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

WESTERN EQUIPMENT, INC., and DRC)
PACIFIC, INC.,)
)
Plaintiffs,)
)
v.)
)
THE OFFICE OF THE ATTORNEY)
GENERAL, and ATTORNEY GENERAL)
HERB SOLL, both individually and in his)
capacity as the Attorney General, and)
ASSISTANT ATTORNEY GENERAL)
MURPHY PETERSON, both individually)
and in his capacity as Assistant Attorney)
General, and the SECRETARY OF)
PUBLIC WORKS, JUAN B. CEPEDA,)
and the DIRECTOR OF PROCUREMENT)
AND SUPPLY, HERMAN S. SABLAN,)
)
Defendants.)
_____)

Civil Action No. 01-0390
**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

This matter came before the court on September 18, 2001, in Courtroom 220 at 9:00 a.m. on Defendants' Motion to Dismiss. Attorney General Herbert D. Soll, Esq., and Assistant Attorney General David Lochabay, Esq., appeared on behalf of Defendants. Stephen J. Nutting, Esq., appeared on behalf of Plaintiff Western Equipment, Inc., and Plaintiff DRC Pacific, Inc. The court, having reviewed the briefs, memoranda and declarations and having heard and considered the arguments of counsel, now renders its decision.

FOR PUBLICATION

1 **II. FACTS**

2 On December 18, 2000, the Secretary of Public Works (Juan B. Cepeda) and the Director of
3 Procurement and Supply (Herman S. Sablan) issued an Invitation for Bids No. DPW00-IFB-065 (IFB)
4 for the construction of the new adult correctional facility (prison project). Plaintiffs Western Equipment,
5 Inc. and DRC Pacific (Plaintiffs) submitted a bid on the prison project. Telesource, a rival construction
6 company, also submitted a bid on the project.

7 On April 9, 2001, the bids were opened and it was determined that Telesource had submitted the
8 lowest bid.

9 On April 20, 2001, however, Telesource was notified that it did not qualify for “local preference”
10 under Public Law 11-87 and therefore Telesource’s bid would be artificially inflated by 15%.

11 On April 23, 2001, Plaintiffs received a request for further information about its bid because it
12 had been determined that Plaintiffs were the lowest bidder after application of Public Law 11-87 to
13 Telesource’s bid.

14 On May 4, 2001, Telesource filed a protest with the Department of Public Works and the Office
15 of Procurement and Supply. Telesource asserted that Public Law 11-87 does not apply to the prison
16 project because Public Law 11-119, § 8 specifically exempts the prison project from application of the
17 “local preference” rule set forth in Public Law 11-87. Plaintiffs filed a response to Telesource’s protest
18 asserting that Public Law 11-87 did apply because the IFB stated that the awarding of the project “shall
19 be in full compliance with the CNMI procurement regulations . . .”

20 On June 4, 2001, Assistant Attorney General Murphy Peterson advised the Department of
21 Procurement and Supply that Public Law 11-119 effectively waived application of the CNMI
22 Procurement Regulations to the prison project and therefore the “local preference” rule did not apply.

23 On July 3, 2001, Telesource received an “Intent to Award” notice advising Telesource that it
24 would be awarded the contract for the prison project.

25 On July 12, 2001, Plaintiffs filed a complaint for declaratory and injunctive relief seeking: (1)
26 a temporary restraining order and a preliminary injunction enjoining Defendants from proceeding with
27 the process of awarding the contract for the prison project to Telesource; and (2) declaratory relief
28

1 concerning the applicability of Public Law 11-87; (3) damages and reasonable attorney fees pursuant
2 to 42 U.S.C. § 1983.

3 On August 1, 2001, Defendants filed a motion to dismiss the remaining causes of action pursuant
4 to Com. R. Civ. P. 12(b)(6) on the ground that Plaintiffs' complaint fails to state a claim under 42 U.S.C.
5 § 1983.

