



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

FOR PUBLICATION



E-FILED
CNMI SUPERIOR COURT
E-filed: May 17 2013 02:12PM
Clerk Review: N/A
Filing ID: 52334004
Case Number: 13-0013-CV
N/A

**IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

U.S.A. FANTER CORPORATION, LTD.,)	CIVIL CASE NO. 13-0013
)	
Petitioner,)	
)	
v.)	
)	ORDER RE: DECISION OF THE OFFICE
COMMONWEALTH OF THE)	OF THE PUBLIC AUDITOR
NORTHERN MARIANA ISLANDS,)	
)	
Respondent.)	
)	
)	
)	

I. INTRODUCTION

THIS MATTER came before the Court on March 20, 2013, at 1:30 p.m. in Courtroom 223A regarding a petition for judicial review. U.S.A. Fanter Corporation, Ltd. (“Petitioner”) filed the petition for judicial review on January 17, 2013, appealing a final order of the Office of the Public Auditor (“OPA”) issued January 8, 2013. Petitioner was represented by Joseph E. Horey, Esq. Commonwealth of the Northern Mariana Islands (“Respondent”) was represented by Assistant Attorney General James Kearney. Respondent/Interested Party GPPC, Inc. (“GPPC”) was represented by Mark B. Hanson, Esq.

The hearing was with regards to an administrative appeal of a decision made by OPA canceling an award of a private contract to Petitioner and directing the contract to be awarded to GPPC. This Court now conducts judicial review of the appealed decision.

1 **II. BACKGROUND**

2 In April 2012, the CNMI Water Task Force (“WTF”) solicited bids for a project detecting and repairing leaks
3 in water lines between Tekken Street in Susupe and Orchid Street in Garapan. Petitioner’s bid of \$2,076,000.03 was
4 the lowest bid. On August 21, 2012, the Director of Procurement and Supply issued a notice of intent to award the
5 contract for the project to Petitioner.

6 On August 24, 2012, GPPC, one of the three unselected bidders, protested the award to the Director, arguing
7 Petitioner’s bid should have been rejected because it was allegedly non-responsive. On October 26, 2012, the
8 Director denied GPPC’s protest and confirmed the award to Petitioner, finding the bid was indeed responsive.

9 On November 6, 2012, GPPC appealed the Director’s decision to OPA. OPA granted the appeal, found
10 Petitioner’s bid nonresponsive, and directed the Director to cancel the award of the contract to Petitioner and to award
11 it instead to the next lowest bidder. Petitioner then filed the instant petition for judicial review of the OPA decision.

12 WTF’s Invitation for Bids contained instructions for bidders, which is in paragraph 5(b), as follows:

13 Payment and Performance Bonds shall be executed by a surety company listed in Circular 570,
14 published by the United States Secretary of Treasury . . .

15 The Bidder must submit with the bid a letter from the surety or insurance company documenting
16 Bidders [sic] ability to acquire the necessary US Treasury Listed (“T-Listed”) performance and
17 payment bonds. Each bond shall be in an amount equal to 100% of Bid Price.

18 Note: WTF understands that the bonds may not be issued by a surety prior to presentation of a duly
19 executed contract. However, the intent of this requested letter is to have the Bidder provide WTF
20 with a written statement from an authorized surety specifying the Bidder’s ability to acquire the
21 necessary bonds. The letter shall be written by surety and must contain affirmative statement that
22 it will issue the necessary performance and payment bonds to Contractor upon contract award.

23 Pursuant to these instructions, Petitioner submitted a document from First Net Insurance, through its agent Moylan’s,
24 which stated:

25 We . . . certify that First Net is . . . listed by the U.S. Treasury Department as a certified surety
company authorized to issue bonds in favor of the Federal Government in accordance with
Department’s Circular 570.

In connection with USA Fanter’s bid for the Leak Detection and Repairs from Teken [sic] St. in
Susupe to Orchid St. in Garapan, IFB12-GOV-087, we hereby commit in accordance with the bid
bond we have issued for this purpose, that we stand ready to issue the necessary performance and
payment bonds if the contract is awarded to USA Fanter.

1
2 WTF found this document to be sufficient to satisfy the responsive bid requirement, as did the Director after GPPC
3 protested the award of the contract to bidder on the ground that Petitioner’s bid was nonresponsive. OPA, however,
4 disagreed.

5 **III. STANDARD OF REVIEW**

6 The standard of review the Superior Court must apply when reviewing agency actions within the
7 Administrative Procedure Act (“APA”) is set forth in 1 CMC § 9112(f). *Camacho v. Northern Marianas Retirement*
8 *Fund*, 1 NMI 362 (1990). Section 9112(f) requires a reviewing court to decide all relevant questions of law, interpret
9 constitutional and statutory provisions, and determine the meaning or applicability of an agency action. *Tenorio v.*
10 *Superior Ct.*, 1 NMI 1 (1989). Specifically, § 9112(f)(2) mandates that a court set aside an agency action if it finds
11 the action is found to be:

12 Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (ii) Contrary
13 to constitutional right, power, privilege, or immunity; (iii) In excess of statutory jurisdiction,
14 authority, or limitations, or short of statutory rights; (iv) Without observance of procedure required
15 by law; (v) Unsupported by substantial evidence in a case subject to 1 CMC §§ 9108 and 9109 or
otherwise reviewed on the record of an agency hearing provided by statute or (vi) unwarranted by
facts to the extent that the facts are subject to trial de novo by the reviewing court.

