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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 PACIFIC SECURITY ALARM, INC.,
9 Plaintiff,
10 v.
11 COMMONWEALTH PORTS AUTHORITY,
12 Defendant.

Civil Case No. 02-0199E
ORDER AFFIRMING
ADMINISTRATIVE ACTION

13
14 **I. INTRODUCTION**

15 **THIS MATTER** came before this Court for a hearing on Petitioner/Appellant's Petition for
16 Judicial Review on November 14, 2002. Petitioner/Appellant, Pacific Security Alarm, Inc., was
17 represented by G. Anthony Long. Respondent/Appellee was represented by Douglas F. Cushnie. The
18 Court having read the submissions and heard the arguments, now renders its order.

19 **II. FACTS**

20 On June 6, 2001, the Respondent Commonwealth Ports Authority [hereafter CPA] published a
21 Notice to Bidders, soliciting proposals to replace or expand the security access system for the Saipan
22 International Airport and construct a new security control office [hereafter Project]. *See* Petitioner's
23 Opening Mem.for Judicial Review at 1. The Invitation for Bids [hereafter IFB] contained the following
24 provisions:

- 25 1. The Bidder shall have an office in Saipan or Guam, staffed with certified factory-trained
26 engineers and technicians fully capable of engineering, supervising installation, system start-
27 up, commissioning, providing training, and providing on-going maintenance and emergency
28 service. The Bidder must also have proof of this physical office for the last three (3) years.
2. A CNMI contractor's license.
3. References of similar projects completed.
4. Certification via resumes of all engineering and technical support personnel that they are

1 qualified to work on the project.

2 5. Proof that the Bidder has ten (10) years experience in the design, development, production
3 and installation of computerized building systems.

4 6. The Bidder shall submit a list of manufacturer and model numbers of proposed equipment
5 to be installed.

6 7. The Bidder shall submit a spare parts list as recommended by the manufacturers.

7 Petitioner's Excerpts of Record [hereafter ER] at 4-6.

8 The IFB also contained the following provision relating to responsive and responsible Bidder
9 acceptance:

10 The apparent low bidder will be subject to a thorough and comprehensive review of its
11 qualifications and Bid Documents to ensure that they are "responsive and responsible."
12 This review will include, but is not necessarily limited to previous project experience,
13 financial capabilities, quality of equipment and personnel, and bonding and insurance. If
14 the apparent low bidder is found not to be "responsible or responsive", their bid will be
15 rejected and the next lowest bidder will be evaluated for qualifications.

16 *Id.* at 1.

17 A pre-bid conference was held on June 22, 2001, by S.S.F.M. International, Inc. [hereafter
18 SSFM], in which SSFM clarified issues under the IFB through a question and answer session. *Id.* at 11-
19 21.

20 The CPA received seven bids prior to bid opening on July 26, 2001. Opening Mem. for Judicial
21 Review at 3. CPA determined that AIC Marianas Inc. [hereafter AIC], was the lowest responsive bidder.
22 AIC's bid of \$1,493,814 was lower than PSA, the next lowest bidder, at \$1,526,170. *Id.* On August
23 4, 2001, CPA and SSFM held a meeting with AIC in order to guarantee its price bid. ER at 26-28. On
24 September 21, 2001, CPA noticed of its intent to award AIC the contract for the Project. ER at 43. CPA
25 and AIC entered into a contract, on October 3, 2001, for completion of the Project. ER at 43.

26 PSA filed a timely protest on October 8, 2001, to set aside the Project award. *Id.* AIC submitted
27 a detailed list of security access system equipment, electrical equipment, mechanical and other equipment
28 on November 5, 2001. ER at 21-39. CPA's Executive Director denied PSA's bid protest on December
6, 2001. ER at 51. PSA filed a timely appeal of the Executive Director's decision on December 20, 2001.
ER at 80. Shortly thereafter, on December 21, 2001, CPA issued a Notice to Proceed to AIC. ER at
62-63. Commonwealth Superior Court Judge Naraja denied a PSA request for injunctive relief on

1 February 6, 2002. *Pacific Security Alarm, Inc. v. Commonwealth Ports Authority*, Civ. No. 02-0005
2 (N.M.I. Super. Ct. Feb. 6, 2002) ([Unpublished] Order Denying Motion for Preliminary Injunction). The
3 CPA Appeals Committee denied the PSA appeal. ER at 80-90.

