



# Office of the Public Auditor

Commonwealth of the Northern Mariana Islands

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**In re:** ) **APPEAL NO. BP-A101**  
)  
**Appeal of USA Fanter Co., Ltd.** ) **CUC-IFB-19-028, Rev. 2**  
)  
) **“Replacement of Sadog Tasi WWTP Clarifier”**  
)  
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## FACTUAL BACKGROUND

In 2019, the Commonwealth Utilities Corporation (“CUC”) issued CUC-IFB-19-028, an invitation to bid for replacement of the Sadog Tasi water clarifier. The original IFB was later cancelled and CUC issued a revised invitation to bid for the same project titled CUC-IFB-19-028, Revision 1. USA Fanter Company, Ltd. (“USA Fanter” or “Fanter”) submitted a bid as did Pacific Engineering Projects (“PEP”).

Fanter’s bid on the revised project was second lowest to PEP’s. However, PEP’s bid was later disqualified by CUC following a protest by Fanter. Rather than awarding the revised project to Fanter, as the second lowest bid, CUC cancelled the revised project. CUC justified cancellation of the revised IFB on grounds that Fanter’s bid, although the lowest remaining bid, exceeded CUC’s “certified budget threshold” for the project.

The above scenario was largely repeated when CUC later issued its second revised IFB, captioned CUC-IFB-19-028, Revision 2. Again PEP and Fanter submitted competing bids, with PEP’s bid coming in lower than Fanter’s. Once again, PEP’s bid was disqualified after protest by Fanter and, once again, CUC cancelled the second revised invitation instead of awarding the project to Fanter, the second lowest bidder. Budgetary limitations were again cited by CUC to justify its cancellation.

In May of 2021, Fanter lodged a protest of the Acting Executive Director’s (“the Director”) decision to cancel the second revised solicitation. The Director denied Fanter’s protest on June 3,

2021, citing NMIAC § 50-50-235, allowing CUC to cancel solicitations when such is determined to be in the best interest of CUC.

On June 17, 2021, Fanter appealed the Director's protest decision to the Office of the Public Auditor. In due course, the Public Auditor received the Director's report on July 14, 2021 and Fanter's comments on the report on July 28, 2021. The Director filed rebuttal comments on August 4, 2021.

### **JURISDICTION**

The CUC Procurement Regulations vest OPA with jurisdiction to act as the adjudication body for appeals from decisions of the Executive Director. NMIAC § 50-50-405.

OPA has recently taken the position that the regulations designating the Public Auditor as the adjudication body for the central government under NMIAC § 70-30.3-505 exceed the regulatory authority vested in the Department of Finance. *Micronesian Environmental Services, LLC. V. Kina B. Peter, et al.*, Civ. Nos. 20-0344-CV and 21-0004-CV (consolidated) (Super. Ct. March 8, 2021) (Motion to Dismiss under NMI R. Civ. P. 12(b)(6)). The identical statutory and regulatory arguments applicable in OPA's position with respect to that collateral matter apply equally to the CUC regulations, however, notwithstanding the position OPA has taken in that matter, the CUC regulations enjoy a presumption of validity until ruled otherwise by a court of law, and OPA is bound to carry out its duties as the designated adjudication body.

### **DISCUSSION**

The challenge presented to OPA in this matter is to determine the intended meaning of the provision in CUC procurement regulations that sets forth the grounds upon which CUC may cancel an invitation for bids or request for proposals. The provision in question provides:

An invitation for bids or request for proposals may be cancelled, and any and all bids or proposals may be rejected, when such action is determined in writing by the

Director and approved by the Chairman, Board of Director to be in the best interest of CUC or\* any of the following reasons:

- (a) Inadequate or ambiguous specifications contained in the solicitation;
- (b) Specifications which have revised;
- (c) Goods or services being procured which are no longer required;
- (d) Inadequate consideration given to all factors of cost to CUC in the solicitation;
- (e) Bids or proposals received indicate that the needs of CUC can be certified by a less expensive good or service;
- (f) All offers with acceptable bids or proposals received are at unreasonable prices;
- or
- (g) Bids were collusive.

