



Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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In Re:)	APPEAL NO. BP-A075.1
)	
KUTh Energy)	CUC-RFP-11-048
)	
Request for Reconsideration)	“Renewable Energy Development”
)	
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)	

The Office of the Public Auditor (“OPA”) issued Appeal Decision BP-A075, a single decision on two appeals taken by KUTh Energy (“KUTh”) in related procurements for Geothermal Energy exploration on July 26, 2013.¹ On August 9, 2013, KUTh filed a timely request to OPA for reconsideration (the “Request”) of the decision with respect to the cancellation of CUC-RFP-11-048 (the “-048 RFP”). On August 23, OPA solicited comments from interested parties on KUTh’s request for reconsideration. Such comments, if any, were to be submitted to OPA no later than September 9, 2013. OPA received no timely comments.

KUTh’s Request provides four factual and legal grounds for review:

- 1) OPA failed to address CUC’s failure to negotiate and act in good faith;
- 2) Persuasive evidence supports a finding that CUC failed to act and negotiate in good faith, if not in bad faith;
- 3) OPA failed to provide KUTh a copy of the CIP Office response (dated June 18, 2013) for comment as required and requested by KUTh under NMIAC § 50-50-405(f); and
- 4) CUC, through the Governor, acted in bad faith when it negotiated with another IPP at the same time they were negotiating with KUTh.

See Request at p. 1.

OPA has jurisdiction to render a decision on this Request under NMIAC § 50-50-405(a) and (i).

Having considered all legal and factual arguments set forth by KUTh, and discussed in detail below, OPA hereby DENIES KUTh’s Request and affirms OPA Appeal Decision BP-A075.

¹ For a detailed account of the background of CUC-RFP-11-048 and the decision upon which KUTh seeks review, please see OPA Appeal Decision BP-A075 available at opacnmi.com.

GOOD FAITH and BAD FAITH

OPA's appeal decision did not distinguish between KUTH's claims that CUC failed to act in good faith from their claims that CUC acted in bad faith. This, KUTH claims in its Request, was legal error. Accordingly, KUTH rationalizes that because of this error, OPA must reconsider its decision with respect to the Appeal Decision as it applies to the -048 RFP.

KUTH points to several extra-jurisdictional cases involving interpretation of the meaning of "good faith" in the context of the covenant of good faith and fair dealing that is part of *contract law*.² See Request at 3. Specifically, KUTH cites two decisions from the U.S. Court of Federal Claims which suggest that in contract performance, the covenant of good faith and fair dealing might be breached by conduct that is "less than" bad faith. See Request at 3, citing *Rivera Agredano v. United States*, 70 Fed. Cl. 564, 574 n. 8 (2006) and *Tecom Inc. v. United States*, 66 Fed. Cl. 736, 770 (2005). KUTH further cites two federal circuit cases which hold that lack of diligence, failure to cooperate with the other party's performance, or destroying reasonable expectations of the other party regarding the fruits of the contract can constitute a breach of the implied covenant of good faith and fair dealing in *existing contracts*. See *id.*, citing *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) and *Malone v. United States*, 849 F. 2d 1441, 1445 (Fed. Cir. 1988). KUTH proceeds to claim the above standard for "good faith" has been adopted by the CNMI Supreme Court when interpreting the implied covenant of good faith and fair dealing as applied to contract law in the Commonwealth. See *id.* at 3-4, citing *Rosario v. Camacho*, 2001 MP 3, ¶ 99 (correct citation is to ¶98) and *Tano Group v. DPW*, 2009 MP 18, ¶ 45.

As a starting point, all of the cases relied upon by KUTH deal with an implied duty to act in good faith in the *performance of a contract*, not the express duty appearing in the procurement regulations for the Commonwealth Utilities Corporation ("CUC regulations"), which "require all parties, including CUC employees and contractors, involved in the negotiation, bidding, performance or administration of CUC contracts to act in good faith." NMIAC § 50-50-015. KUTH, without discussion, presumes that the definition of good faith in one context (implied covenant in contracts) necessarily translates to all (including pre-contract solicitations).