6 7 **III. ISSUE**

8 Whether the court shall grant Defendants' motion to dismiss pursuant to Com. R. Civ. P.
9 12(b)(6) on the ground that Plaintiffs have failed to state a claim under 42 U.S.C. § 1983 because
10 Attorney General Herbert Soll, Assistant Attorney General Murphy Peterson, Secretary of Public Works
11 Juan B. Cepeda, and Director of Procurement and Supply Herman S. Sablan cannot be sued for
12 monetary relief in their official capacities because they are not "persons" as set forth in 42 U.S.C. § 1983
13 and on the ground that Attorney General Herbert Soll and Assistant Attorney General Murphy Peterson
14 can not be sued in their individual capacities because they are entitled to qualified immunity.

15 16 **IV. ANALYSIS**

17 **A. Motion to Dismiss / Com. R. Civ. P. 12(b)(6).**

18 In considering a motion to dismiss for failure to state a claim upon which relief can be granted,
19 "the court must accept the allegations in the complaint as true and construe them in the light most
20 favorable to the plaintiff." *Govendo v. Micronesian Garment Mfg., Inc.*, 2 N.M.I. 270, 283 (1991), *citing*
21 *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990); *see also Bolalin v. Guam Publications, Inc.*, 4
22 N.M.I. 176, 179 (1994). Dismissal is improper unless the court is absolutely certain that the plaintiff
23 can prove no set of facts in support of his claim which would entitle him to relief. *Id.*, *see also Hishon*
24 *v. King & Spaulding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). The burden is on
25 Defendants in the present matter as "[t]he defendant must . . . demonstrate that, even after taking the
26 well pleaded facts as true, the plaintiff still fails to state a claim for relief." *Govendo v. Marianas Public*
27 *Land Corp.*, 2 N.M.I. 482, 490 (1992). "Dismissal can be based on the lack of a cognizable legal theory

1 or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
2 *Depts.*, 901 F.2d 696, 699 (9th Cir. 1990).

3
4 B. Plaintiffs Complaint Does Not Allege a Cause of Action Against Defendants in their Official
5 Capacity.

6 Defendants assert that they can not be sued in their official capacity under 42 U.S.C. § 1983
7 insofar as a such a suit is brought against a CNMI officer in his/her official capacity for damages. *See*
8 *DeNueva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992) (“Neither the CNMI nor its officers acting in their
9 official capacity can be sued under 42 U.S.C. § 1983”) *citing Will v. Michigan Department of State*
10 *Police*, 491 U.S. 58, 68-70, 109 S.Ct. 2304, 2310-11, 105 L.Ed.2d 45 (1989) (suit against officer in
11 official capacity is a suit against the official's office and is therefore no different from a suit against the
12 State itself).

13 Defendants are correct. Plaintiffs’ complaint, however, does not set forth a cause of action
14 against any of the Defendants in their official capacity. Accordingly, Defendants’ argument is
15 inconsequential.

16
17 C. Plaintiffs’ Complaint Against Defendants Soll and Peterson in their Individual Capacities.

18 Defendants Soll and Peterson assert that they are entitled to qualified immunity for suits brought
19 against them pursuant to 42 U.S.C. § 1983 in their individual capacities. Plaintiffs, however, contend
20 that the claims against Defendants Soll and Peterson are well plead and that Defendants Soll and
21 Peterson are not entitled to qualified immunity.

22 Officials who carry out executive and administrative functions and are sued for monetary relief
23 in their personal capacities may assert the defense of qualified immunity. *See Wood v. Strickland*, 420
24 U.S. 308, 321-22, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). Qualified immunity shields an official from
25 liability and suit. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).
26 An official is entitled to qualified immunity unless he “violate[s] clearly established statutory or
27 constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S.
28 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

1 “In a suit against an officer for an alleged violation of a constitutional right, the requisites of a
2 qualified immunity defense must be considered in proper sequence.” *Saucier v. Katz*, ___ U.S. ___ 121
3 S.Ct. 2151, 1254 (1001). “A court required to rule upon the qualified immunity issue must consider,
4 then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the
5 facts alleged show the officer's conduct violated a constitutional right?” *Id.*, 121 S.Ct. 2151 at 1255.
6 “This must be the initial inquiry.” *Id.* “If no constitutional right would have been violated were the
7 allegations established, there is no necessity for further inquiries concerning qualified immunity.” *Id.*
8 “On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the
9 next, sequential step is to ask whether the right was clearly established.” *Id.* “This inquiry, it is vital
10 to note, must be undertaken in light of the specific context of the case, not as a broad general
11 proposition; and it too serves to advance understanding of the law and to allow officers to avoid the
12 burden of trial if qualified immunity is applicable.” *Id.*

