

Office of the Public Auditor

Commonwealth of the Northern Mariana Islands
Website: http://opacnmi.com
1236 Yap Drive, Capitol Hill, Saipan, MP 96950

Mailing Address: P.O. Box 501399 Salpan, MP 96950

E-mail Address: mail@opacnmi.com

Phone: (670) 322-6481 Fax: (670) 322-7812

)	APPEAL NO. BP-71
In Re: GPPC Appeal DPW12-IFB-010)))	
)))	

December 6, 2012

GPPC must have been 'aggrieved' by some sort of governmental action in order for it to protest the award of the above solicitation and then to file this appeal. See NMIAC 70-30.3-501(a) (1). The claimed aggrieved nature of GPPC's protest flows from CNMI's Local Business Preference law. 1 CMC 7404. GPPC claims that the lowest and second lowest cost bidders are not citizens of the United States and, as such, are not qualified for award of the contract. The Local Business Preference law requires citizenship in the United States for awards to local businesses under \$500,000. This law was codified following its re-enactment by Public Law 11-87. A subsection of the Public Law included the following:

"Section 4. Regulations. The Secretary of Finance shall promulgate rules and regulations for the implementation of this Act within 180 days of this Act becoming law. No local preference shall be granted or available pursuant to 1 CMC 7404, as enacted by this Act, until valid regulations, duly promulgated in accordance with the Administrative Procedures Act, are *in effect*." (Emphasis added)

Thus, in order to apply the Local Business Preference law to a contract award, regulations must have been promulgated <u>and</u> be in effect at the time of award. The Secretary of Finance promulgated regulations in 2000. 22 Com.Reg. 17036 and 17383. However, in 2001, the regulations were removed from the Commonwealth Register. 23 Com.Reg. 17640 and 17855. Following 2001, the regulations required by PL 11-87 were no longer 'in effect' since they ceased to exist in the CNMI's regulatory scheme. 23 Com.Reg. 17640 and 17855. Pursuant to Section 4 of PL 11-87, above, without applicable regulations in effect, the Local Business Preference law cannot be utilized as a bid award criterion. Section 4 of PL 11-87, above, acts as a condition precedent to the codified statute having the full force and effect of law.

1 CMC 7404 has been amended several times but these amendments have not repealed nor replaced Section 4 of PL 11-87. The CNMI Administrative Code, as published by the Law Revision Commission, is the official source for administrative rules and regulations as stated in Executive Order 05-06, dated December 13, 2005:

"...administrative rules and regulations promulgated pursuant to the Administrative Procedures Act ... shall be the prima facie evidence of the rules and regulations contained therein."

A review of the Commonwealth's regulations reveals that there are presently no published regulations relating to the CNMI Local Business Preference law. Since Executive Order 05-06 states that the administrative rules and regulations contained in the Administrative Code are prima facie evidence of the existence of regulations, the absence of such regulations is also true. The underlying law creating the preference (PL 11-87) required that regulations be promulgated in order for the preference to have full force and effect. The absence of regulations simply means that the preference law is not in force. If the preference law cannot be applied to contract awards because it lacks full force and effect, it follows that it cannot be used as a basis for a bid protest or appeal. Simply put, without regulations, the codified preference law at 1 CMC 7404 has no force or effect.

When interpreting legislative meaning, the courts first look to the plain language of the act. Commonwealth v. Hastinto, 1 N.M.I. 377, 382 (1990). As a fundamental cannon of statutory interpretation, the "language of the statute must be given its plain meaning when the meaning is clear and unambiguous." Aguon v. Marianas. Pub. Land Corp., 2001 MP 4 ¶ 30 (citing Estate of Faisao v. Tenorio, 4 NMI 260, 266 (1995)). After determining the plain meaning of the act, "the sole function of the courts is to enforce it according to its terms." Hastinto, 382. Here, the plain language of 1 CMC 7404, citing to Section 4 of PL 11-87 in the Commission Comments, requires that regulations exist before the Local Business Preference law may be applied to contract awards.

A bidder claiming to be 'aggrieved' under NMIAC 70-30.3-501(a) (1), such that it can protest the proposed award of a contract to another bidder, must have a valid statutory and/or regulatory basis for such action. Unless the underlying law forming the basis of a protest is in effect, the 'aggrieved' bidder has no standing to protest. This is the situation here. The enacting legislation for the Local Business Preference law required that regulations be in effect for the preference to be applied and none existed at bid opening. As such, GPPC does not have the status of an 'aggrieved' bidder if the law under which it protests is not in full force and effect. Without the status of an 'aggrieved' bidder, GPPC lacks standing to appeal or even protest if the preference law is used as the basis for such action.

Therefore, the Public Auditor determines that GPPC is not an 'aggrieved' bidder since its protest and appeal are based on the Local Business Preference law and that law was not in effect at the time of bid opening. It was not in effect because regulations had not been promulgated as were required by the public law (PL 11-87) that created the preference.

GPPC has no standing to protest the pending award to Hawaiian Rock. Without a basis of protest, GPPC has no standing to appeal for the same reasons. Accordingly, the appeal is DISMISSED for lack of standing.

JAMES W. TAYLOR OPA Legal Counsel

CONCUR

MICHAEL PAI Public Auditor

CC: Interested Parties and Counsel:

Mark Hanson, GPPC Counsel Marsha K. Shultz, Hawaiian Rock Counsel Anthony Camacho, Acting Secretary of DPW Gil Birnbrich, Civil Chief, OAG James Kearney, Assistant Attorney General Thomas J. Nielsen, President, Maeda Pacific Herman Sablan, Procurement & Supply (mark@saipanlaw.com)
(mschultz@marianaslaw.com)
(camachot24@gmail.com)
(gbirnbrich@gmail.com)
(jokearne@gmail.com)
(Fax 322-6733)
(procurement@pticom.com)