To suggest that the precedent upon which KUTH relies, a lesser standard for good faith as elucidated in the Federal Circuit and Federal Claims cases, cited *supra*, has been adopted in the CNMI is unconvincing. Specifically, *Rosario v. Camacho* merely holds that, where a contract exists, each party owes an implied duty of good faith which requires only "that one party not injure another party's right to receive the benefits of the agreement." *Rosario v. Camacho*, 2001 MP 3 ¶ 89 (emphasis added) (citing *Ellingstad v. Department of Natural Resources*, 979 P.2d 1000, 1009 (Alaska 1999) and Restatement (Second) of Contracts § 205). Intentionally interfering with a party's ability to receive the benefits of the contractual bargain is a classic example of bad faith, not some lesser standard as suggested by KUTH. Moreover, *Tano Group v. DPW*, 2009 MP 18, ¶ 44, simply holds that where a *contract* exists with one party owing payment to another for performance, and a dispute arises, the parties are not permitted to simply withhold payment and refuse attempts to resolve the dispute as the unpaid party goes bankrupt.

² KUTH never had a contract with CUC because the RFP was cancelled before a contract was entered into.

Such “stonewalling” during performance of a contract clearly injures one party’s ability to receive the benefits of the agreement. Again, this is a classic example of bad faith and not some lesser form as suggested by KUTH.

Courts have long struggled with applying the amorphous and elusive concept of “good faith” in contract law. One theory, which has wide application in contract law, was coined the “excluder analysis” by the academic who invented it, Professor Robert Summers, in a 1968 Law Review article. *See generally*, Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provision of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968). Recognizing there exists no readily applicable definition of conduct that constitutes “good faith,” the “excluder analysis” defines the term by an “absence of bad faith.” *Id.* at 196. Courts seeking to ascertain whether conduct constitutes “good faith” simply review “bad faith” precedent to determine whether the duty of good faith and fair dealing was breached. Under such an application, there are only two realms of behavior: bad faith and good faith. Under the “excluder analysis,” there is no room for the awkward interpretation KUTH suggests OPA apply to the CUC regulations, where three realms exist: conduct constituting good faith, conduct which violates good faith but does not amount to bad faith, and conduct constituting bad faith.

The “excluder analysis” is universally recognized as the approach adopted by the Restatement (Second) of Contracts, section 205, adopted in 1979 by the American Law Institute and published in 1981. *See* Robert S. Adler & Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 Akron L. Rev. 31, 43-44 (1994); Robert S. Summers, *The General Duty of Good Faith -- Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810, 813 (1982); Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 Utah L. Rev. 1, 2 (2005); Kevin C. Braley, *What is Good Faith and Fair Dealing?*, 41 S.D. L. Rev. 195, 210 (1995); Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 Iowa L. Rev. 497, 498-99 (1984).

The common law, as it is expressed in the restatements of law, is applicable in the CNMI. *See* 7 CMC § 3401. As such, OPA finds it appropriate to rely on the theory embodied in the Restatement (Second) of Contracts, a resource recognized in CNMI law and relied upon consistently by the CNMI Supreme Court (indeed in both cases cited by KUTH, *supra*) when interpreting the meaning of “good faith” in NMIAC § 50-50-015. Accordingly, OPA adopts the “excluder analysis” definition and construes NMIAC § 50-50-015 as simply *prohibiting* “all parties, including CUC employees and contractors, involved in the negotiation, bidding, performance or administration of CUC contracts” from acting in *bad faith*.

The “excluder analysis” approach has been applied by OPA in good faith analyses, albeit without reference to the theory. Prior OPA decisions have consistently analyzed allegations of a breach of the requirement to act in good faith as allegations of bad faith. *See In re Chongs Corporation*, OPA Appeal No. BP-A073, p. 12-13 (April 11, 2013); *In re: Kautz Glass*, OPA Appeal No. BP-A047, p. 8 (October 27, 2005).

