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

MICRONESIAN ENVIRONMENTAL SERVICES, LLC, **Petitioner,** **v.** **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,** **Respondents.**	**CIVIL ACTION NO. 21-0004** **CIVIL ACTION NO. 20-0344** **ORDER ON PETITION FOR JUDICIAL REVIEW OF AGENCY DECISION**

I. INTRODUCTION

BEFORE THIS COURT is Petitioner Micronesian Environmental Services, LLC's ("Petitioner" or "MES") brief in support of its Petition for Judicial Review of Agency Decisions (the "Brief"). *See* Petitioner's Brief (filed April 1, 2022). 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 ("Respondents" or the "Commonwealth") timely filed an opposition to Petitioner's Brief ("Respondents' Opposition"). *See* Respondents' Opposition (filed April 22, 2022). Intervenor Tang's Corporation ("Tang's") timely filed its own opposition to Petitioner's Brief ("Tang's

Opposition"). *See* Tang's Opposition (filed April 22, 2022). Petitioner timely filed a reply to both oppositions (the "Reply"). *See* Petitioner's Omnibus Reply (filed May 2, 2022).

The Court notified the parties that it would take the matter under advisement and issue a ruling on the Petition for Judicial Review of Agency Decisions (the "Petition") without further oral argument. *See* Order Setting Briefing Schedule (filed March 2, 2022) (citing NMI R. P. Admin. App. 6(b) ("The trial court may . . . hold oral argument, or may issue a ruling on the petition without oral argument.")).

Based upon a review of the arguments, filings, and relevant law, and for the reasons stated herein, the P&S Director's Protest Decision dated September 15, 2020, which resulted in the termination of the Marpi Landfill contract that DPW had awarded Petitioner, is hereby set aside.

II. FACTUAL BACKGROUND

In October 2019, the CNMI Department of Public Works ("DPW") issued a request for proposals for the operation and maintenance of the Marpi Landfill (the "RFP"). Pet. ¶ 24; *see also* Ex. 1.A.[1] The RFP stated five evaluation criteria, each worth a certain number of points: Background and Qualification (25 points), Experience of the Firm on Similar Projects (20 points), Capacity of the Firm's Key Staff/Crew and Equipment Availability (25 points), Project Approach (20 points), and Price (10 points). Pet. ¶¶ 26, 29; Ex. 1.A. Each proposal was evaluated and scored by a team of four DPW employees based on the aforementioned criteria. Pet. ¶ 29; *see also* Ex. 1.B. As part of the scoring process, the evaluators met with each proposal team in December 2019 to interview the teams and allow them to present their conceptual designs for the landfill project. Pet. ¶ 28; *see also* Ex. 1.P at 68, 116.

Five companies, including Petitioner Micronesian Environmental Services, LLC ("MES" or "Petitioner"), submitted proposals in response to the RFP. Pet. ¶ 27; *see also*

[1] All citations to exhibits are to exhibits in the certified record. *See* Designation and Filing of Record (filed January 17, 2021) and related exhibits filed on the same date; Certification of Record (filed March 12, 2021) and related exhibits filed on the same date; Order Confirming Certified Record (filed January 18, 2022).

Ex. 1.X. In February 2020, the companies' proposals were scored out of a total possible 400 points as follows:

- Petitioner received the highest score of **336 points**.
- SM Enterprises, LLC received the second highest score of **314 points**.
- Tang's Corporation ("Tang's") received the third highest score of **300 points**.
- Success International Corporation ("SARS") received the fourth highest score of **291 points**.
- Hong Ye Construction received the lowest score of **278 points**.

Pet. ¶ 30; *see also* Ex. 1.B.

CRITERIA	Hong Ye Construction				Tang's Corporation				Micronesian Environmental Services, LLC				SM Enterprises, LLC				Success International Corporation			
	E1	**E2**	**E3**	**E4**	**E1**	**E2**	**E3**	**E4**	**E1**	**E2**	**E3**	**E4**	**E1**	**E2**	**E3**	**E4**	**E1**	**E2**	**E3**	**E4**
Background and Qualification	18	12	21	20	17	17	20	22	24	12	21	23	22	12	22	22	20	5	24	21
Experience of the firm on similar projects	15	7	15	16	16	11	16	15	18	10	15	17	17	10	15	16	16	7	18	19
Capacity of Firm's Key Staff/Crew & Equipment Availability	20	15	23	18	18	12	20	22	24	23	23	23	23	17	23	20	21	11	22	23
Project Approach	15	7	17	18	15	10	18	15	19	18	19	18	18	12	18	18	15	5	19	19
Price	5	5	5	6	9	10	9	8	7	7	7	8	8	6	8	7	6	5	6	9
Evaluator Score	73	46	81	78	75	60	83	82	92	70	85	89	88	57	86	83	78	33	89	91
Team Score	278				300				336				314				291			
Rank	5				3				1				2				4			
Monthly Price	$ 208,952.50				$ 107,973.50				$ 119,989 (original) $ 109,683 (revised) $ 106,495 (revised)				$ 108,213.20				$ 128,000			

E1 Evaluator No. 1 – Henry Bautista, Highway Engineer III (Evaluation Chairman)
E2 Evaluator No. 2 – Bias T. Mafnas, SWMD Manager/Acting Director
E3 Evaluator No. 3 – Isagani Salazar, Highway Engineer
E4 Evaluator No. 4 – George C. Sablan, Accountant IV

In February 2020, DPW issued a notice requesting that Petitioner submit its "best and final fee proposal." Pet. ¶ 31; *see also* Ex. 1.P at 111. In response, Petitioner lowered its proposal price. Pet. ¶ 32; *see also* Ex. 1.Q. In March 2020, DPW requested that Petitioner submit another "best and final fee proposal," in response to which Petitioner lowered its proposal price further. Pet. ¶ 33; *see also* Ex. 1.R. In June 2020, DPW then awarded the three-year contract to Petitioner for $3.833 million with options to renew for

up to two additional years. Pet. ¶ 34; *see also* Ex. 1.C. The other offerors were notified of the contract award in July 2020. Pet. ¶ 35; *see also* Exs. 1.D-1.E.

