IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,

Plaintiff,

v.

FRANCISCO M BORJA, Mayor of Tinian and Aguiguan; MUNICIPALITY OF TINIAN AND AGUIGUAN, a chartered municipality and political subdivision of the Commonwealth of the Northern Mariana Islands; and the COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Defendants.

CASE NO. CV-02-0016-ARM

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on the cross-motions for summary judgment filed by plaintiff United States of America and defendant Francisco M. Borja, Mayor of Tinian and Aguiguan, and defendant Municipality of Tinian and Aguiguan. Upon consideration of the memoranda of the parties, evidence before the Court and the applicable law, the Court makes the following disposition.

I. FACTS AND PROCEDURE

The facts in this case are undisputed. In 1989 the people of the Municipality of Tinian and Aguiguan (hereinafter "Municipality of Tinian") approved a voter initiative, the Tinian Casino Gaming Control Act of 1989, that permitted gambling and the building of casinos on the island of Tinian. Following the passage of the initiative, the Mayor of Tinian and Aguiguan (hereinafter "Mayor of Tinian") at the time, James Mendiola, sought the building of casinos as well as the development of other projects such as golf courses. The Tinian Soil and Water Conservation District

(U.S. Department of Agriculture), the Municipality of Tinian and Mayor Mendiola recognized a need to evaluate the condition of the water resources on the island before development took place. They were aware of the ground water situation on the neighboring island of Saipan where that island's groundwater resources had become mostly non-potable due to over-pumping and the drilling of too deep wells. At the time, Tinian had only one potable water source. This single well could not supply the water for the resident population and the proposed developments.

After several discussions occurred between officials of the United States Geological Survey ("USGS") and Mayor Mendiola, the USGS and Mayor Mendiola agreed to engage in a water resource investigation project. The purpose of the project was to define and quantify, to the extent possible, Tinian's ground water resources through the collection of hydrologic data and the drilling and testing of exploratory wells and the rehabilitation of old military wells drilled in 1944-45. Mayor Mendiola believed he had the authority to enter into the agreement with the USGS pursuant to the casino initiative.

The project began with the construction and installation of a hydrologic data network on Tinian. This was followed by the purchase of a drilling rig, drilling tools, well construction materials and other related equipment. The USGS transferred an experienced hydrologist to serve as the resident project chief on Tinian. The objective of having a resident project chief was to have him interact with the local officials and citizens to educated them about the island's fragile ground water resources and to suggest ways to protect and manage them. The USGS also hired a Tinian resident as the chief driller and provided him with extensive training. The goal was to train a local citizen in the art of drilling so that Tinian could carry on the drilling and testing work after the USGS left and to train residents to operate and maintain the hydrologic data network consisting of rain gages, monitor wells and a tide gage. All work on the project stopped in 1997 due to non-payment by the Municipality of Tinian. Ultimately, the project drilled seventeen new wells, located and rehabilitated sixteen old military wells, and produced two comprehensive reports on Tinian's water resources. Mayor Mendiola thought the project benefitted the Municipality of Tinian.

Starting in 1990 and continuing through 1996, the USGS and the Municipality of Tinian entered into a series of Joint Funding Agreements ("JFAs") to finance the project. The amounts charged in the JFAs included the project chief's and the chief driller's salary, the cost of renting office space, the cost of operating and maintaining the hydrologic data network and the costs of drilling including fuel, parts, equipment as well as associated material and shipping charges. The costs also included travel expenses and water quality analysis obtained for all wells tested, and for a prorated portion of the USGS' overhead. If the costs for a year exceeded the JFA, the USGS neither recouped the overages for that year nor did the USGS add them to the following year's agreement. The language of all the JFAs was nearly identical and contained the condition that the JFAs were "subject to the availability of appropriations."

At the time Mayor Mendiola entered into the JFAs, the Municipality of Tinian had no local source of money that could be appropriated to pay for the JFAs. Tinian was totally dependant upon the budget approved by the Commonwealth of the Northern Mariana Island ("CNMI") Legislature and assigned to Tinian. It appears from the record that the CNMI Legislature or the local Tinian Legislative Delegation never appropriated funds to pay for the JFAs. At the time Mayor Mendiola entered into the JFAs, he knew there was no appropriation. Nevertheless, USGS officials were assured by Mayor Mendiola that the funds to pay for the JFAs would come from the application fees expected from several gaming interests.

