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

8 IN RE: APPEAL OF MARIANAS
9 INFORMATION TECHNOLOGY CORP.
(MARITECH)

10 RFP No. 01-0118

CIVIL ACTION No. 02-0277E

OPA Appeal No. Bp-A029
Protest Decision No. 02-002

11 **ORDER DENYING MARITECH'S**
12 **JUDICIAL REVIEW APPEAL**

13 **I. INTRODUCTION**

14 This matter came before the Court at 2:00 p.m. on November 14, 2002 for Marianas Information
15 Technology Corp.'s *Petition for Judicial Review*. Marianas Information Technology Corp. (or Maritech,
16 or Petitioner) was represented by Anthony G. Long, Esq. The Department of Finance (or DOF, or
17 Respondent) was represented by Assistant Attorney General Deborah Covington.

18 **II. FACTUAL BACKGROUND**

19 The essential facts in this matter are not in dispute. On September 26, 2001, DOF issued a
20 Request for Proposals ("RFP") to undertake the design and installation of a computer program for
21 automating the CNMI customs garment certification with integration to the CNMI tax system. *See* Opening
22 Mem. for Judicial Review ("Opening Memo") at 1. Bid proposals were submitted by Maritech and AO
23 Enterprises ("AO"). *Id.* The RFP provided that technical requirements and cost would provide the basis
24 for proposal evaluation, and that the Government reserved the right to award the contract to other than the
25 lowest bidder. *See* Respondent's Opp'n Br. to Petitioner's Mem. for Judicial Review ("Respondent's
26 Opp'n") at 1-2. Based on an evaluation of the qualifications of each proposer, AO's higher technical
27 requirements score constituted an awarding of the contract to that organization. *Id.* at 2. Maritech was
28 notified on November 13, 2001 that the contract was awarded to AO. *Id.*

1 Maritech subsequently filed a protest with the Director of Procurement and Supply (“P & S”)
2 arguing: (a) that AO was not a qualified or responsive offeror under CNMI Procurement Regulations
3 because it was undercapitalized; and (b) neither owner Alan Ostergaard nor AO satisfied the CNMI
4 requirements for an alien to reside and engage in business in the CNMI. *See* Opening Mem. at 1-2.
5 Shortly thereafter, AO submitted supplemental information to P & S, detailing the addition of two
6 individuals, one a U.S. citizen, as well as increased capitalization to the amount of \$60,000. *Id.* at 2. AO
7 submitted a letter to P & S in response to a request for additional information concerning AO’s alien status
8 and finances. *Id.* at 3. Maritech’s bid protest was denied on December 26, 2001. *Id.*

9 On January 4, 2002, Maritech filed an appeal with the Office of the Public Auditor (“OPA”). *Id.*
10 OPA denied Maritech’s appeal March 7, 2002. *Id.* at 4. OPA issued its decision finding that (1) proper
11 criteria were used; (2) P & S did not deviate from procedure; and (3) absent clear indication of bad faith
12 or lack of reasonable basis for determination, P & S’s selection would be upheld because AO did not
13 appear to have violated any immigration or business licensing laws. *See* Respondent’s Opp’n at 4.
14 Maritech argues that the OPA decision was not arrived at by statutory or regulatory analysis, but rather
15 based on *ex parte* communications between OPA and AO, the Department of Labor and Immigration
16 (“DOLI”), and the Office of the Attorney General. *See* Opening Mem. at 3.

17 Maritech sought reconsideration of the OPA decision on two grounds: (1) the Decision on Appeal
18 improperly relied upon extra-judicial evidence, in the form of some unwritten, unpublished “policy”
19 exempting United States green card holders from the requirements of the Nonresident Workers Act, 3
20 CMC §§ 4411, *et seq.*, and the regulations governing investment and business activities by aliens; and (2)
21 OPA’s reliance upon *ex parte* communications with DOLI violated Maritech’s right to due process. *Id.*
22 OPA denied the reconsideration on April 2, 2002. *Id.*

23 Maritech seeks an order from this Court “setting aside the award to AO or alternatively remanding
24 this matter for an award to Maritech for lost profits, costs and attorney fees incurred in preparing its offer
25 and pursuing the protest, appeal and this petition for judicial review.” *See* Opening Mem. at 14.
26

27 III. DISCUSSION

28 A. Jurisdiction

1 This Court’s jurisdiction to review an agency action arises from Administrative Procedures Act,
2 1 CMC §§ 9101, *et seq.* (“APA”). Under Section 9112(b) of the APA, a “person suffering legal wrong
3 because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review
4 . . . in the Commonwealth Superior Court.” 1 CMC § 9112(b)

5 1. Agency action.

