



By the order of the court, Judge David A Wiseman

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



**E-FILED**  
**CNMI SUPERIOR COURT**  
E-filed: Jul 8 2010 2:40PM  
Clerk Review: N/A  
Filing ID: 32018823  
Case Number: 04-0234-CV  
N/A

**FOR PUBLICATION**

**IN THE SUPERIOR COURT**

**OF THE**

**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**ASC ARCH STRUCTURE CORPORATION d/b/a ASC CONSTRUCTION,**  
  
**Plaintiff,**  
  
**vs.**  
  
**COMMONWEALTH PORTS AUTHORITY,**  
  
**Defendants.**

**Civil Action No. 04-0234**

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND, THIRD, AND FOURTH CAUSES OF ACTION**

**THIS MATTER** came on for hearing January 14, 2010, at 1:30 p.m. in Courtroom 232A on Commonwealth Ports Authority's (hereinafter "CPA" or "Defendant") Motion to Dismiss. Attorney Stephen Woodruff appeared on behalf of ASC Arch Structure Corporation (hereinafter "ASC" or "Plaintiff"). Attorney Robert Torres appeared on behalf of Defendant. Having considered the oral and written submissions of the parties and the applicable law, this Court is prepared to issue its ruling. **For the reasons stated below, Defendant's Motion to Dismiss Plaintiff's Second, Third, and Fourth Causes of Action is hereby GRANTED.**

1 **I. SYNOPSIS**

2 On May 26, 2004, Plaintiff filed a Complaint for Judicial Review of an Agency Action and  
3 Other Relief. Plaintiff argues that CPA issued an Invitation for Bid (hereinafter "IFB") for the  
4 construction of certain airport terminal improvements, denominated as West Tinian Airport Terminal  
5 Improvements on June 2, 2003. Plaintiff claims that although it was the lowest bidder ASC was denied  
6 the project. The parties agree that the basis for the denial was that Equitable Insurance Company was  
7 not a U.S. Treasury listed corporation. However, Plaintiff claims that CPA's rejection of ASC's  
8 proffered surety was based on nothing more than a memorandum from an Assistant Attorney General to  
9 the Director of Technical Services of the Department of Public Works stating that, "[u]ntil further  
10 notice, the Attorney General's Office will not be accepting any bid, payment, or construction bonds  
11 issued by the Equitable Insurance Company." Thus, Plaintiff argues that the memorandum in question  
12 is an inadequate basis for the denial. Instead, Plaintiff argues that ASC should have been allowed to  
13 choose another bonding company.

14 On November 11, 2003, ASC timely filed its protest with the Executive Director of CPA. On  
15 January 26, 2004, the Executive Directive of CPA issued his decision denying ASC's protest. On  
16 February 10, 2010, ASC timely filed an appeal from the Executive Director's Decision to the CPA  
17 Appeal Committee. On April 6, 2004, the Appeal Committee issued a Decision and Order affirming the  
18 Executive Director's rejection of ASC's protest. On April 21, 2004, ASC timely filed a request for  
19 reconsideration, which was denied on April 26, 2004. On May 13, 2004, the project was awarded to the  
20 lowest responsible bidder, AIC Marianas, Inc. (hereinafter "AIC"). Finally, on May 26, 2004, Plaintiff  
21 filed a Petition for Judicial Review and Other Relief.

22 In ASC's Complaint, Plaintiff alleges the following causes of action: (1) Plaintiff appeals the  
23 decision of CPA denying ASC's protest as being arbitrary, capricious, an abuse of discretion and  
24  
25

1 otherwise not in accordance with applicable law;<sup>1</sup> (2) Plaintiff argues that as taxpayer ASC can bring  
2 this cause of action pursuant to Article X, Section 9 of the Commonwealth Constitution to (a) enjoin the  
3 expenditure of public funds for other than public purposes and (b) for breach of fiduciary duty; (3)  
4 Plaintiff argues that injunctive relief is necessary since ASC has no adequate remedy at law and may  
5 suffer irreparable harm if CPA is not enjoined from awarding the contract to AIC; and (4) Plaintiff  
6 argues that CPA has breached the contract since the IFB, as well as, the bid process are contractual in  
7 nature and thus, ASC is entitled to damages for lost profits and for the recovery of its costs of bid and  
8 protest.

