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FOR PUBLICATION

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

MICRONESIAN ENVIRONMENTAL SERVICES, LLC,

CIVIL ACTION NO. 21-0004  
 CIVIL ACTION NO. 20-0344

Petitioner,

v.

ORDER:

KINA B. PETER, in her official capacity as the Public Auditor of the CNMI OFFICE OF THE PUBLIC AUDITOR, JAMES A. ADA, in his official capacity as the Secretary of the CNMI DEPARTMENT OF PUBLIC WORKS, FRANCISCO C. AGUON, in his official capacity as Acting Director of Procurement & Supply, DAVID ATALIG, in his official capacity as the Secretary of the CNMI DEPARTMENT OF FINANCE, and TANG'S CORPORATION,

- (1) CONFIRMING CERTIFIED RECORD;
- (2) SEALING COMMONWEALTH'S EXHIBIT X;
- (3) ENTERING PROTECTIVE ORDER; AND
- (4) DENYING PETITIONER'S MOTION TO STRIKE AS MOOT

Respondents.

I. INTRODUCTION

THIS MATTER came before the Court on April 21, 2021, at 9:00 a.m. for a hearing on Petitioner's Objection to the Commonwealth's Certification of Record and Motion to Strike Confidential Information from the Public Record and Issue a Protective Order ("Motion to Strike"). Petitioner Micronesian Environmental Services, LLC ("MES") was represented by Robert T. Torres, Esq. and Sean Frink, Esq. Respondents Francisco C. Aguon, in his official capacity as the Acting Director of Procurement and Supply, CNMI Division of Procurement and Supply, and David Atalig, in his official capacity as the Secretary of Finance, CNMI Department of Finance (collectively, the "Commonwealth"), were represented by Assistant Attorney General Abbi Novotny.

By order of the Court, Presiding Judge Roberto C. Naraja

1 Based upon a review of the arguments, filings, record, and relevant law, the Court  
 2 now issues this Order confirming the certified record; sealing the Commonwealth's Exhibit  
 3 X; entering the Protective Order prepared by Petitioner; and denying Petitioner's Motion to  
 4 Strike as moot.

## 5 II. PROCEDURAL BACKGROUND

6 Petitioner filed its Petition for Judicial Review of Agency Decisions ("Petition") on  
 7 January 17, 2021. Petitioner concurrently filed with its Petition a Designation and Filing of  
 8 Record ("Designation"), designating twenty-seven (27) exhibits as constituting the full  
 9 record on appeal. The exhibits designated by Petitioner are as follows:

10 Table 1: Petitioner's Designation of Record		
11	1	Ex. 1 Department of Finance Division of Procurement Services Director's Report
12	2	Ex. 1.A DPW/SWMD19-RFP-005 (Contract No. 70114-OC) (the Request for Proposals)
13	3	Ex. 1.B February 11, 2020, Evaluations of Proposals by Evaluation Committee
14	4	Ex. 1.C Department of Public Works ("DPW") Contract with Micronesia Environmental Services, LLC ("MES")
15	5	Ex. 1.D July 14, 2020 Tang's ("Tang's") Corporation Protest of Award of Contract for Marpi Landfill Operations and Maintenance
16	6	Ex. 1.E July 14, 2020 Success International Corporation's Protest of Award and July 16, 2020 P&S acknowledgment of receipt
17	7	Ex. 1.F July 23, 2020 SM Notice of Protest Withdrawal
18	8	Ex. 1.G July/August 2020 Procurement & Supply ("P&S")/MES email communications
19	9	Ex. 1.H August 2020 P&S Notices to parties of extension of time for submission of protest views and comments
20	10	Ex. 1.I September 15, 2020 Procurement and Supply Director's ("P&S Director") Protest Decision, Matter of DPW/SMWD19-RFP-005 (Contract No. 701144-OC)
21	11	Ex. 1.J September 29, 2020 P&S letter to DPW re solicitation for Contract No.701144-OC re announcement
22	12	Ex. 1.K Office of the Public Auditor's ("OPA") October 9, 2020 recusal and decision not to hear MES's appeal of the P&S Director's Protest Decision in Subject: Appeals Filed: DPW/SMWD19-RFP-005, Contract No. 70144-OC, and Emergency Contract No. 700501-OC
23	13	Ex. 1.L October 14, 2020 Response by DPW to OPA Recusal
24	14	Ex. 1.M October 16, 2020 Response by P&S to OPA Recusal
25	15	Ex. 1.N September 29, 2020 Protest by MES
26	16	Ex. 1.O P&S Director's October 5, 2020 dismissal of MES's protest in Subject: Protest of Micronesia Environmental Services (MES), LLC DPW/SMWD19-RFP-005; Marpi Landfill Operations and Maintenance
27	17	Ex. 1.P September 29, 2020 Appeal by MES to OPA
28	18	Ex. 1.Q February 27, 2020 MES Response to DPW's first request for a best and final offer
	19	Ex. 1.R March 4, 2020 MES Response to DPW's second request for a best and final offer
	20	Ex. 1.S August 25, 2020 DPW's Comments to Tang's Protest
	21	Ex. 1.S-1 August 25, 2020 MES's Comments to Protests by Tang's and Success International Corp.
	22	Ex. 1.T January 30, 2020 BECQ Notice of Violation
	23	Ex. 1.U December 1, 2017 DPW letter to the Office of the Attorney General re contract extension for Contract No. 579270-OC
	24	Ex. 1.V June 19, 2014 Tang's best and final offer in RFP DPW/SWM14-RFP-001
	25	Ex. 1.W October 28, 2015 Tang's letter to DPW Secretary

