

1 FOR PUBLICATION

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6 **IN THE SUPERIOR COURT**
7 **OF THE**
8 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 AUNTIE MAG’S FOOD AND)
9 CATERING SERVICES, INC.,)

CIVIL ACTION NO. 02-0472A

10 Plaintiff,)

ORDER FOLLOWING ORAL RULING
DENYING DEFENDANTS’ MOTION
TO DISMISS FOR LACK
OF SUBJECT MATTER JURISDICTION

11 v.)

12 CNMI PUBLIC SCHOOL SYSTEM)
13 and RITA HOCOG INOS, Commissioner,)

14 Defendants.)
15 _____)

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I. INTRODUCTION

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19 **THIS MATTER** came on for hearing on September 12, 2002, in Courtroom 205A at 10:00
20 a.m. on Plaintiff’s Motion for Declaratory Judgment pursuant to 1 CMC §§ 3202, 9112, 7 CMC §§
21 2421, 2551 and Com. R. Civ. P. 57 and Defendants’ Motion to Dismiss.¹ James S. Sirok, Esq.,
22 appeared on behalf of Auntie Mag’s Food and Catering Services, Inc. (“Plaintiff”). Timothy M. Conner,
23 Esq., appeared on behalf of the CNMI Public School System (“PSS”) and Rita Hocog Inos,
24 Commissioner (“Commissioner”)(collectively “Defendants”). The Court, having reviewed the documents
25 on file, having heard the arguments of counsels, and being fully advised, renders its written decision
26 following its oral ruling denying Defendant’s Motion to Dismiss.

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28 ¹ Defendants’ motion was incorporated in their opposition to Plaintiff’s request for declaratory relief. The Court on September 12, 2002, opted to first address Defendant’s motion before proceeding to Plaintiff’s motion for declaratory relief.

1 **II. BACKGROUND**

2 Each year PSS awards various food service management companies with contracts to provide
3 meals to various schools. See Pl.’s Req. for Declaratory J. (“Pl.’s Req.”) at 3. These awards are given
4 after consideration of various proposals from several food service management companies pursuant to a
5 Request for Proposal (“RFP”). Id. at 3. The CNMI PSS Procurement Rules and Regulations
6 (“PSSPRR”) provide the rules and policies governing PSS’s conduct in requesting proposals, evaluating
7 proposals, and awarding contracts. See Pl.’s Req., Addendum A (“Add. A”).

8 In April and May of 2002, PSS solicited competitive sealed proposals from qualified food service
9 management companies to provide school breakfast and lunch on Saipan, Tinian and Rota for school year
10 2002-2003 under RFP02-004. See Pl.’s Req. at 4; Compl., Ex. A, B. On July 11, 2002, Plaintiff, a
11 food service management company, submitted its proposal. See Pl.’s Req., Ex. C. On July 31, 2002,
12 Greg Sablan as the Acting Food and Nutrition Services Administrator for PSS, thru Louise Conception
13 as the Acting Deputy Commissioner for Administration, issued a written Memorandum² to the

14 _____
15 ²The July 31, 2002, letter provided, in pertinent part:

16 To : Commissioner of Education
17 Thru : Acting Deputy Commissioner For Administration
18 From : Acting Food & Nutrition Services Administrator
19 Subject: : RFP02-004-Bid Evaluation For Proposals For Saipan Schools

20 On June 11, 2002, at 2:00 p.m. RFP02-004, which is for the provision of school breakfast
21 and lunch for schools on Saipan, Tinian Elem. and Rota, was opened. . . . There were a total of
22 seven proposals that submitted a proposal for the schools on Saipan and they were the following:

- 23 1. M V Reyes Catering
- 24 2. Kalayaan, Inc.
- 25 3. LSG Lufsthansa Catering
- 26 4. Auntie Mag’s Catering
- 27 5. Barney’s Pizza and Pasta House
- 28 6. Triple M Corporation
- 7. Three Roses.