4 III. DISCUSSION

5 1. Jurisdiction and Standard of Review.

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

10 A. Agency action

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

21 Administrative decisions must be final in order to be reviewed by the Superior Court. *Bitoy v.*
22 *Rodeo*, Civ. No. 93-1073 (N.M.I. Super. Ct. May 5, 1994) (Decision and Order Granting Complainant’s
23 Motion to Dismiss at 3-5). An administrative decision is final where it has arrived at its administrative
24 conclusion so that the proposed judicial involvement will be determinative. *Id.* at 3.

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

Gallo Cattle Co. v. United States Dep’t of Agric., 159 F.3d 1194, 1198-99 (9th Cir. 1998).

1 Petitioner’s assertion that agency actions are reviewed *de novo* at the trial court level is incorrect.

2
3 [The N.M.I. Supreme Court] review[s] an administrative agency's decision on the same
4 basis as a trial court. The standard of review is *de novo*, similar to our review of a grant
5 of summary judgment The appellate court then reviews the lower court's
6 determination as to the agency's decision. Since the appellate court reviews agency action
on identical basis as does the lower court, the higher court is not required to accord any
particular deference to the lower court's conclusion about the agency's actions. Thus the
appellate court's review of the lower court's review of agency action is *de novo*.

7 *In re San Nicolas*, 1 N.M.I. 329, 333-34 (1990). The *San Nicolas* case passage relates to the
8 Commonwealth Supreme Court review of the trial court’s decision *de novo*. However, the trial court’s
9 analysis is on the basis of an arbitrary and capricious standard, unless the “action is adjudicatory in nature
10 and the agency factfinding procedures were inadequate,” in which case the administrative actions would
11 be reviewed *de novo*. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 915 S.
12 Ct. 814, 825, 28 L. Ed. 2d 136, 153 (1971). The record, as presented, is substantial and the opinions
13 of both the Executive Director and the Appeals Committee are both clear and comprehensive. Without
14 a showing that the actions of the CPA were inadequate regarding their fact finding procedures, the Court
15 must evaluate this case on an arbitrary and capricious standard.

16 The standard for judicial review of agency action is set forth in 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).

20 B. Arbitrary and capricious

21 Arbitrary action under 1 CMC § 9112 is not defined in the statute. However, arbitrary and
22 capricious agency action has been defined in this jurisdiction as “characterization of a decision or action
23 taken by an administrative agency or inferior court meaning willful and unreasonable action without
24 consideration or in disregard of facts or without determining principle.” *In re Blankenship*, 3 N.M.I. 209,
25 217 (1992) (*citing* BLACK’S LAW DICTIONARY (5th ed. 1979)). This jurisdiction has also found that
26 agency action is “arbitrary and capricious if the agency has entirely failed to consider an important aspect
27 of the problem.” *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 45 n.33 (1993).

28 C. Observance of procedure standard of review

1 Section 9112(f) provides the basis for an examination and forms the standard by which this Court
2 will review the action. The CPA determination will be reviewed and set aside if it is found to be:

3 (i) Arbitrary, capricious, an abuse of discretion, or otherwise not in
4 accordance with law;

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

6 (iii) In excess of statutory jurisdiction, authority, or limitations, or short of
7 statutory rights;

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

9 (v) Unsupported by substantial evidence in a case subject to 1 CMC §§
10 9108 and 9109 or otherwise reviewed on the record of an agency hearing
11 provided by statute; or

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

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

17 1 CMC § 9112(f).

18 **2. CPA's Action Was Not Arbitrary or Capricious.**

19 The review by CPA, at both the protest level and the appeal level was accomplished in a detailed
20 and legitimate manner. The heart of this matter concerns only one true question. Was the bid submitted
21 by AIC both responsible and responsive to the CPA bid proposal request? In fact, it was both responsive
22 and responsible as represented throughout the dispute and appeal process by CPA.

