



By Order of the Court, Judge Joseph N. Camacho

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

USA FANTER CORP., LTD,)	CIVIL ACTION NO. 17-0258
)	
Plaintiff,)	ORDER GRANTING DEPARTMENT OF
)	PUBLIC LANDS’ MOTION TO DISMISS
v.)	BECAUSE NOTWITHSTANDING 1 CMC
)	§ 9112 PROVIDING JUDICIAL REVIEW
CNMI DEPARTMENT OF PUBLIC)	OF AGENCY CONTESTED CASES
LANDS,)	PLAINTIFF MUST STILL ESTABLISH
)	CONSTITUTIONAL STANDING UNDER
Defendant.)	THE CNMI CONSTITUTION
)	
)	

I. INTRODUCTION

This matter came before the Court on February 6, 2018 in Courtroom 220A on Defendant Department of Public Lands’ (“DPL”) Motion to Dismiss Pursuant to Com. R. Civ. P. 12(b)(6). Plaintiff USA Fanter Corp., Ltd. (“Plaintiff”), was represented by Attorney Robert T. Torres. DPL was represented by Assistant Attorney General Matthew J. Pugh.

DPL seeks to dismiss Plaintiff’s Petition for Injunctive Relief and Verified Complaint for Declaratory Judgment (hereinafter “Petition & Complaint”). DPL argues that Plaintiff lacks standing and that DPL does not have the legal capacity to be sued.

Based on a review of the filings, oral arguments, and applicable law, the Court hereby issues the following order.

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1 **II. STATEMENT OF FACTS**

2 **A. RFP16-RED007 was issued by DPL in August 2016**

3 Sometime prior to August 12, 2016, DPL issued RFP16-RED007, titled “Quarry Operator
4 on Public Lands – Lot Number 011 C 02 - As Matuis, Saipan.” RFP16-RED007 sought to “issue a
5 quarry permit to the most responsive firm capable of providing DPL the highest return from
6 limestone quarry operations on public lands.” Pl.’s Compl. Ex. 2 at 2. Further, RFP16-RED007
7 specified that “[t]he Department of Public Lands reserves the right to reject any or all proposals and
8 to waive any imperfection in any proposal, if, in its opinion to do so would be in the best interest of
9 public land beneficiaries.” Pl.’s Compl. Ex. 1. Plaintiff submitted a proposal for RFP16-RED007 by
10 the September 16, 2016 submission deadline. Pl.’s Compl. Ex. 3; Aff. of Qian, Guo Cao.

11 On November 9, 2016, DPL issued a notice of intent to award letter to Win Win Way
12 Construction Co., (Saipan) Inc. (hereinafter “Win Win Way”). DPL issued notice of non-award
13 letters to all the other bidders, including Plaintiff. The top three bidders on RFP16-RED007 were: 1.
14 Win Win Way, 2. Blue Oasis, LLC (hereinafter “Blue Oasis”), and 3. Fanter. Pl.’s Compl. Ex. 5.

15 DPL attempted to negotiate a contract with Win Win Way, but the parties were ultimately
16 unable to agree on the terms. Complaint ¶ 9. Win Win Way withdrew from consideration on or
17 about May 23, 2017. DPL then began negotiations with Blue Oasis, the second highest rated bidder.
18 *Id.* ¶ 10. DPL was unable to agree on terms with Blue Oasis and did not enter into a contract with
19 Blue Oasis. *Id.*

20 After contract negotiations failed with Blue Oasis, DPL made the determination that “given
21 the significant amount of time that had passed since the RFP was issued, and considering the terms
22 of the remaining proposals, it would not be in the best interest of DPL and its beneficiaries, people
23 of Northern Marianas Descent, to award the contract to any of the remaining bidders,” including
24 Plaintiff. Pl.’s Compl. Ex. 5. Thus, DPL issued a second RFP for the quarry project without first

1 negotiating with the third highest ranked bidder, Plaintiff, or any of the other remaining responsive
2 bidders.

3 **B. RFP17-RED005 was issued by DPL in September of 2017**

4 Sometime before September 29, 2017, over a year after the first RFP was issued, DPL
5 issued RFP17-RED005, “Quarry Operator on Public Lands – Lot Number 011 C 04 – As Matuis,
6 Saipan.” Pl.’s Compl. Ex. 6. RFP17-RED005 had a submission deadline of October 27, 2017.¹

7 On October 1, 2017, Plaintiff sent a letter to the DPL Secretary, protesting the cancellation
8 of RFP16-RED007 and the issuance of RFP17-RED005. Pl.’s Compl. Ex. 5. Plaintiff thereafter
9 submitted a proposal in response to RFP17-RED005 on October 26, 2017. Pl.’s Reply Ex. 2.