6 Under 1 CMC § 9112(b), agency action is a threshold requirement of conduct by an administrative
7 entity that must be shown to trigger judicial review. The APA defines “agency,” “agency action,”
8 “decision,” and “order.” “‘Agency’ means each authority of the Commonwealth government, whether or
9 not it is within or subject to review by another agency.” 1 CMC § 9101(b). “‘Agency action’ includes the
10 whole or party of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or
11 failure to act.” 1 CMC § 9101(c). “‘Decision’ means the whole or part of a final disposition of an agency
12 in a hearing on a proposed regulation.” 1 CMC § 9101(e). And “[o]rder’ means the whole or part of a
13 final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter
14 other than rule-making but including licensing.” 1 CMC § 9101(h).

15 Administrative decisions must be final in order to be reviewed by the Superior Court. *Bitoy v.*
16 *Rodeo*, Civ. No. 93-1073 (Super. Ct. May 5, 1994) (Decision and Order Granting Complainants’ Motion
17 to Dismiss at 3). An administrative decision is final where it has arrived at its administrative conclusion so
18 that the proposed judicial involvement will be determinative. *Id.* (*citing* 2 CHARLES H. KOCH,
19 ADMINISTRATIVE LAW AND PRACTICE § 10.31 (1992)).

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

24 *Gallo Cattle Co. v. United States Dep’t of Agric.*, 159 F.3d 1194, 1198-99 (9th Cir. 1998) (quotations
25 and citations omitted).

26 The agency action in question is final. The *CNMI Procurement Regulations*, 23 Com. Reg.
27 17,855 (May 24, 2001) (“Procurement Regs”), set forth the standard by which a prospective bidder can
28 protest and appeal an administrative decision to its finality. Maritech followed the correct procedure. First,
Maritech filed an appropriate, timely protest, pursuant to Procurement Regs § 6-101(1)(a). Next, pursuant

1 to Procurement Regs § 6-102(1), a timely appeal was made to the Office of the Public Auditor.
2 Subsequently, Maritech filed a Request for Reconsideration of the OPA decision, pursuant to Procurement
3 Regs § 6-102(9). There are no further administrative remedies provided in the *CNMI Procurement*
4 *Regulations*. Based on the denial of the Request for Reconsideration by OPA, this Court is empowered,
5 through judicial review, to examine the final administrative decision. 1 CMC § 9112(b).

6 2. Legal wrong suffered from agency action

7 The Division of Procurement and Supply awarded a contract to AO instead of Maritech. Maritech
8 claims the award of the contract to AO as the legal wrong it suffered based on the agency decision.

9 B. Standard of Review

10 The standard for judicial review of agency action is set forth at 1 CMC § 9112(f). *Camacho v.*
11 *N. Marianas Retirement Fund*, 1 N.M.I. 362, 367 (1990). Section 9112(f) requires a reviewing court
12 to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the
13 meaning or applicability of [the terms of] an agency action.” *Tenorio v. Superior Ct.*, 1 N.M.I. 1, 13
14 (1989) (*citing* 1 CMC § 9112(f)).

15 1. Arbitrary and capricious

16 What constitutes arbitrary action under 1 CMC § 9112 is not defined within the statute. However,
17 arbitrary and capricious action has been defined in this jurisdiction as “a decision or action taken by an
18 administrative agency or inferior court [that is] willful and unreasonable action without consideration or in
19 disregard of facts or without determining principle.” *In re Blankenship*, 3 N.M.I. 209, 217 (1992) (*citing*
20 *BLACK’S LAW DICTIONARY* (5th ed. 1979)). This jurisdiction has also found that agency action is
21 “arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the
22 problem.” *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 45 n.33 (1993).