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30 Based on the evaluation, listed below were the results of the evaluation:

No. Proposer	Technical	Bid Price	Financial	Total:
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32 In view of the above results, it is hereby recommended that the following proposer be
33 awarded for the following schools:

- 34 1. Proposer: M.V. Reyes Catering
- 35 2. Proposer Kalayaan, Inc. . . .
- 36 3. Proposer LSG Lufsthansa Catering
- 37 4. Proposer Auntie Mag’s Catering
- 38 5. Barney’s Pizza

Should you be in agreement with the above recommendation, please concur below and

1 Commissioner stating the results of the evaluation of proposals under RFP02-004 and recommended that
2 five proposers be awarded contracts to serve meals to the various schools. *See* Pl.'s Req., Ex. D. The
3 letter further stated that if the recommendations were concurred by the Procurement and Supply Officer
4 and approved by the Commissioner, the proposers would be notified in writing of PSS' intention to award
5 the contracts. *Id.* On August 1, 2002, Louise Conception as the Procurement and Supply Officer
6 concurred with Mr. Sablan's recommendation and on August 2, 2002, Rita Sablan, on behalf of the
7 Commissioner, approved the recommendation. *Id.*

8 In an August 1, 2002, letter to Plaintiff, Louise Conception, on behalf of the Commissioner,
9 communicated the results of PSS' evaluation of the proposals submitted under RFP02-004 and advised
10 Plaintiff that PSS intended to award five proposers.³ *See* Pl.'s Req., Ex. E. Plaintiff, who was one of the

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endorse the attached letter of intend to award notifying the respective proposers of the intended
award.

13

Greg Sablan (signed).

Concurred By Louise Concepcion (signed) Date: 8/1/02

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Procurement & Supply Officer

Attachments

Approved by Rita Hocog Inos, Ed. D. (signed) Date: 8/2/02

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Commissioner of Education

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³ The August 1, 2002, letter provided, in pertinent part:

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Mrs. Margarita P. Kintol

Auntie Mag's Catering

P.O.Box 1006

18

Saipan, MP 96950

Dear Mrs. Kintol:

19

The purpose of this letter is to thank you for submitting a proposal in response to
RFP02-004 for the provision of school breakfast and lunch at various school on Saipan for
20 school year 2002-2003. The evaluators of RFP02-004 have completed their evaluation and
listed below were the results of the evaluation:

21

....

In view of the above results, PSS intends to issue an award to the following proposers
for the affected schools:

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Proposer: M V Reyes Catering

23

Proposer: Kalayaan, Inc. . . .

Proposer: LSG Lutsthansa Catering. . . .

24

Proposer: Auntie Mag's Catering. . . .

Proposer: Barney's Pizza and Pasta House. . . .

25

Please be informed that the Public School System is currently processing a contract for Auntie
Mag's Catering for the schools indicated above.

26

....

Sincerely,

27

(signed)

Rita Hocog Inos, Ed. D.

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Commissioner of Education

1 five proposers was also informed that PSS was “currently processing a contract” for Plaintiff to provide
2 meals to the schools identified in the letter. *Id.* On August 9, 2002, Plaintiff executed a written protest
3 to the awarding of contracts pursuant to PSSPRR 5-101(1)(a). Pl.’s Req., Ex. G.

4 On August 12, 2002, Plaintiff filed a Complaint in Superior Court against Defendants for both
5 injunctive and declaratory relief. Plaintiff seeks injunctive relief enjoining Defendants from awarding the
6 contracts as set forth in its RFP02-004 and requiring Defendants to re-evaluate the bids received under
7 RFP02-004 and award the services to bidders in accordance with CNMI laws. In addition, Plaintiff
8 seeks declaratory relief, declaring the current manner used by PSS to evaluate bids received under
9 RFP02-004 as unfair, unequal in treatment, arbitrary, capricious, discriminatory and not in compliance
10 with CNMI laws.

11 On August 14, 2002, Defendants were served with the Summons and Complaint through Timothy
12 M. Conner, Esq., Defendants’ legal counsel. On August 21, 2002, Plaintiff requested for a hearing only
13 on its claim for declaratory relief. On September 9, 2002, Defendants filed their Opposition and moved
14 to dismiss the Complaint for lack of subject matter jurisdiction. On September 10, 2002, Plaintiff filed
15 its Reply. On September 12, 2002, the Court heard oral arguments on the jurisdictional issue and took
16 the matter under advisement. On September 17, 2002, the Court met *in camera* with both parties.
17 Following the meeting, on September 23, 2002, the Court issued a short order affirming the Court’s
18 subject matter jurisdiction and had the matter calendared for evidentiary hearing on Plaintiff’s request for
19 declaratory relief on September 24, 2002. On September 24, 2002, the parties stipulation to take the
20 matter off calendar.