9 Defendant counters by arguing that Plaintiff’s Second, Third, and Fourth Causes of Action  
10 should be dismissed because the Complaint fails to state a claim entitling ASC to taxpayer relief under  
11 Article X, Section 9 of the Commonwealth’s Constitution and fails to point to any contract between  
12 Plaintiff and CPA.<sup>2</sup>

## 14 II. DISCUSSION

### 15 **A. Law Governing Motion to Dismiss**

16 Defendant’s Motion to Dismiss is grounded in Com. R. Civ. 12(b)(6), which allows for the  
17 dismissal of claims for which the recognized law provides no relief. A motion to dismiss is therefore  
18 solely aimed at attacking the pleadings.

19 Since Com. R. Civ. P. 8 requires only a “short and plain statement of the claim showing that the  
20

---

21 <sup>1</sup>The Court would like to note that Plaintiff’s Petition for Judicial Review is not being dismissed. A status  
22 conference will be set following this Order to discuss the procedural posture of the case.

23 <sup>2</sup> Plaintiff concedes that its Third Cause of Action (for injunctive relief) is now moot and accordingly stipulates to  
24 dismissal of the Third Cause of Action on that ground. (Plaintiff’s Opposition to Defendant’s Motion to Dismiss Second,  
25 Third, and Fourth Causes of Action)

1 pleader is entitled to relief,” there is “a powerful presumption against rejecting pleadings for failure to  
2 state a claim.” *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985). Consequently, a  
3 motion to dismiss for failure to state a claim upon which relief can be granted will succeed only if from  
4 the complaint it appears beyond doubt that plaintiffs can prove *no* set of facts in support of their claim  
5 that would entitle them to relief. *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999) (emphasis added).

6 The burden is upon the movants to establish beyond doubt that the Plaintiff’s action is one upon  
7 which the law recognizes no relief. All allegations of material fact are taken as true and construed in the  
8 light most favorable to the non-moving party. The Court in examining the pleadings will assume all  
9 *well-plead* facts are true and draw reasonable inferences to determine whether they support a legitimate  
10 cause of action. *Cepeda v. Hefner*, 3 N.M.I. 121, 127-28 (1992); *In re Adoption of Magofna*, 1 N.M.I.  
11 449, 454 (1990); *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). In reviewing  
12 the sufficiency of the complaint, the “issue is not whether a plaintiff will ultimately prevail but whether  
13 the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232  
14 (1974). “[I]t may appear on the face of the pleadings that recovery is very remote and unlikely but that  
15 is not the test.” *Id.* Rather, the inquiry of the court should be whether the allegations constitute a short  
16 and plain statement of the claim showing that the pleader is entitled to relief. *Cepeda*, 3 N.M.I. at 127-  
17 28.

18 Two issues must be addressed before Plaintiff’s claims can be dismissed. First, does Article X,  
19 Section 9 of the CNMI Constitution grant Plaintiff standing to bring this action? Second, was there a  
20 valid contract between Plaintiff and CPA that could be breached? Each issue will be addressed in turn.

21 **B. Plaintiff Does Not Have Standing As a Taxpayer to Sue CPA.**

22 *Article X § 9 of the Commonwealth Constitution* states: “A taxpayer may bring an action against  
23 the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other  
24 than public purposes or for a breach of fiduciary duty.” In addition, a corporation which is a taxpayer  
25 has as much a right to institute a taxpayer’s action as a natural person who is a taxpayer. *Sioux Fall*

1 *Taxpayers Ass'n v. City of Sioux Falls*, 69 S.D. 93 (1942).

2 A basic principle of construction is that language must be given its plain meaning.  
3 *Commonwealth Ports Auth. v. Hakubotan Saipan Enters, Inc.*, 2 N.M.I. 18 (1991). Legislative intent is  
4 to be discerned from a reading of the statute as a whole and not from a reading of isolated words. *Id.*  
5 When interpreting a statute, the objective is to ascertain and give effect to the intent of the legislature.  
6 *Id.* Based on the plain meaning of Article X Section 9, it is clear that a taxpayer may bring an action  
7 against the government or one of its instrumentalities in order to enjoin the expenditure of public funds:  
8 (1) *for* other than public purposes or (2) *for* a breach of fiduciary duty. The application of Article X,  
9 Section 9 has been discussed by the Supreme Court in *Rayphand v. Tenorio*, *Mafnas v. Commonwealth*,  
10 and *Manglona v. Camacho*.