10 DPL has not yet finished evaluating the proposals it received in response to RFP17-
11 RED005. Currently, no party has an exclusive quarry permit under either RFP16-RED007 or
12 RFP17-RED005.

13 **1. Petition for Injunction was filed by Plaintiff on October 25 2017**

14 On October 25, 2017, Plaintiff filed a petition with the Court for an injunction that
15 prevented DPL from awarding a contract for a quarry permit pursuant to RFP 17-RED005. The
16 Court ultimately granted Plaintiff’s Petition for Preliminary Injunction on February 23, 2018. *USA*
17 *Fanter Corp, Ltd., v. CNMI Department of Public Lands*, Civ. No. 17-0258 (NMI Super. Ct. Feb.
18 23, 2018) (Order Granting Plaintiff’s Petition for Preliminary Injunction Enjoining Department of
19 Public Lands From Acting On A Second Request for Proposals Until Litigation Regarding the First
20 Request for Proposals Is Resolved).

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23 ¹ RFP16-RED007 dealt with Lot Number 011 C 02 and RFP17-RED005 dealt with Lot Number 011 C 04. Both lots are
24 located in As Matuis, Saipan. Plaintiff alleges that these are the same pieces of land, minus a small piece of land that
had been subdivided. Complaint ¶ 13; Exh. 8 at 2-3.

1 **2. Motion to Dismiss was filed by DPL on November 16, 2017**

2 On Nov 16, 2017, DPL filed a Motion to Dismiss Pursuant to Com. R. Civ. P. 12(b) arguing
3 that Plaintiff’s suit must be dismissed because: 1) Plaintiff lacks constitutional standing to bring its
4 suit, and 2) DPL cannot be sued by Plaintiff.

5 Plaintiff filed an opposition on November 30, 2017. Plaintiff argued that it has statutory
6 standing under 1 CMC §§ 9112(b) and the constitutional standing requirements to obtain a
7 declaratory judgment under 7 CMC § 2421. Plaintiff also alleged that DPL has the capacity to sue
8 and be sued. DPL thereafter filed its reply on February 2, 2018.

9
10 **III. LEGAL STANDARD**

11 DPL filed a Motion to Dismiss Pursuant to Commonwealth Rule of Civil Procedure
12 12(b)(6) (“the Motion”) for lack of standing. However, a motion under Rule 12(b)(6) is not the
13 correct mechanism to challenge a party’s standing. Whether a party has standing is a subject matter
14 jurisdiction issue.² Therefore, a party challenging another party’s standing should file a motion
15 under Rule 12(b)(1).³ Though DPL erred in filing its motion under Rule 12(b)(6), “[b]ecause
16 standing is jurisdictional, this Court may raise it as an issue *sua sponte*.”⁴ Therefore, the Court will
17 treat DPL’s Motion as if it was filed under Rule 12(b)(1).⁵

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20 ² See *Commonwealth v. Office of the Civil Serv. Comm’n*, 2005 MP 6 ¶ 9; *Atalig v. Mobil Oil Mariana Islands, Inc.*,
2013 MP 11 ¶ 10.

21 ³ See *Atalig*, 2013 MP 11 ¶ 10 (treating an issue of standing as separate from a Rule 12(b)(6) motion); see also, *Rivera*
v. Guerrero, 4 NMI 79, 81 (1993) (dismissing the complaint under Rule 12(b)(1) for lack of subject matter jurisdiction).

22 ⁴ *Cody v. N. Mar. I. Ret. Fund*, 2011 MP 16 ¶ 23.

23 ⁵ *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 909 n.3 (7th Cir. 2005) (finding that the trial judge could apply the
24 correct standard regardless of whether the parties filed a Rule 12(b)(1) motion or a Rule 12(b)(6) motion); see also
Zimmerman v. Cambridge Credit Counseling Corp., 409 F.3d 473, 475 n.4 (1st Cir. 2005) (“The parties dispute
whether the defendants' motion should have been raised under Fed. R. Civ. P. 12(b)(1) or Fed. R. Civ. P. 12(b)(6). This
dispute is immaterial because the parties agree that either way we must accept the well pleaded allegations as true and
consider the interpretive question *de novo*.”).

