

**MARUYAMA & ASSOCIATES,
LTD.
vs.
MARIANA ISLANDS HOUSING
AUTHORITY and Sumitomo
Corp.**

**Civil Action No. 82-0066
District Court NMI**

Decided May 24, 1984

**1. Sovereign Immunity -
Commonwealth - Agencies**
Absent an agreement by the Marianas
Islands Housing Authority to the contrary,
MIHA was within the Commonwealth's
governmental immunity and subject to
liability only as set forth by law. 6
T.T.C. §§251 et seq.; NMI Public Law 5-
67, §5-2 [2 C.M.C. §4431].

**2. Sovereign Immunity -
Commonwealth - Agencies**
Claim against Mariana Islands Housing
Authority for fraud is barred by
governmental immunity statute. 6 T.T.C.
§252 (5). [7 C.M.C. §2204(b)]

**3. Sovereign Immunity - Civil
Rights Actions**
A claim to enforce federal rights is not
barred by a state's assertion of sovereign
immunity.

**4. Contracts - Government -
Bidding**
An invitation to bid, followed by a
submission of a bid, creates an implied
contract obligating the government to
consider the bid fairly and honestly.

**5. Contracts - Quasi-Contracts -
Damages**

Unjust enrichment of the promisor is not
an element of a claim on an implied
contract, and promisee may recover
expectation or reliance interest.

**6. Government Tort Liability -
Discretionary Functions**
The purpose of the "discretionary
function" exception to the tort claims act
is to allow planning level decisions to be
made without fear of suit. 6 T.T.C.
§252(2). [7 C.M.C. §2204(a)]

**7. Governmental Tort Liability -
Discretionary Functions**
Government agency's decisions regarding
the execution of bid procedures did not
properly fall within the discretionary
function exception of government tort
claims act. 6 T.T.C. §252(2). [7 C.M.C.
§2204(a)]

FILED
Clerk
District Court

MAY 24 1984

For the Northern Mariana Islands
By *[Signature]*

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

MARUYAMA & ASSOCIATES, LTD.,) CIVIL ACTION NO. 82-0066
Plaintiff,)
v.) DECISION
MARIANA ISLANDS HOUSING)
AUTHORITY and SUMITOMO CORP.,)
Defendants.)

I.

The facts giving rise to this action are set forth in the Court's previous decision regarding defendants' motions for summary judgment (Maruyama & Associates v. Mariana Islands Housing Authority, et. al., Civil Action No. 82-0066 (D.N.M.I. Decision filed October 26, 1983)). The facts relating to the claims against the Mariana Islands Housing Authority (MIHA) and relevant to this decision are repeated briefly here. Sometime prior to May 1982, MIHA decided to erect a 300 house turn-key project on the old Kobler air strip, now known as "Koblerville." According to Maruyama, in May of 1982 MIHA solicited bids for the project; Maruyama submitted its bid, but was not awarded the contract.

On November 22, 1982, Maruyama filed this action. By

1 its amended complaint, Maruyama alleged against MIHA breach of
2 express and implied contract, violation of its rights to due
3 process and equal protection, fraud, and violation of public
4 policy. MIHA filed a motion to dismiss or, in the alternative,
5 for summary judgment. In its disposition of these motions, the
6 Court granted summary judgment on the breach of contract claims
7 and denied the motions as to the constitutional and fraud claims
8 as questions of material fact remained. The public policy claim
9 was dismissed for lack of standing.

10 On November 23, 1983, the Court raised, sua sponte,
11 questions of its subject matter jurisdiction in this matter,
12 requesting the parties to provide memoranda on the scope of the
13 Commonwealth's governmental immunity in this action. Specifi-
14 cally, the Court was concerned with Sections 252(2) and 252(5) of
15 Title 6 of the Trust Territory Code (TTC). Subsequently, MIHA
16 filed a motion to dismiss based on its reading of these sections.
17 The parties filed memoranda on the issue and the Court heard the
18 oral arguments of counsel on January 27, 1984. The Court now
19 renders its decision as set forth herein.

20
21 II.

22 [1] The provision regarding MIHA's immunity from suit
23 reads:

24 The Government of the Northern
25 Mariana Islands hereby gives its
26 irrevocable consent to allowing the
Authority to sue and be sued in its
corporate name, upon any contract,

1 claim or obligation arising out of
2 its activities under this Act and
3 hereby authorized [sic] the Au-
4 thority to agree by contract to
waive any immunity from suit which
it might otherwise have..