13 Stated alternatively, courts applying the qualified immunity defense must engage in a two-part
14 analysis: (1) whether the law governing the officer's conduct was clearly established, and if so, (2)
15 whether, under the law, a reasonable officer could have believed his conduct was lawful. *See Browning*
16 *v. Vernon*, 44 F.3d 818, 822 (9th Cir.1995). Plaintiffs bear the burden of proving the existence of a
17 “clearly established constitutional right.” *Id.* If Plaintiffs satisfy that burden, the burden shifts to
18 Defendants Soll and Peterson to establish that their actions were reasonable, even if they did violate
19 Plaintiffs’ “clearly established constitutional right.” *Id.*

20
21 1. Existence of Clearly Established Constitutional Right.

22 Defendants Soll and Peterson assert that no bidder can claim a constitutionally protected
23 property interest in being awarded a contract. Plaintiffs, however, contend that they have a “clearly
24 established constitutional right” to be given “local preference” and that Defendants Soll and Peterson’s
25 interference in the procurement process by awarding the contract to a construction company that does
26 not qualify for “local preference” deprived them of a constitutionally protected property interest.
27 Specifically, Plaintiffs assert that they were the “lowest responsible bidder” and thus had a property
28 interest in the award of the prison project contract.

1 A disappointed bidder may have a constitutionally protected property interest in the award of
2 a contract under 42 U.S.C.A. § 1983 if that interest is acknowledged by “existing rules or
3 understandings that stem from an independent source such as state law.” *Board of Regents v. Roth*, 408
4 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972), *see also Pataula Electric Membership Corp.*
5 *v. Whitworth*, 951 F.2d 1238, 1242 (11th Cir.), *cert. denied sub nom.* “The Court has also made clear
6 that the property interests protected by procedural due process extend well beyond actual ownership of
7 real estate, chattels, or money.” *Id.*, at 408 U.S. 571-572.

8 Pursuant to 11-87, 1 CMC § 7404 was amended to include subsections (d) and (g) which state:

9 (d) In contracting for capital improvements, public works, or
10 procurement of goods or services involving a contract amount of more
11 than \$5,000,000, a **Commonwealth agency shall give preference** for
12 award to a bidder or proposer who is otherwise qualified for award under
13 the particular solicitation and who for five (5) successive years prior to
14 submitting the bid or proposal has:

15 (1) continuously possessed a valid Commonwealth
16 business license; and

17 (2) filed all required Commonwealth employment, excise
18 tax, business gross revenue tax, and income tax returns
19 and paid all amounts owing on such returns; Provided,
20 that the bid or proposal is not more than fifteen (15%)
21 percent higher than the amount bid or proposed by any
22 competing contractor not so qualified.

23 (g) If any bidder or proposer selects and qualifies for a Commonwealth
24 Contractor preference, the Commonwealth agency shall, for evaluation
25 purposes only, adjust the original amounts bid or proposed by bidders not
26 selecting or not qualifying for the Commonwealth contractor preference
27 upward by fifteen percent (15%), but the final contract award shall be
28 based on the actual amount bid or proposed.

29 *See* Public Law 11-87, § 2 (emphasis added).

30 On December 18, 2000, Defendant Juan B. Cepeda, the Secretary of Public Works, and
31 Defendant Herman S. Sablan, the Director of Procurement and Supply, issued an Invitation for Bids
32 (IFB) for the construction of the new adult correctional facility (prison project) wherein it was expressly
33 stated that the bidding procedures for the prison project “shall be in full compliance with the CNMI
34 procurement regulations dated September 12, 1990, as amended.” *See* Plaintiff’s Complaint, Exhibit
35 1 (IFB). Pursuant to Public Law 11-87, a subsection of the Commonwealth Code incorporated in the

1 CNMI procurement regulations, “a Commonwealth agency shall give preference” to those firms
2 qualifying for “local preference.” See Public Law 11-87, § 2.

