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Decision

Matter of: Lucent Technologies World Services Inc.

File: B-295462

Date: March 2, 2005

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David S. Cohen, Esq., John J. O'Brien, Esq., and Rowena Laxa, Esq., Cohen Mohr, LLP, for Sepura Ltd., an intervenor.
Raymond M. Saunders, Esq., Maj. Frank A. March, and Maj. Gregory R. Bockin, Department of the Army, for the agency.
Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's exclusion of an offeror from participation in a procurement is denied where the agency reasonably determined that the protester has an organizational conflict of interest arising from its preparation of technical specifications used by the agency in the solicitation.

DECISION

Lucent Technologies World Services Inc. protests its exclusion from participation in the competition under request for proposals (RFP) No. W914NS-05-R-9003, issued by the Department of the Army for Terrestrial Trunked Radio (TETRA) devices for use in the agency's Advanced First Responder's Network (AFRN) in Iraq.

We deny the protest.

BACKGROUND

The RFP anticipated the award of an indefinite-delivery, indefinite-quantity contract for TETRA devices, which consist of wireless radios and ancillary equipment that incorporate the TETRA communications standards used by emergency first responder personnel.

Lucent is the design/build contractor for the agency's Iraq Reconstruction Communication Sector (IRCS) contract, which requires "complete design-build services and procurement for communications design, construction, demolition, and rehabilitation services." Protest at 3. Task Order 2 of the IRCS contract required Lucent to validate conceptual designs for the AFRN, assess existing communications infrastructure, and design the Phase I AFRN systems and architecture "using an approach that will allow the earliest delivery of a fully functioning nationwide integrated, secure, network." Agency Report (AR), Tab 10, IRCS Task Order 2, at 3.

IRCS Task Order 2 also required Lucent to prepare a cost/benefit analysis of potential technologies for use in AFRN. See Protester's Comments, Exh. 3, E-mail from Agency to Lucent Regarding Task Order 2 (May 23, 2004). Lucent considered TETRA and two other potential alternative communications technologies for use in the AFRN, and solicited price and technical quotes from vendors. Protester's Comments at 5. Lucent also consulted the published standards for TETRA technology. *Id.* In its cost/benefit analysis of the competing technology standards, Lucent recommended that the TETRA technology be adopted for the AFRN. Protester's Comments at 7. The agency accepted Lucent's recommendation and IRCS Task Order 2 was subsequently modified to require Lucent to develop a solicitation for the procurement of the TETRA devices. Protester's Comments, Exh. 10, IRCS Task Order 2, Mod. 2, at 2-3. Lucent prepared "Schedule D -- Statement of Work," which set forth the technical specifications for the TETRA devices, and submitted it to the agency on July 22, 2004. AR, Tab 18.

The agency issued the initial RFP on October 26, 2004. An agency technical representative stated that he prepared the initial RFP requirements based on technical specifications found on computer files residing on the agency's local area network. Agency Technical Representative Decl., Jan. 3, 2005, at 1. These specifications were less detailed than those in Lucent's Schedule D, and the parties agree that these specifications were not supplied by Lucent or based on Lucent specifications.

The agency received questions from offerors regarding the TETRA device specifications in the initial RFP, including one from Sepura Ltd. that observed that the RFP "device specifications" appeared to have been based on a specific Motorola design, and asked whether the procurement was restricted to Motorola specifications. AR, Tab 17, E-Mail from Sepura to Agency Technical Representative (Oct. 29, 2004). Following these questions, the agency suspended the RFP.

The agency asked Lucent to assist in responding to the offerors' questions and ensuring that the technical specifications in the initial RFP were appropriate for use in the AFRN. Lucent refused, however, citing its intent to submit a proposal to provide the TETRA devices. Contracting Officer's Statement at 1; Agency Technical Representative Decl. at 2. The agency's technical representative sought assistance from contracting personnel for the AFRN portion of the IRCS contract, and was provided Schedule D, Lucent's specifications for the TETRA devices. Schedule D

became the basis for the technical specifications that were issued in the revised RFP on November 4. RFP amend. 2, at 3-10. This revised RFP incorporated several changes to the TETRA device specifications, which the agency states were intended to increase competition by removing requirements that were perceived as vendor-specific. Agency Technical Representative Decl. at 2 (“I then reviewed the specifications, and removed any items which were vendor specific, such as exact sizes, button configurations, etc.”)