23 2. Observance of procedure standard of review

24 Title 1, Section 9112(f) of the Commonwealth Code provides the basis for an examination and
25 forms the standard by which this Court will review the agency action. The OPA determination will be
26 reviewed and set aside if it is found to be:

- 27 (i) Arbitrary, capricious, an abuse of discretion, or otherwise not in
28 accordance with law;

1 (ii) Contrary to constitutional right, power, privilege, or immunity;

2 (iii) In excess of statutory jurisdiction, authority, or limitations, or short of
3 statutory rights;

4 (iv) Without observance of procedure required by law;

5 (v) Unsupported by substantial evidence in a case subject to 1 CMC §§
6 9108 and 9109 or otherwise reviewed on the record of an agency hearing
7 provided by statute; or

8 (vi) Unwarranted by the facts to the extent that the facts are subject to
9 trial de novo by the reviewing court.

10 In making the forgoing determination, the court shall review the whole record or those
11 parts of it cited by a party, and due account shall be taken of the rule or prejudicial error.

12 1 CMC § 9112(f)(2).

13 C. Maritech's arguments

14 Maritech presents two arguments in support of its petition for judicial review. First, that AO was
15 not a qualified or responsible offeror. This argument has two components. Maritech argues that AO was
16 not a qualified or responsible offeror because it lacked financial resources and because it failed to comply
17 with immigration law.

18 Second, Maritech argues that certain *ex parte* contacts between the agency officials handling
19 Maritech's administrative appeal and government officials were improper.

20 1. Qualified/responsible offeror

21 The RFP solicited sealed proposals for computer programming services. By the terms of the RFP,
22 procurement of the services was in accordance with the "CNMI Procurement Regulations, Section 3-301
23 of May 24, 2001." *See* RFP, 001 of Appellants Excerpts of Record. In addition, the RFP advertised that
24 proposals would be evaluated based on specified criteria. These criteria included technical requirements
25 and cost. On the technical requirements, proposals would be evaluated equally, with 25% of the total score
26 attributable to the following four criteria: qualification, experience, technical approach and time frame. *See*
27 Respondent's Opp'n at 2.

28 As for the cost component, the RFP advertised that price was to be a factor, although technical
merit was more important than price, and the Government reserved the right to award to other than the
lowest proposer.

1 a. Section 3-301 of the Procurement Regulations

2 Section 3-301 of the *CNMI Procurement Regulations* addresses the “Responsibility of Bidders
3 and Offerors”:

4 (1) *Awards shall be made only to responsible contractors.* To be
5 determined responsible, a prospective contractor must:

6 (a) have adequate financial resources to perform the contract,
7 or the ability to obtain them;

8

9 (g) be otherwise qualified and eligible to receive an award
10 under applicable laws and rules.

11 Procurement Regs § 3-301(1)(a) & (g).

12 i. Financial responsibility

13 Maritech argues that, in denying Maritech’s bid protest, P&S’s determination that financial
14 responsibility is “minimal and of limited importance” is arbitrary, capricious and irrational. *See* Opening
15 Mem. at 8.

16 As part of the basis for its contention, Maritech relied upon *Matter of: Nova Int’l, Inc.*, B-
17 227,696,87-2 CPD P284, 1987 WL 102878, at *3 (Comp. Gen. Sept. 21, 1987) (Unpublished), stating
18 that an absence of clear financial responsibility requires a finding of non-responsibility. Maritech failed to
19 note that both *Matter of: Nova Int’l, Inc.* and Procurement Regs § 3-301(a) provide for either
20 demonstration of adequate financial resources or the ability to obtain them. *See Matter of: Nova Int’l, Inc.*,
21 B-227,696,87-2 CPD P284, 1987 WL 102878, at *3 (Comp. Gen. Sept. 21, 1987) (Unpublished)
22 (allowing contractors to show that they can obtain financial responsibility). Further, the *Matter of: Nova*
23 *Int’l, Inc.* opinion, relied upon by Maritech, allows for “a wide degree of discretion and business judgment”
24 in determining responsibility. *Id.* at *4. Nova International failed to comply with requests from a contracting
25 officer to establish responsibility. *Id.* at *3. Conversely, in the instant case, AO submitted a Fiscal Year
26 2001 annual report restating its capitalization to \$60,000. *See* Respondent’s Excerpt of Record at 29.
27 Further, OPA stated that P & S viewed “the primary resources required to complete the work required
28 under the RFP were ‘intellectual ability, skills and experience’ and that A.O. Enterprises has amply
demonstrated it possessed these resources.” *Id.* OPA failed to find the bad faith required to overturn the

