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DEPT. OF JUSTICE
JUL 10 1997
SUPERIOR COURT

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

JOAQUIN M. MANGLONA) Civil Action No.97-486
Plaintiff,)
v.) ORDER
GOVERNMENT OF THE)
COMMONWEALTH OF THE)
NORTHERN MARIANA ISLANDS)
Defendant.)

I. INTRODUCTION

Defendant's Motion to Dismiss for Lack of Jurisdiction under Commonwealth Rule of Civil Procedure 12(b)(1) and 12(h)(3) came before this Court on July 9, 1997. The CNMI Government moves to dismiss Plaintiff's complaint on the grounds that this Court lacks subject matter jurisdiction over this claim because Plaintiff failed to exhaust his administrative remedies under section 5-201 of the CNMI Procurement Regulations, prior to filing the instant action. Assistant Attorney General Mike Ambrose, Esq., appeared on behalf of the CNMI Government. Douglas F. Cushnie, Esq., appeared on behalf of Plaintiff.

Following the hearing, the Court issued an Order requesting additional briefing on the following issues:

1. Do the CNMI Procurement Regulations set forth at 12 Com. Reg. No. 9 (September 15, 1990) 7274-7320 and especially § 5-201 apply to lease agreements for real property?

For Publication

1 2. If the CNMI Procurement Regulations set forth at 12 Com. Reg. No. 9 (September 15,
2 1990) 7274-7320 do apply to lease agreements for real property, can a landlord leasing real
3 property to the CNMI Government be bound by the requirements of § 5-201 if the lease
4 agreement does not include, and in fact contradicts, the dispute requirements set for in § 5-201?

5 See, Order dated July 11, 1997.

6 Having considered the written and oral arguments of counsel, the Court now renders its
7 decision.

8 II. FACTS

9 In December 1992, the CNMI Government leased from Plaintiff office space for the
10 Department of Labor and Immigration (“DLI”) in Saipan. The building is located near the Saipan
11 International Airport. The lease was for a period of ten years.

12 On January 22, 1997, the Secretary of Finance, Antonio R. Cabrera, wrote to Plaintiff
13 notifying him that DLI had vacated the building and was terminating the lease.

14 On April 30, 1997, Secretary of Labor and Immigration, Thomas O. Sablan, wrote another
15 letter to Plaintiff notifying him that DLI considered the lease terminated as of October, 1996 the
16 date DLI vacated the building. As grounds for terminating the lease, Secretary Sablan cited
17 Plaintiff's failure to keep the building in a state of repair sufficient to make it suitable as office
18 space.

19 On May 6, 1997, Plaintiff filed the present action seeking, inter *alia*, the remaining rent
20 allegedly due under the lease agreement in the amount of \$1,829,002.50.

21 It is undisputed that Plaintiff did not pursue administrative remedies under Section 5-201 of
22 the CNMI Procurement Regulations.

23 III. ISSUE PRESENTED

24 Must a party to a lease agreement for real property with the CNMI Government exhaust
25 administrative remedies under section 5-201 of the CNMI Procurement Regulations prior to filing
26 a lawsuit if the lease agreement, by its terms, does not require administrative remedy exhaustion.
27

1 IV. ANALYSIS

2 The Court begins its analysis by looking at the Lease Agreement executed by Plaintiff and
3 the CNMI Government. The Lease Agreement provides:

4 16. **Remedies of Landlord for Breach of Tenant:** [I]n the event Tenant breaches
5 this Lease and fails to make correction within the time provided, the Landlord may
6 exercise any of the following remedies or any other remedy available to the
7 Landlord at law or in equity, and all such remedies shall be cumulative and
nonexclusive of any one or more such remedies, and exercise of one remedy shall
not be deemed to be an exclusive election of the remedy or remedies exercised or a
waiver of the remedies not exercised.

8 See, Lease Agreement at 9-10, Exhibit "A" to Plaintiffs Complaint.

9 In addition, the Lease Agreement provides:

10 25. **Entire Agreement:** This writing and the exhibits hereto contain the entire
11 agreement of the parties hereto with respect to the subject matter hereof, and may
12 not be modified, altered, or changed in any manner whatsoever, except by written
agreement signed by the parties hereto.

