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2 **For Publication**

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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**) **CIVIL ACTION NO. 02-0522E**
9 **INFORMATION TECHNOLOGY CORP.**)
10 **(MARITECH)**)
11) **OPA Appeal No. BP-A030**
12) **Protest Decision No. 02-0005**
13) **DECISION**
14) **JUDICIAL REVIEW OF**
15) **ADMINISTRATIVE APPEAL**
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25 **I. INTRODUCTION**

26 This matter came before the Court pursuant to a petition by Marianas Information
27 Technology Corporation (“Petitioner” or “Maritech”) for judicial review of a Procurement & Supply
28 Protest Decision (“Decision”) issued by the Office of the Public Auditor (“OPA”). The Decision
was the result of Maritech challenging Department of Finance (“DOF”) awarding a government
contract to A.O. Enterprises, Inc. (“AOE”). G. Anthony Long represents Maritech; Deborah
Covington, Assistant Attorney General, appears for Department of Finance; and Alan Barak,
Assistant Attorney General, appears for OPA.

29 **II. BACKGROUND**

30 In 2001, Maritech was under contract with DOF to provide certain computer maintenance
31 services to the CNMI government. Maritech’s contract was scheduled to expire and did in fact
32 expire on December 31, 2001. Prior to the contract’s expiration, DOF failed to take any steps to
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1 solicit bids or proposals for a new service provider. As such, when the contract expired, DOF
2 awarded a new contract for computer services to AOE without competitive selection, on an
3 expedited procurement basis. The contract had a term of two months, January 22 to March 22, 2002.
4 The Director of Procurement & Supply issued a memorandum notifying DOF that the contract had
5 completed approval processing.
6

7 After confirming that a contract had indeed been executed, Maritech timely protested the
8 contract award, filing a bid protest seven pages in length accompanied by a three-page declaration
9 of Joseph M. Abuschon, the President of Maritech. The protest, filed on February 21, 2002,
10 contended that: (1) the government could not justify an expedited procurement; (2) AOE's principals
11 could not lawfully provide services in the CNMI due to their immigration status; and (3) Maritech
12 was entitled to preference under CNMI law.
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14 Maritech's filing of a bid protest on February 21, 2002, resulted in a March 21, 2002,
15 deadline for a decision. The deadline was later extended and the Procurement & Supply ("P&S")
16 decision denying Maritech's protest was issued on April 8, 2002, citing: (1) failure to present a
17 concise, logically arranged, and direct statement of the grounds for appeal as required by statute; (2)
18 failure to request a ruling by the Public Auditor as required by statute; (3) frivolousness "as
19 evidenced by its extreme brevity;" and (4) abuse of the administrative appeals process in the sole
20 purpose of the protest being to harass the Government.
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22 Maritech appealed the decision April 17, 2002, based on: (1) insufficient justification to
23 support the expedited procurement; and (2) AOE not being a "responsible contractor." As provided
24 by the administrative process, OPA requested, and P&S provided, a complete report. The report was
25 submitted to OPA on April 23, 2002, within the statutory ten days, with P&S recommending that
26 the appeal be denied because it was frivolous and an abuse of the administrative process. Maritech
27 filed its comment on the P&S report May 7, 2002, contending that: (1) the government could not
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1 justify the expedited procurement and (2) AOE did not qualify as a responsible offeror. AOE did
2 not comment on the appeal.