The contracting officer notified Lucent on November 5, 2004 that she had determined that the firm had an OCI under FAR § 9.505-2 that prohibited it from receiving the award of the TETRA device contract. AR, Tab 4, Initial Exclusion Notice. Lucent responded to the notice on November 10, seeking details regarding the basis of the OCI determination. AR, Tab 5. The contracting officer issued a “Final Determination” on November 16, confirming that Lucent was prohibited from participating in the TETRA device competition because the agency found an OCI under FAR § 9.505-2(a)(1) arising from Lucent’s work under the IRCS contract. AR, Tab 8. This FAR provision states:

If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract.

The agency awarded the contract to Sepura on November 24, and this protest followed.

DISCUSSION

Lucent argues that its exclusion from the competition was unreasonable because the contracting officer improperly relied upon the authority in FAR § 9.505-2(a)(1) in determining that Lucent had an OCI. In particular, Lucent argues that FAR § 9.505-2(a)(1) applies only to “complete specifications” for “non-developmental items” (NDI), and that those definitions do not apply to Lucent’s activities here. Lucent also argues that the agency failed to reasonably determine whether Lucent could actually benefit from the alleged OCI or skew the competition in its favor. Finally, Lucent contends that the agency failed to consider whether exemptions under the FAR or other factors mitigated the OCI so as to render Lucent’s participation in the competition appropriate.¹

¹ Lucent makes several additional allegations that the OCI determination was unreasonable. Although we have addressed the most significant issues in this decision, we have reviewed all of Lucent’s contentions and find the balance of those not discussed in detail to lack merit. In addition, the agency and the intervenor have
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The FAR instructs agencies to identify potential OCIs as early as possible in the procurement process, and to avoid, neutralize, or mitigate significant conflicts before contract award so as to prevent unfair competitive advantage or the existence of conflicting roles that might impair a contractor's objectivity. FAR §§ 9.501, 9.504, 9.505; PURVIS Sys., Inc., B-293807.3, B-293807.4, Aug. 16, 2004, 2004 CPD ¶ 177 at 7. The responsibility for determining whether a contractor has a conflict of interest and should be excluded from competition rests with the contracting officer, who must exercise "common sense, good judgment and sound discretion" in assessing whether a significant potential conflict exists and in developing appropriate ways to resolve it. FAR §§ 9.504, 9.505; Aetna Gov. Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397, et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. We will not sustain a protest challenging an agency's determination that a contractor should be excluded from a procurement based on an OCI unless that determination is shown to be unreasonable. SSR Eng'rs, Inc., B-282244, June 18, 1999, 99-2 CPD ¶ 27 at 2.

Identification of the OCI

Lucent argues that the contracting officer's reliance on FAR § 9.505-2 renders the OCI determination unreasonable, as certain factual predicates of that provision are missing here. Lucent contends that it did not provide "complete specifications" for the TETRA devices, and that the devices are not NDI, as that term is used in the FAR OCI provision.

As a general matter, FAR § 9.505 describes the broad duties and responsibilities of contracting officers to identify and address OCIs, and explains that contracting officers are given broad discretion in the handling of OCIs. Examples of circumstances where contractors with OCIs should be prohibited from competition are discussed in FAR §§ 9.505-1 to 9.505-5 and 9.508, along with exemptions from those provisions. The FAR makes clear, however, that the specific examples listed are considered guidelines, and that situations other than those specifically enumerated may also constitute impermissible OCIs:

The general rules in 9.505-1 through 9.505-4 prescribe limitations on contracting as the means of avoiding, neutralizing, or mitigating organizational conflicts of interest that might otherwise exist in the stated situations. Some illustrative examples are provided in 9.508. Conflicts may arise in situations not expressly covered in this section 9.505 or in the examples in 9.508. Each individual contracting situation

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challenged the timeliness of several aspects of Lucent's protest. We have reviewed these arguments and find no basis to find Lucent's protest untimely.

should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

FAR § 9.505.

