



By the order of the court, Judge David A Wiseman

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FOR PUBLICATION



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

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|--------------------------------------|---|---------------------------------------|
| In Re: |) | CIVIL CASE NO. 14-0202 |
| |) | |
| DECISION OF THE OFFICE OF THE |) | ORDER GRANTING CUC’S MOTION TO |
| PUBLIC AUDITOR ON THE |) | DISMISS WITHOUT PREJUDICE |
| ADMINISTRATIVE APPEAL OF |) | |
| COLDWELL SOLAR, INC., |) | |
| OPA Appeal No. BP-A086, |) | |
| |) | |
| COMMONWEALTH UTILITIES |) | |
| CORPORATION, |) | |
| |) | |
| Contracting Agency, |) | |
| |) | |
| COLDWELL SOLAR |) | |
| INTERNATIONAL, INC., |) | |
| |) | |
| Petitioner. |) | |
| |) | |

I. INTRODUCTION

THIS MATTER came before the Court on November 6, 2014, at 1:30 p.m. in Courtroom 223A. Attorney Joseph E. Horey appeared for the Petitioner, Coldwell Solar International, Inc. Attorney James S. Sirok appeared for the Respondent, Commonwealth Utilities Corporation (“CUC”). Assistant Attorney General Reena Patel appeared for the Office of the Public Auditor (“the OPA”).

Based on review of the filings, oral arguments, and applicable law, the Court hereby **GRANTS** CUC’s Motion to Dismiss without prejudice.

II. BACKGROUND

This matter arises from a bid protest between Petitioner and CUC. Petitioner alleges that, on March 2011, CUC issued a request for proposals (“RFP”) from independent power producers to enter into a power

1 purchase agreement with CUC for electric power generated by means of a solar photovoltaic system.

2 Petitioner alleges that CUC issued a notice of intent to enter into a power purchase agreement with
3 American Capital Energy, Inc. (“ACE”). Petitioner also alleges that by the time CUC and ACE entered into
4 a contract (“the ACE Contract”), the cost of solar power generation had dropped so low that it was no longer
5 reasonable for CUC and ACE to execute said contract.

6 On July 3, 2014, Petitioner filed a bid protest with CUC for its decision to proceed with the ACE
7 Contract. On July 10, 2014, CUC denied Petitioner’s protest. On July 11, 2014, Petitioner appealed CUC’s
8 denial of the protest to the OPA. On September 29, 2014, the OPA dismissed Petitioner’s appeal on the
9 ground that it lacked jurisdiction to decide the appeal.

10 Petitioner now brings the instant petition for judicial review of the OPA’s decision under the
11 Commonwealth Administrative Procedure Act (“CAPA”). Petitioner seeks for this Court to reverse OPA’s
12 decision and remand the matter for decision on the merits of Petitioner’s appeal.

13 III. LEGAL STANDARD

14 Rule 2(g)(1) of the Rules of Procedure for Administrative Appeals (“Rule 2(g)(1)”) governs a motion
15 to dismiss for jurisdictional defects in the petition for judicial review of an agency action. Because Rule
16 2(g)(1) also provides that the Rules of Civil Procedure (“NMI R. Civ. P.”) shall govern in a Rule 2(g)(1)
17 motion, the Court applies the legal standards set forth in Rule 12(b)(6) of NMI R. Civ. P (“Rule 12(b)(6)”).
18 A Rule 12(b)(6) motion tests the legal sufficiency of a pleading. *Camacho v. Micronesian Dev. Co.*, 2008
19 MP 8 ¶ 10. In ruling on a Rule 12(b)(6) motion, the court accepts the allegations in the pleading as true and
20 construes them in the light most favorable to the petitioner. *See id.* Dismissal is appropriate when it appears
21 beyond a doubt that the petitioner can prove no set of facts that would entitle him to relief. *Id.*

22 Commonwealth administrative agency decisions are not reviewable by the judiciary as a matter of
23 right. *N. Marianas College v. Civil Serv. Comm’n*, 2006 MP 4 ¶ 12. Thus, in a petition for judicial review
24 of an agency action, CAPA must authorize a court to review the matter. Under CAPA, a court may review
25 an agency action under limited circumstances: (1) where there is a relevant statutory authority; (2) a final

1 agency action; and (3) where there is no other adequate remedy in a court. 1 CMC § 9112(d). Thus, the
2 moving party’s burden is to show that CAPA does not authorize the Court to review the petition for judicial
3 review on the merits, its factual allegations the Court accepts as true.