Tang's and SARS filed protests objecting to DPW's decision to award the contract to Petitioner.[2] *Id*. The dispute over the award of the Marpi Landfill contract was decided by Francisco C. Aguon in his official capacity as the Acting Director of Procurement and Supply (the "P&S Director"). Pet. ¶ 38. On September 15, 2020, the P&S Director issued a decision in response to Tang's and SARS's protests (the "Protest Decision"). *Id*.; *see also* Ex. 1.I. The P&S Director, in his Protest Decision, found that the procurement regulations had been violated during the evaluation process and, further, determined that it would be in the Commonwealth's best interest to terminate the contract that DPW had awarded Petitioner. Pet. ¶ 40; Ex. 1.I.

Petitioner timely filed its own protest to the P&S Director's Protest Decision terminating its contract with DPW to operate and maintain the Marpi Landfill. Pet. ¶ 43; *see also* Ex. 1.N. This dispute was elevated to the Office of the Public Auditor ("OPA"), which, at that time, was the agency tasked with reviewing appeals of final decisions made by the P&S Director.[3] Pet. ¶¶ 48-49; *see also* Exs. 1.O-1.P. However, on October 9, 2020, the OPA issued a letter declining to hear the appeal based on an internal conflict created by the OPA's involvement in a parallel investigation into the Marpi Landfill contract ("OPA's Recusal"). Pet. ¶ 50; *see also* Ex. 1.K. On December 18, 2020, OPA issued a second letter affirming its decision to recuse itself from the dispute. *See* Ex. 2.

Having exhausted its administrative remedies, Petitioner timely filed a Petition for Judicial Review of Agency Decisions on October 15, 2020 in Case No. 20-0344-CV. Pet. ¶ 52. On January 17, 2021, Petitioner filed an amended petition to add additional parties and facts, and this amended petition was filed as a new case, Case No. 21-0004-CV (the "Petition"). The Petition identified the P&S Director's Protest Decision and OPA's

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[2] SM Enterprises, LLC also filed a protest but later withdrew its protest. Pet. ¶ 36; *see also* Ex. 1.F.

[3] Since the filing of the Petition, the NMI Supreme Court has ruled that the OPA does not have jurisdiction to review such appeals. *RNV Constr. v. GPPC, Inc*., 2021 MP 13.

Recusal[4] as the two primary agency decisions it was aggrieved by. *Id*. ¶¶ 61 ("[T]he P&S Director's September 15, 2020 Protest Decision attempted to deprive MES of the contract award and MES was additionally deprived of a proper and lawful alternative of consideration of ratification of the contract."), 64. The requested relief includes reversal of the P&S Director's Protest Decision and/or ratification of the contract awarded to Petitioner by DPW. Pet. at 15-16.

III. LEGAL STANDARD

The NMI Supreme Court has made clear that under the Administrative Procedure Act, "[a]gency decisions are reviewed on the basis of an 'arbitrary and capricious' standard." *Pac. Sec. Alarm, Inc. v. Commonwealth Ports Auth*., 2006 MP 17 ¶ 14 (citing *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367, 1374 (9th Cir. 1995)); *see also* 1 CMC § 9112. "[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Commonwealth Ports Auth*., 2006 MP 17 ¶ 14 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

Arbitrary and capricious action under 1 CMC § 9112 is not defined in the statute. However, arbitrary and capricious agency action has been defined in this jurisdiction as "a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or without determining principle." *In re Blankenship*, 3 N.M.I. 209, 217 (1992) (*citing* BLACK'S LAW DICTIONARY (5th ed. 1979)). This jurisdiction has also found that agency action is "arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem." *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 45 n.33 (1993).

[4] *But see* footnote 3, *supra*. Because of the NMI Supreme Court's ruling in *RNV Constr. v. GPPC, Inc*., 2021 MP 13, this Order will only address the P&S Director's Protest Decision and Petitioner's requested relief therefrom.

IV. DISCUSSION

A. The P&S Director's Protest Decision Constitutes Final Agency Action.

The Court's jurisdiction to review the agency action arises from Commonwealth Code, Title 1, Section 9112. Under Section 9112(b), "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review . . . in the Commonwealth Superior Court." 1 CMC § 9112(b).

Under 1 CMC § 9112(b), agency action is a threshold requirement of conduct by an administrative entity that must be shown to trigger judicial review. The Administrative Procedure Act, 1 CMC §§ 9101, *et seq.*, defines "agency" and "agency action." "'Agency' means each authority of the Commonwealth government, whether or not it is within or subject to review by another agency." 1 CMC § 9101(b). "'Agency action' includes the whole or party of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 1 CMC § 9101(c). An agency action is "final" and subject to judicial review where the action (i) "mark[s] the consummation of the agency's decision making process" and (ii) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Cody v. N. Mariana Islands Ret. Fund*, 2011 MP 16, ¶ 18.

Here, the P&S Director's Protest Decision constitutes a final agency action, as defined above, subject to judicial review. *See also* 1 CMC § 9112(d) ("Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined . . . an appeal to superior agency authority."). The CNMI Department of Finance, Division of Procurement and Supply, is an authority of the Commonwealth government. Francisco C. Aguon, in his official capacity as the Acting Director of Procurement and Supply (the "P&S Director"), issued a decision on September 15, 2020 (the "Protest Decision") that (i) marked the consummation of the agency's decision making process in regard to Tang's and SARS's protests, and (ii) resulted in the termination of the Marpi Landfill contract that DPW had

awarded Petitioner. Thus, the P&S Director's Protest Decision is a final agency action for purposes of judicial review.