26	Ex. 1.X	Proposal Submissions for DPW/SWMD19-RFP-005
27	Ex. 2	OPA's December 18, 2020 recusal and decision not to hear MES's appeal of the P&S Director's Protest Decision in Subject: Appeals Filed: DPW/SMWD19-RFP-005, Contract No. 70144-OC

On February 21, 2021, this Court set a March 3<sup>rd</sup> status conference on this matter. *See* Order Setting Status Conference (filed February 24, 2021). Several dates were set at the March 3<sup>rd</sup> hearing. *Id.* The parties agreed that the Commonwealth would file a Certification of Record by March 15, 2021 and that all objections to the record would be filed by April 1, 2021. *See* Order Granting Motion to Consolidate Matters (filed March 8, 2021).

On March 12, 2021, pursuant to the Court's order, the Commonwealth filed a Certification of Record certifying that the documents filed by Petitioner in its Designation accurately represented the administrative record except that it erroneously excluded four documents, which the Commonwealth filed as its own Exhibits D, W, X, and Y. *See* Certification of Record (filed March 12, 2021) at 2. The Commonwealth certified that "the addition of [the Commonwealth's Exhibits D, W, X, and Y] now represents the complete Administrative record in this matter." *Id.*

Table 2: Respondent Commonwealth's Certification of Record		
28	Ex. D	July 16, 2020 Department of Finance letter confirming receipt of Tang's Corporation Protest
29	Ex. W	October 28, 2015 Tang's letter to DPW Secretary (includes third page of letter which was erroneously omitted from Petitioner's filing of the record)
30	Ex. X	Micronesia Environmental Services, LLC's ("MES") financial statements, balance sheet, and taxpayer identification (W-9 Form)
31	Ex. V	June 19, 2014 Tang's best and final offer in RFP DPW/SWM14-RFP-001

On April 1, 2021, Petitioner filed an Objection to the Commonwealth's Certification of Record and Motion to Strike Confidential Information from the Public Record and Issue a Protective Order ("Motion to Strike"). *See* Motion to Strike (filed April 1, 2021). Petitioner objected to the inclusion of the Commonwealth's Exhibits D, W, and V as extraneous and not relevant to the administrative record. *Id.* at 2-3. Petitioner also objected to the Commonwealth's disclosure of Petitioner's financial and tax documents in the Commonwealth's Exhibit X without redaction of Petitioner's confidential information, including its taxpayer identification number, among other things. *Id.* at 3. The

1 Commonwealth filed its opposition to Petitioner’s Motion to Strike on May 18, 2021.  
2 Petitioner filed its reply on May 28, 2021.

3 **III. LEGAL STANDARD**

4 The Commonwealth Rules of Procedure for Administrative Appeals govern this  
5 matter. *See generally* NMI R. P. Admin. App. Specifically, Rule 4 sets forth the procedure  
6 for designation and filing of the record on appeal. NMI R. P. Admin. App. 4. Rule 4(a)  
7 provides that “[u]pon filing of the petition, the petitioner shall designate those parts of the  
8 record deemed material to the questions presented in the appeal . . . .” NMI R. P. Admin.  
9 App. 4(a). Rule 4(b) provides that “[w]ithin thirty days after the filing of the petition and  
10 docketing statement, or within such further time as the trial court may allow, the agency  
11 shall file a certification of record stating that the record, including all necessary transcripts  
12 and exhibits, is complete for purposes of the appeal.” NMI R. P. Admin. App. 4(b).

13 Rule 4(b)(3) allows the trial court to “modify the time to submit all or parts of the  
14 designated record” upon a showing of good cause by either party. NMI R. P. Admin. App.  
15 4(b)(3). Rule 2(g)(2) allows the trial court to consider motions submitted by the parties “on  
16 a case by case basis,” excluding motions for summary judgment. NMI R. P. Admin. App.  
17 2(g)(2). Finally, Rule 7 allows the trial court to “suspend or modify any provision” within  
18 the rules “and order proceedings as it directs” in the interest of “fairness or judicial  
19 economy.” NMI R. P. Admin. App. 7.

20 **IV. DISCUSSION**

21 **a. The Court Now Confirms the Certified Record.**

22 Because the parties were unable to stipulate to a joint designation of the record  
23 pursuant to NMI R. P. Admin. App. 4 and, further, contest whether the Commonwealth’s  
24 Exhibits D, W, X, and V should be included in the certified record, the Court by this Order  
25 hereby determines that the entirety of the certified record on appeal shall consist of all  
26 twenty-seven (27) exhibits filed by Petitioner (*see* Table 1 above) and all four (4) exhibits  
27 filed by the Commonwealth to supplement Petitioner’s exhibits (*see* Table 2 above).

