



A few months later, after hearing rumors that BPL had come up with a selection criteria and had decided to conduct interviews with proposers, MMM wrote several letters to the BPL Chairman asking primarily for a copy of the evaluation criteria and the date of interviews with the proposers. This information, according to MMM, was not contained in the earlier NRFP. On January 11, 1999, the Chairman of BPL responded to MMM by clarifying that the primary intention of the NRFP was to help in formulating a detailed request for proposals to be approved by BPL. He said that BPL adopted this approach in view of the impending passage of House Bill No. 11-220,<sup>1</sup> which provides preferential treatment to persons or corporations of Northern Marianas descent in the bidding process for the Managaha concession.

The Chairman also refuted reports that BPL had approved a selection criteria, and he denied that interviews would be conducted with companies that responded to the NRFP. In his January 11, 1999 letter, however, the Chairman stated that DPL would be announcing solicitation for “competitive sealed proposals” for a commercial recreational concession of Managaha. He stated that BPL and DPL had reviewed all the proposals and had come up with proposed criteria for this new solicitation.

## **The Protest and Subsequent Appeal to OPA**

On January 12, 1999, MMM filed a written protest with the P&S Director contesting BPL’s decision to solicit competitive proposals for the Managaha concession. MMM claimed that this was a violation of the CNMI-PR, particularly Section 1-105. MMM argued that BPL is clearly included in the definition of “Public Agencies” covered by the CNMI-PR, and MMM added that it was not aware of any law that exempts BPL from the CNMI-PR. MMM also requested P&S, in its protest, to instruct BPL to decide on the Managaha concession based on the existing proposals after the evaluation criteria<sup>2</sup> had been provided to all proposers and required interviews had been conducted in accordance with the CNMI-PR. MMM also asked P&S to exercise its authority and tell BPL not to act on the planned solicitation until its protest had been decided.

The Acting Director of P&S denied MMM’s protest on January 20, 1999 for lack of jurisdiction. Referring to CNMI-PR Section 1-105, the Acting Director stated that an expenditure of public funds would have to be involved for the CNMI-PR to apply to the Managaha concession. He explained that, in this case, BPL would be receiving royalty payments in exchange for the grant of a franchise to operate on Managaha. The Acting Director also stated that this reflected BPL’s usual area of operation which is to sell or lease public lands, and that he had been assured by BPL that no expenditure of public funds was contemplated in this project.

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<sup>1</sup> This was enacted into law as Public Law (PL) No. 11-48 on November 19, 1998.

<sup>2</sup> In the same protest letter, MMM claimed that the NRFP issued by DPL did not comply with Section 3-106 of the CNMI-PR largely because of not stating the evaluation factors in the published RFP. In spite of these alleged defects, however, MMM submitted its proposal on August 31, 1998, the deadline for submission of proposals.

On January 29, 1999, MMM appealed the protest decision to OPA claiming that Section 1-105 cited by the Acting P&S Director is not exclusive as it merely states that the regulations apply whenever the expenditure of public funds is involved. MMM argues that, as provided in Section 2-103(5) of the CNMI-PR, the duties and responsibilities of the Director also include the sale, trade or other disposal of surplus supplies of the Government. MMM adds that these activities do not require expenditure of public funds, yet jurisdiction has been given to P&S. In addition, MMM states that the definition of “goods” in the CNMI-PR includes the sale or disposal of real and personal property.

In response to the appeal, the P&S Director acknowledges that the sale, trade or disposal of surplus supplies is the responsibility of his Division, but he disagrees that the granting of a concession in Managaha should be considered a sale, trade or disposal of a surplus item. The Director does agree that the definition of “goods” in the CNMI-PR includes the sale or other disposal of real and personal property, but points out that MPLC’s sale or disposal of public land is specifically excluded from the definition.

On February 24, 1999, the Director of DPL offered her comments on the appeal. She explains that this project is not a procurement that would involve the proper expenditure of public funds but rather is a matter of ensuring that sacred places such as Managaha are preserved and protected, while at the same time ensuring that financial returns are maximized. She argues that under PL10-57, BPL and DPL have exclusive jurisdiction over the management, use and disposition of surface public lands. The Director adds that the procurement regulations (possibly referring to the CNMI-PR) are powerless to limit the authority vested by the Legislature in these two agencies.

OPA is issuing its decision on this appeal pursuant to Section 5-102(8)(c)(i) which provides that the Public Auditor shall issue a decision after all necessary information for the resolution of the appeal has been received.

