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3 **FOR PUBLICATION**
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5 **IN THE SUPERIOR COURT**
6 **FOR THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 SECRETARY OF PUBLIC WORKS JUAN S.
9 REYES and TANO GROUP, INC.,

10 Plaintiffs,

11 v.

12 RITA H. INOS as Commissioner of Education,
13 HERMAN S. SABLAN as Director of
14 Procurement and Supply, HERMAN T.
15 GUERRERO as Chairperson of the CNMI
16 Board of Education, and the CNMI PUBLIC
17 SCHOOL SYSTEM,

18 Defendants.

Civil Action No. 03-0052E

**ORDER GRANTING PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT**

19 **I. INTRODUCTION**

20 THIS MATTER came before this Court for a hearing on Plaintiff’s *Motion for Summary*
21 *Judgment* and Defendant’s *Cross-Motion for Summary Judgment* on June 26, 2003. The Plaintiffs Juan
22 S. Reyes, Secretary of Public Works, and Tano Group, Inc., were represented by Benjamin Sachs and
23 Rexford C. Kosack respectively. The Defendants, Rita H. Inos, Commissioner of Education, Herman S.
24 Sablan, Director of Procurement and Supply, Herman T. Guerrero, Chairperson of the CNMI Board of
25 Education, and the CNMI Public School System, were represented by Robert O’Connor and Heather L.
26 Kennedy.

27 **II. FACTS**

28 The essential facts are not in dispute. This case involves a contract dispute over payment for the
construction of an elementary school on Rota.

On July 27, 1999, the Legislature passed PL 11-89. Section 4(a) of that law included a provision
for the construction of the Sinapalu Elementary School on Rota. *See* Pls.’ Ex. A. Tano Group, Inc.
 (“Tano”) was awarded the contract for construction of the school. *See* Pls.’ Mot. For Summ. J. at 2.

1 Lieutenant Governor Jesus R. Sablan submitted a letter to the Legislature acknowledging a conflict in said
2 law because of the designations of the Secretary of Public Works and the Commissioner of Education both
3 as Expenditure Authority. *See* Pls.’ Ex. B. The Legislature then, through PL 11-100 amended Section
4 6 of PL 11-89, relating to “Expenditure Authority” to state:

5 Expenditure Authority. Expenditure authority for the funds appropriated by this Act shall
6 be the Commissioner of the Public School System in consultation with the Chairperson of
7 the Board of Education and in coordination with the CIP Administrator in the Office of
the Governor. The contracting officer of the projects identified in Section 4 of Public Law
11-89 shall be the Secretary of the Department of Public Works.

8 PL 11-100, § 1 (*see* Pls.’ Ex. C).

9 The subsequently issued construction contract provided that the Contracting Officer, solely, had
10 the power to bind the Commonwealth regarding the project. *See* Pls.’ Ex. E, Agreement and Contract for
11 Construction (“Contract”), Clause 7(a).

12 The complete contract price was \$1,783,585, and the project was to be completed 225 days from
13 the commencement of work. Contract, Clause 1(a). Tano completed the project 244 days after the
14 originally scheduled completion date. *See* Pls.’ Mot. For Summ. J. at 3. Department of Public Works
15 Secretary, Juan S. Reyes (Plaintiff) determined that Tano was entitled to an excusable delay of a 125-day
16 extension, but was subject to liquidated damages for the additional 119 days of late performance. *Id.*
17 Total liquidated damages were assessed at \$500 per day totaling \$59,500. *Id.* Secretary Reyes
18 concluded the project was complete according to specification and that Tano was due an additional
19 \$51,271.19 for extra work performed. *Id.* The \$51,271.19 was subtracted from the \$59,500 liquidated
20 amount, with Tano finally owing \$8,228.81. The remaining balance due to Tano under the original contract
21 price was \$241,274.94, which then had the amount Tano owed subtracted, to reach the final figure of
22 \$233,046.31. *Id.* The Commissioner of Education, Rita H. Inos (Defendant) declined approval of the
23 change order detailing the figures above. *Id.* A change order is essentially a legal amendment to a contract
24 altering the terms, i.e., granting an extension of time for performance, or authorizing additional work
25 beyond the scope of the original contract. Because the change order was not approved, Tano remains
26 uncompensated for the amount designated in the order. *Id.* at 4.