1           Petitioner concedes in its Motion to Strike that Exhibits D, W, and V were  
2 “included in the Director’s Report.” *See* Motion to Strike at 2. The Director’s Report is  
3 properly included in the administrative record on appeal, and accordingly all exhibits to the  
4 Director’s Report are part of the administrative record, regardless of Petitioner’s opinion of  
5 their relevance. The Court will also admit the Commonwealth’s Exhibit X into the  
6 administrative record because of its relevance to the instant appeal and because the  
7 documents were relied upon by the Procurement and Supply (“P&S”) Director in making  
8 his protest decision. However, due to the sensitive and competitive nature of the financial  
9 and tax documents included in the Commonwealth’s Exhibit X, it shall be placed under  
10 seal upon entry of this Order, as explained further below.

11           **b. The Commonwealth’s Exhibit X Shall Be Placed Under Seal Upon Entry of**  
12           **This Order.**

13           The Commonwealth’s Exhibit X consists of Petitioner’s financial statements,  
14 balance sheet, taxpayer identification (W-9 Form), and application for Letter of  
15 Compliance, all of which were submitted to the Department of Public Works as part of the  
16 bid process. The Commonwealth’s submission of Exhibit X contained no redactions and  
17 was not filed under seal. Petitioner asserts that “[t]hese documents are confidential and  
18 private, and would not have been disclosed to protesting parties because of their  
19 confidential nature.” *See* Motion to Strike at 3. The Court agrees.

20           Procurement regulations protect tax returns and other financial documents  
21 submitted as part of the bidding process. For example, when informing unsuccessful  
22 offerors of the reason they were not selected, “[i]n no event may an offeror’s cost  
23 breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques,  
24 or other confidential business information be disclosed to any other offeror.” NMIAC  
25 § 70-30.3-210(j)(2)(v). Moreover, procurement regulations define “confidential  
26 information” as any information made available that “is not a matter of public knowledge  
27 or available to the public on request,” but rather made available to an employee only by  
28 virtue of their government employment. NMIAC § 70-30.3-701(a). Notably, when

1 Petitioner appealed the P&S Director’s protest decision to the Office of the Public Auditor  
2 (“OPA”), the P&S Director omitted the documents in Exhibit X from the report given to  
3 the parties on appeal to OPA. The P&S Director likely recognized the confidential and  
4 proprietary nature of MES’s financial and tax information.

5 The information contained in the Commonwealth’s Exhibit X, which includes  
6 Petitioner’s financial statements, balance sheet, taxpayer identification (W-9 Form), and tax  
7 clearance from the Division of Revenue and Taxation, fall within the purview of “an  
8 offeror’s cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and  
9 techniques, or other confidential business information.” NMIAC § 70-30.3-210(j)(2)(v).  
10 Further, Petitioner’s financial and tax documents are “not a matter of public knowledge or  
11 available to the public on request.” NMIAC § 70-30.3-701(a). The documents fall  
12 squarely under the definition of “confidential information” as provided by the procurement  
13 regulations. *Id.* The Court cautions the Commonwealth to take all necessary precautions  
14 in the future to protect the confidential, proprietary, and competitive information of parties,  
15 whether by redaction or by filing such documents under seal. By entry of this Order, the  
16 Commonwealth’s Exhibit X is hereby placed under seal.

17 **c. The Parties Are Ordered to Abide by the Protective Order Entered on**  
18 **December 9, 2021.**

19 The Petitioner filed a proposed Protective Order on November 9, 2021. *See*  
20 Proposed Protective (filed November 9, 2021). The Court entered the Protective Order on  
21 December 9, 2021. *See* Protective Order (Granted) (filed December 9, 2021). The parties  
22 are hereby ordered to abide by the Protective Order entered on December 9, 2021. Any  
23 copies of the Commonwealth’s Exhibit X must be promptly destroyed and not used for any  
24 purpose.

25 **d. Except as Otherwise Ordered, Petitioner’s Motion to Strike is Denied as Moot.**

26 Because the Court has confirmed the certified record to include the exhibits  
27 submitted by the Commonwealth in addition to those submitted by Petitioner, placed the  
28

1 Commonwealth's Exhibit X under seal, and entered the Protective Order, Petitioner's  
2 Motion to Strike is now moot and is accordingly **DENIED**.

3 **V. CONCLUSION**

4 **THEREFORE**, for the reasons stated above, the certified record shall include all  
5 exhibits filed by Petitioner in Table 1 and all exhibits filed by the Commonwealth in Table  
6 2; the Commonwealth's Exhibit X is hereby placed under seal; the parties are ordered to  
7 abide by the Protective Order, including by promptly destroying any copies of the  
8 Commonwealth's Exhibit X; and Petitioner's Motion to Strike is **DENIED** as moot.

9  
10 **IT IS SO ORDERED** this 18th day of January, 2022.

11  
12 /s/  
13 **ROBERTO C. NARAJA**, Presiding Judge