16 The standard of review for an appeal alleging an arbitrary and capricious action is similar to the abuse of discretion
17 standard. *In re Blankenship*, 3 NMI 209 ¶ 16 (1992). “A court will review an action or decision alleged to be
18 arbitrary and capricious to determine whether the action was reasonable and based on information sufficient to
19 support the decision at the time it was made.” *Id.*

20 **IV. DISCUSSION**

21 Petitioner claims that while OPA acknowledged that the letter made a promise to provide the necessary
22 bonding, the instructions required documentation of a bidder’s ability to bond, and not just a promise to bond the
23 project.

24 In response, Petitioner first claims OPA misconstrued the Instructions for Bidders in WTF’s Invitation for
25 Bids, erring in its interpretation of the term “documenting.” Petitioner argues the term, as used in the Invitation for

1 Bids, did not require more than the letter it provided. Petitioner claims the plain grammatical meaning of the
2 instructions required only a letter documenting a bidder's ability to acquire the bonds, and did not require any
3 documentation beyond that. Second, Petitioner argues this interpretation is clarified when read with the rest of the
4 document, which states the purpose of requiring the letter is to have a written statement from an authorized surety
5 which specifies the bidder's ability to acquire the necessary bonds. Finally, Petitioner argues if clarity were lacking,
6 it should be resolved by the express intent of the writers of the Invitation for Bids, i.e. WTF. Petitioner asserts WTF
7 wrote to OPA, stating the purpose of the solicitation requirements was to gain assurance that the bidder would be
8 approved for bonding if awarded the contract, and the letter is only intended to show the bidder has been examined
9 so that the surety can state the bidder is eligible for the required bonding. Petitioner thus prays for a determination
10 that its bid was fully responsive to the Invitation for Bids and for a mandatory injunction requiring the award of the
11 contract for the project to Petitioner.
12

13 Respondent claims, first, that OPA's determination that Petitioner's bid was nonresponsive was not
14 arbitrary and capricious. Respondent claims OPA determined the letter was insufficient because it failed to disclose
15 that First Net Insurance was incapable of issuing bid bonds equal to the entire amount of the bid price on its own
16 without reinsurance, as First Net Insurance's underwriting was limited to \$1,004,000.00 and the bid amount was
17 \$2,076,000.00. Respondent claims OPA properly determined the letter should have demonstrated the surety could
18 provide enough insurance to cover the entire amount of the bid price to show the surety is capable of providing
19 bonds in an amount equal to one hundred percent of the bid price, as required in the Instructions to Bidders.
20 Respondent argues if the surety was incapable of doing so, the letter should have provided information as to how
21 it would do so. Respondent argues OPA's determination was based on case law (a nonauthoritative decision by the
22 Comptroller General of the United States), which held that where a bid bond provided by a surety is greater than
23 the surety's underwriting limit, without documented evidence of adequate reinsurance, the bid is nonresponsive.
24

25 Second, Respondent argues that although the Court must look at the Invitation for Bids to determine its
meaning, at issue is whether OPA's interpretation of it was arbitrary and capricious, not based on whether WTF was

1 in a better position to determine the meaning of the Invitation for Bids. Respondent argues the law states OPA's
2 decision should be given deference, and there is no law requiring such deference to contracting agencies.

3 GPPC, in its opposition to Petitioner's request for judicial review, claims the Court should give deference
4 to OPA's decision. GPPC argues Petitioner's bid was defective because it needed a certification of a larger amount
5 of bonding than First Net Insurance could provide. GPPC claims WTF essentially argued the certification did not
6 have to be accurate and truthful, it just had to be made, yet later WTF required Petitioner to submit a new
7 certification, which, for the first time, included two additional sureties. GPPC argues WTF thus ignored the
8 language of the Invitation for Bids which required certification prior to bid opening, and also illegally accepted a
9 false certification. GPPC argues WTF's intent regarding the bond certification requirement affirms their argument
10 because the intent of the letter is to have a written statement from a surety specifying the bidder's ability to acquire
11 the necessary bonds, as an objective indicator that there would not be a problem after the contract was awarded.

12
13 Petitioner, in its reply, argues first that applying the abuse of discretion standard of review is erroneous
14 and this Court should review OPA's decision de novo and without deference to OPA's decision. Petitioner asserts
15 questions of law are reviewed de novo by courts, including in the administrative appeals context, basing this
16 argument on several CNMI cases where the court reviewed de novo issues of law arising from administrative
17 hearings, while giving deference to the findings of fact. Petitioner argues it is universally held by courts construing
18 the parallel provision of the federal Administrative Appeals Act that the appropriate standard for review of questions
19 of law is de novo. Petitioner asserts a recent federal case noted the interpretation of a solicitation is a question of
20 law, and the instant case turns on the interpretation of the solicitation, and not the bid. Petitioner argues it is a
21 question of law whether its bid could be considered responsive to the Invitation for Bids if it did not also include
22 information as to how the surety would secure adequate reinsurance.