At first Tinian was diligent in making payments on the JFAs. In 1990 the USGS and Mayor Mendiola on behalf of the Municipality of Tinian entered into three JFAs requiring the Municipality of Tinian to contribute $2,500.00, $82,100.00 and $43,800.00 respectively. These JFAs were paid by the Municipality of Tinian, although the source of the funds is not clear. However, starting with the JFA entered into in October of 1991, the Municipality of Tinian paid very little. In 1991 and 1992, the USGS and Mayor Mendiola on behalf of the Municipality of Tinian entered into JFAs requiring the Municipality of Tinian to contribute $729,000.00 and $202,592.00 respectively. No funds were appropriated for these amounts and they were never paid despite repeated assurances by Mayor

Mendiola that they would be paid. In 1993, 1994, 1995 and 1996, the USGS and the new Mayor of Tinian, Herman M. Manglona, entered into JFAs requiring the Municipality of Tinian to contribute $333,600.00, $226,500.00, $298,700.00 and $285,600.00 respectively. No funds were appropriated for these amounts and they were never paid despite assurances by the new Mayor, Herman Manglona, that they would be paid. One payment of $240,000 was eventually made after the sale of a drilling rig. After negotiations with the United States in 1999, that money was applied to the debt from the JFA entered in 1993 and that JFA's debt was written off by the United States.

On April 30, 2002, the United States filed the instant action. On June 2, 2003, the United States filed an amended complaint (Doc. #20) against Francisco M. Borja, the current Mayor of Tinian, the Municipality of Tinian and the CNMI. In Counts I through V, the United States sued for breach of the JFAs entered into for the years 1991, 1992, 1994, 1995 and 1996. The United States sought $1,742,392.00 in damages plus interest, penalties, and administrative costs as mandated by 31 U.S.C. § 3717. Following dismissal of the CNMI as a party in this action, plaintiff United States and defendants Mayor Borja and the Municipality of Tinian filed cross-motions for summary judgment (Doc. #60-61) on March 31, 2005. All parties timely filed briefs in opposition (Doc. ##63-64) and reply briefs (Doc. ##67-68). The motions came on for hearing before the Court on April 28, 2005.

III. LAW AND DISCUSSION

A. Standard of Review

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn therefrom must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

The initial burden rests on the moving party to point out the absence of any genuine issue of

material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party must make a showing that is "'sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.'" *Calderone v. United States,* 799 F.2d 254, 259 (6th Cir.1986). See *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1162, 1141 (C.D.Cal. 2001). For those issues where the moving party will not have the burden of proof at trial, the movant must point out to the court "that there is an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325.

B. Whether The Joint Funding Agreements Are Enforceable

The United States asserts that the defendants, the Mayor of Tinian and the Municipality of Tinian, entered into express and enforceable contracts with the United States government. Defendants do not dispute that the JFAs were entered into. Defendants' counter in their opposition brief and cross-motion for summary judgment that the JFAs are void and unenforceable because the acts of entering into them by the Mayors of Tinian were *ultra vires* acts. Specifically, defendants argue that the JFAs are invalid and unenforceable because the Mayors and the Municipality of Tinian did not have the authority under CNMI law to enter into the JFAs.

Whether an enforceable contract exists between the United States and the Municipality of Tinian is a question of federal common law. See *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983). In determining federal common law, federal courts follow the principles of contract law applicable to private individuals.[1] See *Franconia Associates v. United States*, 536 U.S. 129, 141 (2002); *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1135 (E.D.Cal. 2001).

The general rule that municipal corporations have those powers, but only those, which are expressly granted to them by legislative or constitutional provision, or those implied from the ones expressly granted, or those essential to the carrying out of the declared objects and purposes of the

---

[1] Sources of federal common law include: (1) the Restatement of Contracts (2d); (2) the U.C.C.; (3) federal caselaw; and (4) state law. *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1135 (E.D.Cal. 2001)(citing Robert E. Jones, Gerald E. Rosen, William E. Wegner, and Jeffrey Scott, *Federal Civil Trials and Evidence* ¶ 8:4455 (2000) (citing cases)).

corporation, is applicable with respect to the power of a municipality to bind itself by contract. 56 Am. Jur.2d *Municipal Corporations, Counties, and other Political Subdivisions* § 440 (2000)(citing cases therein); 10 McQuillin, *Municipal Corporations* § 29.05 (3d ed. 1999). A person who contracts with a municipal corporation is chargeable with knowledge of the statutes and constitutional provisions that regulate the municipalities contracting powers and is bound by them. 56 Am. Jur.2d *Municipal Corporations, Counties, and other Political Subdivisions* § 455 (2000)(citing cases therein); 10 McQuillin, *Municipal Corporations* § 29.06 (3d ed. 1999). A contract entered into by a municipal corporation without compliance with the conditions which the constitution or the legislature has prescribed is invalid. 56 Am. Jur.2d *Municipal Corporations, Counties, and other Political Subdivisions* § 453 (2000)(citing cases therein).