23 Responsibility and responsive bidding are two distinct categories involved in bidding proposals.

24 A bid is **responsive** as submitted when it offers to perform without exception the exact
25 thing called for in the IFB [invitation for bid] , and acceptance of the bid will bind the
26 contractor to perform in accordance with all the IFB's material terms and conditions . . .
27 .

28 **Responsibility**, on the other hand, refers to a bidder's apparent ability and capacity to
perform all contract requirements and is determined not at bid opening, but at any time
prior to award based on any information received by the agency up to that time.

Matter of Triton Marine Constr. Corp., No. B-255373, 1993 U.S. Comp. Gen. LEXIS 975 at *2
(Oct. 20, 1993) (emphasis added). The crux of the distinction between responsive and responsible
bidding is that, responsibility requirements and issues can be resolved after bid opening. *Abbott Power
Corp.*, No. B-192792, 1979 U.S. Comp. Gen. LEXIS 2621 (April 30, 1979). Responsibility issues

1 then, can be resolved, as was the case here with AIC, after bid opening. PSA raised several qualification
2 concerns through its appeal.

3 Eligibility requirements and items listed under the “Qualifications” heading are matters of
4 responsibility and not responsiveness. *Id.* The *Triton Marine* case also supports that notion, holding that
5 personnel and their qualifications and financial information of the bidder relate to responsibility
6 requirements. Here, the equipment and spare parts list, and staffing and experience requirements were
7 included as part of the “Qualifications” section. They are, therefore, matters of responsibility.

8 PSA also challenges the modification of equipment quantities by AIC after bid opening. Item
9 3.2(8)(a)(i) of the *Commonwealth Ports Authority Procurement Rules and Regulations*, 10 Com.
10 Reg. 5,625 (Aug. 15, 1988) *adopted at* 10 Com. Reg. 5,716 (Oct. 15, 1988), allows for the
11 modification of clear typographic errors. Here, there is strong evidence that AIC made a typographical
12 error, as they amended the amount of the equipment without amending the associated price.

13 Finally, PSA alleges that the appeals process through which the protest proceeded did not
14 comport with 14th Amendment due process requirements. The main thrust of this argument arises from
15 the fact that CPA appeared at the preliminary injunction hearing. PSA asserts that CPA, from the position
16 it took with regard to preliminary remedies, had pre-judged the outcome of the appeal before it.
17 Disqualification of an administrative official is only permitted if the plaintiff can show that members of the
18 appeal committee prejudged the appeal and were “impervious to contrary evidence.” *Power v. Fed.*
19 *Labor Relations Auth.*, 146 F.3d 995, 1001-02 (D.C. Cir. 1998). Moreover, there is a presumption
20 that members of an appeal committee are impartial and fair. *Navistar Int’l Transp. Corp. v. E.P.A.*, 941
21 F.2d 1339, 1360 (6th Cir. 1991). PSA has failed to demonstrate how the preliminary injunction hearing
22 impacted the appeals process that its protest went through. Appearing in the litigation is distinct from the
23 appeals process. The only fact that PSA can present to buttress its position is that the appearance at the
24 hearing automatically equates to a complete lack of impartiality on behalf of CPA. Without stronger
25 evidence of the absence of impartiality, this Court cannot find that CPA violated due process concerns.
26 This is especially true in light of a detailed and well reasoned appeals decision. It is clear from the appeals
27 decision that the matter was taken seriously and not decided on a whim.

28 CPA’s action neither amount to arbitrariness or capriciousness. CPA’s arguments and decisions

1 throughout the process are supported by well reasoned analysis, and not the sort of actions that amount
2 to irrational decision making. This Court finds that the actions of CPA do not rise to the level warranting
3 a reversal through judicial review.

4 **IV. ORDER**

5 The administrative action of CPA is hereby **AFFIRMED**.

6
7 **SO ORDERED** this 1st day of October 2003.

8
9
10 /s/ _____
DAVID A. WISEMAN, Associate Judge