11 In *Rayphand*, the Court stated that taxpayers may sue not only for spending funds in violation of  
12 a public purpose but also for spending funds in breach of a fiduciary duty. *Rayphand v. Tenorio*, 2003  
13 MP 12 at ¶ 33. In addition, the *Rayphand* opinion discussed the holding in *Mafnas v. Commonwealth*  
14 and reiterated that “in the NMI, the right of taxpayers to challenge allegedly illegal expenditures of  
15 public funds is expressly granted by our Constitution. Discussing Article X, Section 9, we stated our  
16 constitutional provision explicitly recognizes the right of Commonwealth taxpayers to call their  
17 government to account in matters pertaining to expenditures of public funds.” *Rayphand*, 2003 MP at ¶  
18 23 (*quoting Mafnas v. Commonwealth*, 2 N.M.I. 248, 261 (1991)) (internal quotations removed).  
19 Further, the Court stated that “a court must first find that public funds are being (or will be) expended  
20 for other than a public purpose or in breach of a fiduciary duty.” *Id.* at ¶ 24. Thus, there must first be an  
21 expenditure of public funds.

22 Moreover, the court in *Rayphand* goes on to explain that in finding that a taxpayer can sue for  
23 expenditure of funds in breach of a fiduciary duty, “a public authority is the trustee of public funds and a  
24 taxpayer has standing to sue for a trustee’s misapplication of those funds.” *Id.* at ¶ 36. The *Rayphand*  
25 Court thus found that when funds were spent in breach of a fiduciary duty (not just when funds were

1 spent for other than public purposes) Article X, Section 9 granted the taxpayer standing.

2 In *Mafnas*, the plaintiff challenged a judge’s right to hold the office of Presiding Judge and  
3 sought an order directing the judge to return to the Commonwealth Treasurer sums he had received as  
4 salary in excess of an associate judge’s salary, as well as, an injunction prohibiting the Commonwealth  
5 from paying him a salary in excess of the associate judge’s salary. *Mafnas v. Commonwealth*, 2 N.M.I.  
6 248 (1991). However, the ultimate issue in this case was the type of relief that was proper in a suit  
7 brought pursuant to Section 9.

8 To answer that question, the Court briefly discussed the history of taxpayer suits stating that  
9 “[e]ven before the adoption of Art. X, § 9 in 1985, an NMI court expressly recognized the right of  
10 Commonwealth taxpayers to bring such actions. Our constitutional provision explicitly recognizes the  
11 right of Commonwealth taxpayers to call their government to account *in matters pertaining to*  
12 *expenditures of public funds.*” *Mafnas*, 2 N.M.I. at ¶ 10 (citing *Manglona v. Camacho*, 1 CR 820  
13 (D.N.M.I. App. Div. 1983)) (emphasis added). As such, the Court found that Section 9 authorizes both  
14 declaratory and injunctive relief. *Mafnas*, 2 N.M.I. at ¶ 12.

15 Here, there was an expenditure of public funds used to repair the Tinian airport. The project has  
16 been substantially completed, so injunctive relief is inappropriate at this time. However, Plaintiff is still  
17 entitled to declaratory relief if Plaintiff can show that CPA breached its fiduciary duty.<sup>3</sup> However, before  
18 going further the Court must address whether or not Plaintiff is entitled to relief both as a bidder and as a  
19 taxpayer.<sup>4</sup>

---

21 <sup>3</sup> Because having a working airport benefits the public at large, Plaintiff cannot claim that funds were not used for a  
22 public purpose.

23 <sup>4</sup> The California Court of Appeals noted that a corporation’s standing to bring a citizen action depends on a number  
24 of factors. *Waste Management of Alameda County, Inc. v. County of Alameda*, 79 Cal.App.4th 1223 (2000). These include a  
25 demonstration that it has a continuing commitment to the public interest it purports to assert or that it consists in

1 Plaintiff claims that as a taxpayer, it has a constitutional right to have expenditures of public  
2 funds made only in accordance with the law. Alternatively, CPA counters by arguing that although this  
3 Court has recognized that CNMI taxpayers have standing under certain limited circumstances to sue to  
4 protest a breach of a fiduciary duty involving an expenditure of public funds, an unsuccessful offeror's  
5 mandatory and exclusive remedy is its substantive challenge under Procurement Law. In other words,  
6 Defendant argues that a bidder on a public contract cannot simply switch hats to a "concerned taxpayer"  
7 to challenge the award of the contract to another party. *See Imagistics Intern., Inc. v. Department of*  
8 *General Services*, 150 Cal.App.4th 581, 594 (2007). The Court agrees.