27 Tano requested that the Office of Procurement and Supply (“P&S”) evaluate the issue and
28 determine that the Expenditure Authority (Commissioner of Education) was bound by the actions of the

1 Contracting Officer (Secretary of Public Works). *Id.* P&S ruled against Tano on December 31, 2002.
2 *Id.* Examining the issue through its own regulations, *CNMI Procurement Regulations*, 23 Com. Reg.
3 17,856 (May 24, 2001) (“Procurement Regulations”), P&S tendered its ruling on two basic conclusions.
4 First, that the term “Contracting Officer” does not exist anywhere within the Procurement Regulations
5 universe. Second, that the Commissioner of the Public School System (“PSS”) (a.k.a. Commissioner of
6 Education) is the official with contracting authority, precluding the Secretary of the Department of Public
7 Works (“DPW”) (a.k.a. Secretary of Public Works) from having any power to bind the Commonwealth.
8 *See* Pls.’ Ex. K, P&S Decision of December 31, 2002 (“P&S Decision”) at 9.

9 The Plaintiffs appealed the case to this Court for a determination on the matter. The Defendants
10 submitted a cross-motion for summary judgment. Both sides agree that the issues in this matter are entirely
11 legal, and as such, warrant adjudication by summary judgment.

12 **III. DISCUSSION**

13 1. Jurisdiction

14 This Court’s jurisdiction to review the agency action arises from Commonwealth Code, Title 1,
15 Section 9112. Under Section 9112(b), “a person suffering legal wrong because of agency action, or
16 adversely affected or aggrieved by agency action, is entitled to judicial review . . . in the Commonwealth
17 Superior Court.” 1 CMC § 9112(b)

18 A. Agency Action

19 Under 1 CMC § 9112(b), agency action is a threshold requirement of conduct by an administrative
20 entity that must be shown to trigger judicial review. The Administrative Procedure Act, 1 CMC §§ 9101,
21 *et seq.* (“APA”) defines the terms “agency,” “agency action,” “decision,” and “order.” “‘Agency’ means
22 each authority of the Commonwealth government, whether or not it is within or subject to review by
23 another agency.” 1 CMC § 9101(b). “‘Agency action’ includes the whole or party of an agency rule,
24 order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 1 CMC § 9101(c).
25 “‘Decision’ means the whole or part of a final disposition of an agency in a hearing on a proposed
26 regulation.” 1 CMC § 9101(e). And “‘[o]rder’ means the whole or part of a final disposition, whether
27 affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making but
28 including licensing.” 1 CMC § 9101(h).

1 Administrative decisions must be final in order to be reviewed by the Superior Court. *Bitoy v.*
2 *Rodeo*, Civ. No. 93-1073 (Super. Ct. May 5, 1994) (Decision and order Granting Complainants' Motion
3 to Dismiss at 3-5). An administrative decision is final where it has arrived at its administrative conclusion
4 so that the proposed judicial involvement will be determinative. *Id.* at 3.

5 Agency action is 'final' if a minimum of two conditions are met: 'first, the action must mark
6 the consummation of the agency's decision making process. It must not be of a merely
tentative or interlocutory nature. And second, the action must be one by which rights or
obligations have been determined, or from which legal consequences will flow.'

7 *Gallo Cattle Co. v. U. S. Dep't of Agric.*, 159 F.3d 1194, 1198-99 (9th Cir. 1998).

8 The P&S decision marked the end of the administrative review of the contract dispute. As such,
9 the administrative decision was final and provides this Court with jurisdiction to hear the matter.

10 B. Legal Wrong Suffered From Agency Action

11 Tano claims it suffered financial detriment based on the decision rendered by P&S constituting a
12 legal wrong. DPW Secretary Reyes claims he suffered a legal wrong when he lost the ability and the
13 authority to administer the Contract he believed he was responsible for, as provided by law.

14 2. Standard of Review

15 A. Agency Actions

16 The standard for judicial review of agency action is set forth at 1 CMC § 9112(f). *Camacho v.*
17 *N. Marianas Ret. Fund*, 1 N.M.I. 362, 367 (1990). Section 9112(f) requires a reviewing court to
18 "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the
19 meaning or applicability of the terms of an agency action." 1 CMC § 9112(f). Administrative agency
20 decisions are reviewed at the trial court *de novo*. *In re San Nicolas*, 1 N.M.I. 329, 333-34 (1990).