3 Plaintiffs assert that they qualify for “local preference” and therefore had a legitimate expectation
4 that they were entitled to be awarded the prison contract as the “lowest responsible bidder.” See
5 *Teleprompter of Erie, Inc. v. City of Erie*, 567 F.Supp. 1277 (W.D.Pa.1983) (an unsuccessful bidder who
6 was the “lowest responsible bidder” in full compliance with the specifications of the bidding procedure
7 had a legitimate expectation, and therefore a property interest, in being awarded the contract a statute
8 even if the statute reserved to the government the right to reject all bids), see also *Douglas N. Higgins,*
9 *Inc. v. Florida Keys*, 565 F.Supp. 126 (S.D.Fla.1983); *Teleprompter of Erie, Inc. v. City of Erie*, 537
10 F.Supp. 6 (W.D.Pa.1981); *Kendrick v. City Council of Augusta, Georgia*, 516 F.Supp. 1134
11 (S.D.Ga.1981); *Three Rivers Cablevision v. City of Pittsburgh*, 502 F.Supp. 1118 (W.D.Pa.1980). As
12 such, the court finds that Commonwealth law, the CNMI procurement regulations and Public Law 11-
13 87, create a constitutionally protected property interest. The court further finds, without passing upon
14 the merits of the allegations, that Plaintiffs’ complaint articulates specific facts which, if proved, give
15 rise to an inference that Defendants Soll and Peterson violated this constitutionally protected property
16 interest.

17
18 2. Reasonable Belief that Conduct was Lawful.

19 Having established that Defendants Soll and Peterson’s actions could have violated a “clearly
20 established constitutional right,” the burden shifts to Defendants Soll and Peterson to establish that they
21 had a reasonable belief that their conduct was lawful. See *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct.
22 1920, 1924, 64 L.Ed.2d 572 (1980) (Defendants bear the burden of proving a qualified immunity
23 defense).

24 Defendants Soll and Peterson assert that their conduct was reasonable because they relied on
25 Public Law 11-119, § 8, to intervene in the underlying procurement process and “award” the prison
26 contract to Telesource. Public Law 11-119, § 8 states:

27 **Notwithstanding any other law or regulation, with respect to the prison**
28 **project . . . the CNMI Procurement Regulations are waived for the**
funds which are appropriated under both this act and prior

1 **legislation for such project** in order to allow the Administration to
2 continue to act quickly to comply with any legal requirements that have
3 been and/or may be placed upon the Commonwealth by law or court
4 action and/or for the benefit of the public safety; provided, however, that
5 any contract entered into shall contain all certifications and be executed
6 by all officials required under Section 2-104 of the CNMI Procurement
7 Regulations. **In addition, the Attorney General or his or her designee
8 shall certify, for each new contract, that the items to be procured will
9 be in compliance with all requirements imposed on the
10 Commonwealth pursuant to any court order or consent decree.**

7 *See* Public Law 11-119, § 8 (emphases added).

8 Nothing in the foregoing language purports to provide the Office of the Attorney General the
9 authority to negotiate and award a contract. Also, the Office of the Attorney General reinforced the
10 apparent unreasonableness of Defendants Soll and Peterson on July 27, 2001, in an Opinion wherein
11 it concluded that “[n]o provision of Commonwealth law provides the Attorney General the power to
12 make a determination as to which bidder should be awarded a contract in Invitation for Bids No.
13 DPW00-IFB-065.” *See* Plaintiffs’ Motion to Dismiss, Exhibit 2 (Opinion of the Attorney General at
14 5). The court finds, therefore, that Defendants Soll and Peterson have not established that their actions
15 were reasonable for purposes of a motion to dismiss pursuant to Com. R. Civ. 12(b)(6). Accordingly,
16 Defendants Soll and Peterson’s motion to dismiss is **DENIED**.

18 V. CONCLUSION

19 For the foregoing reasons, the court finds that Plaintiffs have properly alleged that
20 Defendants deprived Plaintiffs of a constitutionally protected property interest. The court also finds
21 that Defendants Soll and Peterson have failed to establish that their actions were reasonable for
22 purposes of a motion to dismiss pursuant to Com. R. Civ. P. 12(b)(6). Accordingly, Defendants Soll
23 and Peterson’s motion to dismiss is **DENIED**.

25 So ORDERED this 28th day of September, 2001.

27 /S/
28 JUAN T. LIZAMA, Associate Judge