9 In addition, Defendant further argues that although a number of jurisdictions have adopted an  
10 exception allowing disappointed bidders to challenge the award of a public contract, these jurisdictions  
11 only recognize standing in cases of "fraud, corruption, or acts undermining the objective and integrity of  
12 the bidding process." Plaintiff agrees with Defendant and contends that this is precisely what has  
13 occurred here. However, nowhere in Plaintiff's Complaint does ASC argue that CPA acted fraudulently  
14 or corruptly. Instead, Plaintiff challenges the decision CPA made in denying its bid arguing that CPA  
15 should have allowed it to seek out an alternative bonding company before denying the bid. Therefore,  
16 the Court does not believe that Plaintiff has shown how he can bring a taxpayer suit when Plaintiff, an  
17 interested party, is merely trying to recover as a protesting bidder.

18 The Court is cognitive that Plaintiff as a taxpayer, is owed a fiduciary duty, but in light of the  
19 surrounding circumstances of ASC's procurement case the Court does not believe that this creates

20 \_\_\_\_\_  
21 representative fashion of individuals who would otherwise have a beneficial interest in the action who would find it difficult  
22 or impossible otherwise to enforce their own rights, and that its prosecution of the action would not conflict with competing  
23 legislative policies. *Id.* at 1238. Where the first three factors are absent, and the corporation is pursuing an action against a  
24 competitor out of economic interest, the corporation does not have standing. *Id.* at 1238-1239.

1 standing for Plaintiff to sue both as a bidder and as a taxpayer. Although Plaintiff has alleged standing  
2 as taxpayers under Section 9, this case is more properly characterized as a Judicial Review of an Agency  
3 Action.

4 **C. Since An IFB Is Only An Offer, A Contractual Agreement Never Existed Between ASC and**  
5 **CPA Because CPA Never Accepted ASC's Offer.**

6 Plaintiff argues that the bidding process had legally enforceable contract elements that Defendant  
7 was bound by. However, an IFB is only an invitation to bid; it does not constitute a contract with every  
8 offeror. *See Connecticut Associated Builders and Contractors v. City of Harford*, 251 Conn.169, 740  
9 A.2d 813(1999). Basic principles of contract law, as well as, *CPA Procurement Regulations*, compel  
10 this conclusion.

11 “[A] bid, even the lowest responsible one, submitted in response to an invitation for bids is only  
12 an offer which, until accepted by the municipality, does not give rise to a contract between the parties.”  
13 *John J. Brennan Construction Corporation, Inc. v. Shelton*, 187 Conn. 695, 702, 448 A.2d 180 (1982).  
14 Here, assuming Plaintiff was the lowest responsible bidder, this would only be an offer subject to CPA’s  
15 approval. Because CPA rejected ASC’s offer, no contract was ever entered into by either of the parties.

16 In addition, *CPA Procurement Regulation 2.3* imposes strict requirements on every contract to  
17 which CPA is a party **before** that contract may be enforceable against the agency. (Emphasis Added).  
18 *CPA Procurement Regulation 2.3 (4)* states in part: “No contract is effective against the Authority until  
19 all of the officials whose signatures appear on the contract form have signed the contract.” As such, in  
20 order for Defendant to be bound by a contract certain formalities must first be satisfied, including  
21 certification by the Attorney upon the Executive Director’s approval. Here, this was never done because  
22 ASC’s bid was never accepted.

23 Moreover, CPA had the right to reject a bid pursuant to *CPA Procurement Regulation 3.2 (7)*.  
24 While the Court does not wish to address the merits of Plaintiff’s claim for Judicial Review at this time,  
25 the Court finds that CPA could reject a bid for any of reasons set forth under said subsection prior to



1 contracting with ASC.

2  
3 **III. CONCLUSION**

4 Therefore, for the foregoing reasons, Defendant’s Motion to Dismiss Plaintiff’s Second, Third,  
5 and Fourth Causes of Action is hereby **GRANTED**.

6  
7 **SO ORDERED this 8<sup>th</sup> day of July, 2010.**

8  
9 \_\_\_\_\_ / s /  
10 David A. Wiseman, Associate Judge