NMIAC § 50-50-235 (\*So in original). As noted by the asterisk and footnote placed by the Law Revision Commission, the regulation language, as promulgated, does not make sense. The clause following the “or” cannot stand on its own without the preceding clause as would be expected in any either/or phrase. There is clearly an error or omission in the promulgated language. There appears to be two plausible explanations of how this occurred. One is that an “f” was omitted before “or” making the sentence read “for” instead of “or.” The other is that the “or” is correct and the word “for” was omitted after the “or” making the sentence read “or for.”

The consequences of these two alternative readings are profound. The former explanation, reading the “or” as “for” **limits** CUC’s ability to cancel any solicitation to seven enumerated scenarios and, even then, only if under such a scenario cancellation were determined to be in the best interest of CUC. The latter explanation **expands** CUC’s ability to cancel any solicitation *beyond* the seven enumerated scenarios *whenever* cancellation is determined to be in the best interest of CUC.

Director has interpreted the language more broadly, reading the “or” as “or for” (though not acknowledging this is his interpretation in his Director’s Report or comments) and allowing CUC the ability to cancel a solicitation when any circumstance that is not specifically enumerated, such as budgetary limitations, render proceeding with the solicitation outside of CUC’s best interest. To support his interpretation, the Director largely skips any discussion on the rules of statutory construction when dealing with an ambiguity and instead suggests the word “or” is plain and unambiguous. Director’s Report p. 3. This approach ignores the fact that it is the “or” on its own that actually creates the ambiguity. In the Director’s interpretation, the language as promulgated

needs modification to read “or for,” though that fact is never recognized in any of CUC’s responses. After skirting any analysis of the regulatory language itself, the Director then focuses on the fact that the CUC procurement regulations largely favor CUC’s best interests, citing four other occasions where CUC’s best interests are affirmatively recognized. Director’s Report, p. 3. The Director then suggests that Fanter’s urging that “or” is a misprint of the intended “for” attempts to bypass proper rule making protocol under 1 CMC § 9104, that CUC’s interpretation of its own regulations should be given deference, and that Fanter’s position is unreasonable and futile. Director’s Report, p. 4-5.

As may be expected, Fanter, as the bidder next in line, urges the more restrictive reading, supplanting “for” for the ambiguous “or.” As discussed, this interpretation would limit CUC’s ability to cancel the invitation only to the seven scenarios appearing in the regulations. To support its position, Fanter embarks on a scholarly analysis supporting their position, elucidating the many clerical errors in the CUC procurement regulations. Fanter suggests that reviewing courts should substitute one word for another where a word is the obvious result of a clerical error. Appeal, p. 5. Fanter argues substituting “or for” would render the seven enumerated reasons superfluous because the catch all “best interest of CUC” would cover all of those scenarios, among many others. Fanter points out that reviewing courts, when confronted with an ambiguity, construct statutes in such a way as to avoid superfluous language. *Id.*

Both Fanter’s scholarly analysis and the CUC Director’s limited analysis miss an important piece of this regulatory puzzle: that the CUC procurement regulations are largely based off the Department of Finance (“DOF”) procurement regulations. Looking at the overall procurement system in the Commonwealth, almost every autonomous agency or public corporation has adopted procurement regulations nearly identical to those promulgated by DOF. This is either because of the **requirement** that certain expenditure authorities adopt such a nearly identical system, or by default - mimicking the DOF regulations because that agency manages most of the Commonwealth procurement activities. *See*, NMIAC § 70-30.3-020. In either case, looking more specifically at the provisions governing cancellation of solicitations or invitations to bid between CUC and DOF reveals the seven specifically enumerated justifications for cancellation are identical (with the exception of one typographical error and the substitution of “CUC” for “government”). *See*,

NMIAC §§ 50-50-235; 70-30.3-240. The chief difference is that the DOF regulations include reference to the “best interest” justification as *both* a preface to the specific enumerated justifications *and* as a separate eighth enumerated justification. NMIAC § 70-30.3-240 (h). The CUC regulations retain the “best interest” language, *only* but include it in the prefatory portion of the provision along with the inconvenient and ambiguous “or.” NMIAC § 50-50-235.