23 Second, Petitioner argues a plain reading of the Invitation for Bids demonstrates there is no requirement
24 to explain how the bond would be secured. Petitioner claims that instead of addressing the plain language of the
25 Invitation for Bids, the responding parties use terms like "demonstrate" and "show" in their arguments, terms that

1 appear nowhere in the Invitation for Bids. Petitioner argues bidders are required to document with a letter that bonds
2 will be issued, they are not required to show how they will be issued, funded or secured. Petitioner argues only an
3 affirmative statement from a surety is required for a bid to be responsive; the actual ability to issue the bonds is an
4 issue to be addressed at a later point. Petitioner declares erroneous GPPC's argument that the new certification
5 requested by the Director was supposed to substitute the allegedly defective original certification. Petitioner claims
6 the Director's request, not the bid submission, was a request the Director was required to make pursuant to NMIAC
7 § 70, to ensure the bonds would be sufficient to cover the obligation.

8
9 Third, Petitioner argues OPA's decision was contrary to the intent of the issuing agency of the contract
10 award, and failed to give deference to either WTF or the Director of Procurement and Supply, both of whom found
11 Petitioner's bid to be responsive.

12 Finally, Petitioner claims OPA's decision fails even under "arbitrary and capricious" review. Petitioner
13 argues OPA disregarded the plain reading of the Invitation for Bids and declared its own interpretation as correct.
14 Petitioner argues that because OPA's decision was reached without governing principle and because OPA failed
15 to consider an important aspect of the problem (when it allegedly failed to give no consideration to WTF's intent
16 in establishing the bond letter requirement in the first place), its decision was arbitrary and capricious.

17 **V. CONCLUSION**

18 "Issues of law arising from administrative hearings are reviewed *de novo*." *Royal Crown Insurance Corp.*
19 *v. Director of Labor*, No. 10-0102 (NMI Super. Ct. Dec. 20, 2011) (Order Affirming the Secretary of Labor's Order
20 on Appeal at 4); *see Tenorio v. Superior Court*, 1 NMI 4, 9 (1989). Like the interpretation of contract provisions,
21 the interpretation of a solicitation is a question of law, requiring *de novo* review. *See NVT Techs., Inc. v. United*
22 *States*, 370 F.3d 1153, 1159 (2004); *Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1353 (2004).
23 Interpreting a solicitation requires the document to be considered as a whole and interpreted in "a manner that
24 harmonizes and gives reasonable meaning to all of its provisions." *CBY Designs Builders v. United States*, 105 Fed.
25

1 Cl. 303, 327 (Fed. Cl. 2012) (quoting *Banknote Corp.*, 365 F.3d at 1353). Because interpretation of a solicitation
2 is a question of law, the Court will apply de novo review.

3 A plain reading of paragraph 5(b) of the Invitation for Bids indicates that a bidder is required to submit
4 a letter from the surety or insurance company documenting the bidder's ability to acquire the necessary bonds.
5 Petitioner did so when it submitted a document from First Net Insurance, through its agent Moylan's, which stated
6 it was a qualified surety, it was committed to the bid bond issued in connection with the project, and it stood ready
7 to issue the necessary bonds if the contract was awarded to Petitioner. A note in the instructions for bidders also
8 indicated that "the intent of this requested letter is to have the Bidder provide WTF with a written statement from
9 an authorized surety specifying the Bidder's ability to acquire the necessary bonds." The letter from First Net
10 Insurance constitutes a written statement from an authorized surety, which specified it had the ability to acquire the
11 necessary bonds. Although the surety could not issue bid bonds equal to the entire amount of the bid price on its
12 own, it could do so with reinsurance. A plain reading of the provision in the instructions to bidders indicates all that
13 was needed was a letter documenting the ability to issue the necessary bonds. The provision does not specify that
14 the letter must provide information as to how the surety was capable of issuing such bonds, but merely that it was
15 capable of doing so.
16

17 Further, if there were any doubt regarding the provision, WTF, the party requiring the letter submission
18 in the first place, clarified to OPA, the parties in dispute, and other interested persons the purpose and intent of
19 WTF's solicitation requirements. The letter indicated, among other things, that the letter was not intended to test
20 the surety's capability, but to test the contractor's ability to obtain bonding.

21 Therefore, this Court finds Petitioner's bid was responsive to the Invitation for Bids and **REVERSES**
22 OPA's decision.

23 **VI. JUDGMENT**

24 Judgment is therefore rendered in favor of Petitioner. The Court directs WTF to award the contract to
25 Petitioner. This ruling by the Court constitutes a final agency decision and resolves all issues so as to constitute a

1 final judgment. A party may file any appeal of this decision to the CNMI Supreme Court within thirty (30) days
2 of the date of this order.

3
4 **SO ORDERED this 17th day of May, 2013.**

5
6
7 _____ / s / _____
8

9 **David A. Wiseman, Associate Judge**
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25