

1 **FOR PUBLICATION**

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7 **IN THE SUPERIOR COURT**
8 **OF THE**
9 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

10 **J&A ENTERPRISES,**) **Civil Action No. 04-0413E**
11 **Plaintiff/Appellant,**)
12 **vs.**) **DECISION AND ORDER AFFIRMING**
13 **COMMONWEALTH UTILITIES**) **THE DECISION OF THE PUBLIC**
14 **CORPORATION and MICHAEL S.**) **AUDITOR**
15 **SABLAN, AS CNMI PUBLIC AUDITOR,**)
16 **AND THE PUBLIC AUDITOR**)
17 **Defendants/Appellees.**)
_____)

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20 **I. INTRODUCTION**

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22 **THIS MATTER** came to the Court for judicial review proceedings under 1 CMC § 9112.
23 Counsel Eric Bozman represented Plaintiff/Appellant J&A Enterprises (J&A). Kathryn Delafield
24 appeared on behalf of Defendant/Appellee Commonwealth Utilities Corporation (CUC). Assistant
25 Attorney General Alan Barak appeared on behalf of Defendant/Appellee, the CNMI Public Auditor
26 (OPA and Public Auditor).

27 The above-captioned action concerns J&A’s appeal of a decision issued by OPA. OPA’s
28 decision reversed the CUC director’s finding that J&A’s protest of CUC’s procurement award to a

1 nonconforming bidder was untimely and further determined that CUC's procurement award to
2 another bidder (JMI) was improper. However, J&A was not awarded any remedies as a result of
3 the findings because OPA determined that the sole remedies available for an improper award under
4 CUC procurement regulations were limited to either cancelling or affirming the improperly awarded
5 contract. Therefore, J&A seeks an appeal of OPA's determination that no remedies were available
6 to J&A as a result of CUC's misfeasance. Having reviewed the parties' submissions, the written
7 findings and legal conclusions of the Public Auditor, and the applicable law pertaining to review of
8 agency actions, this Court renders its decision and order.

9 10 **II. FACTUAL AND PROCEDURAL HISTORY**

11 In December, 2003, CUC solicited competitive sealed bids for the purchase of 152
12 submersible water well pumps ("IFB").

13 CUC's bid specification required a pump which required that the 6-inch pumps must have
14 pump suction and discharge housing made of investment cast 304 stainless steel. Moreover, the
15 pumps were required to incorporate a hard chrome-plated top bearing journal and self-aligning
16 Teflon wear rings. The bid specification was unequivocal in allowing no deviations from the
17 outlined requirements.

18 In December, 2004, J&A submitted a timely, conforming bid with no deviations from the
19 bid solicitation. However, on or about, March 30, 2004, CUC advised J&A that it had awarded the
20 contract to a lower bidder, JMI.

21 Although JMI was the lowest bidder, JMI's bid did not conform to the IFB's bid
22 specifications. Namely, the 6-inch pump discharge heads were not made of "investment cast"
23 stainless steel, but were made of "fabricated" stainless steel; the 6-inch suction/motor adaptor parts
24 were not made of "investment cast" stainless steel; the top bearings were not made of stainless steel
25 hardened chrome, but were made of rubber; and the self-aligning wear rings were not made of
26 Teflon, but were made of rubber.

27 On or about April 2, 2004, J&A filed a protest of CUC's award of the contract to JMI and
28 enumerated the above-listed deviations to the IFB specifications contained in JMI's bid. The

1 Executive Director of CUC denied J&A's protest on May 6, 2004, on the sole ground that it was
2 untimely.

3 On May 20, 2004, J&A filed a timely appeal with OPA, which presented evidence that the
4 protest to CUC had in fact been filed timely. Furthermore, CUC submitted a letter to OPA on July
5 23, 2004, admitting that JMI's goods were nonconforming. The letter of July 23, 2004, also stated
6 that on June 29, 2004, CUC provided JMI with a second chance to supply conforming goods, but
7 that JMI had failed to provide conforming goods. Because JMI was unable to perform as specified,
8 CUC canceled Contract CUC-WD-04-008. However, instead of re-submitting an IFB for new bids
9 or accepting the next lowest bidder, CUC elected to purchase its water pumps by smaller purchase
10 orders. CUC claimed that the typhoon damage from Ting-Ting necessitated such altered action to
11 immediately restore water service from wells rendered inoperative by the typhoon.