## **ANALYSIS**

*The P&S Director’s denial of MMM’s protest on the Managaha concession for lack of jurisdiction is the issue of this appeal. We now summarize the arguments as presented in the protest and appeal process, including our comments on the relevant issues.*

### **MMM’s Arguments in its Protest to the Chief**

In its January 12, 1999 protest, MMM argued that BPL failed to follow the provisions of the CNMI-PR relating to request for proposals (RFP), alleging primarily that BPL’s decision to subsequently solicit proposals for the Managaha concession violated the provisions of the CNMI-PR. MMM stated that it was not aware of any law exempting BPL from the CNMI-PR and asserted that the CNMI-PR applied because BPL falls under the definition of “Public Agencies” set forth in Section 1-105. MMM cited Section 1-105 of the CNMI-PR: “...These regulations apply to all agencies, departments, branches of the government, political subdivisions, public corporations and agencies of local government of the Commonwealth,

all collectively referred to herein as 'Public Agencies'....” MMM claimed that this definition covers BPL in the absence of its own procurement regulations. Accordingly, MMM stated that BPL has no authority to divert from the permissible source selection methods in the CNMI-PR Section 3-101. MMM found “blatantly in error and insulting” BPL’s January 11, 1999 statement that the August 14, 1998 solicitation was not an RFP, arguing that the notice itself was labeled a request for proposals.

### **Decision on the Protest by the Director of Procurement & Supply**

The Acting P&S Director denied MMM’s protest for lack of jurisdiction. Although the Acting Director acknowledged that MMM was correct in asserting that the CNMI-PR applies to both DPL and BPL, he explained that an expenditure of public funds would have to be involved for the CNMI-PR to apply to the Managaha concession RFP.

The P&S Acting Director added that the CNMI-PR might apply to the procurement if the concession could be considered a “Procurement” under the definition provided in Section 1-210 of the CNMI-PR. However, P&S stated that in this instance BPL would only be granting a franchise or a license for the operation of Managaha as a tourist concession. P&S added that under this arrangement, BPL would receive royalties, and no expenditure of public funds would be involved, adding that this is typical of BPL’s normal operations which involve selling or leasing public lands for the benefit of the Commonwealth.

### **MMM’s Arguments in its Appeal to the Public Auditor**

MMM claims in its appeal that the Acting P&S Director was incorrect in concluding that P&S lacks jurisdiction on this protest, and argues that Section 1-105 of the CNMI-PR is not exclusive as it merely states that the regulations apply whenever the expenditure of public funds is involved. MMM points out that, as provided in Section 2-103(5) of the CNMI-PR, the duties and responsibilities of the Director also include the sale, trade or other disposal of surplus supplies belonging to the Government. MMM adds that although these do not involve the expenditure of public funds, jurisdiction has nevertheless been given to P&S.

Moreover, MMM quotes the definition of “goods” in Section 1-210(9) of the CNMI-PR: “...all property, including but not limited to equipment, materials, supplies and other tangible personal property of any kind or nature, printing, insurance, leases of real and personal property, and sale or other disposal of real and personal property, except the sale of[sic] disposal of public lands under the management of the Marianas Public Land Corporation (MPLC)....” MMM again points out that the sale or other disposal of real and personal property in this definition does not involve the expenditure of public funds, claiming that the exception for the disposal of public lands does not apply in this case because a concession is only the grant of a privilege.

## **P&S Director's Report on the Appeal**

In his response dated February 2, 1999, the P&S Director agrees with the appellant's contention that the sale, trade, or disposal of surplus supplies is a responsibility of P&S, but disagrees that the granting of a concession for Managaha is also a sale, trade, or other disposal of a *surplus* item over which P&S has jurisdiction.

Moreover, the Director acknowledges that the definition of "goods" includes the sale or other disposal of real and personal property, but points out that the sale or disposal of public lands under the jurisdiction of MPLC is specifically excluded from the definition of "goods." He adds that since P&S has no jurisdiction over public lands sold or otherwise disposed of by BPL and DPL, which are the legal successors of MPLC, P&S has no jurisdiction over the actions of these agencies with regard to the Managaha concession.

The Director concludes that this concession would not qualify as a "Procurement" within his jurisdiction since this matter does not fall under the definition of "goods" and does not involve the expenditure of public funds. He requests OPA to uphold the protest decision and deny MMM's claim that P&S has jurisdiction over the grant of a concession on Managaha.

## **DPL's Comments on the Appeal**

In her comment on MMM's appeal, the DPL Director argues that the subject matter is not a procurement in which the concern is ensuring that public funds are expended properly. She explains that this is a matter of ensuring that the NMI people's precious, limited public land assets are used in a manner that preserves and protects sacred places such as Managaha, and at the same time, maximizes the financial return for the NMI people collectively and not for the benefit of a few. [Citing parts of Article XIV, Commonwealth Constitution].

The Director contends that under Public Law 10-57, BPL and DPL have exclusive jurisdiction over the management, use and disposition of surface public lands. She explains that it is black-letter law that the procurement regulations are powerless to limit the authority that the Legislature vested in these two agencies to govern the management, use and disposition of public lands. The DPL Director states that if MMM is concerned that it has been denied its right to due process, it can go through the administrative process before DPL and BPL, and then eventually to the Superior Court.

## **OPA's Comments**

The main issue in this appeal is whether BPL's solicitation of proposals for the Managaha concession (called NRFP) falls under the jurisdiction of P&S. We believe that an analysis of this issue should focus on two questions: (1) is the NRFP considered an official Request for Proposals (RFP)?, and (2) is it covered by the CNMI-PR?

