PUBLIC CONTRACTS

When the state's letter says that the bid was incomplete and that the contract was awarded to another bidder, it is a fair inference that the bid was rejected. International Bridge Corp. v. Yap, 9 FSM R. 362, 364 (Yap 2000).

Rejection of a contractor's bid on the basis it was incomplete is a final administrative determination which confers on the bidder the right to judicial review. International Bridge Corp. v. Yap, 9 FSM R. 362, 365 (Yap 2000).

A suit for injunctive relief is the appropriate vehicle by which to challenge a contract award under public bidding statutes because as a general rule, a declaratory judgment and an injunction are the only adequate means of protecting the public interest, the integrity of the competitive bidding process, and the individual bidder's rights. International Bridge Corp. v. Yap, 9 FSM R. 390, 394 (Yap 2000).

A court must fully take into account the discretion that is typically accorded an official in the procurement agencies by statutes and regulations. Such discretion extends not only to the evaluation of bids submitted in response to a solicitation but also to the agency's determination with respect to the application of technical, and often esoteric, regulations to the complicated circumstances of individual procurement. International Bridge Corp. v. Yap, 9 FSM R. 390, 396 (Yap 2000).

Under 9 Y.S.C. 528, all Yap state government contracts must be in writing and be executed by the agency which is authorized to let contracts in its own name and must be made with the lowest responsible bidder. The lowest responsible bidder is the lowest bidder whose offer adequately responds in quality, fitness, and capacity to the particular requirements of the proposed work called for by the contract. The lowest responsible bidder may be the bidder who submits the lowest price, but not necessarily. International Bridge Corp. v. Yap, 9 FSM R. 390, 397 (Yap 2000).

All state contracts shall be in writing and made with the lowest responsible bidder. If the lowest bid is rejected, the contracting officer may, at his discretion, award the contract to the lowest remaining responsible bidder or advertise anew for bids. In each instance the officer, at his discretion, after determining the lowest responsible bidder, may negotiate with that bidder, and that bidder only, to reduce the scope of work and to award the contract at a price which reflects the reduction in the scope of work. International Bridge Corp. v. Yap, 9 FSM R. 390, 397 (Yap 2000).

While the better procedure under 9 Y.S.C. 528 would have been for Public Works to formally select the second lowest bidder as the lowest responsible bidder before beginning negotiations with it to reduce the scope of work, and consequent price, the essential point is that the state had legally sufficient reasons for rejecting the lowest bidder's bid when it did so. As a result, no substantial right of the lowest bidder was violated by the state's failure to strictly conform to the statutory procedure. The court therefore will not reverse, modify, or remand the case for further proceedings pursuant to 10 Y.S.C. 165 on the basis of the state's negotiations with the second lowest bidder. International Bridge Corp. v. Yap, 9 FSM R. 390, 398 (Yap 2000).

The state must provide contract bidders with substantial, material, and detailed information

necessary for a bidder to make a knowing and fully informed bid. International Bridge Corp. v. Yap, 9 FSM R. 390, 399 (Yap 2000).

Materials provided by the state, however denominated, must provide sufficient specificity to permit real competition between the bidders on contracts, and fair comparison among the several bids. The state-provided specifications may be sufficient to provide real competition and a fair comparison although the bid form requires the bidder to provide additional specifications. International Bridge Corp. v. Yap, 9 FSM R. 390, 400 (Yap 2000).

When the state's bid documents provided specifications for metal buildings in extreme detail it could properly require a contract bidder to provide the brand name and additional specifications for the metal buildings as part of its bid, and could reject the bid on this basis when those items were not provided. International Bridge Corp. v. Yap, 9 FSM R. 390, 401-02 (Yap 2000).

The lowest responsible bidder is the lowest bidder whose offer adequately responds in quality, fitness, and capacity to the particular requirements of the proposed work called for by the contract. International Bridge Corp. v. Yap, 9 FSM R. 390, 403 (Yap 2000).

The lowest responsible bidder for a contract for public work is one who is responsible and the lowest in price on the advertised basis. The term "responsible" as thus used is not limited in its meaning to financial resources and ability. Authorizations of this kind invest public authorities with discretionary power to pass upon the bidder's experience and his facilities for carrying out the contract, his previous conduct under other contracts, and the quality of his previous work, and when that discretion is properly exercised, the courts will not interfere. A bidder's experience in his field of expertise is a valid factor which may be considered in evaluating competing bids in order to determine the lowest responsible bidder. International Bridge Corp. v. Yap, 9 FSM R. 390, 403 (Yap 2000).