1 P & S decision. OPA instead found that, when measured against the scope of work required for the
2 contract, the decision was supported by sufficient evidence of intellectual and financial resources. *Id.*

3 P & S, in selecting the contractor, would have had to take a “willful and unreasonable action without
4 consideration or in disregard of facts or without determining principle.” *In re Blankenship*, 3 N.M.I. at 217.
5 It appears that the weight of P & S’s decision was based on technical merit and that a more important
6 aspect of the determination was based on intellectual capability regarding the project. *See* Respondent’s
7 Excerpt of Record at 14. It further appears that the request for additional information from AO, regarding
8 its financial situation, was specifically for clarification purposes, an act that is far from arbitrary. Arbitrary
9 and capricious as defined by *In re Blankenship* requires essentially the absence of consideration, or decision
10 without factual basis. The financial requirement prescribed in Procurement Regs § 3-301(a) is one of seven
11 requirements that a prospective contractor must meet to be determined a “responsible bidder.” The
12 assessment and awarding of a contract, involves most assuredly in nearly every instance, a balancing of the
13 relative qualifications of each bidder. In certain situations, no single bidder will have one hundred percent
14 of the qualifications required under the *CNMI Procurement Regulations*. Rather, a balancing of the merits
15 of bidders is necessary, in order to obtain the most efficacious result. Agencies must maintain some
16 discretion in awarding contracts, without such strict adherence that the best result cannot be achieved.

17 Maritech has established no basis for a finding of bad faith. There are no allegations of wrongdoing
18 on part of either P & S or OPA. Therefore, a review overturning the decision can only be made on the basis
19 of “a lack of any reasonable basis for the determination.” However, this determination was not arbitrary.
20 P & S pursued and received assurances regarding the capitalization of AO. In the view of P & S, the
21 restated Fiscal Report provided sufficient evidence that AO had at least the ability to obtain the necessary
22 capitalization to warrant a finding of financial responsibility.

23 ii. Immigration issue

24 The same standard applied to the financial responsibility finding applies in the context of the
25 immigration issue. Was the decision made by P & S, upheld by OPA, made in bad faith or without a
26 reasonable basis? This is measured by evidence that the actions involved were arbitrary or capricious.
27 Neither P & S nor OPA acted either arbitrarily or capriciously.

28 “‘Alien’ means an individual who is not a United States citizen, a citizen of the former Trust Territory

1 of the Pacific Islands, a CNMI permanent resident or a holder of a CNMI Certificate of Identity.” 4 CMC
2 § 5901(a). “‘Alien investor’ is an alien who has expressed a willingness to invest, has invested in or is in the
3 process of investing in an enterprise in the Commonwealth of the Northern Mariana Islands . . . [a]n alien
4 investor does not include entities such as **corporations**, partnerships or other entities existing solely by virtue
5 of the law.” 4 CMC § 5901(b). (emphasis added). Based on the fact that AO is a corporation, the status
6 of its employees is irrelevant for the purpose of the award of the contract. P & S confirmed and OPA
7 reconfirmed with DOLI that the possession of U.S. green cards would entitle the two non-citizen members
8 of AO to work in the CNMI.

9 Maritech bases its allegation on Procurement Regs § 3-301(g), which states that the contractor
10 must be “qualified and eligible to receive an award [of the contract] under applicable laws and rules [of the
11 CNMI].” The contract was awarded to the corporation and the status of the two non-citizen members of
12 AO was confirmed as adequate for the purpose of employment.