21 B. Summary Judgment

22 Summary Judgment provides litigants with the ability to resolve matters with the use of pleadings,
23 interrogatories, admissions and affidavits, provided there is "no genuine issue as to any material fact and
24 that the moving party is entitled to judgment as a matter of law." Com. R. Civ. P. 56(c). Where no genuine
25 issue of material fact exists, the moving party is "entitled to judgment as a matter of law." *Eurotex*
26 *(Saipan), Inc. v. Muna*, 4 N.M.I. 280, 283 (1995). Judgment is determined based on an application of
27 the substantive law. *Santos v. Santos*, 4 N.M.I. 206, 209 (1994). Both parties agreed, in their pleading
28

1 and during oral presentation at the hearing on this matter, that no genuine material fact issues exist, and that
2 this matter must be resolved as matter of law.

3 3. The Procurement and Supply Decision

4 Although the focus of this matter centers around one single question, the main issue evolves into
5 many strains of analysis. The question is this: does the Secretary of the DPW, as Contracting Officer, or
6 the Commissioner of the PSS, as Expenditure Authority, have the capacity to bind the Commonwealth
7 regarding the Contract for construction of a Rota school? Although the issue is singular, the parties present
8 entirely different avenues in assessing the answer to our contractual quagmire.

9 A. Plaintiffs' Contention

10 The thrust of Plaintiffs' argument centers around the decision issued by P&S. Precisely, the
11 Plaintiffs believe that P&S reached its incorrect decision largely on the basis that the term "Contracting
12 Officer" as identified in PL 11-100, exists nowhere in the Procurement Regulations. In Plaintiffs' view,
13 P&S's decision constituted flawed reasoning based on the hierarchy of statutes over regulations. If PL 11-
14 100 created the position of "Contracting Officer," then a claim by P&S, that the position does not exist,
15 cannot be valid. Essentially, the statute should control, and since the position was created by statute, the
16 statute should be read in conjunction with the Contract to give the Contracting Officer the authority the
17 Legislature intended through enacting the legislation.

18 The Plaintiffs contend that while the term Contracting Officer does not exist in the Procurement
19 Regulations, it does exist extensively in the Federal contract regulation scheme. The legislative history of
20 PL 11-89 and the addition of a "Contracting Officer" through amendment of PL 11-89 by PL 11-100,
21 provide the supposition that the legislature intended the Contracting Officer to have the powers detailed
22 above.

23 B. Defendants' Contention

24 The Contract itself provides, that for guidance purposes, the parties should look to the Procurement
25 Regulations to resolve disputes. The Procurement Regulations define the role of the Expenditure Authority,
26 but do not define precisely what a Contracting Officer is. A plain meaning review of the Procurement
27 Regulations weighs in favor of providing the Expenditure Authority with the power to make the
28 determinations regarding the Contract.

1 The Defendants assert that the legislative history supports this position, based on an analysis of
2 bond, when taken in conjunction with the amendment. An amendment to PL 11-89 was made for the
3 purpose of conforming the bond requirement designating the Commissioner of the PSS as the Expenditure
4 Authority. In so doing, the Legislature provided the Expenditure Authority with the power the Legislature
5 originally intended, in proposed House Bill No.11-443 (prior to its amendment to House Bill No. 11-443,
6 House Draft 1). The Defendants state that any other interpretation would amount to fraud on behalf of the
7 Legislature. At a minimum, the legislative history suggests that decisions should be made by the Contracting
8 Officer and the Expenditure Authority in tandem.

9 Finally, the Defendants assert that the Commissioner of the PSS cannot be estopped from using
10 her authority in matters concerning the Contract. Because she could not effectively waive her power, then
11 the decision making authority was never transferred to the Contracting Officer.

12 4. Does the Contracting Officer or the Expenditure Authority Have the Power to Bind the
13 Commonwealth?

14 The Plaintiffs accurately characterize the issue as “not who gets to make payments, but who gets
15 to decide whether payment is due.” The statute clearly creates the role of Contracting Officer concerning
16 the construction of the school. PL 11-100, § 1. Reaffirming that distinction, the Legislature again amended
17 the law, but left the designation of the Secretary of the DPW as the Contracting Officer within the statutory
18 text. PL 12-62, § 2.