In the United States' motion for summary judgment and opposition to summary judgment, the United States cites N. Mar. I. Const. art. VI § 8(a) and the Tinian Casino Gaming Control Act of 1989 § 50, 10 N. Mar. I. Code § 2571, and argues that the JFAs are enforceable because the Mayors of Tinian had the authority to collect local taxes and spend it for local purposes. The Court disagrees and finds that N. Mar. I. Const. art. VI § 8(a) and 10 N. Mar. I. Code § 2571 do not render the JFAs valid and enforceable.

N. Mar. I. Const. art. VI § 8(a) states that "[l]ocal taxes paid to the chartered municipal governments of Rota, and, Tinian and Aguiguan, and Saipan may be expended for local public purposes on the island or islands producing those revenues." 10 N. Mar. I. Code § 2571[2] provides in

---

[2] The Tinian Casino Gaming Control Act of 1989, codified at 10 N. Mar. I. Code § 2571, was "modified" by the Commonwealth Superior Court in *Commonwealth v. Tinian Casino Gaming Control Comm.*, No. 91-0690 (N. Mar. I. Super. Ct. April 8, 1993), wherein the court also directed defendant to submit a revised Act. This was done and the Superior Court issued an order approving and adopting the "revised" Act. See *Commonwealth v. Tinian Casino Gaming Control Comm.*, No. 91-0690 (N. Mar. I. Super. Ct. August 18, 1993). The propriety of the Superior Court's judicial "revision" of the Act appears dubious. The dubiousness of the revision seems shared by the CNMI Law Revision Commission. They retained and codified the original language of the Act in its editions of the CNMI Code issued after 1993. The statute as it appears in the CNMI Code is the version the Court is analyzing.

Ultimately, which version the Court analyzes does not matter. The relevant language of 10 N. Mar. I. Code § 2571(a)-(b) and section 50 of the judicially modified Tinian Casino Gaming Control Act of 1989 is identical.

relevant part that:

> (a) All license fees and gambling revenue taxes generated by casinos in the Second Senatorial District (Tinian) shall be local revenues and shall be available for appropriation by the Tinian Municipal Council to be expended by the mayor for local public purposes, as specified herein.
>
> (b) An appropriation for local public purposes may include, but is not limited to: assistance in education; programs for youth and elderly development; scholarships; medical referral; agricultural and fisheries development; cultural programs; community and recreational development; programs for invalids; disabled and disadvantaged individuals' medical and dental insurance assistance; and assistance to law enforcement.

A plain reading of 10 N. Mar. I. Code § 2571(a) indicates that only if the Tinian Municipal Council first appropriates funds for a local public purpose may a mayor then expend it for that local public purpose. Even if the section could be considered ambiguous, the Court believes that the drafters of 10 N. Mar. I. Code § 2571(a) intended to require an appropriation by the Tinian Municipal Council before the mayor could expend license fee and gambling tax revenue.[3] Other CNMI statutes invariably require an appropriation before funds may be expended. See., *e.g.*, 1 N. Mar. I. Code § 7401(stating that "[n]o expenditure of Commonwealth funds shall be made unless the funds are appropriated in currently effective annual appropriation acts... No Commonwealth official may make an obligation or contract for the expenditure of unappropriated Commonwealth funds, unless provided by law or approved in advance..."); 1 N. Mar. I. Code § 5106(f)(granting mayors the power to "[e]xpend for local public purposes the revenues raised by local taxes that are designated by law for

---

[3] In construing a Commonwealth statute, the Court is bound by the pronouncements of the Commonwealth's highest court. See *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002). If the Commonwealth's highest court has not addressed the issue, then this Court must predict how that court would interpret the statute. *Id.* The CNMI Supreme Court has not yet construed 10 N. Mar. I. Code § 2571. Accordingly, the Court's task is to predict how it would interpret that statutory provision.

