Office of the Public Auditor
Commonwealth of the Northern Mariana Islands
World Wide Web Site: http://opacnmi.com
2nd Floor J. E. Tenorio Building, Chalan Pale Arnold
Gualo Rai, Saipan, MP 96950

Mailing Address:
P.O. Box 501399
Saipan, MP 96950
E-mail Address:
mail@opacnmi.com
Phone: (670) 234-6481
Fax: (670) 234-7812

IN RE THE PROTEST APPEALS OF SAIPAN POWER PARTNERS; TOMEN POWER, SINGAPORE POWER, ALSONS AND TAN HOLDINGS CORPORATION; AND TELESOURCE CNMI INC. - CUC RFP 97-0025	DECISION No. BP-A025

SUMMARY

On December 15, 2000, the Commonwealth Utilities Corporation (CUC) filed a motion with the Office of the Public Auditor (OPA) to dismiss the appeals previously filed with OPA by Saipan Power Partners, Telesource CNMI Inc., and the Consortium of Tomen Power/ Singapore Power/ Alsons/ and Tan Holdings Corporation (Appellants) on CUC's Request for Proposal (RFP) 97-0025, or in the alternative, to show cause why the appeals should not be dismissed. In its motion, CUC claims that the appeals are jurisdictionally barred under Public Law (PL) 12-1, also known as the Energy Sufficiency Assurance Act of 2000.

OPA's review authority stems from the CUC Procurement Regulations (CUC-PR) § 5-102 (erroneously written as § 54-192), *et. seq*. PL 12-1, however, overrides OPA's jurisdiction to review the protests. Lacking jurisdiction to proceed with the protest appeals filed herein, we hereby *dismiss* the appeals.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On March 31, 2000, the Governor signed PL 12-1, the Energy Sufficiency Assurance Act of 2000, in which the Legislature found that cancellation of CUC RFP 97-0025[1] provided no meaningful benefit and could only lead to substantially increased cost and further delay in the project. The Legislature directed CUC to make an award under this RFP and PL 12-1 within 60 days of the effective date of the law, absent clear and convincing evidence that such an award would not be in the best interest of CUC. Accordingly, on May 26, 2000, the CUC Board of Directors conditionally awarded CUC RFP 97-0025 to Enron International Mariana

[1] A solicitation for an 80 megawatt (MW) Saipan power plant which was cancelled by the CUC Board of Directors on January 13, 2000.

Power Inc. (Enron), the bidder who ranked first among five companies who submitted their best and final offers.

As a result of the conditional award to Enron, the Consortium of Tomen Power/ Singapore Power/ Alsons/ and Tan Holdings Corporation filed its protest with CUC on June 9, 2000, while Saipan Power Partners and Telesource CNMI Inc. filed theirs on June 12, 2000. CUC's Executive Director, in his September 1, 2000 decision, denied the protests. Subsequently, on September 18, 2000, these companies filed their respective appeals with OPA.

On September 19, 2000, in accordance with CUC-PR Section 5-102(4), OPA notified CUC of the appeals filed, and requested a complete report on these appeals including a copy of the Executive Director's signed statement setting forth his findings, actions, recommendations, and any additional information. Instead of including his signed statement in the report submitted on October 25, 2000, the Executive Director included his September 1, 2000 protest decision, and informed OPA that his decision constituted his findings and conclusions on the protest. On October 31, 2000, OPA advised the Executive Director that the CUC-PR contemplates the submission of a signed statement separate from the protest decision, and requested that such signed statement be submitted to OPA. However, instead of submitting his signed statement, on December 15, 2000 the Executive Director filed a motion to dismiss the three appeals, or in the alternative, for OPA to issue an order to Appellants to show cause why the appeals should not be dismissed. On December 28, 2000, OPA gave the three Appellants and the selected bidder ten (10) working days to submit their comments on CUC's December 15, 2000 motion. Accordingly, Appellants submitted their comments to OPA on January 15, 2001. The selected bidder submitted no comments.

ANALYSIS

The basis for CUC's motion to dismiss the appeals is its claim that under PL 12-1, these appeals are jurisdictionally barred. Following is a discussion of the appeal jurisdiction issue presented by CUC in its motion to dismiss, the Appellants' opposition, and OPA's comments.

CUC's Arguments on OPA's Appeal Jurisdiction

CUC claims that under PL 12-1, appeals on RFP 97-0025 are jurisdictionally barred, because the law specifically provides that: "Notwithstanding any regulation or other law, no procurement protest or legal challenge may be brought or prosecuted based on a decision to award a contract modified in accordance with that law or providing for phased construction of an 80 MW facility." According to CUC, although Appellants claim the Public Auditor's jurisdiction to determine their appeals is based on the CNMI Constitution and a provision of the CUC-PR, the Legislature, through PL 12-1, has mandated that no protest of the award may be brought or prosecuted on the grounds advanced by the Appellants. Therefore, CUC concludes that the appeals should be dismissed for want of jurisdiction.