3 OPA issued its decision on July 8, 2002, finding that while AOE was indeed qualified to
4 execute government contracts, the expedited contract procurement process was improper. However,
5 because the term of the two month contract had long since expired and the CNMI obtained the
6 benefit of the services provided by AOE, OPA determined it was in the best interest of the
7 Commonwealth to ratify and affirm the contract in accordance with Procurement and Supply
8 Regulation section 6-103(2).
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10 Following the July 8, 2002 decision, P&S filed a Request for Reconsideration of the issue
11 concerning the expedited contract procurement process. While the P&S Request was pending,
12 Maritech filed a Petition for Judicial Review with the Court naming DOF, P&S and OPA as
13 respondents under Civil Action No. 02-0456E (“Petition One”). DOF responded with an Amended
14 Motion to Dismiss for lack of subject matter pending the outcome of the OPA Request for
15 Reconsideration.
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17 Before the Court made its determination regarding DOF’s Motion to Dismiss, OPA issued
18 its decision denying DOF’s Request for Reconsideration on September 11, 2002, and Maritech filed
19 the instant action, a second petition for judicial review (“Petition Two”) on September 17, 2002,
20 naming only DOF as Respondent.
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22 Thereafter, on October 15, 2002, the Court issued its Order Granting Respondent DOF’s
23 Motion to Dismiss Civil Action One, holding that when Petition One was filed, OPA had not yet
24 rendered a decision regarding its reconsideration, and as such, the Court lacked jurisdiction. After
25 OPA’s decision was issued, DOF subsequently moved for Summary Judgment on Petition Two,
26 claiming failure to name the proper parties, which the Court denied and ordered that Maritech add
27 OPA as a Respondent. OPA was added and promptly filed a Motion to Dismiss, arguing that
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1 Maritech filed its appeal outside of the statute of limitations because OPA was added beyond the 30-
2 day time period provide by statute. The Court denied OPA’s Motion to Dismiss and ordered a
3 briefing schedule.
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5 **III. STANDARD OF REVIEW**

6 The standard of review when examining an administrative agency’s decision is de novo.
7 *In re San Nicolas*, 1 N.M.I. 329, 333 (1990). Further, the Court has the authority to review an
8 agency’s actions pursuant to the Administrative Procedure Act, 1 CMC §§ 9101, *et seq.* Section
9 9112(f) of Title 1 of the Commonwealth Code provides:
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11 The reviewing court shall:

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13 (2) Hold unlawful and set aside agency action, findings, and conclusions
14 found to be:

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

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

18 (iii) In excess of statutory jurisdiction, authority, or limitations, or
19 short of statutory rights;

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

21 (v) Unsupported by substantial evidence in a case subject to §§ 9108
22 and 9109 or otherwise reviewed on the record of an agency hearing provided
23 by statute; or

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

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

1 CMC § 9112(f); *see also*, *In re San Nicolas*, 1 N.M.I. 329 (1990).

29 **IV. DISCUSSION**

30 AOE AS A QUALIFIED OFFEROR

31 Turning first to the matter of AOE’s status as a qualified offeror: in support of its contention
32 that AOE is not a qualified government offeror, Maritech asserts that OPA’s determination that
33 green card holders may conduct business in the Commonwealth was arbitrary and capricious in that
34 OPA relied on unpublished policies of the Department of Labor and Immigration and/or the Office

1 of the Attorney General in making its determination. Maritech further asserts that the determination
2 controverts and undermines the Nonresident Workers Act, 3 CMC §§ 4411, *et seq.*, and other duly
3 promulgated regulations governing the investment and business activities by aliens, and finally, that
4 the determination violates the Commonwealth Administrative Procedure Act, 1 CMC §§ 9101, *et*
5 *seq.*, more specifically Sections 9109(g)(1) and section 9102(c); thereby denying Maritech its due
6 process guarantees. Maritech’s assertion stems from the P&S Decision, which stated, “the position
7 of DOLI and the Attorney General, is that US green card holders are treated as resident workers in
8 the CNMI and are free to work here.” See, P&S Protest Decision 02-005, page 3.

