

7-22-99

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
26
27
28

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

COMMONWEALTH DEVELOPMENT)
AUTHORITY)
)
Plaintiff,)
)
v.)
)
GUERRERO BROTHERS, INC., et al,)
)
Defendants/Third Party)
Plaintiffs,)
)
COMMONWEALTH PUBLIC SCHOOL)
SYSTEM,)
)
Third Party Defendant.)

Civil Action No. 97-677

**ORDER GRANTING THIRD
PARTY DEFENDANT'S
MOTION TO DISMISS**

I. PROCEDURAL BACKGROUND

This matter came before the Court on Third Party Defendant Commonwealth Public School System's motion to dismiss. Sally B. Pfund, Esq. appeared on behalf of the Commonwealth Public School System. Douglas F. Cushnie, Esq. appeared on behalf of Defendant/Third Party Plaintiffs Guerrero Brothers, Inc. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

/

FOR PUBLICATION

*Pfund
Cushnie
S.G.*

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
26
27
28

II. FACTS

In August 1993, Third Party Plaintiff Guerrero Brothers, Inc. ("GBI") entered into a contract with Third Party Defendant Commonwealth Public School System ("PSS") to construct a new high school on Tinian. The contract included a provision that any disputes arising under the contract must be submitted for review pursuant to the PSS Procurement Regulations ("PSSPR").^{1/} In order to finance the school construction, GBI made application for funding to the Bank of Saipan. The Bank of Saipan approved the loans on the condition that GBI obtain a loan guaranty from the Commonwealth Development Authority ("CDA") in favor of Bank of Saipan. GBI subsequently sought and obtained the requisite guaranty from CDA.

During the course of construction, GBI filed several claims with PSS for additional compensation under the contract. The claims were reviewed by PSS and the parties engaged in discussions in an attempt to resolve them. However, many of GBI's claims went unresolved and GBI abandoned work on the project.

In February 1997, PSS issued a cure notice to GBI on the grounds that GBI had wrongfully abandoned the project and that it failed to complete performance under the contract. PSS stated that it would terminate the contract if GBI had not cured their default within ten days.

In April 1997, PSS terminated the contract for default after GBI failed to resume work on the project. In the notice of termination, PSS advised GBI of its right to appeal the decision under § 5-201 of the PSSPR. GBI subsequently filed a timely notice of appeal to the Commissioner of Education.

In May 1997, CDA served GBI with a notice of default and in June 1997, CDA brought suit against GBI seeking judgment in the amount of its guaranty, plus interest and additional relief.

In August 1997, GBI answered CDA's complaint and filed an amended third party complaint joining PSS as a third party defendant.

^{1/}See PSS Contract No. C30053, § 3, attached as Exhibit 1 to Motion to Dismiss.

1 In January 1999, PSS filed the instant motion to dismiss contending that the Court lacks
2 jurisdiction over the subject matter in GBI's third party action as GBI has not exhausted its
3 administrative remedies.

4 III. ISSUES

5 1. Whether GBI is required to exhaust its administrative remedies?

6 IV. ANALYSIS

7 A. Motion to Dismiss

8 A Rule 12(b)(1) motion is a proper motion for challenging the court's subject matter
9 jurisdiction. Bauer v. McCoy, 1 CR 248 (D.N.M.I. 1982). If the court determines that it lacks
10 jurisdiction and dismisses a complaint under Rule 12(b)(1), the court should proceed no further.
11 Rivera v. Guerrero, 4 N.M.I. 79 (1993).

12 3. Exhaustion of administrative remedies

13 In support of the instant motion, PSS contends that the Court lacks subject matter over GBI's
14 third party complaint as it has failed to exhaust its administrative remedies as provided in the PSSPR.

15 It is a jurisdictional prerequisite under the NMI Administrative Procedure Act ("APA") that
16 a party exhaust its administrative remedies before seeking judicial review. Rivera, supra; I.G.I.
17 General Contractor & Dev., Inc. v. PSS, No.93-031 (N.M.I. Apr.28, 1999)(slip op. at 6-7).

18 The contract between GBI and PSS expressly provides that any disputes arising under the
19 contract *shall* be submitted for administrative review as provided in PSSPR § 5-201 before any action
20 may be brought at law or equity." Here, GBI has already appealed the decision by PSS to terminate
21 the construction contract under § 5-201(1) and has been fully participating in the underlying
22 administrative proceedings.^{2/} Therefore, until final agency action has been ascertained, the Court
23 finds that it lacks subject matter jurisdiction over GBI's third party action against PSS. As such, the

24 ^{2/}Id. at § 3.

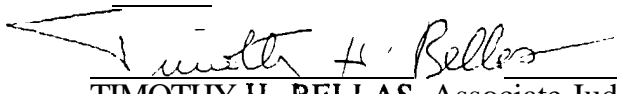
25 ^{3/}See Declaration of Timothy M. Connor, attached as Exhibit 7 to Motion to Dismiss.

1 Court finds it appropriate to dismiss GBI's third party action against PSS under Com.R.Civ.P.
2 12(b)(1)."

3 **V. CONCLUSION**

4 For all the reasons stated above, Third Party Defendant PSS's motion to dismiss is
5 **GRANTED.** GBI's Third Party Complaint shall be dismissed without prejudice.

6 **2 2 JUL 1999**
7 So ORDERED this d a y o f ~~June, 1999~~.

8
9
10 
11 TIMOTHY H. BELLAS, Associate Judge

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

⁴Because GBI's failure to exhaust its administrative remedies is dispositive in this case, the Court will not address the issue of whether the Commonwealth has waived sovereign immunity.