Applying this construction to the Request, OPA’s decision in BP-A075, which addresses KUTH’s allegations that CUC did not act in good faith, results in a conclusion relative to the Request that nothing presented in KUTH’s original appeal overcame the presumption that

procurement officials acted in good faith. As previous OPA decisions make clear, contract officials are presumed to act in good faith and any allegation to the contrary must be supported by convincing proof. *In re Chongs Corporation*, OPA Appeal No. BP-A073 (April 11, 2013); *See also, In re Appeal of Resource Management International Corporation*, OPA Appeal No. BP-A055 (July 15, 2008) (procurement officials are required to act in good faith and may be presumed to do so). Absent evidence of bad faith, OPA will not attribute improper motives to government officials based on inferences or suppositions. *In re: SSFM (Saipan) Engineers, Inc.*, BP-A017, p. 8 (May 17, 1999). Proof of wrongdoing must be based on actual facts, and not on “suspicion or innuendo.” *In re Chongs Corporation*, OPA Appeal No. BP-A073, p. 12 (April 11, 2013).

KUTH relies heavily upon events and the passage of time during the period between the Notice of Intent to Award, issued on January 27, 2012, and the cancellation of the -048 RFP, issued on September 21, 2012, to suggest bad faith. Specifically, KUTH points to unanswered inquiries to CUC about the status of the project and the fact that then-Governor Fitial, as the legal head of CUC,³ was simultaneously negotiating a conflicting diesel energy contract while the deal with KUTH simmered.

With respect to the non-response by CUC to KUTH’s requests for updates, while perhaps being evidence of bad business practices or management turmoil, such failure to respond does not rise to the level of bad faith, *per se*. Absent some proof that the government intentionally strung KUTH along or intentionally mislead KUTH with full knowledge that the government had no intention of pursuing any geothermal energy exploration project, such allegations also do not rise to the level of bad faith. The fact that a similar, but distinguishable, RFP was issued by the Capital Improvement Program Office on the same day that CUC informed KUTH that it needed more time to decide KUTH’s pending protest was not evidence of bad faith. Further, the fact that CUC informed KUTH that it would re-issue the geothermal RFP on the same day that the CIP Office issued the now canceled CIP-RFP13-GOV-024 (the “-024 RFP”) also may indicate management inefficiencies but not bad faith. In fact, such actions by CIP and CUC appear to be evidence that the CNMI had not abandoned its intention to pursue geothermal drilling and consulting services but were refining the scope of work for this project.

Pursuit of multiple projects at the same time, even if mutually exclusive, does not *per se* equate to bad faith. The CUC procurement regulations set forth an intended purpose to “increase economy in CUC procurement activities and to maximize the fullest extent practicable the purchasing value of CUC funds.” NMIAC § 50-50-001 (b) (3). This guiding principle, while it does not set any actual legal standard, indicates an intended flexibility to the government. Limited by the prohibition on acting in bad faith, this allows the government to entertain multiple possibilities so as to make the appropriate critical decisions to maximize the buying power of taxpayer (or ratepayer) dollars. As is made clear by the email from Alan Fletcher, CUC Acting Director, to James Stump, Contracting Officer for CIP, the CNMI government was exploring multiple courses for the future of the CNMI’s energy needs, including solar, geothermal, and diesel. *See Exhibit C to Request for Reconsideration*. Given the unknown capabilities of any of

³ At the time relevant to KUTH’s protest, the former Governor was the legal head of CUC pursuant to an Executive Order. As noted by OPA in its Appeal Decision BP-A075, this was a shared responsibility with the Acting Director of CUC. In any case, as set forth below, this fact is not sufficient to constitute bad faith.

these sources of energy, it makes sense for the CNMI to explore the viability of multiple technologies to secure the most sensible path forward.