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11 The principal of law asserted by Maritech is correct, to an extent. The Administrative
12 Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual
13 rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the
14 inherently arbitrary nature of unpublished ad hoc determinations. See, e.g. *Morton v. Ruiz*, 415 U.S.
15 199, 232, 94 S. Ct. 1055, 1073, 39 L. Ed. 2d 270, 279 (1974). However, a close reading of the
16 relevant case law reveals that the purpose of the Act is to protect the due process rights of
17 individuals by prohibiting what amounts to an unpublished ad hoc determination of an agency not
18 promulgated in accordance with its own procedures. *Id.*

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20 An agency abuses its discretion when its decisions are either contrary to the plain language
21 of a statute or regulation or add a requirement not contained in the statute. *Puerto Rican Cement*
22 *Co. v. U.S. E.P.A.*, 889 F.2d 292, 299 (1st Cir.1989). Any reliance on unpublished rules or
23 regulations does prohibit an agency from adopting significantly inconsistent policies that result in
24 the creation of “conflicting lines of precedent governing the identical situation.” *Shaw’s*
25 *Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir.1989). But it does not prohibit an agency from
26 simply noting the interpretation of regulations by other agencies when merely clarifying or
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1 explaining its regulations. *See generally, R.L. Inv. Ltd. Partners v. I.N.S.*, 86 F. Supp.2d 1014 (D.
2 Hawai'i, 2000). As it appears to be in this case, such reference is “essentially hortatory and
3 instructional in that they go more to what the administrative officer thinks the statute or regulation
4 means, when applied in particular, narrowly defined, situations.” *Id.* Indeed, Maritech did not argue
5 that there was a statute, regulation, or published decision interpreting a statute that had been
6 contravened, either by an additional requirement or by a contrary interpretation. Rather, Maritech
7 asserts that any reference to another agency by OPA constituted error.
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9 Despite Maritech’s assertions, it is not even clear that Maritech’s reference to DOLI and the
10 Attorney General’s office meant that P&S or OPA relied on any unwritten policies by either agency.
11 In its brief, Maritech chose to ignore the paragraph following the statement in question, which held,
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13 given the fact that [AOE’s] principals have indeed formed a corporation, obtained
14 a license to do business in the CNMI, and are regarded as ‘resident workers’ by
15 Commonwealth law, it would appear that those CNMI laws and regulations
16 governing the investment and business activities of aliens were not intended to apply
17 to them.

18 The paragraph can be read to stand alone, independent of the preceding paragraph, and without any
19 reference to said paragraph. When it is unclear how an agency determination is to be read, a
20 reviewing court must give the agency’s interpretation. *See e.g. Chevron, U.S.A v. Natural Res. Def.*
21 *Council*, 467 U.S. 837, 843, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694, 698 (1984). As such, the
22 Court is unconvinced that OPA relied on any unpublished regulations, even if OPA was prohibited
23 from doing so in reaching its decision.

24 For these reasons, any reference to an opinion of DOLI or Attorney General’s office finding
25 AOE a qualified offeror cannot be said to constitute contravention to OPA regulations. As such, the
26 Court finds the determination of AOE as a qualified offeror was made in compliance with all laws,
27 regulations, and statutes.
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1 CONTRACT RATIFICATION