1 In determining whether a plaintiff has proper standing to sue, the Court “must accept as true
2 all material allegations of the complaint.”⁶ Furthermore, “each element must be supported in the
3 same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner
4 and degree of evidence required at the successive stages of the litigation.”⁷ At the pleading stage,
5 “general factual allegations of injury resulting from the defendant's conduct may suffice,”⁸
6 however, “[g]eneral allegations of injury devoid of any facts will not.”⁹

7 8 IV. DISCUSSION

9 DPL argues that the Petition and Complaint must be dismissed, because Plaintiff lacks
10 standing to challenge a non-award of a government contract and because DPL cannot be properly
11 sued by Plaintiff. Because Plaintiff lacks standing to challenge DPL’s actions, the Court need not
12 reach the question of whether DPL can be sued by Plaintiff.

13 A. Statutory Standing

14 Plaintiff argues that 1 CMC § 9112(b) provides “statutory standing” for it to bring its claim
15 against DPL separate from the CNMI constitutional standing requirements.¹⁰ Plaintiff quoted the
16 “statutory standing” doctrine outlined in *Benevente v. Taitano*, which states that “a party must
17 adhere to the requirements of standing under Article III, *except* where standing is conferred by
18 statute.” 2006 Guam 15 ¶ 15 (citation omitted) (emphasis added)). However, this “either-or”
19 proposition is inconsistent with United States Supreme Court precedent. *See Spokeo, Inc. v. Robins*,
20 136 S. Ct. 1540, 1547-48 (2016) (finding that “it is settled that [the legislature] cannot erase Article
21 III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not

22 ⁶ *Atalig*, 2013 MP 11 ¶ 10 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

23 ⁷ *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

⁸ *Atalig*, 2013 MP 11 ¶ 10 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 561).

⁹ *Atalig*, 2013 MP 11 ¶ 10.

24 ¹⁰ *USA Fanter Corp. v. DPL*, Civ. No. 17-0258 (NMI Super. Ct. Oct. 25, 2017) (Opposition to Defendant’s Motion to Dismiss: Memorandum of Points and Authorities at 5).

1 otherwise have standing”) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (internal quotation
2 marks and additional citations omitted)). The United States Supreme Court is clear that for a party
3 to have standing, it must satisfy the requirements of constitutional standing. *See Summers v. Earth*
4 *Island Institute*, 555 U.S. 488, 497 (2009) (finding that “the requirement of injury in fact is a hard
5 floor of Article III jurisdiction that cannot be removed by statute”).

6 As Commonwealth standing jurisprudence follows the Supreme Court’s interpretation of
7 constitutional standing under the United States Constitution,¹¹ “statutory jurisdiction” is not a
8 separate source of jurisdiction under the CNMI Constitution.¹² Therefore, because 1 CMC §
9 9112(b) is not a separate source of standing, Plaintiff’s case can only proceed if it satisfies the
10 constitutional standing test.

11 **B. Constitutional Standing**

12 For a plaintiff to have standing, the plaintiff has the burden to show that:

13 (1) [it] suffered an *injury in fact*—an invasion of a *legally protected interest*
14 which is a) concrete and particularized, and b) actual or imminent, not conjectural
15 or hypothetical; (2) there [is] a causal connection between the injury and the
16 conduct complained of—the injury has to be fairly traceable to the challenged
17 action of the defendant, and not the result of independent action of some third
18 party not before the court; and (3) it [is] likely, as opposed to merely
19 speculative[,] that the injury will be redressed by a favorable decision. (emphasis
20 added).¹³

21 A plaintiff can establish that it suffered an injury in fact by showing that the Commonwealth
22 violated a statute that created a legal right in the plaintiff—as such a violation would be an invasion
23 of an interest that is legally protected. *See Warth v. Seldin*, 422 U.S. 490, 514 (1975) (“[the
24 legislature] may create a statutory right or entitlement the alleged deprivation of which can confer

22 ¹¹ *Atalig*, 2013 MP 11 ¶ 10-11.