Comments of Saipan Power Partners

Saipan Power Partners (SPP) contends that proceedings of the Public Auditor are administrative procedures as opposed to court proceedings, and that there is nothing in the process that calls for a motion to dismiss, as there is in the rules of courts. Furthermore, SPP argues that the Public Auditor cannot read a motion to dismiss into the regulations, because administrative agencies must enforce the regulations governing them as written. For this reason, SPP alleges that it would be a violation of due process for OPA to entertain CUC's motion.

SPP also claims that its appeal is not jurisdictionally barred by PL 12-1 because: (1) PL 12-1 only bars appeals based on the phased building of the power plant, which is not a ground raised by SPP, (2) the Covenant and CNMI Constitution bar the Legislature from taking over CUC's procurement and preventing an appeal challenging the takeover, and (3) even if PL 12-1 could prevent the appeal as a matter of law, equity would still allow an appeal.

Comments of Telesource CNMI Inc. (Telesource)

Telesource states that there is a conflict between the provisions of PL 12-1, which attempts to preclude all procurement protests and legal challenges to the awarding of the contract, and the Public Auditor's constitutional duties. According to Telesource, our Constitution will prevail over conflicting statutory or regulatory enactments. In this case, the Public Auditor's jurisdiction derives from the CNMI Constitution which trumps the provision in PL 12-1 which, on its face, attempts to prevent any and all oversight of the expenditure of public funds to finance the Saipan power plant. Accordingly, Telesource contends that CUC's motion to dismiss must be denied, and the Public Auditor's constitutional duty to oversee the expenditure of public funds must be recognized as superior to that of any statute which attempts to take away that duty.

Comments of Tomen Power/ Singapore Power/ Alsons/ and Tan Holdings Corporation (Consortium)

The Consortium argues that OPA does not need an additional legislative mandate to audit CUC's conduct of RFP 97-0025 (a transaction involving the procurement of a Saipan power plant), because OPA also has the constitutional responsibility of auditing any transaction involving the procurement of supplies or the procurement of any construction and related supplies and services by agencies of the Commonwealth, and any programs and operations involving expenditure of public funds. The Consortium does not believe that Section 5 of PL 12-1 countermands the CNMI Constitution and restricts OPA from complying with its constitutional duties and responsibilities.

OPA's Comments

We will first discuss the differences between OPA's auditing function and the responsibility of adjudicating appeals of procurement protest decisions. While auditing is an OPA function provided for under Article III Section 12 of the CNMI Constitution, adjudicating appeals of procurement protests is a function created by authority of the procurement regulations, in this case, the CUC-PR. The word "audit" in 1 CMC §7813(b) is defined as "an independent examination of books, performance, documents, records, and other evidence relating to the receipt, possession, obligation, disbursement, expenditure, or use of public funds by any agency or any activity of any agency; or relating to any contract or grant to which any agency is a party, including any operations relating to the transactions." In contrast, adjudicating appeals of procurement protests is a quasi-judicial proceeding by an agency tribunal, and is not an auditing function. The result of OPA audit work is in the nature of an audit report with recommendations, while in protest appeals, OPA issues findings and a decision. Although OPA has the authority under the Constitution to audit procurement activities such as the subject matter of these appeals, that authority is independent of the appeal process.

Challenges to the constitutionality of legislative enactments, such as those advanced by SPP, are within the exclusive jurisdiction of the courts. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 178, 2 L. Ed. 60 (1803). "... the power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts under the division of powers between the legislative, executive, and judicial branches of government ..." *In re Metropolitan Utilities Dist. of Omaha*, 179 Neb. 783, 140 N.W.2d 626, 631 (1966). "The right to declare an act unconstitutional is purely a judicial power, and cannot be exercised by the officers of the executive department ..." *State ex rel. Atlantic Coast Line R. Co. v. State Bd. of Equalizers*, 30 A.L.R. 362, 366, 84 Fla. 592, 94 So. 681 (1922). The Office of the Public Auditor, or for that matter any lawful agency reviewing other agency action, may not consider the constitutionality of legislative action. Only the judiciary is empowered to scrutinize laws created by the legislature against constitutional challenges. "... [I]n an appeal from an order of an administrative agency direct to the Supreme Court, the question of constitutionality of the act, under which the administrative agency assumes its authority, can be first raised in the Supreme Court since it is the first time afforded to raise such an issue before a judicial tribunal."*Metropolitan Utilities*, *supra*, at 633.

When confronted with claims of unconstitutional provisions in statutes of the legislature, non-judicial review must presume the validity of applicable statutes and defer constitutional challenges to the courts. Consider the language in the *Metropolitan Utilities* case (*supra* at 632), which states: "The Department of Water Resources is an administrative agency and, as such, has no authority to declare an act of the Legislature void because of unconstitutionality. Its function, in the performance of its delegated authority, is to give force to the presumption of constitutionality and comply with the provision of the statute under which it is called upon to act. It would be a vain thing to require the raising of constitutional objections before a tribunal that has no authority to determine them." "A legislative enactment carries with it a strong presumption of constitutionality, i.e., it is presumed to be supported by facts known

to the Legislature." *Lincoln Building Associates v. Barr*, 135 N.E.2d 801, 802 (1956), citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S.Ct. 778. On this basis, our review will not consider those constitutional challenges brought herein concerning Public Law 12-1. Appellants, should they desire to seek further review in the courts, may do so according to law.