In the CNMI, as in the Ninth Circuit generally, it is a basic principle of statutory construction that language in a statute must be given its plain meaning. *Commonwealth Ports Authority v. Hakubotan Saipan Enters., Inc.,* 2 N. Mar. I. 212, 221, 1991 WL 258324 (1991) (citations omitted); *see also United States v. Rashkovski,* 301 F.3d 1133, 1136 (9th Cir. 2002) ("Under the rules of statutory construction, [t]he plain meaning of the statute controls ....") (internal quotation marks and citations omitted). If the statutory language is ambiguous, "[i]t is therefore necessary for us to give it the meaning that the legislature intended." *In re Estate of Rofag,* 2 N. Mar. I. 18, 29, 1991 WL 70067 (1991); *see also United States v. Buckland,* 289 F.3d 558, 565 (9th Cir. 2002) (en banc) ("Where the language is not dispositive, we look to the [legislative] intent....").

those purposes after the expenditures are authorized by the legislature..."). The Court therefore determines that 10 N. Mar. I. Code § 2571(a) requires an appropriation by the Tinian Municipal Council before the mayor is allowed to expend license fee and gambling tax revenue.

As hinted at in the discussion above, the Court further finds that if the Mayors of Tinian entered into the JFAs without a prior appropriation, the JFAs are invalid. The construction of 1 N. Mar. I. Code § 5106(f) is persuasive to this finding. 1 N. Mar. I. Code § 5106(f) deals with a subject matter similar to 10 N. Mar. I. Code § 2571(a), the expenditure of local revenue from local taxes. 1 N. Mar. I. Code § 5106(f) grants mayors the power to "[e]xpend for local public purposes the revenues raised by local taxes that are designated by law for those purposes after the expenditures are authorized by the legislature or by the affirmative vote of a majority of the members of the legislature representing the island or islands served by a mayor." Under 1 N. Mar. I. Code § 5106(f), a mayor may not make any expenditure without a prior appropriation by the legislature or of a majority of the members of the legislature representing the island served by the mayor. *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* 115 (1976)(hereinafter *Analysis of the Constitution*)[4]. "If the mayor expends tax revenues in violation of this section, that expenditure is void." *Id.* Similar to 1 N. Mar. I. Code § 5106(f), 10 N. Mar. I. Code § 2571 requires a prior appropriation before funds may be expended by the Mayor of Tinian. Accordingly, the Court concludes that any expenditure of funds by the Mayor of Tinian without a prior appropriation is invalid.

Turning to the undisputed facts, the Court finds that the subject JFAs are invalid and unenforceable. On their face, the JFAs themselves condition their validity on the availability of appropriations. As discussed above, under 10 N. Mar. I. Code § 2571, any expenditure of license fee revenue by the Mayor of Tinian for water resource investigation by the USGS without a prior

---

[4] The *Analysis of the Constitution* was officially approved by the Northern Mariana Constitutional Convention. See *Northern Mariana Islands v. United States*, 399 F.3d 1057, 1065 n.9 (9th Cir. 2005). This section of the *Analysis of the Constitution* explains former N. Mar. I. Const. art VI § 3(f). 1 N. Mar. I. Code § 5106(f) tracks exactly the language contained in former N. Mar. I. Const. art VI § 3(f).

appropriation by the Tinian Municipal Council for that purpose is invalid. *See* 3A Words and Phrases 486 (1953 & Supp. 2004)(An "appropriation" is the setting aside from public revenue of a certain sum of money for a specified object in such manner that executive officers of government are authorized to use for that object and no more). Assuming that license fee revenue was available, there is no evidence that the Tinian Municipal Council ever appropriated any license fee revenue to pay for the JFAs. In fact there is no evidence that any legislative body ever appropriated funds for expenditure by the Mayors of Tinian on the subject JFAs. Since there were never any appropriations to pay for the JFAs, the Mayors of Tinian did not have authority to enter into the JFAs. Accordingly, the JFAs are invalid and unenforceable.

B. Whether Defendants Can Be Estopped from Asserting the Invalidity of the Joint Funding Agreements

In the United States' opposition to defendants' motion for summary judgment, the United States argues that defendants are nevertheless estopped from arguing that the JFAs are invalid and unenforceable. The United States argues that defendants, having received the benefit of the USGS's services and having acknowledged their obligation by paying the 1990 and 1993 JFAs, defendants cannot now assert the invalidity of the other JFAs.

The United States is arguing for the application of quasi-estoppel in this case. Quasi-estoppel precludes a party from asserting, to another's prejudice, a position that is inconsistent with a previously held position. *Stinnett v. Colorado Interstate Gas Co.*, 227 F.3d 247, 258 (5th Cir. 2000). The doctrine applies where it would be unconscionable to permit a person to maintain a position inconsistent with one in which he acquiesced or where he accepted a benefit. *Id. Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580, 585 (W.D.Pa. 1987). "The essence of the doctrine of quasi-estoppel is the existence of facts and circumstances making the assertion of an inconsistent position unconscionable." *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978). See also *Brooks v. Hackney*, 404 S.E.2d 854, 859 (N.C. 1991)(stating that quasi-estoppel "rests upon the principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result").