23 ¹² The Court’s finding that “statutory standing” is not recognized in the CNMI is consistent with recent CNMI Supreme
24 Court rulings. *See Blanco-Maratita v. Borja*, 2017 MP 06 ¶ 14 (finding that “[i]n order to have standing, a plaintiff”
must satisfy the constitutional standing requirements).

¹³ *Id.* (quoting *Estate of Ogumoro v. Han Yoon Ko*, 2011 MP 11 ¶ 19).

1 standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the
2 absence of statute”); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (finding that
3 the Legislature may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries
4 that were previously inadequate in law”).

5 The Commonwealth created a right in the CNMI Administrative Procedures Act (“CAPA”)
6 for “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved
7 by agency action, [to seek] judicial review of the action.” 1 CMC § 9112(b). “‘Agency action’
8 includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or
9 denial thereof, or failure to act.”¹⁴ When reviewing “agency action” under 1 CMC §9112(b), courts
10 use the “arbitrary and capricious” standard.¹⁵ Therefore, for an unsuccessful bidder to show that an
11 agency action caused it to suffer an injury in fact, the bidder must make a *prima facie* showing that
12 the agency acted arbitrarily and capriciously.¹⁶

13 The phrase “arbitrary and capricious” under 1 CMC § 9112 is not defined by the statute.
14 However, the CNMI Supreme Court has defined it as a “willful and unreasonable action without
15 consideration or in disregard of facts or without determining principle.”¹⁷ Agency action will be
16 overturned under the “arbitrary and capricious” standard if:

17 the agency has relied on factors the Legislature has not intended it to consider,
18 entirely failed to consider an important aspect of the problem, offered an
19 explanation for its decision that runs counter to the evidence before the agency, or
is so implausible that it could not be ascribed to a difference in view or the
product of agency expertise.¹⁸

20 ¹⁴ 1 CMC § 9101(c).

21 ¹⁵ *Pac. Sec. Alarm, Inc. v. Commonwealth Ports Auth.*, 2006 MP 17 ¶ 13-14.

22 ¹⁶ *See id.* ¶ 13-15; *see also Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 962-64 (4th Cir. 1984); *B.K. Instrument,*
Inc. v. United States, 715 F.2d 713, 717-19 (2d Cir. 1983); *Hayes International Corp. v. McLucas*, 509 F.2d 247 (5th
23 Cir.), cert. denied, 423 U.S. 864 (1975); *Airco Inc. v. Energy Research and Development Administration*, 528 F.2d 1294
(7th Cir. 1975) (per curiam); *Armstrong & Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir.1975) (per curiam);
Scanwell Labs., Inc. v. Shaffer, 137 U.S. App. D.C. 371, 424 (1970).

24 ¹⁷ *Calvo v. N. Mariana Islands Scholarship Advisory Bd.*, 2009 MP 2 ¶ 10 (quoting *In re Blankenship*, 3 NMI 209, 217
(1992); *see also Pac. Sec. Alarm, Inc.*, 2006 MP 17 ¶ 14.

¹⁸ *Calvo*, 2009 MP 2 ¶ 10 (quoting *In re Blankenship*, 3 NMI at 217 (internal quotation marks omitted)).

1 The arbitrary and capricious standard has a very narrow scope and “a court is not to substitute its
2 judgment for that of the agency.”¹⁹ Furthermore, agency actions are “entitled to a presumption of
3 regularity”²⁰ and “an agency should not be required to provide an explanation unless the
4 presumption of regularity has been rebutted by evidence suggesting that the agency decision is
5 arbitrary and capricious.”²¹

6 Here, Plaintiff made several arguments that DPL acted arbitrarily and capriciously when it
7 did not negotiate with it despite negotiating with the second place bidder, Blue Oasis. These
8 arguments are: (1) DPL’s decision to not negotiate with Plaintiff violated its duty to “develop
9 administrative policies, procedures, and controls related to public land [to ensure that] Public land is
10 utilized in an efficient and objective manner” in violation of 1 CMC § 2808(c)(2); (2) DPL is not
11 authorized by its regulations to cancel bid requests or reject individual responses; and (3) NMIAC §
12 145-70-501(f) required Plaintiff to present its “best and final offer.”²² However, even accepting all
13 of Plaintiff’s factual allegations as true, none of Plaintiff’s arguments made a prima facie showing
14 that DPL acted arbitrarily and capriciously.