21 III. QUESTION PRESENTED

22 Whether the July 31, 2002 letter, recommending the awarding of contracts and the approval of
23 the recommendation by PSS officials, and the August 1, 2002 letter, informing Plaintiff of the award,
24 constitute final agency action subject to review by the Superior Court pursuant to 1 CMC § 9112(d).

25 IV. ANALYSIS

26 Defendants assert that this Court lacks subject matter jurisdiction to hear Plaintiff’s request
27 because Plaintiff failed to exhaust administrative remedies. *See* Defs.’ Opp’n to Mot. for Declaratory J.
28 (“Defs.’ Opp’n”) at 6, 8. Defendants argue that the July 31, 2002, and August 1, 2002, letters to Plaintiff

1 do not constitute final agency action because Plaintiff subsequently filed a protest with PSS, that the
2 process of the protest remains ongoing, and the Commissioner has not rendered a decision.⁴ Defs.’
3 Opp’n at 3, 5. Plaintiff, on the other hand, contends that the Court has subject matter jurisdiction pursuant
4 to of the Commonwealth Administrative Procedures Act, 1 CMC § 9101 *et seq.*, (“APA”). Plaintiff
5 argues that the APA and the PSSPRR do not mandate that Plaintiff exhaust administrative remedies and
6 that the correspondences at issue do constitute PSS’s final agency action. *See* Pl.’s Req., Ex. E; Compl.,
7 Ex. C. Both parties rely on *Rivera v. Guerrero*, 4 N.M.I. 79 (1993), to support their respective
8 positions.

9 The jurisdictional questions posed turn on whether Commonwealth laws or regulations preclude
10 judicial review of PSS’ action and, if they do not, whether the correspondences constitute final agency
11 action appropriate for judicial review under the APA. At issue is the effect of 1 CMC § 9112 (b) and (d).
12 The APA at 1 CMC § 9112 bears the caption “Administrative Procedure: Judicial Review of Contested
13 Cases.” Subsection (b) reads: “[a] person suffering legal wrong because of agency action or adversely
14 affected or aggrieved by agency action, is entitled to judicial review of the action within 30 days thereafter
15 in the Commonwealth Superior Court.” *See* 1 CMC § 9112(b).

16 Subsection (d) reads:

17 Agency action made reviewable by statute and final agency action for which there
18 is no other adequate remedy in a court are subject to judicial review. . . . Except
19 as otherwise expressly required by statute, agency action otherwise final is final
20 for the purposes of this section whether or not there has been presented or
21 determined an application for a declaratory order, for any form of
22 reconsideration, or, unless the agency otherwise requires by rule and provides
23 that the action meanwhile is inoperative, for an appeal to superior agency
24 authority.

25 *See* 1 CMC § 9112(d).

26 In *Rivera*, the N.M.I. Supreme Court dealt with an appeal of the trial court’s decision to dismiss
27 a complaint filed under 1 CMC § 9112 for plaintiffs’ failure to file within the time limitations established
28 by law. *Rivera v. Guerrero*, 4 N.M.I. 79 (1993). Plaintiff Rivera objected to the Commonwealth Ports

27 ⁴ The Court notes that at the *in-camera* meeting held on September 17, 2002, Defendants’ counsel indicated that the
28 Acting Commissioner’s letter of August 1, 2002, would have been considered a “final” decision but for Plaintiff’s
protest of August 9, 2002.

1 Authority (“CPA”) award of a contract to another applicant. CPA regulations⁵ provided that a protest
2 could be filed within 10 days from the date Rivera received the CPA’s letter of award. Rivera did not
3 submit his letter of protest until 34 days after he received the CPA’s letter of award. Four days later, he
4 abandoned his administrative letter of protest and filed a complaint in Superior Court. The Supreme Court
5 found that the Superior Court’s dismissal was proper and affirmed. The Court concluded that it “lacks
6 jurisdiction to review an administrative decision not timely appealed during the administrative process.”
7 *Id.* at 82.

8 Because the N.M.I. Supreme Court affirmed the trial court’s dismissal on grounds of timeliness,
9 the issue of judicial review of a final agency action under the APA was not raised or discussed in *Rivera*.
10 The Supreme Court, however, *in dicta*, discussed the issue at bar, and appears to conclude that if the
11 CPA rejection of Rivera’s proposal was deemed final agency action, Rivera would not have had to
12 exhaust his administrative remedies. The N.M.I. Supreme Court stated:

13 Although the parties did not raise or discuss the issue of finality under
14 the APA, we note that the APA provides for judicial review of “[a]gency
15 action made reviewable by statute and *final* agency action for which there
16 is no other adequate remedy in a court.” An aggrieved party may seek such
17 review within thirty days after the agency issues its final decision about the
18 matter in question.