13 Id. at 15.

14 The Lease Agreement does not require Plaintiff to seek administrative relief prior to
15 filing a lawsuit in the event the CNMI Government breaches the Lease Agreement; thus any such
16 duty must be imposed by statute or law.

17 Section 5-201 of the CNMI Procurement Regulations provides:

18 **Disputes:** (1) Any dispute between the government and a contractor relating to the
19 performance, interpretation of or compensation due under a contract, which is
20 subject of these **regulations**, must be filed in writing with the Chief and the
official with the expenditure authority within ten (10) calendar days after
knowledge of the facts surrounding the dispute.

21 See, CNMI Procurement Regulation § 5-201, 12 Com. Reg. No. 9 (September 15, 1990) 7274-
22 7320. (emphasis added) In order for the dispute requirements of the Procurement Regulations to
23 apply, the contract in dispute must be "a contract which is the subject of these regulations." See
24 Procurement Regulations at §5-201.

25 The Procurement Regulations define "Contract" to include:

26 . . . all types of agreements, regardless of what they may be called for the
27 procurement of supplies, services or construction.

1 *See*, Procurement Regulations § 1-201.5. Thus, in order for a lease of real property to be a
2 contract subject to the dispute requirements of the Procurement Regulations, a lease for real
3 property must be included in the definition of either supplies, services, or construction.

4 The Procurement Regulations do not define supplies. Furthermore, the definitions of
5 services^{1/} and construction^{2/} do not include leases for real property. Consequently, a lease for real
6 property is outside the scope of contracts in which administrative remedy exhaustion is required
7 under section 5-201 of the Procurement Regulations.

8 The Government argues that the Procurement Regulations' definition of "goods" should be
9 substituted for the word "services." *See Government's Supplemental Brief* at 5. *See also*,
10 Procurement Regulations § 1-201.9.^{3/} As a basis for doing so, the Government offers this
11 explanation:

12 We acknowledge that, at some places in the regulations, the term "supplies" is used
13 instead of "goods", with apparently interchangeable meanings. This may be
14 because the American Bar Association Model Procurement Code for State and
15 Local Government (Public Contract Law Section 1979), which has many identical
provisions to the CNMI Procurement Regulations and may have been a model for
the CNMI, uses the term "supplies" instead of "goods". In that model code, there

16 ^{1/} Services is defined as follows:

17 Services means the **furnishing** of time, labor or effort by a person other than an employee,
18 and not involving the delivery of a specific end product other than reports, plans and
incidental documents.

19 *See*, Procurement Regulations § 1-201.18.

20 ^{2/} Construction is defined as follows:

21 Construction means the process of building, altering, repairing, improving or demolishing
22 of a public structure or building or public improvements commonly known as "capital
improvements". It does not include the routine maintenance of existing structures,
buildings, or public real property.

23 *See*, Procurement Regulations § 1-201.4.

24 ^{3/} Goods is defined as follows:

25 Goods means all property, including but not limited to equipment, materials, supplies,
26 and other tangible personal property of any kind or nature, printing, insurance, leases
of real and personal property, and sale or other disposal of real and personal property,
except the sale or disposal of public lands under the management of the Marianas Public
Land Corporation (MPLC).

27 *See*, Procurement Regulations § 1-201.9.

1 is a definition of "supplies" and not of "goods". In the CNMI Procurement
2 Regulations, there is a definition of "goods" but not "supplies." The Model Code
3 definition of "supplies", like the CNMI Procurement Regulation Definition of
4 "goods", specifically includes "leases of real property." ABA Model Code at § 1-
5 301(21). . . . While it would undoubtedly be neater if the same term was used in
6 all places in the regulation, there can be no doubt that the inclusion of leases of real
7 property in the definition of "goods" indicates the intent to include such leases in
8 the coverage of the procurement regulations.

9 *See Government's Supplemental Brief at 5.* As plausible as the Government's explanation may be,
10 the fact remains that the word "goods" is not included in the Procurement Regulation's definition
11 of contract. Furthermore, the Government's explanation underscores the fact that the
12 Procurement Regulations are ambiguous when applied to the facts of this case.