FAILURE TO PROVIDE KUTH with the JUNE 18, 2013 CIP EMAIL

KUTH claims legal error in OPA's failure to provide KUTH with a copy of the June 18, 2013 response email from CIP pursuant to NMIAC § 50-50-405(f) and afford KUTH the opportunity to comment. CUC regulations provide:

Public Auditor shall, upon request, make available to any interested party information on the substance of the appeal which has been submitted by interested parties or agencies, except to the extent that withholding of information is permitted or required by law or regulation. Any comments thereon shall be submitted within a maximum of ten days.

NMIAC § 50-50-405(f).

While KUTH is correct in identifying that it did not receive the CIP document, it is incorrect in its assertion that OPA *relied* upon the CIP response in issuing Appeal Decision BP-075. In footnote 1 on page 7 of the Decision, OPA specifically noted that it made no decision on the validity of the decision of the (then) Lt. Governor in determining that the -048 RFP needed to be restructured to be in compliance with the NREL report. Indeed, OPA expressed concern over the fact that the -048 RFP was cancelled more than one year after CUC received the NREL report. Notwithstanding, OPA recognized that precedent favored the government, as an agency "may cancel no matter when the information precipitating the cancellation first surfaces or should have been known, even if the solicitation is not cancelled until after proposals have been submitted and evaluated and protesters have incurred costs in pursuing the award." *See* Appeal Decision BP-A075, p. 6 (July 26, 2013) (*citing MedVet Development LLC., B-406530 (June 18, 2012).*

In addition to OPA's lack of reliance on the factual basis contained within the CIP response, any error on the part of OPA in not providing the email to KUTH (along with KUTH's ability to comment) renders any such error harmless due to KUTH's present Request. KUTH has now presented its position on the matter to OPA. Substantively, KUTH disputes that the -048 RFP conflicts with the NREL report. In support, KUTH points to a comment by one of the NREL report's four co-authors, Mr. Charles F. Visser, who also participated as a member of the -048 RFP Selection Committee at CUC. Specifically, KUTH claims that Mr. Visser stated to KUTH representatives that they (KUTH) were selected because their drilling and development plan best complied with the NREL report. *See* Request at 5. Furthermore, KUTH claims, that despite numerous meetings with Mr. Visser and the Selection Committee, they were never informed that the proposal conflicted in any way with the NREL report. *Id.*

KUTH fails to comprehend that the appropriate question is not whether KUTH's actual proposal under the -048 RFP conflicted with the NREL report, but rather whether the -048 RFP was cancelled for the purpose of restructuring it or whether it was cancelled in bad faith. Revision of specifications is an appropriate justification for cancellation of an RFP. NMIAC § 50-50-235(b); OPA Appeal BP-A075, p. 7 (July 26, 2013).

Comparing the -048 RFP to the later issued, but since cancelled, -024 RFP, which is part of the record on the initial protest appeal, it is clear there are specific and substantive differences in the scope of work between these two solicitations. *See* -048 RFP and -024 RFP; *see also* OPA Appeal Decision BP-A075.

From the changes in the scope of the geothermal project, as described in each of the above RFP's, it can be inferred that the government sought to change the nature of the geothermal project in order to ostensibly proceed in a manner they found most prudent in light of the recommendations in the NREL report. In any case, while KUTH and Mr. Visser might believe that the KUTH proposal was in compliance with the NREL report, it is of no consequence if government officials responsible for the management of geothermal development, e.g., the Lt. Governor, believed the -048 RFP was not appropriate in light of the NREL report and thus a revision in the direction the government was taking was required. KUTH's failure to point out any evidence of bad faith behind the decision to cancel the -048 RFP and the fact that the government subsequently solicited a similar, but substantively different, geothermal exploration solicitation, with the -024 RFP, eliminates any cause for OPA to question the government's cancellation of the -048 RFP.

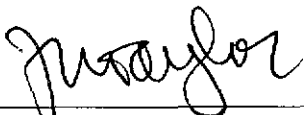
DECISION

For the reasons set forth above, KUTH Energy's Request for Reconsideration of OPA Appeal Decision BP-A075 with respect to CUC-RFP-13-048 is hereby DENIED.

Dated this 2nd day of October, 2013.

BY

CONCUR



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