The Court believes that permitting the United States to assert quasi-estoppel against a municipality in this type of case is inappropriate. The conduct of a municipality prior to litigation may demonstrate that they considered the contracts they entered into with the United States to be valid and enforceable. However, the invalidation of an unauthorized contract by a court is a well recognized and long standing defense against municipal liability. The basis of the defense is the strong public policy of protecting "the citizens and taxpayers of a municipality from unjust, ill-considered, or extortionate contracts, or those showing favoritism." 10 McQuillin, *Municipal Corporations* § 29.02 (3d ed. 1999). Estopping a municipality from asserting the invalidity of a contract because it accepted benefits or otherwise acknowledged the validity of a contract prior to litigation would eviscerate the defense and run counter to strong public policy. The residents of municipalities potentially could be punished for the egregious acts of its officials, officials that may not be in office any longer, just because those officials acted as if contracts entered into were valid. On balance, a municipality accepting the benefits of a contract but later denying the contract's validity on the basis that it was unauthorized would not be unconscionable.

The Court's conclusion is buttressed by the fact that injustice does not necessarily result from denying the United States the ability to assert quasi-estoppel against the Municipality of Tinian. As discussed below, if certain conditions are met, then the United States may still have a claim for *quantum meruit*. It just will not have a claim for contract damages. For these reasons, the Court will not estop defendants from asserting the invalidity of the JFAs.

C. Whether the United States Can Assert a Claim for *Quantum Meruit*

Having determined that the JFAs are invalid and unenforceable, the Court must now determine whether the United States can recover at all for the services it rendered. There is a distinction as to effect between an act which is not within the power of a municipal corporation to make under any circumstances versus an act within the power of a corporation to make, although irregularly made. 10 McQuillin, *Municipal Corporations* § 29.10 (3d ed. 1999). The former are *ultra vires* and consequently wholly void with no means of recovery against the municipality available. *Id.* In the

latter case, a party may seek recovery on a theory of *quantum meruit* for money, goods or services furnished to and retained by a municipality. See, *e.g.*, *Noel v. Cole*, 655 P.2d 245, 250 (Wash. 1982). *See* 56 Am. Jur.2d *Municipal Corporations, Counties, and other Political Subdivisions* § 478 (2000).

There is division and conflict of authority on the question of when an act by a municipal corporation is *ultra vires* or "irregular." Many jurisdictions hold that if a municipal corporation does not strictly follow statues regulating the power of a municipality to contract, then the contractual act is *ultra vires*. *See* 10 McQuillin, *Municipal Corporations* § 29.02 (3d ed. 1999)(stating that the general rule is that if the applicable charter or statute requires certain steps to be taken before making a contract and its terms are mandatory, a contract not made in conformity is void and a claim for unjust enrichment cannot be asserted); Annotation, *Liability of Municipality on Quasi Contract for Value of Property or Work Furnished Without Compliance with Bidding Requirements*, 33 A.L.R.3d 1164 (1970)(cases cited therein); Annotation, *Liability of Municipality or Other Governmental Body on Implied or Quasi Contract for Value of Property or Work*, 154 A.L.R. 356 (1945). Other more lenient jurisdictions hold that a party may assert a claim for *quantum meruit* where the party acted in good faith, the municipality had the power it sought to exercise but merely exercised it in an irregular manner or by unauthorized procedural means and the municipality's actions were not malum in se, malum prohibitum, or manifestly against public policy. See, *e.g.*, *Noel*, 655 P.2d at 250; *J.A. & W.A. Hess, Inc. v. Hazel Township*, 400 A.2d 1277 (Pa. 1979). Finally, other even more lenient jurisdictions hold that a party may assert a claim for *quantum meruit* where the municipality has enjoyed the benefit of the goods or services provided and the municipality had the power to contract for goods or service provided but exercised its power in an irregular manner. See *Hurdis Realty, Inc. v. Town of North Providence*, 397 A.2d 896, 897 (R.I. 1979). See also *Marrone v. Town of Hampton*, 466 A.2d 907, 911 (N.H. 1983); *Blum v. City of Hillsboro*, 183 N.W. 2d 47, 50 (Wis. 1971).