B. <u>The P&S Director's Decision to Terminate DPW's contract with Petitioner was Arbitrary and Capricious.</u>

The P&S Director's decision to terminate the Marpi Landfill contract awarded by DPW to Petitioner was based on five stated grounds:

1. that DPW inconsistently evaluated Experience of the Firm on Similar Projects when it considered Tang's past performance instead of merely considering Tang's past experience;
2. that DPW inconsistently evaluated Experience of the Firm on Similar Projects when it considered the experience of individual personnel of MES and not MES alone as an entity;
3. that DPW allowed MES to submit a best and final fee proposal and did not give the same to Tang's and SARS;
4. that DPW used interviews to select the most qualified proposer, and this selection process was not stated in the evaluation criteria; and
5. that MES did not provide financial statements for the years 2016 through 2018 as required by the RFP because MES was incorporated in 2019, which may have resulted in unfair competition.

The Petition identifies the following grounds upon which Petitioner believes the Protest Decision should be reversed or modified, including that the P&S Director, in his Protest Decision:

- "misapplied a federal procurement decision";
- "arbitrarily . . . decided that the evaluators could not consider past performance in the context of past experience" with regard to the evaluation criteria;
- failed to provide support for his determination that the experience of individual personnel could not count toward the experience of the corporate entity;

- incorrectly found that Tang's and SARS should have been given the opportunity to submit a "best and final fee proposal" alongside Petitioner;
- "arbitrarily created [a new] basis for protest on his own" despite that none of the protestors had raised the issue;
- "arbitrarily created a requirement that all proposers must have been in business for at least three years," in contradiction to the language of the RFP; and
- failed to consider whether ratifying the contract, instead of terminating it, would be in the best interest of the Commonwealth.

Pet. ¶¶ 67-88.

The Court addresses each issue below.

i. <u>Decision that evaluators could not consider past performance in the context of past experience and misapplication of a federal procurement decision</u>

NMIAC § 70-30.3-210(h)[5] provides that only "price and the evaluation factors set forth in the [RFP]" may be used in the evaluation of proposals and is explicit that "[n]o other factors or criteria may be used . . ." NMIAC § 70-30.3-210(h).

The Protest Decision found that the evaluators incorrectly considered Tang's past performance[6] when it evaluated Tang's experience under the "Experience of the Firm on Similar Projects" category. *See* Ex. 1.I at 4-5. According to the P&S Director, Tang's past performance operating the Marpi Landfill does not concern the "degree to which an offeror performed similar work" but rather concerns the "quality of work" and was therefore incorrectly considered under this category. *Id*. Further, the P&S Director took issue with

[5] All references to the procurement regulations are in reference to the version in place as of January 28, 2021. The procurement regulations were subsequently amended on May 28, 2021, and the Court does not reference this later version.

[6] At the time of the evaluations, Tang's was the company in charge of operating the Marpi Landfill. Each of the four evaluators included negative comments about Tang's apparently less-than-satisfactory performance operating the Marpi Landfill in their individual evaluations of Tang's. *See* Ex. 1.B.

the fact that the RFP did not explicitly define "experience" to include "past performance." *Id*.

In support of his determination that "past performance" is not appropriately considered under the "experience" category, the P&S Director relied on a federal procurement decision: *VariQ-CV JV, LLC.*, B-418551, B-418551.3 (U.S. Gov't Accountability Office June 15, 2020). *VariQ* involved the award of a government contract for IT support services based on the following five criteria: (1) relevant experience, (2) past performance, (3) technical capability, (4) management approach, and (5) price. *Id*. at 2. In walking through each of these five criteria, for purposes of discussing whether the contract was wrongfully awarded, the *VariQ* decision distinguished between the "relevant experience" category and the separate "past performance" category by defining the former as "the degree to which an offeror actually has performed similar work" and the latter as "the quality of the work." *Id*. at 5. "Generally," the *VariQ* decision posited, "an agency's evaluation under an experience factor is distinct from its evaluation of an offeror's past performance." *Id*.

Notably, however, nothing in the *VariQ* decision suggests that an agency may never consider past performance when evaluating a proposer's past experience on the same or similar projects, particularly where, as here, "relevant experience" and "past performance" are not included as two separate review criteria. And importantly, the *VariQ* decision stressed that "[w]here a protestor challenges the evaluation of an offeror's experience and past performance," it is not the reviewer's role to "reevaluate submissions" but rather to "examine the supporting record to determine whether the decision was reasonable, consistent [and] adequately documented." *Id*.

Having reviewed the extensive certified record in this case, the Court finds nothing objectionable about the evaluators considering Tang's past performance under the "Experience of the Firm on Similar Projects." More specifically, the Court finds no violation of NMIAC § 70-30.3-210(h). Nothing in the procurement regulations prohibits an agency from selecting its own unique evaluation criteria or bars an agency from

considering past experience and past performance together. Put another way, there is no requirement under the procurement regulations that "experience" and "past performance" must always be evaluated separately and, indeed, it may be difficult at times to completely separate the two, as even the *VariQ* decision indicates. Nor is there any requirement under the procurement regulations that an RFP must explicitly define "experience" to include "past performance" or else evaluators are barred from considering past performance under the "experience" category altogether.

Additionally, in considering the reasonableness of the evaluators' decision to evaluate past performance with relevant experience, the Court takes note of the fact that the RFP's five review criteria consisted of:

1. Background and Qualification – 25%
2. Experience of the Firm on Similar Projects – 20%
3. Capacity of the Firm's Key Staff/Crew and Equipment Availability – 25%
4. Project Approach – 20%
5. Price – 10%

See Ex. 1.A at 2. The RFP also instructed proposers to include information about the "firm's existing operations" and the "firm's experience, if any, with solid waste management [and] facilities management," among other things. *Id*. at 5.