2 Turning next to the issue of whether the contract was properly ratified. As OPA determined
3 in its review of the contract procurement process, a government contract entered into that does not
4 comply with procurement regulations is invalid and subject to rescission. *See also, Schoenbrod v.*
5 *U.S.*, 410 F.2d 400 (Ct. Cl. 1969). However, despite making said determination, OPA ratified the
6 contract because it had already been performed and the Government had received AOE’s services.
7 The issue then is whether the contract was properly ratified and whether there is a remedy available
8 to Maritech pursuant to the invalid procurement process employed by P&S.
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10 As an initial matter, AOE is clearly entitled to payment. The courts have repeatedly
11 observed that it would be “manifestly unfair” to deny a service provider payment for benefits already
12 provided to the government despite any deficiencies in the procurement process. For example,
13 *United States v. New York & Porto Rico S.S. Co.*, 239 U.S. 88, 92, 36 S. Ct. 41, 42, 60 L. Ed. 161,
14 161 (1915) (*citing United States v. R.P. Andrews & Co.*, 207 U.S. 229, 243, 28 S. Ct. 100, 105, 52
15 L. Ed. 185, 187 (1907)), held that when the government did not comply with formal requirements,
16 the contract was not illegal and recovery was permitted upon *quantum valebat* when performed. In
17 *Trilon Educ. Corp. v. United States*, 578 F.2d 1356 (Ct. Cl. 1978), the court found that although the
18 contracting officer may have disregarded an agency regulation, it did not render the contract a nullity
19 in so far as the service provider’s payment was concerned. And in *Ocean Tech., Inc. v. United*
20 *States*, 19 Cl. Ct. 288, 294 (1990), the court held that performance having been fully completed, the
21 government is obligated to pay for services received.
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24 Further, not every violation of a statute or regulation renders a contract void or invalid-
25 particularly after it has been fully performed. Indeed, contracts between the government and a
26 private party have been sustained even when statutes and regulations relating to the procurement or
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1 award process have been violated. *See E. Walters & Co., Inc. v. United States*, 576 F.2d 362, 367
2 (Ct. Cl. 1978) (“the fact that a procurement practice is prohibited does not necessarily mean that it
3 is therefore actionable.”); *Walsh v. Schlecht*, 429 U.S. 401, 408, 97 S. Ct. 679, 685, 50 L. Ed. 2d
4 641, 643 (1977) (requiring preservation of the validity of contracts that are not plainly illegal). The
5 key factor in determining whether a government contract may be ratified despite the violation of a
6 regulation, rule, or statute is whether it violates provisions explicitly limiting the authority of a party
7 to enter into the contract, or expressly prohibiting the contract altogether. *See, e.g., Clark v. United*
8 *States*, 95 U.S. 539, 542 (1877); *Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1150 (Fed.
9 Cir. 1983); *Alabama Rural Fire Ins. Co. v. United States*, 572 F.2d 727, 729 (Ct. Cl. 1978) (the
10 statute creating the plaintiff corporation expressly forbade plaintiff from entering contract). In the
11 instant case, the nature of the violation does not fall into a category that would render the contract
12 a nullity. Therefore, OPA’s ratification of the contract with AOE was proper.

15 The remaining issue is what, if any, compensation Maritech is entitled to, in light of P&S
16 violating its own regulations in contracting with AOE on a spurious expedited procurement basis.
17 Maritech asserts that it is entitled to lost profits, its costs, and reasonable attorney fees. Maritech
18 cites *City of Durant v. Laws Const. Co., Inc.* to support its petition for lost profits, attorney fees, and
19 cost of bid preparation. 721 So. 2d 598 (Miss. 1998). *City of Durant* involved an open bid process
20 wherein the lowest bidder failed to include the contractor’s Certificate of Responsibility number on
21 the exterior of the envelope as required by local code. Despite the omission, the bidder was awarded
22 the contract. The city later conceded that had it neither opened nor considered the low bid, the city
23 would have awarded petitioner the contract. Here, the facts are vastly different. To begin with,
24 Maritech must show that but for P&S’s failure to follow its procurement regulations, Maritech
25 would have been awarded the contract. The fact that Maritech was the service provider immediately
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1 prior to the contract with AOE does not establish that Maritech was the best-qualified contractor to
2 fulfill the two-month contract or would have been the low bidder. The fact that AOE was hired on
3 an expedited basis might be because they were the best qualified for the contract despite the
4 impropriety of the process. Maritech presents no evidence, other than its prior contract, that it would
5 have been hired but for the improper expedited procurement process. Furthermore, the Court finds
6 no case law supporting the proposition that a prospective bidder, without any evidence that it would
7 have been awarded a contract but for an improper procedure, is entitled to recovery. On the facts
8 before it, the Court is unable to find any justification to award Maritech lost profits, costs, or
9 attorney fees.
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12 **V. CONCLUSION**

13 For the aforementioned reasons, Maritech's Petition on Judicial Review is hereby DENIED.
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15 SO ORDERED this 18th day of August 2004.
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18 /s/ _____
19 David A. Wiseman
20 Associate Judge
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