In addition to the names of any joint or subcontractors and the work they will do, all bids for state contracts must include any other materially relevant information the contracting officer may require, and any bid which does not comply with the advertisement's requirements or the statutory provisions shall be rejected. International Bridge Corp. v. Yap, 9 FSM R. 390, 403 (Yap 2000).

It is not for the court to second-guess the state's determination that a bidder's related experience was insufficient to qualify it as the lowest responsible bidder because a court has no warrant to set aside agency actions as arbitrary or capricious when those words mean no more than that the judge would have handled the matter differently had he been an agency member. International Bridge Corp. v. Yap, 9 FSM R. 390, 404 (Yap 2000).

The state may reject a contract bid when the bidder has not supplied the names and curriculum vitae of its key personnel which was materially relevant information required by the bidding documents. International Bridge Corp. v. Yap, 9 FSM R. 390, 404 (Yap 2000).

When the subcontractors' professional experience was not required under the terms of the bid documents themselves, nor was its submission a customary practice, a bidder's failure to submit them was not properly a basis for the rejection of its bid. International Bridge Corp. v. Yap, 9 FSM R. 390, 405 (Yap 2000).

When the statute provides that any bid which does not comply with the bid advertisement's requirements or the statutory provisions shall be rejected, and when the bidder's qualification statement makes it clear that failure to provide any of the information requested may result in the contracting officer's rejection of the bid, the lack of materially relevant information required by the bid documents was a sufficient basis upon which to reject the bid. International Bridge Corp. v. Yap, 9 FSM R. 390, 405 (Yap 2000).

Although the statute requires the state to determine before a bid is submitted whether a potential bidder's financial ability to perform the work and its experience in performing similar work, the state may also require that a bidder provide, as part of its bid package, additional information regarding the qualifications of those specific individuals within its organization who would be working on the project. International Bridge Corp. v. Yap, 9 FSM R. 390, 406 (Yap 2000).

A contract for public work or public property or supplies must be executed on the public body's behalf by some officer or officers possessed of the power to contract on behalf of the governmental body which they represent. The fundamental rule is that a public officer, who has only such authority as is conferred upon him by law, may make for the government he represents only such contracts as he is authorized by law to make. Nagata v. Pohnpei, 11 FSM R. 265, 271 (Pon. 2002).

The terms and conditions of a contract with a successful bidder for public contracts where competitive bidding is required are to be gathered from the terms and specifications of the advertisement or solicitation for bids. Nagata v. Pohnpei, 11 FSM R. 265, 271 (Pon. 2002).

When the plaintiffs have shown that the state has acted *ultra vires* with regard to soliciting bids, designating successful bidders, and entering into contracts for trochus, and has acted arbitrarily in determining what constitutes evidence of available funds and in attaching other conditions to the contract awards which were not included in the solicitation to bid documents, they have demonstrated that they will be irreparably injured if the trochus harvest is permitted to proceed, as the bid solicitation and contract award processes were contrary to Pohnpei state law. The plaintiffs are thus entitled to a declaratory judgment that the defendants' trochus harvest activities are illegal and to a permanent injunction, prohibiting the defendants from proceeding with any trochus harvest until the state has implemented procedures to conduct a fair and transparent bidding process for trochus, through the department authorized by law to conduct it. Nagata v. Pohnpei, 11 FSM R. 265, 272 (Pon. 2002).

A fair and transparent bidding process requires that regulations for soliciting bids, designating successful bidders, and awarding contracts for trochus be properly noticed, published, and distributed by the authorized department and that the department's solicitations to bid set forth in clear terms each and every term and condition of the contract to be formed with a successful bidder for a trochus harvest, which terms may not be varied by the state after a bid is awarded. Nagata v. Pohnpei, 11 FSM R. 265, 272 (Pon. 2002).

The statutory provision entitled "State Acquisition of Land" applies to the state's acquisition of interests in private land, which includes purchases of land in fee simple, and also other interests such as leases, easements for access roads and rights of way. Sigrah v. Kosrae, 12 FSM R. 513, 521-22 (Kos. S. Ct. Tr. 2004).

When the timing and manner in which a parcel was selected for a state quarry site, and

when the negotiations were conducted and a lease agreement executed without public notice, without bidding procedures and without testing the suitability of the rock therein for aggregate production, it raises issues of public trust, transparency of government operations and propriety of the these actions under state law. Sigrah v. Kosrae, 12 FSM R. 513, 522 (Kos. S. Ct. Tr. 2004).