Given that DPW did not separate "relevant experience" and "past performance" into two distinct categories as was the case in *VariQ*, and given that the RFP contained explicit instructions for proposers to discuss their "existing operations" and "experience . . . with solid waste management [and] facilities management," the Court finds nothing objectionable about the evaluators considering both Tang's past experience and past performance under an essentially identical contract for maintenance of the Marpi Landfill when evaluating "Experience of the Firm on Similar Projects." Tang's performance as the then-holder of the Marpi Landfill contract at the time of the evaluations constitutes an "existing operation" of the firm relating to "solid waste management [and] facilities management." Further, Tang's performance on its at-the-time current contract for the

Marpi Landfill project could not have reasonably been considered under the other four categories; the only category wherein past performance on a similar (or, in this case, the exact same) project could have been evaluated was "Experience of the Firm on Similar Projects," and it was reasonable of DPW to do so.[7]

In sum, the P&S Director's reliance on the *VariQ* decision to conclude that it was a violation of NMIAC § 70-30.3-210(h) for the evaluators to consider Tang's past performance operating the Marpi Landfill under the "Experience of the Firm on Similar Projects" category was misguided; nothing in the *VariQ* decision suggests that an agency may never consider past performance when evaluating a proposer's past experience on the same or similar projects, and it was reasonable of DPW to consider experience together with past performance where "experience" and "past performance" were not included in the RFP as two separate review criteria. Because the P&S Director's decision on this point was unreasonable, not well-grounded in law or fact, and based on the misapplication of a federal procurement decision, the Court finds this basis for terminating DPW's contract with Petitioner to be arbitrary, capricious, and an abuse of discretion.

ii. Determination that experience of individual personnel could not count toward experience of the corporate entity

The Protest Decision again cited a violation of NMIAC § 70-30.3-210(h) when it found that the evaluators incorrectly considered the experience of individual personnel under the "Experience of the Firm on Similar Projects" category. *See* Ex. 1.I ("Protest

[7] A review of the evaluators' comments under this category also shows that they were consistent in considering Tang's past experience and past performance with operating the Marpi Landfill project. *See* Ex. 1.B at 5 ("Tang's is currently the contractor for the Marpi Landfill and the firm's performance during this period is less than satisfactory."), 11 ("The firm is currently task[ed] for the operation and maintenance [of the Marpi Landfill] but the performance is questionable."), 17 ("Tang's has [] good experience[] in the operation of the Marpi Landfill, but failed to maintain properly the landfill area."), 23 ("Although the Firm is presently the contractor managing/operating the Marpi Landfill operation, [DPW] is not satisfied with the current landfill operation."). Despite these negative remarks, the evaluators nevertheless gave Tang's high marks under this category, demonstrating that Tang's was properly credited for its experience operating the Marpi Landfill. *See id*. at 5 (evaluator gave Tang's the highest score in this category of 11% out of 20% and gave the other firms between 7% to 10%), 11 (evaluator gave Tang's 16% out of 20%), 17 (evaluator gave Tang's 16% out of 20%), 23 (evaluator gave Tang's 15% out of 20%).

Decision") at 5-6; *see* NMIAC § 70-30.3-210(h) (stating that no factors other than "price and the evaluation factors set forth in the [RFP]" may be used in the evaluation).

According to the P&S Director, Petitioner should not have been awarded more points than Tang's under the "Experience of the Firm on Similar Projects" category because MES was incorporated in 2019 and therefore had no prior experience as a corporate entity whereas Tang's, as a company, had many more years' experience in operating a landfill. *See* Ex. 1.I at 5. The P&S Director determined that the evaluators had improperly considered the experience of MES's key personnel in relevant areas such as construction, environmental engineering, and health and safety compliance under this category. *Id*. This was improper, according to the P&S Director, because the attributes of key personnel should have been more appropriately discussed in the separate "Capacity of the Firm's Key Staff/Crew and Equipment Availability" category. *Id*. Because key personnel were discussed under both the "Experience of the Firm on Similar Projects" category and the "Capacity of the Firm's Key Staff/Crew and Equipment Availability" category, the P&S Director concluded that Petitioner "was improperly credited." *Id*. at 5-6.

In support of this point, the P&S Director relied on another federal procurement decision: *Inquiries, Inc.*, B-418486, B-418486.2, B-418486.3 (U.S. Gov't Accountability Office May 27, 2020). *Inquiries* involved the award of a government contract for case processing operation center (CPOC) services related to federal background investigations based upon nine criteria, of which one was "corporate experience." *Id*. The RFP in *Inquiries* provided that the "corporate experience" factor would be used to determine whether offerors had experience that would enhance their ability to perform the CPOC requirements. *Id*. The *Inquiries* decision determined that the awardee should not have been credited under "corporate experience" for listing the successes of its affiliate companies where there was no indication "whether the affiliates would play a meaningful role" in the awardee's successful performance of the contract. *Id*. Rather than "defin[ing] any assigned role for these affiliates in performing the contract," the awardee claimed that

the affiliates' experience was relevant because the awardee would "use the same shared services." *Id*.

The *Inquiries* decision concluded, "An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror," with resources being defined to include "management." *Id*. "In this regard, while it would be appropriate to consider an affiliate's performance record where it will be involved in the contract effort ***or where it shares management with the offeror***, it is inappropriate to consider an affiliate's record where that record does not bear on the likelihood of successful performance by the offeror and where there is no evidence that the affiliate will meaningfully contribute to performance." *Id*. (emphasis added).

A plain reading of the *Inquiries* decision shows that it actually supports Petitioner's position. In contrast to the awardee in *Inquiries*, who referenced successful affiliate companies only because both would "use the same shared services," here MES's proposal referenced Tano Group, Inc. (TGI) and MB Tech Micronesia LLC (MBTM)—two companies with experience relevant to the success of operating the Marpi Landfill project—because their owners would be involved in the management of MES during its operation of the Marpi Landfill. *See* Ex. 1.X at 28-29 (MES proposal submission listing Robert J. Bracken, founder and owner of TGI, and Mahesh Balakrishnan, sole owner of MBTM, as heads of MES's management team). Pursuant to *Inquiries*, an agency may properly attribute the experience of an affiliate company to an offeror where the offeror's proposal demonstrates that the resources of the affiliate company will affect the performance of the offeror—with resources being defined to include shared management. *Inquiries* also explicitly states that it is appropriate to consider an affiliate's performance record where it shares management with the offeror or bears on the likelihood of successful performance by the offeror.