5 Public Law 5-67, § 5-2. This Court in its Memorandum Decision in
6 Joaquin Atalig v. Mariana Islands Housing Authority, Civil Action
7 No. 78-27 (D.N.M.I. Oct. 31, 1979) interpreted the language of
8 P.L. 5-67 to conclusively demonstrate that absent an agreement by
9 MIHA to the contrary, MIHA was within the Commonwealth's govern-
10 mental immunity and subject to liability only as set forth at 6
11 TTC § 251 et. seq.

12 This Court is aware that the concept of sovereign im-
13 munity is currently the subject of serious question. The "modern
14 trend of legislative policy and judicial thought is toward the
15 abandonment of the monarchistic doctrine of sovereign and govern-
16 mental immunity." Civil Actions Against State Government
17 §§ 2.5-2.6 (Shepard's/McGraw-Hill, 1982); see generally L. Jaffe,
18 Suits Against Governments and Officers: Sovereign Immunity, 77
19 Harvard Law Review 1 (1963)(modern concept of sovereign immunity
20 rests on misunderstanding of the doctrine as it developed in
21 England; history of doctrine does not support modern use of the
22 immunity). However, the doctrine continues to be recognized by
23 the United States Supreme Court. Civil Actions Against State
24 Government, supra, at § 2.10. Assuming the validity of the
25 concept, there also exists a great deal of confusion regarding
26 the nature and scope of governmental immunity as it applies to

1 public corporations. Compare Federal Housing Administration v.
2 Burr, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed. 725 (1940) and Payne
3 v. Panama Canal Co., 607 F.2d 155, 163 (5th Cir. 1979) (immunity
4 of federal public corporation to be determined from legislative
5 intent) with Specter v. Commonwealth of Pennsylvania, 341 A.2d
6 481 (Penn. 1975) and Civil Actions Against State Government,
7 supra p.3, at § 2.30 (Shepard's/McGraw-Hill, 1982)(focal point in
8 addressing question of immunity of state public corporation is
9 relationship of agency to state; specifically, courts examine
10 autonomy of corporation to determine whether state is real party
11 in interest). Considering the unsettled state of the law and the
12 absence of persuasive arguments by Maruyama, the Court at this
13 time is unwilling to overrule its decision in Atalig. Accord-
14 ingly, the claims asserted by Maruyama are viewed against the
15 Commonwealth's statutory immunity.

16
17 III.

18 [2] Maruyama asserts a claim against MIHA for fraud. 6 TTC
19 § 252 reads in relevant part:

20 The [court] shall not have juris-
21 diction... of:

- 22 (5) Any claim arising out of
23 assault, battery, false im-
24 prisonment, false arrest, mali-
25 cious prosecution, abuse or
26 [sic] process, libel, slander,
misrepresentation, deceit or
interference with contract
rights. [Emphasis added].

1 The legislative history of this section demonstrates an intent to
2 follow the Federal Tort Claims Act (28 U.S.C. §§ 2671-80).
3 Ikosia v. Trust Territory, 7 TTR 274, 277 (Tr.Div.)(High Court
4 1975). 28 U.S.C. § 2680(h) parallels, verbatim, 6 TTC § 252(5).
5 That section of the Federal Tort Claims Act has been interpreted
6 to exclude all claims of fraud. Genson v. Ripley, 544 F.Supp.
7 251, 253 (D.Ariz. 1982), aff'd, 681 F.2d 1240 (9th Cir. 1982),
8 cert. denied, ___ U.S. ___, 103 S.Ct. 245, 74 L.Ed.2d 193
9 (1982); see also United States v. Neustadt, 366 U.S. 696, 81
10 S.Ct. 1294, 6 L.Ed.2d 614 (1961); Moon v. Takisaki, 501 F.2d 389
11 (9th Cir. 1974); Green v. United States, 629 F.2d 581 (9th Cir.
12 1980). Accordingly, the claim against MIHA sounding in fraud is
13 dismissed.

14
15 IV.

16 Maruyama also asserts a claim against MIHA for in-
17 fringement of its rights to due process and equal protection as
18 guaranteed under the 14th Amendment to the United States Consti-
19 tution. The Court rejects MIHA's assertion that this claim is
20 barred by the Commonwealth's immunity.