The Kosrae Financial Management Regulations, Section 4.2(b) requires free, open and competitive bidding for purchases more than $25,000. Sigrah v. Kosrae, 12 FSM R. 531, 534 (Kos. S. Ct. Tr. 2004).

The Financial Management Regulations, Section 4.17 provides the requirements for an exemption from open bidding when the Governor, in the event of an emergency affecting public health, safety, or convenience so declares in writing, describing the nature of the emergency and danger, an exemption to open bidding will be made to the extent necessary to avoid the stated danger. Sigrah v. Kosrae, 12 FSM R. 531, 534 (Kos. S. Ct. Tr. 2004).

The State of Kosrae acquires an interest in private land at the direction of the Governor through negotiation or through a procedure for acquisition of an interest in private land through court proceedings. Sigrah v. Kosrae, 12 FSM R. 531, 535 (Kos. S. Ct. Tr. 2004).

If the state's lease interest in parcels of which the Governor as a co-owner was acquired at the Lt. Governor's direction, or at the direction of any person other than the Governor, then it appears that lease interest was acquired in violation of Kosrae State Code, Section 11.103(1), but if the lease interest in the parcels was acquired at the Governor's direction, in compliance with Section 11.103, then it appears that the lease interest was acquired in violation of the Kosrae State Ethics Act. Sigrah v. Kosrae, 12 FSM R. 531, 535 (Kos. S. Ct. Tr. 2004).

An insurance broker did not violate the Chuuk Financial Management Act by advancing the premium on Chuuk's behalf when it was not a state officer, employee, or allottee within the meaning of the statute and it thus did not create an obligation within the statute's meaning because no evidence suggests that the broker was anything other than one of Chuuk's many vendors with whom Chuuk entered into a binding contract. Actouka Executive Ins. Underwriters v. Simina, 15 FSM R. 642, 654 (Pon. 2008).

All contracts for the purchase of personal property involving $50,000 or more made on behalf of any national government agency must be let by free and open competitive bidding. Actouka Executive Ins. Underwriters v. Simina, 15 FSM R. 642, 655 (Pon. 2008).

When the FSM assumed the responsibility for arranging for insurance coverage for the vessels owned by the FSM including those operated by the four states, and the broker, Chuuk, and the FSM knew that the vessels' operators would be responsible for paying for the insurance for their respective vessels, the public bidding statute, as a matter of law, does not create liability on the FSM's part to the broker for Chuuk's premiums. Actouka Executive Ins. Underwriters v. Simina, 15 FSM R. 642, 655 (Pon. 2008).

When none of the questions to be decided by the court directly touch upon treaty relations between the FSM and the United States, the FSM Supreme Court may determine whether the FSM wrongfully provided false information to U.S. officials, whether, if proven, those actions were actionable, and if so, what damages the defendant-counterclaimant suffered since the court can also decide the issue of whether either party breached the contract, and if so, who

owes what sums to the other. The mere existence of a funding mechanism agreed to by two sovereign nations cannot strip the court of jurisdiction to issue a decision on the merits of this case. Nor does the Compact intend to so hobble the court. FSM v. GMP Hawaii, Inc., 16 FSM R. 479, 484 (Pon. 2009).

When a public law's statutory language seems to speak only in prospective terms and certainly does not expressly state or clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously show legislative intent to make the statute retroactive or for it to be applied retrospectively to previously-awarded public contracts, the movant is entitled to summary judgment and a declaration that the public law does not apply to the parties' earlier contract. FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 592 (Pon. 2011).

Chuuk cannot escape liability when the plaintiff did not accept the risk that Chuuk might not be able to find funds and was not promised payment only when and if funds were available; when the plaintiff was told on November 24, 1995, that Chuuk was still awaiting the Chuuk Department of Treasury's issuance of a check for full payment of the insurance premium which Chuuk hoped would be within a week, and was asked to "Please bear with us your usual patient [sic] and understanding"; when the plaintiff would have had every reason to believe that the funds had been appropriated and, apparently like in previous years, Chuuk was waiting for them to become available and the paperwork done to cut the check; when the same should be true for fiscal 1997, when Chuuk informed the plaintiff that it had submitted a requisition to Chuuk Finance for $84,000 and was making daily follow-up; and when the judgment was not on a breach of contract theory. Chuuk v. Actouka Executive Ins. Underwriters, 18 FSM R. 111, 119 (App. 2011).

There is no authority that a party to a government contract has a duty to inquire and determine for itself whether the funds to pay for the contract have been properly appropriated and are certified as available, although there is plenty of authority that the government cannot create an obligation to pay unless there has been an appropriation and certification. Chuuk v. Actouka Executive Ins. Underwriters, 18 FSM R. 111, 119 (App. 2011).