Here, it is clear from the evaluator's comments under the "Experience of the Firm on Similar Projects" category that the experience of key MES personnel on similar projects

was considered because their past experience would affect MES's performance on the Marpi Landfill project and bear on the likelihood of MES's successful performance. *See* Ex. 1.B at 3 ("Although [MES] is newly established, proposed key personnel have direct landfill experience either as regulators or operators."), 9 ("The firm is newly established with the experienced personnel form[ing] a team that [DPW] could rely on their skills."), 21 ("Firm has not operated a landfill operation . . . However, the Firm's staff and consultants have experience in the landfill operation or similar projects."). This is an entirely appropriate consideration under the *Inquiries* decision.

The P&S Director's suggestion that the experience of key personnel should have only been considered under the separate "Capacity of the Firm's Key Staff/Crew and Equipment Availability" category is also misguided. Having reviewed the evaluation criteria and the evaluations themselves, the Court sees a clear distinction between the "Experience of the Firm on Similar Projects" and "Capacity of the Firm's Key Staff/Crew and Equipment Availability" criteria. "Experience of the Firm on Similar Projects" captures the firm's or its personnel's past experience on projects similar to the Marpi Landfill project, and the evaluator's comments reflect as much. "Capacity of the Firm's Key Staff/Crew and Equipment Availability," on the other hand, captures the firm's readiness to provide staff and equipment for the day-to-day operations of the landfill. Put another way, this criteria reflects the availability and reliability of equipment and manpower to begin operations promptly, and the evaluator's comments reflect this.[8] It was therefore reasonable for the evaluators to consider the experience of key personnel on similar projects under the "Experience of the Firm on Similar Projects" category.

[8] *See* Ex. 1.B at 3 ("80% of [MES's] required equipment is on island with a documented commitment to procure the remaining . . ."), 4 ("[SM Enterprise] failed to mention key personnel's time allocation during operation and number of crew. Equipment availability is limited . . ."), 5 ("[Tang's] equipment inventories are less than reliable and are constantly under repair."), 6 ("[SARS's] equipment availability is limited and condition is questionable."), 7 ("[Hong Ye] failed to provide . . . staffing structure during operation . . ."), 9 (discussing "readiness" of MES based on equipment availability and staffing capabilities) 12 ("[SARS's] reconditioned equipment are not reliable . . . and may not fulfil the required task."), 13 ("[Hong Ye's] reliance [on] off island consultant maybe a big concern in day to day operations."), 16 (discussing SM Enterprise's failure to specify which staff would be responsible for the daily operation of the landfill).

In sum, the Court finds that no violation of NMIAC § 70-30.3-210(h) occurred where the evaluators properly considered the experience of key MES personnel on similar projects because their past experience would affect MES's performance on the Marpi Landfill project and bear on the likelihood of MES's successful performance, which is directly in line with the *Inquiries* decision relied on by the P&S Director. Because the P&S Director's decision on this point was unreasonable, not well-grounded in law or fact, and based on the misapplication of a federal procurement decision, the Court finds this basis for terminating DPW's contract with Petitioner to be arbitrary, capricious, and an abuse of discretion.

iii. Finding that Tang's and SARS should have been given opportunity to present "best and final fee proposal" alongside Petitioner

NMIAC § 70-30.3-210(g) provides that "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submission and prior to award for the purpose of obtaining the best and final offers." NMIAC § 70-30.3-210(g).

The Protest Decision determined that NMIAC § 70-30.3-210(g) was violated when only Petitioner was given an opportunity to revise its fee proposal for submission of its "best and final" offer despite the fact that both Tang's and SARS had been notified at some point in time that they were among the "top qualified proposers." *See* Ex. 1.I at 6. The P&S Director interpreted this "top qualified proposers" language to mean that Tang's and SARS were within the competitive range and therefore should have also been accorded a "fair and equal" opportunity to revise their fee proposals. *Id*.

A review of the procurement regulations indicates that the P&S Director conflated this "top qualified proposers" language with what qualifies as within the "competitive range." The procurement regulations make no mention of "top qualified proposers." Instead, NMIAC § 70-30.3-210(e)(2) provides:

> Competitive range. The official with expenditure authority shall determine which proposals are in the competitive range, based on the recommendations of the evaluator or evaluation team, for the purposes of conducting written or oral discussions, and shall include all proposals ***that have a reasonable chance of being selected for award***. . . .

NMIAC § 70-30.3-210(e)(2) (emphasis added); *see also* NMIAC § 70-30.3-210(g) ("discussions may be conducted with responsible offerors who submit proposals determined to be ***reasonably susceptible of being selected for award*** . . .") (emphasis added). NMIAC § 70-30.3-210(e)(2) continues:

> Proposals determined to have no reasonable chance of being selected for contract award shall no longer be considered for selection. A proposal ***is not reasonably susceptible of being selected for award and can be excluded from the competitive range*** if it is clear that . . . [i]n comparison with other proposals, such proposal clearly has no chance of being selected for award.

NMIAC § 70-30.3-210(e)(2) (emphasis added).