In determining which approach to apply in this case, the Court notes again that the *ultra vires* doctrine exists "to protect the citizens and taxpayers of the municipality from unjust, ill-considered, or extortionate contracts, or those showing favoritism." 10 McQuillin, *Municipal Corporations* §

29.02 (3d ed. 1999). The Court also notes that *ultra vires* contracts are not enforced because "if the municipality is allowed to disregard the formalities and the other contracting party is, nevertheless, permitted to recover for the property delivered or the services rendered... then it follows that the statute or charter provision can always be evaded." *Id.* On the other hand, the reasoning behind the *ultra vires* doctrine is premised on the proposition that protection of taxpayers and residents of a municipality is of "more importance then the dispensation of justice to a private party in a particular case." *Id.* That premise does not apply in this case. Here, a government entity is seeking to recover against a municipality for services rendered. Like a municipality, the United States has a responsibility to the welfare of its citizens and a responsibility to protect the public fisc. Thus, the Court must balance the interests of a municipality against the interests of the United States in determining when the United States may assert a claim of *quantum meruit* against a municipality.

Upon a balancing of a municipality's interests and upon consideration of the state of the law across the jurisdictions, the Court believes the United States must demonstrate the following conditions: (1) The United States acted in good faith and without fraud or collusion and (2) the municipality had the power it sought to exercise but merely exercised it in an irregular manner or by unauthorized procedural means. Requiring the United States to show good faith reflects the fact that *quantum meruit* is a remedy rooted in "justness and fairness"[5] and that the United States must have been dealing with the municipality fairly if it expects a remedy. Requiring the United States to act without fraud or collusion also reflects the concept of justness and fairness inherent in *quantum meruit.* At the same time, requiring the United States to act without collusion advances a municipality's interests by assuring that municipal officials are working on the municipality's behalf. Requiring that the municipality had the power it sought to exercise but merely exercised it in an irregular manner or by unauthorized procedural means is critical. This condition protects a municipality's treasury and resident's welfare from official's actions that are clearly unjust, ill-

---

[5] *See* Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation,* 35 Am.U.L.Rev. 547, 554 n.15 (1986).

considered or illegal. At the same time, this condition reflects that the United States is a government entity with its own responsibilities to the public by not denying the United States possible recovery due to technical procedural errors on the part of the municipality. Overall, the Court believes that this balance lessen the risk imposed on the United States in dealing with a municipality while still protecting the municipality from egregious conduct. If the United States demonstrates these conditions, then the United States may assert a claim for *quantum meruit* against the Municipality of Tinian.

Reviewing the evidence before the Court, the Court finds the first condition satisfied. The USGS's actions surrounding the negotiation and performance of the JFAs appear honest and fair. *See* Black's Law Dictionary 713 (8th ed. 2004)(defining "good faith" in relevant part as a "state of mind consisting in honesty in belief or purpose" and "faithfulness to one's duty or obligation..."). Moreover, there is absolutely no evidence of fraud or collusion on the part of the USGS.

The second condition is satisfied as well. There does not seem to be any dispute that the Mayors of Tinian had the power to enter into contracts on behalf of the Municipality of Tinian to conduct water resource investigation on Tinian. *See* 1 N. Mar. I. Code § 5106(f); 10 N. Mar. I. Code § 2571. *See also* N. Mar. I Const. art. VI § 3(b)(granting mayors the power to "administer... appropriations provided by law"); *Inos v. Tenorio*, No. 94-1289 (N.Mar. I. Super. Ct. Oct. 18, 1995)(interpreting this language of N. Mar. I Const. art. VI § 3(b) to mean that a mayor has the authority to spend public funds appropriated by the legislature for his municipality). The Mayors' signing of the JFAs before appropriations were obtained, although an important failure, was still a mere failure to comply with a procedural requirement. Thus, the Mayors of Tinian did not lack substantive authority to enter the JFAs with the USGS but merely carried it out in an unauthorized procedural manner by failing to comply with statutory prerequisites. See *Noel*, 655 P.2d at 250.

Defendants cite 1 N. Mar. I. Code §§ 7401 and 7701 and argue that the failure by the Mayors of Tinian to get a prior appropriation before entering the JFAs is no mere procedural indiscretion but a violation of statutory and criminal law. 1 N. Mar. I. Code § 7401 states in relevant part that:

> No expenditure of Commonwealth funds shall be made unless the funds are appropriated in currently effective annual appropriation acts or pursuant to 1 [N. Mar. I.] § 7204(d).[6] No Commonwealth official may make an obligation or contract for the expenditure of unappropriated Commonwealth funds, unless provided by law or approved in advance by joint resolution of the legislature.