15 Plaintiff did not show that DPL violated 1 CMC § 2808(c)(2). DPL did not ignore
16 Plaintiff’s protest of its bid denial. Instead, DPL considered the remaining proposals after Blue
17 Oasis ended negotiations but decided against continuing the negotiations under RFP16-RED007
18 because it found that both the terms of the remaining bids and the amount of time that had passed
19 since the initial request for bids made continuing negotiations under RFP16-RED007 to not be in
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22 ¹⁹ *Pac. Sec. Alarm, Inc.*, 2006 MP 17 ¶ 14 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463
U.S. 29, 43 (1983).

23 ²⁰ *Pac. Sec. Alarm, Inc.*, 2006 MP 17 ¶ 15 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415
(1971)).

24 ²¹ *Pac. Sec. Alarm, Inc.*, 2006 MP 17 ¶ 15.

²² The parties did not dispute that Plaintiff is a person under CAPA, DPL is an agency, and that DPL performed an
action as defined under CAPA.

1 the best interests of the people of Northern Marianas descent.²³ DPL’s decision to cancel RFP16-
2 RED007 after about one year of its issuance and issue RFP17-RED005 to try to obtain better bids
3 was not an “unreasonable action [that] disregarded the facts.”²⁴ Though Plaintiff’s bid was
4 “responsive, exceed[ing] the minimum compensation required by DPL, and otherwise fully
5 [complied] with RFP16-RED007,”²⁵ without more, the Court “will not substitute its judgment for
6 that of the agency.”²⁶

7 Furthermore, though there is no provision in the Northern Marana Islands Administrative
8 Code (“NMIAC”) that expressly gives DPL the ability to cancel an RFP, NMIAC § 145-70-501
9 grants the Secretary of DPL broad discretion. NMIAC § 145-70-501 states that “DPL may issue
10 RFPs at the discretion of the Secretary.” Furthermore, there are no statutes or regulations that
11 require DPL to award a contract after a request for proposals to any bidders, and DPL expressly
12 stated in writing its right to not award a contract in RFP16-RED007 by stating:

13 The Department [of] Public Lands reserves the right to reject any or all proposals and to
14 waive any imperfection in any proposal, if, in its opinion to do so would be in the best
interest of the public land beneficiaries.²⁷

15 Therefore, the Secretary of DPL has the discretionary authority to cancel RFP16-RED007

16 Finally, DPL did not violate any requirement under NMIAC § 145-70-501(f). NMIAC §
17 145-70-501(f) states that “DPL shall always request a best and final offer on the amount of rent
18 payments and public benefit options *before selecting the final proposal*” (emphasis added). Here,
19 none of the bidders of RFP16-RED007 were selected. Therefore, NMIAC § 145-70-501(f) does not
20 apply here.

22 ²³ See *USA Fanter Corp. v. DPL*, Civ. No. 17-0258 (NMI Super. Ct. Oct. 25, 2017) (Pl.’s Compl. Ex. 5).

23 ²⁴ *Calvo*, 2009 MP 2 ¶ 10.

24 ²⁵ *USA Fanter Corp. v. DPL*, Civ. No. 17-0258 (NMI Super. Ct. Oct. 25, 2017) (Pl.’s Compl. at 4).

²⁶ *Pac. Sec. Alarm, Inc.*, 2006 MP 17 ¶ 14.

²⁷ *USA Fanter Corp. v. DPL*, Civ. No. 17-0258 (NMI Super. Ct. Oct. 25, 2017) (Pl.’s Compl. Ex. 1).

1 Because Plaintiff failed to show that DPL acted arbitrarily and capriciously with respect to
2 its handling of Plaintiff's submission for RFP16-RED007, Plaintiff did not establish that DPL
3 violated 1 CMC § 9112(b). Because Plaintiff did not show that DPL violated 1 CMC § 9112(b),
4 Plaintiff did not demonstrate that it suffered an injury in fact. Therefore, because Plaintiff did not
5 suffer an injury in fact, Plaintiff did not establish that it has constitutional standing to challenge
6 DPL's decision to revoke RFP16-RED007 in lieu of negotiating with Plaintiff.

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V. CONCLUSION

For the foregoing reasons, DPL's Motion to Dismiss is hereby **GRANTED**. Plaintiff's claims presented in the Petition and Complaint are hereby **DISMISSED**.

IT IS SO ORDERED this 19th day of March, 2019.

/s/
JOSEPH N. CAMACHO
Associate Judge