The record contains no evidence that Tang's and SARS were ever determined to be within the competitive range, despite those firms allegedly having been notified, at some point in time, that they were among the "top qualified proposers."[9] The procurement regulations make clear that the agency "shall" engage in negotiations with only those proposers "that have a reasonable chance of being selected for award" and that those proposals determined to have no reasonable chance of being selected for award "can be excluded from the competitive range." NMIAC § 70-30.3-210(e)(2). That DPW chose to only move forward with negotiations with Petitioner is indicative that only Petitioner was determined to be within the "competitive range" at that point, *i.e.*, Petitioner was the only

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[9] This "top qualified proposers" language appears to be referenced from the RFP: "Discussion shall be conducted with . . . no less than three firms determined to be the most highly qualified to perform the services required." Ex. 1.A at 3. These discussions occurred in December 2019 when the evaluators met with all five firms to conduct interviews and allow them to present their proposals. *See* Pet. ¶ 28; *see also* Ex. 1.P at 68, 116. It appears from the record that all five firms were notified that they were among the "top qualified proposers" when being invited to interview with DPW in December 2019. *See* Ex. 1.P at 116 ("The RFP evaluation committee notified MES . . . that we were one of the selected top qualified proposers and that the committee would conduct meetings with MES ***and the other top proposers*** during the week of December 23, 2019.") (emphases added), 69 ("I understand that the other proposers received a very similar letter at the same time."). This is further evidence that the "top qualified proposers" language does not signify that the firm was determined to be within the "competitive range."

offeror "reasonably susceptible of being selected for award." DPW was not required to entertain fee proposal revisions from Tang's and SARS where Tang's and SARS were no longer in the running for the contract. *See* NMIAC § 70-30.3-210(e)(2) ("Proposals determined to have no reasonable chance of being selected for contract award shall no longer be considered for selection.").

Moreover, the P&S Director's suggestion that "[i]n the absence of Tang's exclusion [from the competitive range], DPW was obligated to treat Tang's fairly and equally" with respect to the opportunity to revise its fee proposal is not supported by the language of the regulations. First, as discussed above, there is no evidence that Tang's was ever determined to be in the competitive range; the evidence instead supports a finding that only Petitioner was considered to be "reasonably susceptible of being selected for award" at that point. Second, NMIAC § 70-30.3-210(e)(2) states that the agency "shall" determine which proposals fall within the competitive range. The use of the word "shall" creates a mandatory duty upon the agency to actively select those proposals determined to be "reasonably susceptible of being selected for award" for further consideration. *See Calvo v. N. Mar. I. Scholarship Advisory Bd.*, 2009 MP 2 ¶ 25 ("When we examine the statute's language, we find that the use of the term 'shall' is mandatory and has the effect of creating a duty."). This language does not suggest that a proposer, by default, is placed within the "competitive range" and remains there until he is actively notified that he has been excluded from the competitive range.

Lastly, NMIAC § 70-30.3-210(f)'s requirement that offerors must be "promptly notif[ied]" when they "are excluded from the competitive range or otherwise excluded from further consideration" does not provide a reasonable basis for terminating DPW's contract with Petitioner because DPW's failure to notify Tang's and SARS any sooner than it did resulted in no prejudice to Tang's or SARS. There is no evidence that either firm was determined to be within the "competitive range" for purposes of price negotiations, and neither firm was next in line for award consideration. *See United States v. Int'l Business Machines Corp.*, 892 D.2d 1006, 1011 (Fed. Cir. 1989) ("Congress simply did not intend

for the [procurement appeals] board to entertain the protests of innumerable disappointed bidders who have little or no chance of receiving the contract."). Based on the evaluation scores, SM Enterprises, LLC was next in line for consideration, coming in second to SME's 336 points at 314 points. *See* Ex. 1.B. After SM Enterprises, LLC was Tang's, who received a score of 300 points. *Id*. After Tang's was SARS at 291 points. *Id*.

In sum, the Court finds that no violation of NMIAC § 70-30.3-210(g) occurred where the procurement rules make clear that the agency need only engage in negotiations with those proposers "that have a reasonable chance of being selected for award" and may exclude those proposals "determined to have no reasonable chance of being selected for contract award." NMIAC § 70-30.3-210(e)(2). There is no evidence in the record that either Tang's or SARS were ever determined to be in the competitive range, and in fact the evidence supports a finding that only Petitioner was considered to be within the competitive range. Because the P&S Director's decision on this point was unreasonable, not well-grounded in law or fact, based on a conflation of the terms "top qualified proposers" and "competitive range," and based on a misapplication of the procurement regulations, the Court finds this basis for terminating DPW's contract with Petitioner to be arbitrary, capricious, and an abuse of discretion.

iv. Creation of a new basis for protest despite that none of the protestors had raised the issue

The Court need not address the issue of whether it was proper for the P&S Director to *sua sponte* raise a new basis for protest that none of the protestors had raised. Assuming *arguendo* that it was appropriate for the P&S Director to do so, the Court finds that the grounds raised by the P&S Director nevertheless do not constitute a violation of procurement regulations.

Specifically, the P&S Director found it to be a violation of NMIAC § 70-30.3-210(h) that the evaluators met with each proposer in December 2019 to conduct interviews and allow the teams to present their conceptual designs for the landfill project. *See* Ex. 1.I at 6-7. The P&S Director determined that the presentation and evaluation of a conceptual

design was not included in the evaluation criteria, nor was it required under the procurement procedures, and as such it violated NMIAC § 70-30.3-210(h). *See* NMIAC § 70-30.3-210(h) ("Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the government taking into consideration price and the evaluation factors set forth in the request for proposals.").