12 On August 5, 2004, the Public Auditor reversed the CUC Director's determination that
13 J&A's protest was untimely, finding that J&A's protest with CUC on April 5, 2004 was timely
14 within the CUC Procurement Regulations (CUC PR); that the award of Contract CUC-WD-04-008
15 to JMI was contrary to the CUC PR because JMI's bid specifications did not conform with the IFB
16 specifications; and that cancellation of the award was allowable under the CUC-PR as a remedy
17 after an award.

18 The Public Auditor, however, did not award, or order CUC to award the Contract to J&A as
19 the lowest conforming bidder. Nor did he award any damages to J&A.

21 III. DISCUSSION

22 A. Standard of Review

23 1 CMC § 9112(f) prescribes the standard of review the Superior Court must apply when
24 reviewing agency actions within the Administrative Procedure Act. *Camacho v. Northern*
25 *Marianas Retirement Fund*, 1 N.M.I. 362 (1990). In its administrative appeal, J&A asks this Court
26 to reverse the Public Auditor's decision, insofar as it failed to award J&A the Contract, force CUC
27 to award J&A the contract, or award damages to J&A to remedy CUC's improper award, pursuant
28 to 1CMC § 9112. Although J&A cites to no particular standard under § 9112, its complaint and

1 brief unequivocally agree with the Public Auditor’s factual findings, however, it disputes the Public
2 Auditor’s failure to award any remedies to J&A, other than it’s finding that cancellation of the
3 contract was allowable pursuant to CUC PR, section 5-103(2)(a). A court may overturn an
4 administrative decision if it finds that decision to be “arbitrary, capricious, an abuse of discretion, or
5 otherwise not in accordance with the law.” 1 CMC § 9112(i). Here, because J&A asserts that the
6 Public Auditor’s failure to award the Contract to J&A or award damages to J&A as a result of
7 CUC’s improper award and rejection of J&A’s protest was wrong in light of CUC PR, sections 3-
8 102(9) and 5-103(2)(a), and 4 CMC § 8158(a), the Court will review the Public Auditor’s Decision
9 to determine whether it withheld remedies available to J&A in contravention to applicable law.

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11 **B. CUC PR, sections 3-102(9) and 5-103(2)(a) do not require that CUC award a**
12 **contract to the next lowest bidder when CUC has erroneously awarded a contract to a non-**
13 **conforming bidder.**

14 J&A asserts that the Public Auditor could have awarded or compelled CUC to award the
15 Contract to J&A pursuant to CUC PR, sections 3-102(9) and 5-103(2)(A). Section 3-102 lays out
16 the procedural framework for competitive sealed bidding by CUC. Subsection (9) of this section
17 deals particularly with how a contract is awarded:

18 (a) the contract must be awarded . . . to the lowest responsive bid by a responsible
19 bidder whose bid fully meets the requirements of the invitation for bids and these
20 regulations.
CUC PR, § 3-102(9)

21 Here, it came to light to all parties involved, that although JMI was the lowest bidder, it
22 nevertheless submitted a non-responsive or nonconforming bid. Consequently J&A submitted the
23 lowest responsive bid. Notwithstanding J&A’s compliance, CUC erroneously awarded the contract
24 to an entity contrary to the requirements of CUC PR, section 3-102(9). However, although J&A’s
25 interpretation that section 3-102(9) requires CUC to re-award a contract erroneously granted to a
26 nonconforming bidder, the plain language of this section solely lays out the standard for awarding a
27 contract, but is silent on the issue of any penalties or remedies to apply when the contract has been
28 awarded in contravention to its requirements. Indeed, the Public Auditor’s findings echoed that

1 CUC's award to JMI was in direct violation of section 3-102, but the plain language of section 3-
2 102 stops short of requiring CUC to award a contract to the next-lowest conforming bidder when
3 the contract was erroneously awarded to a non-conforming bidder.