13 The Court adopts the reasoning of the U.S. Supreme Court in *McCarthy v. Madigan*, 112
14 S.Ct 1081 (1992), cited by Plaintiff.

15 In *McCarthy*, a prisoner filed a civil action against the prison where he was incarcerated
16 for its alleged denial of his medical care. The District Court dismissed the prisoner's complaint
17 based on his failure to exhaust administrative remedies. *McCarthy* at 1085. The U.S. Supreme
18 Court reversed. In doing so, the U.S. Supreme Court stated that:

19 Of "paramount importance" to any exhaustion inquiry is congressional intent.
20 Where Congress specifically mandates, exhaustion is required. But where Congress
21 has not clearly required exhaustion, sound judicial discretion governs.

22 *McCarthy* at 1086. (citations omitted)

23 Based on this reasoning expressed in *McCarthy*, the Court finds that its inquiry need go no
24 further. The analysis of the Definitions section of the Procurement Regulations, *supra*,
25 demonstrates that the Procurement Regulations are ambiguous as to whether the Dispute
26 Requirements apply to contracts involving leases of real property.

27 The Government relies heavily on Section 5-201, *Rivera et al. v. Guerrero et al.*, No. 93-
28 015, slip op. (N.M.I. December 22, 1993) and *Nansay Micronesia Corp. v. Govendo*, 3 N.M.I.
12 (1992) for the proposition that it is mandatory to exhaust administrative remedies prior to filing
a lawsuit based on a contract involving the CNMI Government. This Court disagrees; neither
Rivera nor *Nansay* involve disputes arising from executed and enforceable contracts. Instead, in

1 Rivera the Supreme Court held that a party bidding on a contract offered by the Commonwealth
2 Ports Authority ("CPA") must, pursuant to the Commonwealth Ports Authority Procurement
3 Rules and Regulations § 10.1(1)(a), 10 Com. Reg. 5642-43 (Aug. 15, 1988), file a timely protest
4 with the CPA prior to filing a lawsuit. Likewise in *Nansay*, the Supreme Court held that a party
5 who wishes to protest a building permit issued by the Coastal Resources Management ("CRM")
6 must, pursuant to the Coastal Resources Management Act (2 CMC § 1541(b)), file a timely appeal
7 with the CRM prior to filing a lawsuit.

8 As noted, supra, the U.S. Supreme Court has stated that "where Congress specifically
9 mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound
10 judicial discretion governs." *McCarthy* at 1086. The Court finds that an ambiguity exists as to
11 whether or not the Procurement Regulations provisions regarding disputes, as set forth in
12 Procurement Regulation Section 5-201, as defined in Section 1-20, require exhaustion of
13 administrative remedies with respect to the subject Lease Agreement. Thus, the Procurement
14 Regulations fail to "specifically mandate" or "clearly require exhaustion" of administrative
15 remedies prior to filing an action in the Superior Court." Consequently, this Court finds that it
16 has subject matter jurisdiction over this action.

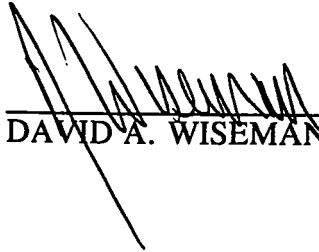
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24 ⁴ The Court also notes that in future contracts the Government could easily avoid this issue by
25 specifically incorporating the requirements of the Procurement Regulations into the terms of the
26 contract. See for *example*, United States v. *Holpuch*, 328 U.S. 234, 66 S.Ct. 1000, 1001 (1946)(Both
27 contracts in dispute specifically stated that "All labor issues arising under this contract . . . shall be
submitted to the Board of Labor Review;" *Transcontinental & Western Air v. Koppal*, 345 U.S. 653,
73 S.Ct. 906 (1953)(Under Missouri law, an employee must exhaust all administrative remedies
specified in his contract, prior to filing a lawsuit).

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V. CONCLUSION

For the foregoing reasons, the Government for the Commonwealth of the Northern Mariana Islands' Motion to Dismiss is **DENIED**.

So ORDERED this 6 day of October, 1997.



DAVID A. WISEMAN, Special Judge