The Court finds after reviewing the record that there was nothing improper about the interviews conducted by DPW as part of its selection process. NMIAC § 70-30.3-210(h) states that the agency may take into consideration any "evaluation factors set forth" in the agency's request for proposals. Here, the RFP clearly stated that "[d]iscussions shall be conducted with at least three of the firms regarding the contract requirements and technical approach." *See* Ex. 1.A at 3. In fact, the evaluators met with all five firms and gave each team an opportunity to present on their proposal. That this method of evaluating proposals "is not [] required" by the procurement regulations is of no note. Nothing in the procurement regulations prohibits an agency from selecting its own unique evaluation criteria or bars an agency from conducting in-person interviews or presentations to aid in its evaluation. The procurement regulations are not meant to be a straightjacket but rather a helpful guideline for agencies to engage in fair process and follow the law. Moreover, the practice of requesting oral presentations has become increasingly common among agencies:

> In recent years agencies have used oral presentations in lieu of written proposals to evaluate whether offerors fully understand the work that will be required to successfully perform the prospective contract. Such presentations have proved a superior means of assessing offerors' understanding because they permit the agency personnel to communicate directly with the offerors' personnel that will perform the work rather than reading technical proposals that may have been prepared by professional proposal writers.

See Cibinic, John, Jr., *et al.*, Formation of Government Contracts (3d Ed.), p. 764.

Additionally, a review of the record indicates that the in-person interviews and presentations were not, as the Protest Decision suggests, additional criteria that the proposers were scored on without their knowledge, but rather were meant to aid in the

evaluators' understanding of the firms' proposals. Nowhere in the evaluations was a firm scored or judged on the basis of their "presentation" or "conceptual design." *See generally* Ex. 1.I. The only five criteria on which the firms were scored were those listed in the RFP: (1) Background and Qualification, (2) Experience of the Firm on Similar Projects, (3) Capacity of the Firm's Key Staff/Crew and Equipment Availability, (4) Project Approach, and (5) Price. *See* Ex. 1.A at 2. This supports the notion that the in-person interviews and presentations served only as aids to the evaluators in evaluating the aforementioned five criteria.

In sum, the Court finds that no violation of NMIAC § 70-30.3-210(h) occurred where the RFP set forth that "[d]iscussions shall be conducted with at least three of the firms regarding the contract requirements and technical approach" and where the record shows that the subsequent in-person interviews and presentations that took place were used only to aid the evaluators in scoring the five criteria listed in the RFP rather than to serve as independent and additional criteria upon which proposers were unknowingly scored. Because the P&S Director's decision on this point was unreasonable, not well-grounded in law or fact, and based on a misapplication of the procurement regulations, the Court finds this basis for terminating DPW's contract with Petitioner to be arbitrary, capricious, and an abuse of discretion.

v. <u>Creation of requirement that all proposers must have been in business for at least three years</u>

NMIAC § 70-30.3-705(a) provides that the procurement process must be discharged in such a manner as to "[e]nsure fair competitive access to governmental procurement by reasonable contractors." NMIAC § 70-30.3-705(a).

The Protest Decision determined that NMIAC § 70-30.3-705(a) was violated because DPW failed to disqualify Petitioner even though there was no way Petitioner, having been incorporated in 2019, could have satisfied the RFP's requirement that proposers must "[s]ubmit financial statements . . . for 2016-2018." *See* Ex. 1.I at 7; Ex. 1.A at 5. The P&S Director reasoned that DPW's waiver of this financial requirement for

Petitioner was unfair because it "was inconsistent with the [RFP's] provisions" and "may have resulted in unfair competition." *See* Ex. 1.I at 7.

The P&S Director's position is unsupported by the record. Contrary to his assertion that DPW's waiver of these financial statements was "inconsistent with the [RFP's] provisions," the RFP plainly stated that the agency "reserves the right . . . to waive any imperfections in any Proposal in the best interest of the Government." *See* Ex. 1.A at 3. DPW's right to waive imperfections was referenced again two pages later: "Proposers who do not follow these guidelines or submit incomplete information may be disqualified." *Id.* at 5 (emphasis in original). The use of the phrase "may be disqualified" indicates that DPW had the discretion to either disqualify a proposal or waive an imperfection in the proposal in the best interest of the Government. Again, the procurement regulations are not meant to be wielded as a straightjacket, limiting an agency's right to make determinations in its best interest and in the Commonwealth's best interest. There was nothing inconsistent about DPW's decision to waive the requirement to submit financial statements for the years 2016 to 2018 where the RFP explicitly stated that the agency could do so if it believed waiver was in the best interest of the Commonwealth.[10]

Further, the P&S Director's concern that the process was unfair because "other vendors may have decided to refrain from participating in the procurement in consideration of the stated requirement [to provide financial statements from 2016-2018]" is both tenuous and unsubstantiated. These hypothetical other vendors would have had access to the exact same RFP as did Petitioner, and they therefore would have been able to read that imperfections could be waived at DPW's discretion and opted to submit a proposal. All interested proposers were thus subject to the same requirements and had the same

[10] The record supports a finding that, despite Petitioner having only been recently incorporated, the evaluators had confidence in MES's ability to perform successfully on the contract due to the cumulative experience of the MES team on similar past projects. *See* Ex. 1.B at 3 ("Although [MES] is newly established, proposed key personnel have direct landfill experience either as regulators or operators."), 9 ("The firm is newly established with the experienced personnel form[ing] a team that [DPW] could rely on their skills."), 21 ("Firm has not operated a landfill operation . . . However, the Firm's staff and consultants have experience in the landfill operation or similar projects.").

opportunity to have their proposals considered, and any imperfections potentially waived, by DPW. The process was both consistent with the language of the RFP and fair.

In sum, the Court finds that no violation of NMIAC § 70-30.3-705(a) occurred when DPW waived the requirement to submit financial documents for the years 2016 to 2018 because the RFP plainly stated that DPW had the right to waive any imperfections in a proposal if doing so was in the best interest of the Commonwealth and because all interested proposers were subject to the same RFP requirements and had the same opportunity to have their proposals considered, and any imperfections waived, by DPW. Because the P&S Director's decision on this point was unreasonable, not well-grounded in law or fact, and based on a misapplication of the procurement regulations, the Court finds this basis for terminating DPW's contract with Petitioner to be arbitrary, capricious, and an abuse of discretion.

vi. <u>Failure to meaningfully consider ratification of the contract as an alternative to terminating it</u>

In totality, a review of the record shows that the P&S Director substituted his own judgment for that of the DPW evaluators and created overly narrow, rigid rules that he claimed DPW violated based on his own misunderstanding and misapplication of federal procurement decisions and the procurement regulations. His decision to terminate DPW's contract with Petitioner based on the above grounds was arbitrary, capricious, and an abuse of discretion, where arbitrary and capricious agency action has been defined in this jurisdiction as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." *In re Blankenship*, 3 N.M.I. 209, 217. On this basis alone, the Court finds that the P&S Director's Protest Decision dated September 15, 2020, which resulted in the termination of the Marpi Landfill contract that DPW had awarded Petitioner, must be set aside.