19 It is a basic legal premise that statutes control over regulations and regulations control over
20 contracts. *Farrell v. United States*, 313 F.3d 1214, 1219 (9th Cir. 2002). Additionally, statutes void
21 a regulation when it conflicts with the statute. *K-Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 294 (1988).
22 The P&S decision refused to acknowledge the existence of a Contracting Officer stating:

23 In the Federal regulatory scheme, a Contracting Officer performs these responsibilities.
24 In the CNMI contracting scheme, as set out in the CNMI_PR, the Expenditure Authority
25 has these responsibilities. There is no “Contracting Officer” in the CNMI-PR.

26 P&S Decision at 7. Any application of regulations, as stated above, must conform to the applicable
27 statutes. Basing an agency decision on the notion that something that does not exist within the confines of
28 its own regulations, when it does exist within the universe of Commonwealth statutes, is error.

The Contract requires a layered approach concerning interpretation of the instrument:

1 Interpretation and Validity

2 (a) This contract shall be interpreted under the laws of the Commonwealth of the
3 Northern Mariana Islands. Where no local law is available to resolve a particular
4 issue, reference shall be had to U.S. federal procurement law and cases similar to
5 the matter in dispute, including the Federal Acquisition Regulation and decisions
6 interpreting it, as well as scholarly treatise on U.S. federal procurement law.

7 Contract, General Condition 5(a). The first sentence alone demands recognition of the Contracting Officer
8 as created by PL 11-100. The second sentence requires that where no local law exists on the subject,
9 analogous federal alternatives should be examined. The basis of the P&S decision was that the position
10 of “Contracting Officer” did not exist within the Procurement Regulations, and the agency was obligated
11 by the Contract provisions to determine what the role of “Contracting Officer” entailed. Within General
12 Condition 5(a) is guidance for understanding the role of the Contracting Officer, and that guidance occurs
13 through analysis of federal procurement law, cases, regulations, decisions and treatises. P&S failed to
14 follow that step.

15 Contracting Officers are “those individuals with the authority to execute contractual documents that
16 bind the Government and to sign determinations and findings and other internal documents.” J. CIBNIC &
17 R. NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS 34 (3d ed. 1995). Furthermore, Federal
18 Acquisition Regulations define Contracting Officers as those persons “with the authority to enter into,
19 administer, and/or terminate contracts and make related determinations and findings.” 48 C.F.R. § 2.101
20 (2003). P&S was required to look to the federal scheme in interpreting the Contract provisions. Using
21 these resources to define the authority and understand the role of the Contracting Officer was the proper
22 course of action for P&S to take. This is especially so in light of the following statement by P&S: “[t]he
23 General Conditions which have been made part of this contract are virtually identical with Federal
24 provisions giving finality to Contracting Officer decisions regarding time extensions and equitable
25 entitlement.” P&S Decision at 7. P&S recognized the Contract’s General Conditions as being similar to
26 federal provisions, and in absence of law setting forth the responsibilities and authority of the Contracting
27 Officer in the CNMI, P&S should have used available federal resources to aid in interpretation, per the
28 Contract provisions.

29 A. Legislative History

30 “It is appropriate to turn to legislative history for guidance where a statute ‘may reasonably be read

1 in two ways, or where no single path of meaning clearly appears.” *Babauta v. Superior Ct.*, 4 N.M.I.
2 309, 312 n.18 (1995) (quoting *Songao v. Commonwealth*, 4 N.M.I. 186, 190 n.18 (1994)). When a
3 statute is clear and unambiguous there is no need to go beyond the language of the statute for interpretation
4 purposes. *Aguon v. Marianas Pub. Land Corp.*, 2001 MP 4 ¶ 30.

5 However, when a statute is unclear, the Court's objective then is to ascertain and give
6 effect to the intent of the legislature. In discerning legislative intent, the statute must be read
7 as a whole, and not as isolated words contained therein. The intent of the legislature may
8 also be determined from irrelevant legislative history, including standing committee reports,
9 which are highly persuasive evidence of legislative intent.

10 *Id.* (internal citations omitted). This Court must look to the legislative history in order to ascertain who the
11 Legislature intended to have the authority to bind the Commonwealth.