4 In addition, there is a strong presumption that the Commonwealth Legislature intends judicial review
5 of agency actions. *N. Marianas College*, 2006 MP 4 ¶ 13 (citing *Bowen v. Michigan Acad. of Family*
6 *Physicians*, 476 U.S. 667, 670 (1986)). Thus, the moving party has an additional burden to show by “clear
7 and convincing evidence” that the Commonwealth Legislature did not intend judicial review of the subject-
8 agency action. *Id.* ¶ 14 (citing *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)). Any prohibitions against
9 judicial review are construed narrowly against the moving party. *See id.*

10 IV. DISCUSSION

11 The Court finds that CUC met its burden to show that the Commonwealth Legislature intended to
12 exclude from judicial review a proceeding initiated under Section 50-50-401 of Title 50 of the Northern
13 Mariana Islands Administrative Code (“Bid Protest Proceeding”), and appealed to the OPA under Section
14 50-50-405 of the Northern Mariana Islands Administrative Code (“Bid Protest Appeal Proceeding”). CUC
15 made a showing by “clear and convincing” evidence that, under the Rules of Procedure for Administrative
16 Appeals (“the Rules”), Petitioner must allege that the disputed matter arises from an “agency final order or
17 decision in a contested case.” NMI R. P. Admin. App. 2. Here, Petitioner did not do so.

18 CUC argues that the text of the Rules evinces legislative intent that judicial review of an agency
19 action are limited to *contested* cases, those that require an agency hearing. CAPA requires the Court to
20 follow the procedural guidelines set in the Rules, unless those Rules are inadequate. 1 CMC § 9112 (c)
21 (“The form of proceeding for judicial review is the special statutory review proceeding relevant to the
22 subject matter in the Commonwealth Superior Court . . .”). The Rules were adopted by the Commonwealth
23 Legislature and qualifies as evidence supporting legislative intent.¹ Judicial Admin. Order No. 2010-ADM-

24
25 ¹ While the Court notes that the section heading to Section 9112 is “Administrative Procedure: Judicial Review of Contested Case,” the Court is persuaded by Petitioner’s argument that a section heading in itself is without legal force.

1 0003-RULE (NMI Sup. Ct. Sept. 7, 2010). Because there was no agency hearing involved in the course of
2 the original litigation, CUC argues CAPA does not authorize the Court to adjudicate the instant “contested
3 case” petition for judicial review as it is currently pleaded.

4 The Rules provide that “[a]n appeal from an agency final order or decision in a contested case is
5 commenced by filing a petition for judicial review in the office of the clerk of the Superior Court.” NMI R.
6 P. Admin. App. 2. The Rules define a contested case as a “proceeding before an agency in which the legal
7 rights, duties, interests or privileges of specific parties are required by law or constitutional right to be
8 determined after an agency hearing” *Id.* 1(f)(3). The Rules also define cases that are not contested.
9 Those include cases where “an agency issues a license, permit or certificate after an examination to test the
10 knowledge or ability of the applicant where the controversy concerns whether the examination was fair or
11 whether the applicant passed the examination.” *Id.* The Rules also prevent a Court from requiring a party
12 to petition an agency for rule making or to apply for extraordinary remedies, such as declaratory rulings,
13 before finding that the underlying agency action was a “contested case.” *Id.*

14 A Bid Protest falls somewhere along the middle in the “contested case” spectrum. It allows a
15 prospective bidder, such as Petitioner, to file a written protest to the CUC Executive Director (“the
16 Director”) in a non-administrative hearing proceeding. NMIAC § 50-50-401(a)(1). The written protest
17 requires a petitioner to state its factual and legal grounds for their requested relief. *Id.* If the Director does
18 not grant said requested relief, then the petitioner may appeal the Director’s decision to the OPA under a Bid
19 Protest Appeal Proceeding. The Bid Protest Appeal Proceeding does not require a formal administrative
20 hearing, but a conference may be scheduled by the parties at the discretion of the OPA. *Id.* § 50-50-405(h).