### *Whether the NRFP is an Official RFP*

The NRFP published by DPL and BPL was not an official RFP. Our review of the NRFP showed that although it was labeled “Request for Proposals,” it merely asked for ideas for later use in formulating criteria for the operation of tourist facilities on Managaha. According to BPL, such criteria would be spelled out later in a detailed RFP. Unlike the competitive sealed proposals method where award is made to a responsible offeror whose proposal is determined to be most advantageous to the government, there was never any contract award intended under this solicitation. The third paragraph of the NRFP makes clear that it was “not to be construed as a bid or request for proposals.”

We believe that the absence of any evaluation criteria and provision for interviews in the NRFP well supports BPL’s position that there was never an intention to award a contract under this solicitation. Although we have not found any local decisions involving this form of solicitation, the U.S. General Accounting Office (GAO) has provided some guidance in this matter. GAO stated in a protest decision that where an agency has merely rejected an applicant under a prequalification procedure *that does not involve the issuance of a solicitation or the award or proposed award of a contract*, GAO does not have bid protest jurisdiction over the agency’s action [Schreiber et al., B-272181, August 16, 1996]. [Emphasis added]. In the same manner, the NRFP does not involve the award or proposed award of a contract and is therefore outside the scope of the procurement protest and appeals process.

### *Applicability of the CNMI-PR*

Based on the discussions above, we have determined that the NRFP was not an official RFP, and therefore there was no official solicitation on which to file a protest. Because we have concluded that the NRFP was not an official solicitation, it is unnecessary to discuss the applicability of the CNMI-PR to the subject matter of the NRFP, that is, the operation of tourist-related commercial business on Managaha. However, for purposes of discussion and clarification, we choose to offer some guidance on the applicability of the CNMI-PR had the NRFP been issued as an official solicitation. We believe that including this discussion is appropriate in this case where BPL and DPL apparently plan to issue an official RFP in the future.

MMM in its appeal emphasizes that Section 1-201(15) defines procurement to include the acquisition of goods and all related functions, and that the definition of “goods” in §1-201(9) specifically includes the “sale or other disposal of real and personal property.” Appellant concludes that since the acquisition of goods is a procurement matter and the sale or disposal of property is within the definition of “goods,” P&S has jurisdiction over any Managaha concession award. Section 1-201(15) of the CNMI-PR defines procurement as:

“...buying, purchasing, renting, leasing or acquiring construction, goods or services. It also includes all functions that pertain to the obtaining of construction, goods or services, including description requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.”

We understand that under the existing concession, BPL/DPL receives rental payments from the concessionaire for the commercial use of Managaha and as such, it would hardly be the lessee or buyer referred to in the CNMI-PR. Additionally, the authorization of commercial operations in Managaha does not involve expenditure of public funds, unlike when construction, goods or services are being acquired as described in the above definition. This supports our determination that the subject matter of the NRFP was not a procurement within the intent of the CNMI-PR. In his protest decision, the P&S Director ruled that for the CNMI-PR to apply in this solicitation, an expenditure of public funds would have to be involved.

Since we have determined that the grant of a concession is not a procurement action, we now discuss whether it can be considered a sale or other disposal of property under the CNMI-PR. Section 1-201(15) defines procurement to include the acquisition of goods and all related functions, and the definition of “goods” in Section 1-201(9) specifically includes the “sale or other disposal” of real and personal property, we find that an award of a concession contract for Managaha is clearly not a “sale” of a property. The question now is whether a concession contract can be considered as “other disposal.”

Our review did not show any clear definition of “other disposal.” Using a plain language analysis, however, the related phrase “dispose of” is defined as:

“to exercise finally, in any manner, one’s power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way; to finish with; to bargain away. Often used in restricted sense of ‘sale’ only, or so restricted by context.” [Black’s Law Dictionary, Abridged Fifth Edition (1983)].

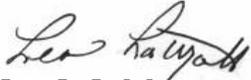
In this case, BPL will not part control over Managaha if and when it chooses to award what would be a limited concession.

Even if “other disposal” could be interpreted to include a concession award, Section 1-201(9) specifically excepts the sale or disposal of public lands under the management of MPLC. The language in the CNMI-PR demonstrates a clear intention to remove the sale or other disposition of public lands from the normal procurement procedures, and to leave the authority with MPLC and its present legal successors, BPL/DPL.

## **DECISION**

We conclude that the P&S Director has no jurisdiction over BPL’s NRFP for the commercial operations of Managaha. The NRFP was neither a procurement nor a sale or disposal action within the scope of the CNMI-PR. Likewise, we believe that our office has no jurisdiction to consider the substantive issues raised by BPL’s NRFP and accordingly do not decide any of those issues raised in the protest appeal, other than agreeing with the protest decision that the P&S Director has no jurisdiction over the NRFP.

Section 5-102(9) of the CNMI-PR provides that the appellant, any interested party who submitted comments during consideration of the protest, the Director, or any agency involved in the protest, may request reconsideration of a decision by the Public Auditor. The request must contain a detailed statement of the factual and legal grounds for which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered. Such a request must be received by the Public Auditor not later than ten (10) days after the basis for reconsideration is known or should have been known, whichever is earlier.



Leo L. LaMotte  
Public Auditor, CNMI

July 13, 1999