Governments are generally not liable on contracts unless there has been an appropriation and a certification of availability of funds, and Chuuk, by its own Financial Management Act, Truk S.L. No. 5-44, has similar statutory requirements. Chuuk v. Actouka Executive Ins. Underwriters, 18 FSM R. 111, 119 (App. 2011).

The public interest factor favors the plaintiffs since the public interest should favor a fair and thorough, but not rushed, evaluation of the power generation bids which ends with the PUC Board of Directors approving a contract with the bidder with the best plan because it involves proposals for a long-term improvement of PUC's power generation capacity and the expenditure of a large sum. The public interest also favors adherence to the Pohnpei statutes that govern an independent public corporation such as PUC, rather than a blatant disregard of PUC's independent nature. Perman v. Ehsa, 18 FSM R. 432, 440 (Pon. 2012).

The public interest favors a bidding process that is fair and transparent. It also favors that foreign investors be seen to be treated fairly and thus encouraged to invest in Pohnpei to the State's benefit. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 563, 568 (Pon. 2013).

A declaratory judgment and an injunction are the only adequate means of protecting the public interest, the integrity of the competitive bidding process, and the individual bidder's rights

to challenge a contract award under the public bidding statutes. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 563, 568 (Pon. 2013).

The successful bidder on a public contract is a necessary and indispensable party to litigation by an unsuccessful bidder that challenges the public bidding process. Luen Thai Fishing Venture, Ltd. v. Pohnpei, 18 FSM R. 573, 575 (Pon. 2013).

The mandate of 55 F.S.M.C. 221(2) prohibits any employee of the FSM to authorize an expenditure or create or authorize an obligation in advance of the availability of funds. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 223 (Pon. 2015).

When the applicable regulations require that any public contracts awarded under those regulations are subject to mandatory alternative dispute methods; when the movants have filed a complaint and thereby "invoked the litigation machinery"; when the parties availed themselves of an alternative dispute method by virtue of a mediation session but the settlement agreement thus reached was unenforceable because it did not receive the required Presidential approval; and when the government is not disposed to resume alternative dispute resolution, the plaintiff's motion to compel arbitration will be denied. Pacific Int'l, Inc. v. FSM, 20 FSM R. 220, 224-25 (Pon. 2015).

When an FSM court has not previously construed an FSM civil procedure rule that is similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the FSM rule, such as when it has not previously considered the application of FSM Civil Rule 56 to litigation involving the termination of a government construction contract. Pacific Int'l, Inc. v. FSM, 21 FSM R. 283, 289 (Pon. 2017).

A contractor asserting claims of bad faith must overcome the strong presumption, that in the absence of clear, contrary evidence, public officials act conscientiously in the discharge of their duties. Thus, unless bad faith is demonstrated, the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. For a contractor attempting to show that a government act was undertaken in bad faith requires well-nigh irrefragable proof to induce the court to abandon the presumption of good faith dealing. The necessary irrefragable proof is equated with evidence of some specific intent to injure the plaintiff, motivated solely by malice or actuated by animus toward same. Pacific Int'l, Inc. v. FSM, 21 FSM R. 283, 289 (Pon. 2017).

Unsubstantiated suspicions and allegations of bad faith actions are not enough to demonstrate bad faith. A contractor must identify specific instances of the government's ill will directed toward it – the contracting officer's state of mind is critical. No less than the contracting officer's knowing and intentional conduct can support a finding of bad faith. Thus, claims of bad faith have been rejected when the contractor can only prove that the convenience termination was an outgrowth of the contracting officer's negligent conduct, or the government's mere error, even if would constitute sufficient ground for contractual breach. Pacific Int'l, Inc. v. FSM, 21 FSM R. 283, 289 (Pon. 2017).

A contractor may attack a contracting officer's decision to terminate on the grounds that such decision was an abuse of discretion or arbitrary and capricious, but the contractor has the burden of proving arbitrary and capricious conduct. Pacific Int'l, Inc. v. FSM, 21 FSM R. 283, 289 (Pon. 2017).

Summary judgment will be denied when a genuine issue of fact exists about whether the contractor had met all material terms of the contract or that the delay was excusable and when the contract provides that if, after termination of the contractor's right to proceed, it is determined that the contractor was not in default or that the delay was excusable, the parties' rights and obligations will be the same as if the termination had been issued for the government's convenience. Pacific Int'l, Inc. v. FSM, 21 FSM R. 283, 290 (Pon. 2017).