21 Thus, while the Court finds that the underlying Bid Protest Proceeding determines the legal rights
22 and duties of specific parties, said legal rights and duties are not determined after an agency hearing. At the
23 same time, the Court does not find that a Bid Protest Proceeding falls into the category of cases that are
24 exclusively removed from the definition of a contested case: it does not involve the issuance of a license,
25 permit, or certificate after a written examination.

1 Even so, the Court does not find that a Bid Protest Proceeding is a “contested case” under the Rules
2 – a necessary component for the Court to adjudicate the instant petition as pleaded. The Commonwealth’s
3 statutory analysis jurisprudence does not permit this Court to find that the Rule’s definition of a “contested
4 case” encompasses a Bid Protest Proceeding (where there is no mandated agency hearing). A basic rule of
5 statutory interpretation is to give statutory provisions their plain meaning. *Owens v. Commonwealth Health*
6 *Ctr.*, 2012 MP 5 ¶ 22. One statutory provision cannot be construed to make another provision either
7 inconsistent or meaningless. *Commonwealth v. Laniyo*, 2012 MP 1 ¶ 10.

8 The Court’s finding that a Bid Protest Proceeding is not a “contested case” falls within the applicable
9 scope of judicial interpretation. CAPA requires the Court to follow the procedural guidelines set by the
10 Rules. 1 CMC § 9112(c). A contrary finding would render the Rule’s requirement that a contested case
11 requires an agency hearing meaningless – an impermissible finding under *Commonwealth v. Laniyo*.

12 Because the Court finds that a Bid Protest Proceeding is not a “contested case,” Petitioner cannot
13 maintain its petition for judicial review as it currently stands as a matter of law. To be eligible for relief,
14 Petitioner must conform its pleading to “any applicable form of legal action” as contemplated by 1 CMC
15 § 9112(c).² As a final note, the Court need not address CUC’s remaining grounds for dismissal as the Court
16

17 ² Petitioner suggests this solution in a footnote in his opposition brief. Pet’r’s Opp’n. at 2 n.1 (“CUC places a great
18 weight of this case to fit the definition of ‘contested case’ in the Administrative Appeals Rules. *See* Motion at 3. Even if that
19 were the case, however, it would only mean that those procedural rules would not be applicable to this case.”). Other
20 jurisdictions treat non-contested cases in a similar fashion. *E.g.*, Mo. Rev. Stat § 536.150.1 (1953)

21 When any administrative officer or body existing under the constitution or by statute or by municipal
22 charter or ordinance shall have rendered a decision **which is not subject to administrative review**,
23 determining the legal rights, duties or privileges of any person, including the denial or revocation of a
24 license, and there is no other provision for judicial inquiry into or review of such decision, **such decision**
25 **may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate**
action, and in any such review proceeding the court may determine the facts relevant to the question
whether such person at the time of such decision was subject to such legal duty, or had such right, or was
entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and
the court may determine whether such decision, in view of the facts as they appear to the court, is
unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the
court shall render judgment accordingly, and may order the administrative officer or body to take such
further action as it may be proper to require; but the court shall not substitute its discretion for discretion
legally vested in such administrative officer or body, and in cases where the granting or withholding of a

1 has already ruled on CUC’s primary argument.³

2 **CONCLUSION**

3 Based on the foregoing, the Court **GRANTS** CUC’s Motion to Dismiss without prejudice.

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5 **SO ORDERED** this 12th day of March, 2015.

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8 David A. Wiseman, Associate Judge

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21 privilege is committed by law to the sole discretion of such administrative officer or body, such discretion
22 lawfully exercised shall not be disturbed.
23 (emphasis added).

24 The Court also notes that two of Petitioner’s citations are misplaced. In *Maeda v. Pacific Corp.*, the Court did not
25 address the issue of judicial review of contested cases. Civ. No. 13-0112 (NMI Super. Ct. Sept. 2, 2014). Neither did the
Court in *USA Fanter Corp., Ltd. v. Commonwealth Water Task Force*, Civ. No. 13-0013 (NMI Super. Ct. May 17, 2013).

³ The Court notes that CUC also argued that the instant petition for judicial review was not ripe for review until an
agency hearing took place before the Commonwealth Public Utilities Commission (“CPUC”) under 4 CMC § 8158 and 4
CMC § 8192.