21 [3] A claim to enforce federal rights is not barred by a
22 state's assertions of sovereign immunity as such would violate
23 the principles of federalism embodied in the Supremacy Clause of
24 the United States Constitution. Civil Actions Against State
25 Government, supra, p.3, at § 2.16, p.34. Cf. Johnson v. Railway
26 Express Agency, Inc., 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44

1 L.Ed.2d 295, 304 (1975)(considerations of state law may be dis-
2 placed when their application would be inconsistent with the
3 federal policy underlying the cause of action in question); San
4 Diego County District Council of Carpenters v. Cory, 685 F.2d
5 1137 (9th Cir. 1982)(court will not apply state statute of
6 limitations if such would unduly qualify or diminish a federal
7 right).^{1/} Therefore, the claim set forth in Count II for
8 constitutional violations is not prohibited by the Commonwealth's
9 sovereign immunity.^{2/}

10
11 V.

12 Lastly, the Court addresses Maruyama's assertion of
13 claims sounding in contract. In its decision of Oct. 26, 1983,
14 supra p.1, at 7-9, the Court found that Maruyama had stated a
15 claim for breach of an implied contract. However, the Court
16 granted summary judgment in favor of MIHA as it found that

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18 ^{1/}Although the Supremacy Claus (Art. VI, Cl. 2) is not one of the
19 provisions made applicable to the Commonwealth in Section
20 501(a) of the Covenant to Establish the Commonwealth of the
21 Northern Mariana Islands in Political Union with the United
22 States of America, (P.L. 94-241, 90 Stat. 263, reprinted at 48
23 U.S.C. § 1681 note (1976)), Section 102 of the Covenant makes
24 those provisions of the Constitution, treaties and laws of the
25 United States applicable to the Northern Mariana Islands the
26 supreme law of the land; the 14th Amendment is applicable
through Section 501.

27 ^{2/}Although not raised by MIHA, it is noted here that an action in
28 this Court against the Commonwealth pursuant to 42 U.S.C. §1983
29 is not barred by the Eleventh Amendment. Island Aviation, Inc.
30 v. Mariana Islands Airport Authority, Civil Action No. 81-0069
31 (D.N.M.I. May 26, 1983).

1 Maruyama had not supported its allegations of unjust enrichment.
2 The Court has reconsidered this decision and has determined that
3 its interpretation of the applicable law was in error; therefore,
4 the summary judgment decision as to the claim on an implied
5 contract is vacated and the claim is reinstated.

6 [4.5] An invitation to bid, followed by a submission of a
7 bid, creates an implied contract obligating the government to
8 consider the bid fairly and honestly. Armstrong & Armstrong,
9 Inc. v. United States, 514 F.2d 402, 403 (9th Cir. 1975); McCarty
10 Corp. v. United States, 499 F.2d 633, 637 (Ct. Claims 1974). This
11 principle follows from Section 90 of the American Law Institute's
12 Restatement of the Law-Contracts 2d (hereinafter Restatement):

13 (1) A promise which the promisor
14 should reasonably expect to induce
15 action or forbearance on the part
16 of the promisee or a third person
17 and which does induce such action
18 or forbearance is binding if in-
justice can be avoided only by
enforcement of the promise. The
remedy granted for breach may be
limited as justice requires.

19 Under this section, unjust enrichment of the promisor is not an
20 element of a claim on an implied contract. While the promisee
21 may recover his or her "restitution interest" (that benefit
22 conferred on the promisor), he may also recover his "expectation
23 interest" (benefit of the bargain) or his "reliance interest"
24 (recovery for loss caused by reliance) as justice requires. Re-

25 ///

26 ///

1 statement § 344.^{3/} The value of the reliance interest is held by
2 the Court of Claims to be the proper measure of recovery on a
3 breach of an implied promise claim such as the one at issue here:

4 [If an unsuccessful bidder is able
5 to prove that [the implied con-
6 tract] was breached and he was put
7 to needless expense in preparing
8 his bid, he is entitled to recover
his bid preparation costs in a suit
against the Government [citation
omitted].

9 McCarty Corporation v. United States, 499 F.2d at 637.

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^{3/}§ 344 reads:

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Judicial remedies under the rules stated in this Restate-
ment serve to protect one or more of the following inte-
rests of a promisee:

(a) his "expectation interest," which is his interest
in having the benefit of his bargain by being put in as
good a position as he would have been in had the contract
been performed,

(b) his "reliance interest," which is his interest in
being reimbursed for loss caused by reliance on the
contract by being put in as good a position as he would
have been in had the contract had not been made, or

(c) his "restitution interest," which is his interest
in having restored to him any benefit that he has conferred
on the other party.