Although OPA's inability to address the validity of Public Law 12-1 may be considered a lack of exhaustion of administrative remedies, *Rivera v. Guerrero*, 4 N.M.I. 79, 83 (1993), states that: "As a general rule, the mere presence of a constitutional claim does not bar operation of the doctrine of exhaustion of administrative remedies. Courts have made exceptions to the exhaustion doctrine in instances where a plaintiff brings constitutional challenges *to the validity of a statute or ordinance* under which the agency acts, and *demonstrates positively* what the administrative decision would be, or that the administrative remedy would be inadequate or irreparably harmful, in his or her particular case." (Emphasis in original). Citing *Aircraft & Diesel Equip. Corp. v. Hirsh*, 331 U.S. 752, 67 S.Ct. 1493, 91 L.Ed. 796 (1947); *American Fed. Of Gov't Employees v. Acree*, 475 F.2d 1289, 1292 (D.C.Cir. 1973); and *Ogo Ass'n. v. City of Torrance*, 112 Cal. Rptr. 761, 763 (Ct. App. 1974). In this case, the statute or ordinance under which OPA acts are the CUC Procurement Regulations providing for appeals of procurement protests to OPA -which authority has been effectively curtailed or removed by Public Law 12-1.

Presuming the validity of Public Law 12-1, as we must, we now discuss what authority, if any, OPA has concerning the protest appeals in this case. Although Appellants correctly point out that the CUC-PR contain no provision for "motions" in their sections pertaining to protest appeals to the Public Auditor, they contain no prohibition thereof. It makes no difference what we call CUC's jurisdictional challenge to OPA's authority to consider these appeals: jurisdiction is the first consideration in any review. Even without a jurisdictional challenge by CUC, OPA must necessarily determine its review authority before proceeding to the substantive issues of the appeal.

Bowen v. Michigan Academy of Family Physicians, *et al*., 106 S.Ct. 2133, 2135-2136 (1986) discusses judicial review of administrative action. Generally speaking, there is a "...strong presumption that Congress intends judicial review of administrative action," citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1510 (1967), and *Marbury v. Madison*, (*supra* at 163). However, *Bowen* (*supra* at 2137) goes on to say: "Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action. The presumption of judicial review is, after all, a presumption, and 'like all presumptions used in interpreting statutes, may be overcome by,' *inter alia*, 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme," quoting from *Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 351, 104 S.Ct. 2450, 2456, 2457 (1984).

Public Law 12-1 clearly provides on its face that all judicial review, including procurement protests, are precluded where issues challenging "... a decision to award a contract calling for phased construction or implementation of the project rather than one that does not, or modified in accordance with this Act; neither shall phasing of construction *or implementation*

be considered in any protest or challenge alleging other, additional grounds, absent a showing that such phasing provisions are material to a showing of discrimination or improper motive." (Emphasis added). PL 12-1, § 5. Clearly, PL 12-1 precludes protests alleging "other grounds" or "additional grounds" beyond phased construction issues, unless the stated exceptions are indicated. Issues of discrimination or improper motive *by CUC* are not alleged in any of the protests herein. Any claims of discrimination under PL 12-1 lie within the province of the judiciary.

Public Law 12-1 defines its purpose "... to eliminate any and all legal impediments to proceeding with immediate award based on proposals submitted pursuant to RFP 97-0025..." "This Act is also intended to protect the CUC Board from possible litigation based on irregularities in the January 13, 2000 board meeting, by mooting the decision to cancel the RFP." PL 12-1, § 3. Section 4 states the public policy to be "... that construction of an 80 megawatt power plant under the build, operate, transfer concept, beginning with immediate installation of 60 megawatts of generating capacity, is in the best interests of the Commonwealth and the people of the CNMI, particularly Saipan."

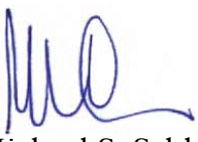
Finally, Public Law 12-1, § 7 mandates that CUC shall only make an award based on proposals that provide for low speed generators as recommended by Burns & McDonnell, thereby virtually eliminating all submitted proposals except one.

Consider *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 43 (1993) - "Judicial review may be precluded by statute, ... and this preclusion may be a form of review as well," citing *Federal Trade Commis. v. Standard Educ. Soc'y*, 302 U.S. 112, 117, 58 S.Ct. 113, 116, 82 L.Ed. 141 (1937), and also citing 1 CMC § 9112(a) (*Administrative Procedure: Judicial Review of Contested Cases)*, which states: "This section applies except to the extent that statutes enacted by the Commonwealth Legislature explicitly preclude judicial review."

DECISION

OPA's review authority stems from CUC-PR § 5-102, *et. seq*. PL 12-1, however, overrides OPA's jurisdiction to review any protests involving issues raised in the appeals, and evolving from CUC RFP 97-0025.

Lacking jurisdiction to proceed with the protest appeals filed herein, we hereby *dismiss* the appeals.



Michael S. Sablan
Public Auditor

February 5, 2001