However, the Court will also address Petitioner's argument that, even if a violation of the procurement regulations had occurred, the Protest Decision should nevertheless be

set aside on the basis that the P&S Director failed to consider ratification of the contract as an alternative to terminating it. NMIAC § 70-30.3-510(b) provides that:

> If after an award the P&S Director or the Public Auditor determines that a solicitation or award of a contract is in violation of law or regulation, then the P&S Director or the Public Auditor may:
>
> > (1) If the person awarded the contract has not acted fraudulently or in bad faith:
> >
> > > (i) Ratify or affirm the contract provided it is determined that doing so is in the best interest of the Commonwealth; or
> > >
> > > (ii) Terminate the contract and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to termination[.]

NMIAC § 70-30.3-510(b).

The record shows that both Petitioner and DPW raised the issue of ratification to the P&S Director, with DPW offering particularly compelling reasons as to why it is in the best interest of the Commonwealth to ratify DPW's contract with Petitioner in lieu of terminating it:

> There are several factors that favor ratification. First, the contract performance has already begun and [MES's] performance has so far met or exceeded expectations. Second, there is a strong probability that the Commonwealth will not obtain a more advantageous contract of it resolicits the bid. Finally, the delay created by resoliciting the bid will be detrimental. As discussed above, the Marpi Landfill has not been fully operational in some time and, as a result, DPW is unaware of the full extent of the issues with the landfill. Disrupting the progress MES has made so far, to accommodate a re-solicitation of the bid that could take several months, is not in the best interest of the Commonwealth. . . . Moreover, terminating the contract will incur costs and expense to the Commonwealth based on the "termination for convenience" clause in the MES contract. . . . For these reasons, I ask that [the P&S Director] consider ratification of the contract as the most appropriate remedy.

See Ex. 1.S at 3 (Letter from DPW Secretary James A. Ada to the P&S Director dated August 25, 2020).

Despite this, the P&S Director failed entirely to consider the issue of ratification in his Protest Decision. The only sentence in the Protest Decision that addressed remedies in any way is found in its last paragraph: "In view of the record and the violations of procurement regulations, it is determined that it would be in the Commonwealth's best

interest to terminate the contract . . ." *See* Ex. 1.I at 9. No support is provided for the P&S Director's naked assertion that terminating the contract would be "in the Commonwealth's best interest." In his Director's Report dated November 12, 2020, the P&S Director again failed to meaningfully address the issue of ratification despite the fact that multiple entities had raised the issue to him at that point. *See* Ex. 1. Instead, he stated that as the P&S Director, he had "broad discretion 'when determining what is in the best interest of the government'" and that this broad discretion allowed him to terminate the contract. *Id*. at 19.

This jurisdiction has found that agency action is "arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem." *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 45 n.33. Ratification was an especially important consideration here given that Petitioner had already begun performing on its contract with DPW and termination of the contract would have required the Commonwealth to pay compensatory damages to Petitioner. Even if it is true that the P&S Director has broad discretion to determine an appropriate remedy, here the record shows that the P&S Director abused his discretion by entirely failing to consider an important aspect of the problem of what to do about DPW's contract with Petitioner, and by claiming that his actions were "in the Commonwealth's best interest" without providing any meaningful support. *See In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 45 n.33.

In sum, even if a violation of the procurement regulations had occurred—and the Court finds no violation of the procurement regulations based on the extensive record before it—the P&S Director's failure entirely to meaningfully address the issue of ratification when said issue had been raised to him numerous times by multiple entities was unreasonable, arbitrary, capricious, and an abuse of discretion. On this alternative basis, the Court finds that the P&S Director's Protest Decision dated September 15, 2020, which resulted in the termination of the Marpi Landfill contract that DPW had awarded Petitioner, must be set aside.

V. CONCLUSION

THEREFORE, for the reasons stated above, the P&S Director's Protest Decision dated September 15, 2020, which resulted in the termination of the Marpi Landfill contract that DPW had awarded Petitioner, is hereby **SET ASIDE**.

Pursuant to the Court's inherent authority under the broad language of NMI R. P. Admin. App. 6(e) to "order any remedy provided for in 1 CMC § 9112"[11] or to "order any other remedy appropriate to the facts and circumstances of a particular appeal," it is **ORDERED** that Contract No. 701144-OC as between DPW and Petitioner for the operation and maintenance of the Marpi Landfill is hereby **RATIFIED**.[12]

IT IS SO ORDERED this 17th day of January, 2023.

/s/
ROBERTO C. NARAJA, Presiding Judge

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[11] 1 CMC § 9112 provides that a court may "[h]old unlawful and set aside agency action, findings, and conclusions found to be . . . [a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "[c]ompel agency action unlawfully withheld or unreasonably delayed." 1 CMC § 9112(f).

[12] It is the Court's determination that Contract No. 701144-OC should not have been terminated in the first place because no violations of the procurement regulations occurred in the underlying RFP process. Because this Court does not have the power to turn back time, it will do the next best thing and ratify the contract. Further, the Court sees no need to address whether the P&S Director's October 5, 2020 decision to dismiss Petitioner's protest was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the Court's decision as to the September 15, 2020 Protest Decision resolves all major issues between the parties and grants the maximum possible relief requested by Petitioner.