1 N. Mar. I. § 7701 in turn provides in relevant par that:

> (b) No officer or employee of the Commonwealth shall willfully and knowingly involve the Commonwealth or any agency in any contract or other obligation for the payment of money for any purpose, or make or authorize any payment out of the Commonwealth Treasury, in advance of, or in the absence of, appropriations made for such purposes, unless such contract or obligation is authorized by law or joint resolution.
>
> * * *
>
> (d) No officer or employee of the Commonwealth shall willfully and knowingly obligate any resources in advance of appropriations made for such purposes except in accordance with provisions of this part.

The Court disagrees with defendants' argument as to the import of these statutes. The first sentence of 1 N. Mar. I. § 7401 is simply a reiteration of the procedural requirement that funds need to be appropriated before they can be expended. More importantly, the statutes do not apply to the actions of a mayor or a municipality. The statutes regulate the actions of "Commonwealth" officials or employees, that is, officials or employees of offices, departments or agencies of the Commonwealth government (e.g., officials or employees of the CNMI Department of Labor). As previously ruled by the Court, the Mayor of Tinian is an agent of local government unless appointed by the governor to be a resident head of an executive branch office. *United States v. Borja*, No. CV-02-0016-ARM, 2003 WL 23009006 (D.N.Mar.I Dec. 12, 2003). That circumstance does not apply here. Therefore, these statutes do not alter the Court's conclusion that the Mayors of Tinian simply carried out their substantive authority in an unauthorized procedural manner.

---

[6] 1 N. Mar. I. Code § 7204(d) provides in relevant part that:

> Funds for operations of the Commonwealth shall be appropriated pursuant to annual appropriation acts. If the annual appropriation acts are not enacted into law prior to the beginning of the budget year, the appropriation levels... and administrative provisions for government operations and obligations as are not inconsistent with the provisions of this part, shall continue as provided in the annual appropriation acts of the current year...

As the United States satisfied the necessary conditions, the United States has demonstrated that the actions of the Mayors and the Municipality of Tinian in entering the JFAs were "irregular" but not *ultra vires*. Accordingly, the United States may assert a claim for *quantum meruit* against the Municipality of Tinian.

D. Whether the Municipality of Tinian is Liable for *Quantum Meruit*

Quantum meruit, also referred to as quasi-contract, are contracts implied by law to enforce legal duties where no proper contract exists. 66 Am. Jur.2d *Restitution & Implied Contracts* § 2 (2001). The essential elements for a claim of *quantum meruit* are a (1) performance of services by the plaintiff, (2) the receipt of the benefit of those services by the defendant, (3) and the unjustness of the defendant's retention of that benefit without compensating the plaintiff. See *Midcoast Aviation, Inc. v. Gen. Elec. Credit Corp.*, 907 F.2d 732, 737 (7th Cir. 1990)(analyzing Illinois law); *Precision Pay Phones v. Qwest Comm. Corp.*, 210 F.Supp.2d 1106, 1112 (N.D.Cal. 2002)(applying California law). *See also* 66 Am. Jur.2d *Restitution & Implied Contracts* § 38 (2001); Kovacic, *supra* at 554 (stating that "[t]he classic elements of restitution, and thus [*quantum meruit*], are: (1) the defendant received a benefit, (2) at the plaintiff's expense, (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it). If these elements are satisfied, then a plaintiff may recover the reasonable value of the work and material provided to the defendant. 66 Am. Jur.2d *Restitution & Implied Contracts* § 40 (2001).

Turning to the evidence before the Court, the undisputed facts show the United States performed services when the USGS conducted water quality analysis, drilled and rehabilitated wells, installed and maintained a hydrologic data network and trained a Tinian resident in the art of drilling. The undisputed facts also show that the Municipality of Tinian received and accepted the benefits of the USGS's services after the Municipality asked for the services, cooperated with the USGS in carrying out the water resource investigation on the island, and in their acknowledgment that it received a benefit from the USGS's services. Finally, the undisputed facts show that it would be unjust for the Municipality of Tinian to retain those benefits without compensating the United States.

A retention of benefits without compensation is unjust where an individual performs services for another with an expectation that he will be paid for those services. *See* 66 Am. Jur.2d *Restitution & Implied Contracts* § 40 (2001). See, *e.g.*, *Nedrich v. Jones*, 429 S.E.2d 201, 207 (Va. 1993)(stating that "[o]ne may not recover under a theory of implied contract simply by showing a benefit to the defendant, without adducing other facts to raise an implication that the defendant promised to pay the plaintiff for such benefit."). Here, the USGS clearly performed its services in expectation of payment. Based on the foregoing, the Court finds that no reasonable trier of fact could find other than that the United States has established a claim for *quantum meruit*.