The contracting officer here cited FAR § 9.505-2 in her November 5 determination, stating that this provision “precludes award to Lucent or any of its subsidiaries.” AR, Tab 4. In her November 16 determination, the contracting officer further explained that FAR § 9.505-2(a)(1) “clearly prohibits Lucent from furnishing” the TETRA devices. AR, Tab, 8.

During the telephone hearing conducted by our Office in this matter, the contracting officer stated that, aside from her reliance on the FAR provisions cited in her November 5 and 16 determinations, she had an overarching concern regarding Lucent’s role in the procurement:

Well, in my mind, aside from, you know, 9. -- the FAR reference that I’ve been talking about; in my mind too, it’s my responsibility to ensure that there is full, open and fair competition. To me, Lucent had an unfair advantage because you drafted the specification that was being used in the RFP and you knew this information several months ahead of anybody else in the field. I don’t think that it would be fair -- it would not be an even playing field if I had allowed Lucent to participate.

Hearing Transcript (Tr.) at 36:19-37:9.

The parties do not dispute that the revised RFP specifications were based on Lucent’s Schedule D, nor do the parties dispute that Lucent sought to submit a proposal to provide those devices.² We conclude, therefore, that the contracting officer’s determination that Lucent’s role in the preparation of the TETRA device specifications and its role as the IRCS contractor and its responsibilities for the AFRN gave rise to an OCI was reasonable, and thus were sufficient to warrant exclusion of Lucent from the competition.

Although we discuss below Lucent’s arguments regarding the definitions of complete specifications and NDI under FAR § 9.505-2, our decision denying this protest relies

² In fact, Lucent notes that it “drafted Schedule D in such a way that it contemplated Lucent would procure the TETRA devices under its existing IDIQ.” Lucent Comments at 8.

primarily upon the broad discretion available to contracting officers under FAR § 9.505 in performing their duties to identify and address conflicts of interest.³ Because the OCI determination was reasonable under the general authority granted to contracting officers, we find no basis to question the decision to exclude Lucent from the competition.⁴

Complete Specifications and NDI Definitions

Lucent argues that the contracting officer's OCI determination was flawed because Lucent did not provide "complete specifications" for the TETRA devices, as that term is used in FAR § 9.505-2(a). Specifically, Lucent contends that it developed the specifications in Schedule D in conjunction with the agency, and that the agency further altered or revised the specifications in Schedule D when it issued the revised RFP.

As a preliminary matter, the FAR does not define the term "complete specifications." A reasonable interpretation of the term suggests that a firm that provides specifications that are necessary and sufficient to inform the solicitation has provided "complete specifications." Based on our review of the record, we agree with the agency that Lucent's Schedule D was the source for the technical

³ Our conclusion here does not pose, as the protester suggests, a concern regarding the weight afforded to the agency's position taken in response to a protest, as compared to a position established during the procurement. In our decision in Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91, we stated that we will accord less weight to agency arguments that are first made in response to a protest, and that do not reflect contemporaneous facts or judgments that are supported by the record. Whereas the agency in Boeing sought to support its source selection decision with a cost/technical tradeoff analysis that it might have made, but did not make, during the procurement, here the contracting officer has always maintained that a disqualifying OCI existed. To the extent the contracting officer relied upon a very specific paragraph of FAR subpart 9.5, of arguably questionable relevance, to support her OCI determination, we see no reason to discount or dismiss the more general authority in FAR subpart 9.5 that she testified that she relied upon in making the OCI determination.