12 House Draft 1 of House Bill No. 11-443 (which became PL 11-89), the genesis of the Contract,
13 amended the designation of “Expenditure Authority,” changing the designation from the Commissioner of
14 the PSS to the Secretary of the DPW. *See* Pls.’ Ex. M. This change in who was to assume the role of
15 Expenditure Authority was precipitated by Rep. Hofschneider. *See* Pls.’ Ex. N, Journal of House of
16 Representatives Session at 45. Speaker of the House Benavente stated during that session:

17 [T]his should be separated from the idea of a expenditure authority for operations of PSS
18 versus expenditure authority for construction of buildings and in this case, yes, we are
19 talking about construction of buildings our classrooms. But whenever we have
20 construction of buildings for this government we provide that over to the Department of
21 Public Works where they have the technical people to review those particular projects .
22 . . .

23 *Id.* at 49. After some deliberation on the matter, including considering whether DPW or the Commissioner
24 of the PSS should possess the authority, the amendment to House Bill No. 11-443 was adopted. *Id.* at
25 51.

26 Acting Governor Sablan determined that, based on the representation in the bond for this project,
27 the Commissioner of the PSS should be granted Expenditure Authority, in order to avoid losing funds
28 associated with the project. *See* Pls.’ Ex. B, Governor Sablan’s Transmittal Letter. House Bill No. 11-
455, House Draft 1, Senate Draft 1 (which became PL 11-100) amended Section 6 of PL 11-89 to
designate the Commissioner of the PSS as the Expenditure Authority and the Secretary of the DPW as the
Contracting Officer. *See* Pls.’ Ex. P. Rather than provide the Commissioner of the PSS with the sole
authority over the contract, the Legislature sought to retain the power it had granted to the Secretary of

1 DPW, through the creation of the Contracting Officer role. That role should not have been ignored by P&S
2 in issuing its decision.

3 It seems clear that the Legislature intended for the Contracting Officer to have authority over the
4 Contract, particularly over the technical aspects. The intent of the Legislature made its way into the
5 language of the Contract itself. It is therefore, also important to note the role of the Contracting Officer as
6 expressed in the contract:

7 Authorities and Limitations

8 (a) All work under the Contract shall be performed under the general direction of
9 the Contracting Officer, who alone shall have the power to bind the
Commonwealth and to exercise the rights, responsibilities, authorities and functions
vested in him by the contract documents

10 Contract, Clause 7(a). The Commissioner of the PSS executed the Contract with the above provision
11 included. P&S also submitted a certification that the “contract is in compliance with CNMI Procurement
12 Regulations.” *See* Pls.’ Ex. E.

13 Government agencies involved in the same contract are bound by the actions of the Contracting
14 Officer. *United States v. Mason & Hanger Co.*, 260 U.S. 323, 326 (1922). “A citizen has the right to
15 expect fair dealing from his government, and this entails in the present context treating the government as
16 a unit rather than as an amalgam of separate entities.” *S & E Contractors, Inc. v. United States*, 406
17 U.S. 1, 10 (1972) (internal citation omitted). Where the Contracting Officer is imbued with decision
18 making powers and has the authority to bind the Commonwealth, those decisions must be respected by
19 other agencies involved in the projects. Individuals and corporations involved in ventures with the
20 Commonwealth Government have the right to expect that they are dealing with the Government as a whole,
21 and not as diffuse, splintered entities. If the Legislature chooses to create a Contracting Officer, and the
22 subsequent contract provides that officer with certain authority, the actions of the officer that are within that
23 authority should control. The Contract provided directly to the Contracting Officer, the power to determine
24 the adequacy of performance and when time extensions were permissible. “[T]he Contracting Officer will
25 . . . extend the contract time when, in his final judgment, the findings of fact justify such an extension, and
26 his findings of fact thereon shall be final and conclusive.” Contract, Clause 15(a).

27 [A]cceptance by the Commonwealth shall be made as promptly as practicable after the completion
28 and inspection of all work required by the Contract. Acceptance shall be final and conclusive
except as regards latent defects, fraud, or such gross mistakes as may amount to fraud , or as

1 regards the Commonwealth's right under any warranty or guarantee.