13 The scope of review under the “arbitrary and capricious” standard is narrow and a court
14 is not to substitute its judgment for that of the agency. Nevertheless, the agency must
15 examine the relevant data and articulate a satisfactory explanation for its action including
16 a “rational connection between the facts found and the choice made.” In reviewing that
17 explanation, [a court] must “consider whether the decision was based on a consideration
18 of the relevant factors and whether there has been a clear error of judgment.”

19 *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103
20 S. Ct. 2856, 2866-67, 77 L. Ed. 2d 443, 457-58 (1983) (citations omitted).

21 The P & S determination that AO was financially responsible and was otherwise qualified and
22 eligible to receive an award under applicable laws and rules was not arbitrary or capricious.

23 2. Maritech’s arguments regarding *ex parte* communications

24 Maritech argues that certain *ex parte* communications between the agencies handling Maritech’s
25 administrative appeal and other Government agencies were improper. Maritech argues that the *ex parte*
26 communications between the P & S Director and the Secretary of DOLI were improper. Maritech also
27 argues that the *ex parte* communications between OPA and DOLI were improper. Maritech argues that
28 these communications violate the *CNMI Procurement Regulations* and the APA.

There is no dispute that the conversations took place. Indeed, the protest decision and the OPA
appeal both discuss the conversations. The *CNMI Procurement Regulations* do not define “*ex parte*

1 communications.”

2 (1) Did the *ex parte* communications violate the APA?

3 Maritech relies heavily on the APA in support of its argument that these communications were
4 improper. Maritech argues that the communications violated Section 9109(g)(1) of the APA.

5 Section 9109 of the APA addresses conduct of hearings. Subsection (g) specifically addresses *ex*
6 *parte* communications. However, Section 9109 deals with conduct of hearings when a person is entitled
7 to an agency hearing. Maritech has failed to show that it was entitled to a hearing which would invoke the
8 provisions of Section 9109.

9 Under Section 9108, persons entitled to an agency hearing are those where there is an adjudication
10 and where a “sanction” may be imposed. *See* 1 CMC § 9108. The APA defines “sanction.”

11 (o) “Sanction” includes the whole or part of an agency:

- 12 (1) Prohibition, requirement, limitation, or other condition affecting
the freedom of a person;
- 13 (2) Withholding of relief where adjudication is required by law;
- 14 (3) Imposition of penalty or fine;
- 15 (4) Destruction, taking, seizure, or withholding of property;
- 16 (5) Assessment of damages, reimbursement, restitution,
compensation, costs, charges, or fees;
- 17 (6) Requirements, revocation, or suspension of a license; or
- 18 (7) Taking other compulsory or restrictive action.

19 1 CMC § 9101(o).

20 Maritech has not established, and this Court cannot find, that failure to be awarded the contract, or
21 the subsequent denial of an appeal qualify as a “sanction” under 1 CMC § 9101(o). Thus, Sections 9108
22 and 9109 do not apply and Maritech’s reliance on this authority does not warrant discussion.

23 (8) Were the communications improper under the *CNMI Procurement Regulations*?

24 Maritech argues that the communications are improper under the *CNMI Procurement Regulations*.
25 It is unclear which authority Maritech relies upon for this proposition. Consistently throughout its petition
26 for judicial review and its reply, Maritech argues that the communications violate Section 6-102(f) of the
27 Procurement Regulations. Section 6-102(f) does not exist within the *CNMI Procurement Regulations*.

28 Nevertheless, the Court will discuss whether these communications were improper under the *CNMI*
Procurement Regulations.

1 Article 6 of the *CNMI Procurement Regulations* addresses protest, dispute and appeal of
2 contractual awards.

3 (1) Alleged communications associated with the P & S decision.

4 Maritech claims it was wrong for P & S to put in its report, concerning the appeal to OPA, that it
5 had relied on the statements of the Secretary of DOLI, at the time of the RFP review, that U.S. green card
6 holders are permitted to freely enter the Commonwealth and remain as long as necessary to complete the
7 work for the customs project.