⁴ Lucent also argues that the IRCS contract lacked OCI provisions informing Lucent that it might be barred from supplying items for the system it designed. The lack of OCI clauses in a contract, however, does not limit the agency's obligations to identify and address potential OCIs in a procurement that is affected by that contract, nor does the absence of OCI clauses prohibit the agency from barring a potential offeror from a competition based on an OCI determination. See DSD Labs., Inc. v. United States, 46 Fed. Cl. 467, 473 (2000), citing NKF Eng'g, Inc. v. United States, 805 F.2d 372 (Fed Cir. 1986).

specifications in the revised RFP and that the specifications provided by Lucent are nearly identical to those listed in the amended RFP. Compare RFP, Amend. 2, at 3-10 with AR, Tab 18, Lucent Schedule D.⁵

Lucent characterizes its work on Schedule D as a collaboration with the agency, and thus argues it did not provide complete specifications. FAR § 9.505-2(a)(1)(ii) provides that the OCI exclusion rule does not apply where contractors prepare specifications under the supervision and control of government representatives. Lucent's references to the record do not, however, conclusively establish that the agency played a joint role in developing the TETRA device specifications, or one that would rise to the level of supervision and control by the agency. At best, correspondence cited by Lucent suggests that the agency was kept apprised of Lucent's progress on the Schedule D specifications, participated in some discussions regarding Lucent's development of the specifications, and provided some comments or feedback prior to the final version of the specifications. See Protester's Comments, Exh. 9, E-mail Correspondence Between Agency Technical Representatives for IRCS Contract and Lucent; id., Exh. 1, Decl. of Lucent Technical Manager, at 1; id., Exh. 2, Decl. of Lucent Technical Consultant, at 1. The record clearly shows that Lucent provided technical specifications for the TETRA devices under IRCS Task Order 2, and that the agency incorporated those specifications into the revised RFP.⁶

Lucent next argues that the agency's modifications to the specifications as part of their incorporation into the revised RFP precluded a determination that Lucent's specifications were "complete." The agency contends that its modifications to Schedule D were for the limited purpose of removing unduly restrictive, vendor-

⁵ Lucent does not dispute this point, and acknowledges, "The Army apparently used a 'Schedule D' document that Lucent had developed jointly with the Army program personnel in July 2004 as the starting point for the amended solicitation." Protester's Comments at 16.

⁶ Lucent cites our decision in American Artisan Prods., Inc., B-292559, B-292559.2, Oct. 7, 2003, 2003 CPD ¶ 176, to support its argument that it was exempted from the FAR OCI provisions because it did not provide "complete specifications." In American Artisan we agreed with the agency that the awardee did not have a disqualifying OCI arising from its subcontractor's work preparing certain specifications for the solicitation. Among other reasons for denying the protest, we found that the awardee's subcontractor was one of several contractors that worked on the development and design work, and thus did not provide "complete" specifications. Here, in contrast, Lucent was the only contractor that provided the technical specifications for the TETRA devices, and, as discussed above, Lucent has not demonstrated that the agency substantively collaborated in developing those specifications.

specific provisions. Memorandum of Law at 5; Agency Technical Representative Decl. at 2. The contracting officer testified that she reviewed the scope of changes to Schedule D that were incorporated into the amended RFP and was informed by agency technical representatives that the changes eliminated overly restrictive provisions. See Tr. at 30:21-33:17. Based on this information, the contracting officer found no basis to consider the specifications sufficiently changed to eliminate the OCI concern regarding Lucent's participation:

I would have to say that, you know, whenever we were thinking about how we could resolve this particular situation -- even with the minor changes that were made, I mean, there were only like minor changes to about 16 of the specifications, I believe. You know, with the whole -- pages and pages of specifications, there are so few changes that I didn't see how the OCI issue would disappear because of the minor changes that were made.

Tr. at 34:17-35:6.

We agree with the agency that these changes, individually and taken as a whole, do not constitute a major revision of the Lucent-prepared specifications, particularly in light of the fact that the vast majority of the technical specifications remain unchanged. The protester cites no authority to suggest that any degree of alteration of specifications provided by a potential offeror will preclude a finding that the offeror has an OCI based on preparation of specifications.⁷ We therefore cannot conclude that the contracting officer was unreasonable in determining that the agency's changes to the specifications did not eliminate the OCI concerns regarding Lucent.

