on July 5, 2013 to discuss the subject matter of the Appellant's notice of appeal. The Board determined that the subject matter as stated in the notice of appeal fell within the jurisdiction of the Board.

As a result of the Board's deliberations on July 5th, the Board adjourned the appeal to allow the Board an opportunity to review relevant documentation and to further schedule a full hearing that allowed for participation of the Appellant, the Contracting Authority, the Contractor and Nunavut Tunngavik Inc. ("NTI").

On July 16, 2013, the Secretary to the Board issued a letter to all of the parties advising that a hearing of the appeal would take place in the City of Iqaluit on July 31, 2013.

However, once again, due to scheduling conflicts, the hearing of the appeal was postponed. The full hearing of this appeal was heard by the Board on September 5, 2013 in the City of Iqaluit.

As Chairperson, Mr. Cornthwaite commenced the hearing by making an opening statement that outlined the issues raised by the Appellant in its notice of appeal dated June 10, 2013.

Mr. Cornthwaite further confirmed the order in which parties present at the appeal hearing would make submissions and replies.

For the purposes of clarity, NTI was not represented at the hearing and did not make prior written submissions.

2.2 Procedure Following Appeal Hearing Leading to Making of Board's Decision

It is incumbent upon the Board to adhere to the principles of procedural fairness and natural justice at all stages of the appeal process. These fundamental principles are reflected in several sections of the NNI Policy.

However, where the provisions of the NNI Policy do not provide procedural guidance to ensure the fairness of the appeal process, the Board may rely on general principles found in the common law to supplement this guidance.

Before and including September 5, 2013, the date on which this appeal was heard by the Board, it was not known by any person involved with the Board - the Chairperson, Mr. Cornthwaite, the Commissioners, Mr. Lahure and Ms. Maniapik, the Secretary to the Board, Mr. Allen Kunuk, the

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 RFP 91.

When this important fact came to the attention of Mr. Kunuk as Secretary to the Board, 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;
- (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 91, 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