See also § 345 for discussion of remedies available for the
protection of these interests.

1 A question remains as to the jurisdiction to entertain
2 this claim in light of 6 TTC § 252(2).^{4/} That section reads in
3 relevant part:

4 The [court] shall not have juris-
5 diction... of: (2) any claim
6 based... upon the exercise or per-
7 formance or the failure to exercise
8 or perform a discretionary function
or duty on the part of any agency
or employee of the government,
whether or not the discretion in-
volved be abused.

9 [6] Federal courts have had many opportunities to interpret
10 this "discretionary function" exception.^{5/} The purpose of the
11 exception is to allow planning level decisions to be made without
12 fear of suit. Lindgren v. United States, 665 F.2d 978, 980 (9th
13 Cir. 1982). Of course, not every discretionary act is included
14 under the section as every decision, even in the performance of
15 day-to-day affairs, necessarily involves some amount of discre-

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17 ^{4/} Initially, the Court notes its concern as to the applicability
18 of this section to non-tort claims. As stated above, the
19 legislative history of this section demonstrates an intent to
follow the Federal Tort Claims Act. The parallel section, 28
20 U.S.C. § 2680(a), applies to tort claims only and not to claims
on contract. The Government Liability Act of 1983 repealed 7
21 TTC §§ 251 et. seq., and replaced them with a modified law, now
codified as 7 CMC § 2201 et. seq.. Under the new law, the tort
22 claims provisions, including the same exception at issue here,
are separated from other claims (although the wording of
23 Article 2 (§ 2251 et. seq.) still creates confusion as to the
applicability of the exceptions to contract claims). However,
24 since the Court finds that the acts alleged here were not based
upon the performance of a discretionary function, the Court
25 need not rule on this underlying question.

26 ^{5/} 6 TTC § 252(2) parallels 28 U.S.C. § 2680(a).

1 tion. The distinction developed by the Ninth Circuit is drawn
2 between those decisions made on a policy and planning level as
3 opposed to those made on an operational level. Thompson v.
4 United States, 592 F.2d 1104, 1111 (9th Cir. 1979); Jablonski by
5 Pahls v. United States, 712 F.2d 391, 395 (9th Cir. 1983). See
6 also Lindgren v. United (citing, inter alia, Smith v. United
7 States, 546 F.2d 872 (10th Cir. 1976)(decision to open Yellow-
8 stone Park and decision to leave some areas undeveloped were
9 discretionary, but decision regarding posting of warning signs
10 was not covered by exception) and United States v. State of
11 Washington, 351 F.2d 913 (9th Cir. 1965)(even assuming location
12 of electrical power line was discretionary function, failure to
13 adequately provide warning device was actionable)). In addition
14 to examining whether the decision was made at the planning or
15 operational level, the Ninth Circuit has also considered "the
16 ability of the judiciary to evaluate the agencies' act/omission
17 and whether judicial evaluation would impair the effective
18 administration of the Government." Lindgren, 665 F.2d at 980.

19 [7] Based on the foregoing, the Court is of the opinion
20 that the alleged decision not to fairly consider Maruyama's bid
21 does not properly fall within the discretionary function ex-
22 ception. Even assuming, without deciding, that MIHA's decisions
23 to develop the turn-key project and to solicit the bids for its
24 construction were made at the "policy level," the decisions made
25 regarding the execution of the bid procedures were operational
26 actions taken to carry out the established policy. The actors

1 were not engaged in policy planning of a sensitive nature where
2 it is desirable to protect them from suit. Rather, the handling
3 of the actual bid procedure was an operational task readily
4 governed by judicially reviewable standards; judicial evaluation
5 of such decisions would not hamper or interfere with the "ef-
6 fective administration of the government." Accordingly, the
7 implied contract claim is not subject to dismissal on grounds of
8 governmental immunity and, material questions of fact remaining,
9 is not ripe for summary judgment.

10
11 VI.

12 In summary, for the reasons stated herein, the Court:

- 13 1) grants MIHA's motion to dismiss the fraud
14 claim (Count IV); and
15 2) denies MIHA's motion to dismiss the due
16 process and equal protection claims (Count
17 II); and
18 3) Vacates the prior summary judgment decision
19 in favor of MIHA on the implied contract
20 claim and reinstates that claim.

21
22
23 May 26, 1984

24 Date

25 Alfred Laureta

26 JUDGE ALFRED LAURETA