With regard to the definition of NDI, the parties agree that the TETRA devices are commercial items, in that they are sold commercially. The parties dispute, however, whether the TETRA devices are NDI, as that term is used in the FAR. The FAR defines NDI as:

(1) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

⁷ Lucent's position is particularly unreasonable because that position suggests that an agency's efforts to expand the scope of competition by revising certain overly restrictive portions of contractor-prepared specifications would negate the agency's ability to eliminate that contractor from participation in a procurement based on those specifications if an OCI was identified. Such a rigid rule is not consistent with the broad authority granted to contracting officers to address OCIs under FAR § 9.505.

- (2) Any item described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or
- (3) Any item of supply being produced that does not meet the requirements of paragraphs (1) or (2) solely because the item is not yet in use.

FAR § 2.101. NDI is also listed under the definition of “commercial item,” which lists NDI as one of eight categories of items that are considered commercial: “A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.” *Id.* Furthermore, NDI is defined under the Federal Acquisition Streamlining Act (FASA) as “any of the following: (A) Any commercial item” 41 U.S.C. § 403(13) (2000).

Lucent argues that because the TETRA devices are sold in substantial quantities in the commercial marketplace, they do not meet the “used exclusively for governmental purposes” definition of NDI under in FAR § 2.101. We acknowledge that, if the definition of NDI means only those items used exclusively for governmental purposes, then the contracting officer’s reliance on FAR § 9.505-2 may have been in error. Although an argument could be made that NDIs cannot reasonably be limited to items used exclusively by the government, and the agency and intervenor advance the commercial item definitions in the FAR and FASA to support a broader definition of NDI, we need not resolve a dispute regarding the definition of NDI. As discussed above, we conclude that the contracting officer’s intent was to exclude Lucent based on its role in preparing the specifications for the TETRA devices. To the extent that the contracting officer’s reliance on FAR § 9.505-2(a) was misplaced based on interpretations of the NDI definition, we do not believe that any potential error here prejudiced Lucent. To succeed in its protest, the protester must demonstrate not only that the agency failed to follow established procedures, but also that the failure could have materially affected the outcome of the competition. McDonald Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). As discussed above, the contracting officer had an independent legal basis for barring Lucent from the competition based on her broad, inherent authority to address OCIs.

Advantage From The OCI

Lucent next argues that even if the agency determined that there was a potential OCI, the agency failed to establish that Lucent would receive an actual benefit from its role in preparing the technical specifications, or that the competition would actually be skewed as a result of Lucent’s role. Lucent argues that the OCI provisions do not apply to it because it does not manufacture or commercially resell the TETRA devices, and that FAR § 9.505-2(a)(2) only permits excluding a contractor

from a competition to “avoid the situation where the contractor could prepare specifications favoring its own products or capabilities.”

The contracting officer testified that she considered Lucent to have an OCI because of the advantage conferred by preparation of the TETRA device specifications and the resulting knowledge of those specifications prior to the issuance of the RFP: “Well, [Lucent] fit into [the OCI concern] because they furnished the specifications. And it’s very clear that they’re not allowed to furnish the specifications and then turn around and furnish the items.” Tr. at 24:7-11; see also, Tr. at 36:14-37:9.⁸