4 Moreover, at the time this case reached the Court, CUC had already canceled the IFB, re-
5 evaluated its needs, and purchased pumps via several small purchases, in accordance with the
6 purchase order method outlined in CUC PR 3-103. Although the Court cannot attest to the fiscal
7 prudence of CUC's use of such a method to obtain its operational equipment, it is also reluctant to
8 compel CUC to award a contract, the fruits of which are no longer required, if a comparable remedy
9 at law is available. Logically, awarding such a contract to J&A at this point in time would only
10 create economic waste and a financial burden that CUC would assuredly pass on to its customers in
11 the Commonwealth. In light of this reasoning, the Court will not compel CUC to posthumously
12 award Contract CUC-WD-04-008 to J&A.

13 In support of its argument that the Public Auditor should have awarded J&A damages in
14 the form of lost profits for CUC's actions, J&A cites to Ohio authority in which an appellate state
15 court awarded lost damages to a contractor after a city wrongfully rejected the contractor's bid, and
16 where injunctive relief was no longer available, when holding such did not violate public policy by
17 requiring taxpayers to pay twice for the same project, and when penalizing the city protected the
18 integrity of the bidding process. *See Cementech v. Fairlawn*, 160 Ohio App.3d 450 (Ohio App. 9
19 Dist., 2005)¹. However, this authority, although persuasive insofar as it seeks to encourage
20 maintenance of the integrity of the bidding process, is not mandatory in this jurisdiction, nor does it
21 comport with the Court's reluctance to heave another heavy burden upon Commonwealth
22 consumers during times of economic decay.

23 Moreover, the holding in *Cementech* was reversed in the Ohio Supreme Court, when the
24 Court found that "when a municipality violates competitive-bidding laws in awarding a

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27 ¹The Court notes that J&A originally cited this case as coming from the Ninth Circuit Court
28 of Appeals, when in fact it comes from a state court appellate division in Ohio. The Court hopes
that this error in citation was solely a result of sloppy drafting rather than any attempt by J&A
through its attorneys to mislead it.

1 competitively bid project, the rejected bidder cannot recover its lost profits as damages.”
2 *Cementech v. City of Fairlawn*, 109 Ohio St.3d 475, 477, 849 N.E.2d 24, 28 (Ohio, 2006). Despite
3 this Court’s disappointment with CUC’s glaring ineptitude in managing its procurement process,
4 and the Court’s desire to maintain policies which encourage a transparent and fair bidding process,
5 the Court nevertheless finds the Ohio Supreme Court’s reasoning against awarding lost profit
6 damages to an aggrieved bidder as overly punitive to a community that is ultimately responsible for
7 footing the bill is highly persuasive. Further, J&A has failed to locate any other CUC PR provision
8 which requires such an award in instances where it erroneously awards a contract to a
9 nonconforming bidder.

10 Lastly, J&A asserts that it must be awarded the Contract or damages pursuant to CUC PR,
11 section 5-103(2)(a). CUC PR, section 5-103(2) outlines the remedies available under the CUC PR
12 if “after an award the Director or the Public Auditor determines that a solicitation or award of a
13 contract is in violation of a law or regulation . . .” CUC PR, § 5-103(2). Specifically, subsection
14 (2)(a) provides that if the “person awarded the contract has not acted fraudulently or in bad faith,”
15 the contract may either be ratified or cancelled. CUC PR, § 5-103(2)(a). Here, J&A argues that
16 CUC acted in bad faith by cancelling the contract instead of awarding it to J&A and then buying
17 essentially the same elements by the less-transparent purchase order procedure. However, the Court
18 cannot agree for the following reasons.

19 First, the “bad faith” provision in subsection (2) only pertains to whether or not there was
20 demonstrated “bad faith” on the part of the party to whom the contract was unlawfully awarded.
21 Obviously, this subsection is not meant to provide a remedy for jilted bidders, but rather it is to
22 specify what steps CUC may take if it has erroneously awarded a contract. Consequently,
23 cancelling the contract or ratifying the contract was the sole avenue of relief for CUC. The plain
24 language of section 5-103(2)(a) simply does not provide relief to the aggrieved bidder.