E. Whether the Doctrine of Mitigation Damages Bars Recovery of Quantum Meruit

In defendants' motion for summary judgment, defendants assert that, should the Court find that the United States is entitled to a recovery in *quantum meruit*, then defendants' failure to mitigate damages denies the United States payment for such benefits. Defendants argue that "the USGS, upon determining that the first billing had not been and would not be paid, should have ceased work and not proceeded with further work until payment was resolved. Instead USGS continued to run up costs for six years without ever receiving a payment from the Municipality." (Doc. #61, Defs.' Mem. Supp. Summ. J. at 12).

The Court is unsure of defendants' argument. If "upon determining that the first billing had not been paid" defendants' mean that they never paid for the first JFAs, they are wrong. The evidence indicates that defendants paid for the first three JFAs. On the other hand, if the phrase is supposed to mean the first JFA that was not paid for, that would be a permissible characterization of the evidence. Although an interesting exercise in semantics, deciphering defendants' phrasing does not affect the outcome of this issue.

The Court finds that the doctrine of mitigation of damages does not bar or otherwise reduce the United States' restitution under its claim of *quantum meruit*. Mitigation "is not part of the accepted *quantum meruit* framework." *United States ex rel. Maris Equip. Co. v. Morganti, Inc.*, 163 F.Supp.2d 174, 198 (E.D.N.Y. 2001). See *S.T.S. Transp. Serv., Inc. v. Volvo White Truck Corp.*, 766

F.2d 1089, 1092 (7th Cir. 1985)(stating that "the duty to mitigate (if there is such a duty) arises out of the breach of a valid contract."). The legitimacy of the United States' conduct is encompassed within *quantum meruits*' requirements that defendants must have been unjustly enriched and that the United States is only entitled to the reasonable value of the work and material provided to defendants. See *Morganti*, 163 F.Supp.2d at 198 (citing New York law and explaining that "the legitimacy of [a plaintiff's] conduct is subsumed by the 'good faith' and 'reasonable value' aspects" of the elements of *quantum meruit*). Accordingly, the Court finds that defendants' assertion of the doctrine of mitigation fails as a matter of law.

F. Final Matters

Although the United States has established a claim for *quantum meruit*, the Court is not satisfied with the evidence as it relates to the reasonable value of the work and material provided to the defendants. The United States presents no evidence on the issue in its motion for summary judgment. In fact the United States does not even suggest an amount. The United States does suggest an amount in its *opposition* to defendants' motion for summary judgment. In the opposition the United States suggests an award $1,349,367.96, an earlier proposed settlement amount. However, this proposed amount does not conform with how *quantum meruit* is measured. *See* Restatement (Second) of Contracts § 371 (1981). As the United States presents no evidence as to the reasonable value of the work and material provided to the defendants, the Court will conduct an evidentiary hearing on the issue.

Before finally concluding, the Court notes that the United States did not specifically assert a claim for *quantum meruit* in its amended complaint. However, the United States requested "the Court grant such other relief as may appear just and proper" in its prayer for relief. Further, as stated in *Reynolds v. Slaughter*, 541 F.2d 254, 256 (10th Cir. 1976)(citations omitted),

> Even though [the United States] did not request restitution in his pleadings, the court's award is proper nonetheless under Fed.R.Civ.P. 54(c), which provides in part that 'every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in [the party's] pleadings.' The rule gives effect to the federal rules' simplification of procedure and rejection of formalism. Under the rule, which has been liberally applied, the court is

not restricted to the relief set out in the pleadings; rather, it should grant the relief which is consistent with the pleadings or proof.

See *Matarese v. Moore-McCormack Lines, Inc.*, 158 F.2d 631, 633 (2d Cir. 1946); Annotation, *Recovery on Quantum Meruit Where Only Express Contract is Pleaded, under Federal Rules of Civil Procedure 8 and 54 and Similar State Statutes or Rules*, 84 A.L.R.2d 1077 (1962). Accordingly, the United States is entitled to recovery in *quantum meruit* despite not specifically pleading a claim for such relief.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED** that:

(1) The motion for summary judgment (Doc. #61) filed by defendant Francisco M. Borja, Mayor of Tinian and Aguiguan, and defendant Municipality of Tinian and Aguiguan is **DENIED**.

(2) The motion for summary judgment (Doc. #60) filed by plaintiff United States of America is **GRANTED**.

(3) An evidentiary hearing will be held on June 28, 2005 at 9:00 a.m. to determine the reasonable value of the work and material provided to defendants. If the matter is settled prior to the hearing date, the parties shall immediately inform the Court.

DATED this 26TH day of May, 2005

Alex R. Munson
Chief Judge, United States District Court