Contracting officers are required to address both actual and apparent OCIs, and the facts necessary to establish an OCI are those that pertain to the existence of the conflict, rather than its precise impact. Aetna Gov. Health Plans, Inc., supra, at 16 (“It is true that a determination to exclude an offeror must be based on hard facts, rather than mere suspicion . . . The facts that are required, however, are those which establish the existence of the organizational conflict of interest, not the specific impact of that conflict.”) Agencies may reasonably conclude that a contractor’s preparation of specifications for a contract give that contractor an inherent advantage sufficient to warrant exclusion from the competition. See, e.g., SSR Eng’g, Inc., supra, at 3-4; Basile, Baumann, Prost & Assocs., Inc., B-274870, Jan. 10, 1997, 97-1 CPD ¶ 15 at 4-5. Where, as here, the agency and protester dispute the actual utility of the alleged advantage conferred upon the conflicted contractor, we will not overturn the agency’s determination unless it is clearly unreasonable. SSR Eng’g, Inc., supra. In our view, even the appearance of an unfair competitive advantage may compromise the integrity of the procurement process, thus justifying a contracting officer’s decision to err, if at all, on the side of avoiding the appearance of a tainted competition. Based on the record here, we have no basis to question the agency’s determination that Lucent’s role in preparing the specifications gave that contractor an unfair competitive advantage.

Exemption from OCI Provisions

Lucent also argues that it is exempted from an OCI disqualification under the FAR provisions regarding preparation of work statements by offerors who perform “development and design” work. The FAR provision cited by Lucent states that:

⁸ The agency expresses concern that Lucent prepared the specifications in a manner that would favor a Motorola-based product, and that Lucent intended to provide the TETRA devices through a relationship or arrangement with Motorola. Lucent contends that the agency has not demonstrated that such a relationship existed. Because we conclude that the agency’s concern regarding Lucent’s role in preparing the specifications, in and of itself, was sufficient to warrant excluding Lucent from the competition, we need not address further the agency’s concern in this regard.

- (b)(1) If a contractor prepares, or assists in preparing, a work statement to be used in competitively acquiring a system or services-or provides material leading directly, predictably, and without delay to such a work statement-that contractor may not supply the system, major components of the system, or the services unless- . . .
- (ii) It has participated in the development and design work . . .

FAR § 9.505-2(b)(1)(ii).

The contracting officer testified that she considered whether the exceptions for development and design contractors applied, and found that the facts here did not exempt Lucent from the OCI. See Tr. at 19:17-21:5, 38:18-42:4. In any case, we find that the development and design exemption under FAR § 9.505-2(b) is not relevant to the OCI at issue here, as the exemption applies to the system or services being competitively acquired, and not other systems or services that the potentially conflicted offeror provides. Lucent does not claim that it was the developer of the TETRA technology itself. Instead, Lucent prepared the TETRA device specifications for the procurement here as part of its work under IRCS Task Order 2 based on Lucent's request for information from vendors and review of existing technological standards. Thus, Lucent cannot credibly argue that it should be exempted from the OCI provisions at FAR § 9.505-2 based on the exemption that applies to "development and design" contractors of the technology to be acquired.

Mitigation of the OCI

Lucent finally contends that the agency failed to properly consider whether the OCI could have been mitigated. The contracting officer stated that she "saw no potential means of mitigating this OCI given the clear language of the FAR regarding contractors who design specifications for the government, and given the extent to which Lucent was involved both with the program office and the specification." Contracting Officer's Statement at 2. The contracting officer also advised the head of the contracting activity of Lucent's request for a waiver of the OCI, and the request was denied. Contracting Officer's Statement at 2.

Although Lucent argues that it should have been provided an opportunity to submit a mitigation plan, it had an opportunity to do so during its exchanges with the agency. FAR § 9.504 requires the contracting officer to provide an offeror the opportunity to respond to an OCI determination if the contracting officer intends to withhold award based on that determination. Lucent submitted several written objections to the OCI determination following the contracting officer's November 5 determination and prior to and following her final determination on November 16. See AR, Tab 5, Letter from Lucent to the Contracting Officer (Nov. 10, 2004); Tab 6, Letter from Lucent to the Contracting Officer (Nov. 15, 2004); Tab 9, Letter from Lucent to the Contracting Officer (Nov. 23, 2004). Lucent's decision to contest the basis of the OCI

determination rather than submit a proposal to mitigate the agency's concern provides no basis to challenge its exclusion from the competition.

The protest is denied.

Anthony H. Gamboa
General Counsel