19 In the instant case, CPA’s December 24, 1992, notice to Rivera
20 of the rejection of his proposal might or might not be deemed final agency action.
21 If it was a non-final CPA action, then Rivera could not seek review under the
22 APA, which authorizes review only of final agency decisions.

23 If the December 24, 1992, rejection was a final CPA action, then Rivera
24 had thirty days within which to seek judicial review of the rejection. He would
25 not have had to exhaust his administrative remedy under such circumstances.
26 Rivera, however, did not file his action in court until thirty-nine days after he
27 received notice of the rejection of his proposal. Consequently, even if he could
28 have sought judicial review of the rejection of his proposal as final agency action
under the APA, Rivera’s court action was untimely.

29 *Id.* at 84, 85. The N.M.I. Supreme Court’s rationale was apparently based on the application of the
30 *Darby* Rule set forth in the U.S. Supreme Court case of *Darby v. Cisneros*, 509 U.S. 137, 113 S. Ct.
31 2539, 125 L. Ed. 2d 113 (1993), decided a few months before the *Rivera* decision was issued.

32 The U. S. Supreme Court, in *Darby*, was presented with the question of whether federal courts

33 ⁵ The CPA regulations regarding protests are similar to PSSPRR § 5-101(1)(a), 19 Com. Reg. 15,443 (Aug. 5, 1997)
34 adopted at 20 Com. Reg. 15,965 (Jun. 15, 1998).

1 have the authority to require that a plaintiff exhaust available administrative remedies before seeking
2 judicial review under the United States Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, where
3 neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review.
4 *Darby*, 509 U.S. at 138, 113 S. Ct. at 2540, 125 L. Ed. 2d at 117-18. The Court reviewed Section
5 10(c) of 5 U.S.C. § 704, which is identical to 1 CMC § 9112(d), and held that federal courts, absent
6 statutory authority, were not free to impose appropriate exhaustion requirements. The Court stated that
7 “where the APA applies, an appeal to ‘superior agency authority’ is a prerequisite to judicial review *only*
8 when expressly required by statute or when an agency rule requires appeal before review and the
9 administrative action is made inoperative pending that review.” *Darby*, 509 U.S. at 154, 113 S. Ct. at
10 2548, 125 L. Ed. 2d at 127.

11 Applying the *Rivera* rationale and the *Darby* Rule to the case at bar, the Court finds that there
12 are no statutes or regulations, nor have Defendants offered any, expressly requiring an aggrieved party
13 to appeal an agency decision to “superior agency authority” as a prerequisite to judicial review. Both the
14 CPA Rules and Regulations at issue in *Rivera* and the PSSPRR provide only for permissive or optional
15 protest. PSSPRR at § 5-101(1)(a), 19 Com. Reg. 15,443 (Aug. 5, 1997) adopted at 20 Com. Reg.
16 15,965 (Jun. 15, 1998), provides in part: “[a]ny actual or prospective bidder, offeror, or contractor who
17 is aggrieved in connection with the solicitation or award of a contract *may* protest to the Commissioner
18 of Education” (emphasis added). *See* Add. A at 29.

19 Agencies may avoid the finality of an initial decision, first, by adopting a rule
20 that an agency appeal be taken before judicial review is available, and, second,
21 by providing that the initial decision would be ‘inoperative’ pending appeal.
Otherwise, the initial decision may become final and the aggrieved party is
entitled to judicial review.

22 *Darby*, 509 U.S. at 152, 113 S. Ct. at 2547, 125 L. Ed. 2d at 126. In the instant case, because PSS
23 does not mandate appeal to a superior agency authority, Plaintiff need not exhaust administrative remedies
24 available to it. Subsections (b) and (d) of 1 CMC § 9112 only require that the agency action at issue be
25 deemed final.

26 The appropriate inquiry, thus, is whether PSS’ correspondences of July 31, 2002, and August 1,
27 2002, regarding the awarding of contracts under RFP02-004 meet the finality requirement under the APA.
28 The Court in *Darby*, addressed the finality requirement under the APA, by distinguishing it from the

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SO ORDERED this 8th day of November 2002.

/s/ Virginia S. Sablan-Onerheim
VIRGINIA S. SABLAN-ONERHEIM, Associate Judge