25 Secondly, even if there was a provision which mandated a certain remedy upon a
26 demonstration of bad faith by CUC, none was shown here. After reviewing the facts of the case,
27 the Public Auditor found that CUC made an error, both in denying J&A’s protest as untimely, and
28 in awarding the contract to the nonconforming bidder JMI. However, the Public Auditor

1 unequivocally found that there was no demonstrated bad faith on the part of CUC, because J&A
2 failed to submit sufficient evidence to substantiate such a claim. Even when this Court examines
3 the circumstances that J&A claims demonstrate bad faith, i.e. CUC's refusal to re-award the
4 Contract to J&A and its subsequent purchase of the same water pumps through a non-transparent
5 purchase order process, it would only be able to draw the same conclusion by sheer speculation.
6 J&A failed to prove bad faith to the Public Auditor and has failed to prove it here. Surely, as
7 spelled out above, CUC has demonstrated egregious carelessness which may not have been
8 discovered had it not been for J&A's diligence, however, egregious carelessness combined with the
9 circumstances set forth by J&A merely suggest that foul play could have been afoot, but does not
10 conclusively demonstrate it.

11 **C. 4 CMC § 8158(a) does not provide costs and attorneys fees to a party who prevails**
12 **at the administrative level but does not prevail at the judicial appeal.**

13 J&A additionally argues that it is entitled to an award of costs and attorney fees associated
14 with bringing its administrative action and judicial review under 4 CMC, section 8158(a). The
15 plain language of section 8158(a) provides that “[a]ny person aggrieved by an act or omission of the
16 corporation may obtain judicial review pursuant to the Administrative Procedure Act [1 CMC §
17 9101 et seq.]. A litigant who, in the opinion of the court, substantially prevails on the merits shall
18 receive his costs and attorney's fees.” 4 CMC § 8158(a). Thus, if an aggrieved party prevails on
19 the merits of its appeal of agency action at the judicial review level, it is entitled to fees and costs
20 associated with that appeal.

21 Here, J&A substantially prevailed in its administrative appeal to the Public Auditor because
22 the Public Auditor found that the CUC director erroneously rejected J&A's protest as untimely and
23 found that CUC's award of the Contract to JMI was contrary to the CUC PR. However, J&A
24 appealed the Public Auditor's decision to this Court pursuant to 1 CMC, section 9112, solely on the
25 issue of whether the Public Auditor's decision was not according to law insofar as its failure to
26 award any remedies to J&A. As demonstrated above, this Court has been unable to find any legal
27 flaws in the Public Auditor's application of the law to J&A's situation, and consequently this Court
28 cannot conclude that J&A has prevailed on the merits of its appeal. Therefore, the Court will not

1 award J&A attorney fees and costs pursuant to section 8158(a).

2 Notwithstanding the Court's inability to award J&A fees and costs pursuant to section
3 8158(a), the Court finds that equity and fairness would most definitely justify that J&A receive
4 compensation for its successful efforts at the administrative level. By timely protesting CUC's
5 erroneous award, J&A alerted CUC to its own undetected mistakes. Although it is difficult to
6 speculate as to whether CUC was therefore saved from serious consequences by J&A's diligence, it
7 is good policy to encourage competitive bidders to bring such errors to the immediate attention of
8 the procuring entity. However, although the Court has strained to locate any authority in equity or
9 in common law which would allow it to award J&A all reasonable attorney fees and costs
10 associated solely with J&A's protest and its administrative appeal of the CUC Director's decision to
11 the Public Auditor, it has been unable to locate any such authority. Moreover, J&A has not
12 presented the Court with any additional authority to allow such an award.

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IV. CONCLUSION

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For the foregoing reasons, this Court **AFFIRMS** the Public Auditor's decision of August 5,
2004.

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So ORDERED this 12th day of July 2007.

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/s/
David A. Wiseman, Associate Judge

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