8 P & S received a letter from AO's counsel on December 18, 2001. Based on the letter, P & S
9 determined that AO would be in compliance with subsection (g) of Procurement Regs § 3-301. The letter
10 is proper under Section 3-103(7). Under this section, "discussions may be conducted with responsible
11 offerors who submit proposals determined to be reasonably susceptible of being selected for award for the
12 purpose of clarification and to insure full understanding of, and responsiveness to, solicitation requirements."
13 Procurement Regs. § 3-103(7).

14 In its report to the OPA, on January 8, 2002, concerning Maritech's protest appeal, P & S reported
15 to OPA that it had contacted and "verified directly with Mark Zachares, Secretary of Labor and
16 Immigration, the statement attributed to him by AO's counsel, to the effect that AO's principals, as U.S.
17 green card holders will be allowed to freely enter the Commonwealth, and remain as long as needed to
18 complete the work of the Customs project." See Respondent's Excerpts of Record at 22. However, this
19 was reported after the P & S protest decision on December 26, 2001. It is important to note that Maritech
20 was given an opportunity to comment on the January 8, 2002 P & S report to OPA concerning its appeal.
21 OPA concluded that Maritech failed to persuade it on the immigration issue.

22 (2) Alleged communications associated with the OPA decision.

23 Maritech states that OPA had *ex parte* communications with DOLI and the Office of the Attorney
24 General. In making its decision on appeal, OPA stated that P & S relied on representations of officials from
25 DOLI that U.S. green card holders are permitted to work in the Commonwealth without obtaining a
26 separate CNMI entry permit. In the decision on appeal, OPA stated that it had "reconfirmed with both the
27 Department of Labor and Immigration and the Attorney General's office that this is the policy." See
28 Appellant's Excerpts of Record at 23. OPA's Reconsideration stated: "confirmation of the existence of and

1 basis for such a policy was pivotal to the decision in the appeal.” See Appellant’s Excerpts of Record at
2 26. OPA’s Reconsideration relies on the fact that it had authority under Section 6-102(7) to inquire further.

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4 Section 6-102(7) states: “[t]ime for Submission of Additional Information. Any additional
5 information requested by the Public Auditor from the appellant or interested parties shall be submitted no
6 later than five (5) days after the receipt of such request.” Procurement Regs § 6-102(7).

7 Section 6-102(7) is not an explicit authorization of *ex parte* communications. In order to promote
8 informed decision making, the regulation authorizes the collection of information. Courts must afford the
9 agency deference, when reviewing an agency’s interpretation of its own regulations. *Citizens for Fair Util.*
10 *Regulation v. United States Nuclear Regulatory Agency*, 898 F.2d 51, 54-55 (5th Cir. 1990) (“This
11 standard is even more deferential where, as here, a Court is reviewing an agency’s application and
12 interpretation of its own regulations.”) Thus, the Court finds the communications involved here are not in
13 violation of the law and the agency decision is not arbitrary or capricious.

14 What must be noted, is the APA provision entitling P & S, and other agencies that are entitled, to
15 seek advice from the Attorney General’s Office. Section 9109(h)(2) of the APA states: “[p]ersons presiding
16 at hearings or participating in orders or decisions may: . . . (2) Have the aid and advice of . . . the Attorney
17 General and his or her staff if such assistance would not be in violation of subsection (g) of this section.” 1
18 CMC § 9109(h)(2). Subsection (g) of 1 CMC § 9109 provides that agencies may not “[c]onsult a person
19 or party or representative of a person or party on a fact in issue or on applicable law, unless on notice and
20 opportunity for all parties to participate.” Thus, the Attorney General’s Office is a specifically carved
21 exception, and any communication merely seeking clarification of policy falls within the exception as
22 expressed in the APA.

23 IV. CONCLUSION

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25 The orders issued in this matter shall not be set aside because they are not arbitrary or capricious
26 and the *ex parte* communications did not violate either the *CNMI Procurement Regulations* or the
27 Administrative Procedures Act.
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SO ORDERED this 7 th day of June 2003.

/s/

David A. Wiseman
Associate Judge