A survey of other Commonwealth agencies’ procurement regulations that closely track the DOF regulations reveal a common theme: **none** of those regulations eliminate any agency’s ability to cancel any invitation or solicitation for **any** reason when deemed by the procuring authority to be in the best interest of that agency. The Commonwealth Ports Authority regulations dispense with the “best interest” language in the prefatory portion, but retain it as a specifically enumerated “catch all” justification. NMIAC § 40-50-301 (a). The Northern Marianas Housing Corporation and the Northern Marianas College regulations each include the “best interest” language in both the prefatory portion of the cancellation provision and as a specifically enumerated justification. NMIAC § 100-60-240; NMIAC § 95-50-1010 (k). Marianas Visitors Authority regulations dispense with the “best interest” language in the prefatory portion, but include it as a “catch all” in the specifically enumerated justifications. NMIAC § 90-20-301 (a). Finally, OPA’s own procurement regulations include the “best interest” language in both the prefatory portion of the cancellation and as a specifically enumerated justification, analogous to the DOF regulations. NMIAC § 130-30-235. This review shows that while many other independent agencies have altered the language from the DOF regulations allowing cancellation of invitations to bid or requests for proposals, **none** have chosen to eliminate the procuring authority’s ability to cancel the solicitation when to do so is deemed in the best interest of the agency.

Resolving the ambiguity posed by the CUC cancellation regulation requires OPA to discern the intent of its drafters. Comparing the “purpose” sections of the CUC procurement regulations to the DOF procurement regulations reveal that five of the listed provisions are identical (with exception of the agency name):

1. To provide for increased public confidence in the procedures followed in CUC procurement;

2. To ensure the fair and equitable treatment of all persons who deal with the procurement system of CUC;
3. To provide increased economy in CUC procurement activities and to maximize to the fullest extent practicable the purchasing value of CUC funds;
4. To foster effective broad-based competition within the free enterprise system; and
5. To provide safeguards for the maintenance of a procurement system of quality and integrity.

NMIAC §§ 50-50-001 (b); 70-30.3-001 (b)(3)-(b)(7). The goals of both the CUC and DOF procurement regulations are identical. Nothing in any of the CUC regulations indicates to OPA any intent to limit the Executive Director's ability to cancel a solicitation to the seven enumerated situations appearing in the regulation. Instead, it appears to OPA that the drafters of the CUC procurement regulations sought to reduce the verbiage of the provision allowing for cancellation by removing what appeared to be a duplicative "best interest" reference in the specifically enumerated justifications and include the "catch all" "best interest" reference only in the prefatory language. Unfortunately, the drafters did so in a sloppy manner. This drafting oversight excluded the word "for," which would have more clearly retained the Executive Director's ability to cancel any procurement when he deems it in CUC's best interest, whether or not it is one of the seven limited enumerated reasons appearing in 50-50-235 (a) through (g). The language should read: "An invitation for bids or request for proposals may be cancelled, and any and all bids or proposals may be rejected, when such action is determined in writing by the Director and approved by the Chairman, Board of Director to be in the best interest of CUC or *for* any of the following reasons...." To limit CUC's authority to cancel procurements to the seven enumerated reasons would unreasonably limit the corporation's ability to manage its own affairs.

The argument advanced by Fanter that the remaining seven enumerated reasons would be superfluous does not resonate with OPA: the list of enumerated reasons provides helpful examples for the procuring entity of when cancellation might be appropriate, even though such a list is not exhaustive. It would be nearly impossible to reduce the myriad reasons cancellation would be appropriate to a comprehensive list in the regulations. Some level of discretion to the procuring authority is essential to a functioning procurement system. The evils advanced by Fanter in

allowing such authority to the Executive Director, would be prevented by the existing requirement that all parties involved in the negotiation, bidding, performance, or administration of CUC contracts to act in good faith. NMIAC § 50-50-015. This provision would prohibit any abuse of cancelling solicitations for improper purposes under the guise of the “best interest of CUC.”

### DECISION

For the reasons set forth above, the appeal by USA Fanter Company, Ltd. of the protest decision of the Director of Procurement and Supply is hereby denied.

**Dated this 16<sup>th</sup> day of September, 2021.**

BY: 

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CONCUR:



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