2 Contract, Clause 35(f). Clause 35(f), when read in conjunction with Clause 7(a), which provides: "who
3 alone shall have the power to bind the Commonwealth and to exercise the rights, responsibilities, authorities
4 and functions vested in him by the contract documents," places the authority of acceptance under control
5 of the Contracting Officer. Contract, Clause 7(a).

6 "Additive Work and Equitable Adjustments" were also powers granted to the Contracting Officer
7 under the Contract. Authority to "make any change in the work within the general scope of the contract"
8 is expressly granted to the Contracting Officer. Contract, Clause 19(a). "Equitable Adjustments" refers
9 to the power to increase or decrease work or time for performance, and is also specifically granted.
10 Contract, Clause 19(d). Finally, the Contracting Officer has the ultimate authority to issue a "unilateral
11 determination" adjusting the contract price or granting time extensions. Contract, Clause 20(f). The
12 authority of the Contracting Officer in the above matters is final and conclusive.

13 The "Expenditure Authority" is not granted such powers under the Contract. There are provisions
14 within the Contract regarding disputes between the Contractor (Tano) and the Commonwealth concerning
15 interpretation, performance and compensation due under the Contract, that may involve the Expenditure
16 Authority, depending on whether a dispute is filed. *See* Contract, Clauses 17(b) and (f). However, the
17 creation of a Contracting Officer by the Legislature is effectively an implied repeal of those Expenditure
18 Authority powers, because they are inconsistent with the statute.

19 B. Role of the Expenditure Authority

20 An Expenditure Authority is "that public official who may expend, obligate, encumber or otherwise
21 commit public funds under the Planning and Budgeting Act or under any annual appropriation act."
22 Procurement Regulations § 1-201(13). Under contracts where no Contracting Officer is present, the
23 Expenditure Authority would have the responsibility to supervise and inspect projects.

24 It is the responsibility of the official with expenditure authority to ensure that the contractor
25 does not sign the contract or incur any expenses under it until all necessary government
26 signatures have been obtained. The supervision, inspection, and administration of a
government contract is the primary responsibility of the official with expenditure authority.

27 Procurement Regulations § 2-104(9). This particular section of the Procurement Regulations however,
28 does not survive enactment of the statute, PL 11-100, which created a Contracting Officer for this project.

1 The statute, and vis-a-vis the statute, the Contract, provide that the Contracting Officer is the individual who
2 possesses the authority for supervision and inspection.

3 As defined in the Procurement Regulations, the “Expenditure Authority” has the power to “expend,
4 obligate, encumber or otherwise commit public funds” in contract matters. Procurement Regulations § 1-
5 201(13). Section 2-104 of the Procurement Regulations provides a ten-step process that a contract must
6 go through from its inception. They are not part of the definition of what it means to assume the role of the
7 Expenditure Authority under a plain meaning analysis. The role of the Expenditure Authority can still be
8 employed to prevent fraud and misuse of public funds, but does not involve, in this instance, the
9 management of a construction contract. The Expenditure Authority still has the power to expend, obligate,
10 encumber and commit public funds, but nowhere does this definition include administration of projects.

11 5. Koblerville Contract

12 Also at issue is the disposition of disputes concerning the Koblerville Contract. Tano filed a dispute
13 with the Contracting Officer, Secretary Reyes, and also submitted a copy to P&S. *See* Pls.’ Mot. For
14 Summ. J. at 45. P&S directed Tano to re-file their dispute with the Commissioner of the PSS. *Id.*

15 Central to this question is the defining of who is the official with “contracting authority” who is
16 responsible for “attempt[ing] to resolve the dispute by mutual agreement” under Procurement Regulations
17 § 6-201. Under the analysis presented in this Order, the individual with “contracting authority” is the
18 Contracting Officer. Public Law No.11-100, § 1 designated the Secretary of the Department of Public
19 Works as the Contracting Officer, and therefore he has the contracting authority under the contract. Thus,
20 P&S is required to abide by the decisions of the Contracting Officer.

21 **IV. ORDER**

22 Plaintiffs’ motion for Summary Judgment is **GRANTED**. In view of the foregoing, the Defendants’
23 Motion for Summary Judgment is **DENIED**.

24
25 SO ORDERED this 29th day of July 2003.

26
27 /s/
28 David A. Wiseman
Associate Judge