

I Mina'Trentai Dos Na Liheslaturan Received
Bill Log Sheet

BILL NO.	SPONSOR	TITLE	DATE INTRODUCED	DATE REFERRED	CMTE REFERRED	PUBLIC HEARING DATE	DATE COMMITTEE REPORT FILED	FISCAL NOTES
224-32 (COR)	T.C. Ada, R J. Respicio	AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a), §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.	11/15/13 4:49 p.m.	11/18/13	Committee on General Governmental Operations and Cultural Affairs	12/13/13 2:00 p.m. 03/06/14 2p.m. RoundTable 4/29/14 2 p.m. RoundTable 7/16/14 9a.m. 11/19/14 9 A.M.	1/27/14 10:52 a.m. as Substituted 12/11/14 3:44 p.m. Revised Report	Fiscal Note Requested 11/25/13, Fiscal Note Waiver Received 12/26/13
	DATE PASSED	TITLE	TRANSMITTED		DUE DATE	DATE SIGNED BY I MAGA'LAHEN GUAHAN	PUBLIC LAW NO.	NOTES



COMMITTEE ON RULES

I Mina'trentai Dos na Liheslaturan Guåhan • The 32nd Guam Legislature
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Senator
Rory J. Respicio
CHAIRPERSON
MAJORITY LEADER

Senator
Thomas C. Ada
VICE CHAIRPERSON
ASSISTANT MAJORITY LEADER

Speaker
Judith T.P. Won Pat, Ed.D.
Member

Senator
Dennis G. Rodriguez, Jr.
Member

Vice-Speaker
Benjamin J.F. Cruz
Member

Legislative Secretary
Tina Rose Muña Barnes
Member

Senator
Frank Blas Aguon, Jr.
Member

Senator
Michael F.Q. San Nicolas
Member

Senator
V. Anthony Ada
Member
MINORITY LEADER

Senator
Aline Yamashita
Member

December 12, 2014

MEMORANDUM

To: **Rennae Meno**
Clerk of the Legislature

From: **Senator Rory J. Respicio**
Chairperson, Committee on Rules

Subject: **Revised Committee Report on
Bill No. 224-32(COR)**

Hafa Adai!

Please include this memo and the attachment as a Revised Committee Report on Bill No. 224-32 (COR).

Please make the appropriate indication in your records; and forward to MIS for posting on our website. I also request that the same be forwarded to all Senators of *I Mina'trentai Dos na Liheslaturan Guåhan*.

Si Yu'os Ma'ase'!

cc: Legal Counsel
Clerk of the Legislature
Sergeant-at-Arms
MIS

2014 DEC 11 PM 3:44



JAN 25 2014

The Honorable Judith T. Won Pat
Speaker
I Mina' Trentai Dos Na Liheslaturan Guahan
32nd Guam Legislature
155 Hesler Place
Hagåtña, Guam 96910

VIA: The Honorable Rory J. Respicio
Chairperson, Committee on Rules

RE: **Committee Report on Bill No. 224-32 (COR), as Substituted**

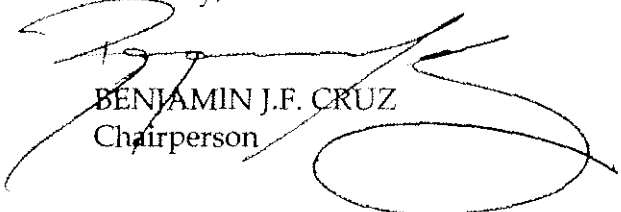
Dear Speaker Won Pat:

Transmitted herewith is the Report of the Committee on General Government Operations and Cultural Affairs on Substitute Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend Article 9 and Article 12 of Chapter 5, Title 5, the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.

Committee votes are as follows:

 2 TO DO PASS
 TO NOT PASS
 4 TO REPORT OUT ONLY
 TO ABSTAIN
 TO PLACE IN INACTIVE FILE

Sincerely,


BENJAMIN J.F. CRUZ
Chairperson

2014 JAN 27 AM 10:52



COMMITTEE REPORT

Bill No. 224-32 (COR), as Substituted

**An act to amend Article 9 and Article 12 of
Chapter 5, Title 5, the Guam Code
Annotated relative to clarifying legal and
contractual remedies in Guam
Procurement Law.**



JAN 27 2014

MEMORANDUM

TO: All Members

**FROM: Vice Speaker Benjamin J.F. Cruz
Committee on General Government Operations and Cultural Affairs**

SUBJECT: Committee Report on Bill No. 224-32 (COR), as Substituted

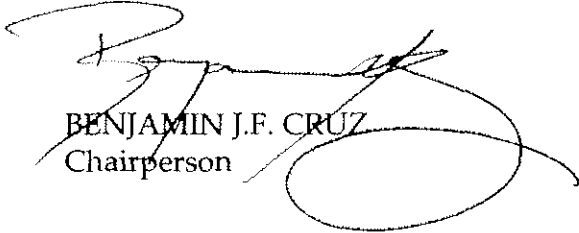
Transmitted herewith for your consideration is the Committee Report on Substitute Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend Article 9 and Article 12 of Chapter 5, Title 5, the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.

This report includes the following:

- Committee Vote Sheet
- Committee Report Digest
- Bill No. 224-32 (COR), as Introduced
- Bill No. 224-32 (COR), as Substituted
- Public Hearing Sign-in Sheet
- Copies of Submitted Testimony & Supporting Documents
- COR Referral of Bill No. 224-32 (COR)
- Fiscal Note Requirement
- Notices of Public Hearing
- Public Hearing Agenda
- Related News Reports

Please take the appropriate action on the attached voting sheet. Your attention to this matter is greatly appreciated. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,


BENJAMIN J.F. CRUZ
Chairperson



COMMITTEE VOTING SHEET

Substitute Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend Article 9 and Article 12 of Chapter 5, Title 5, the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.

COMMITTEE MEMBERS	SIGNATURE	TO DO PASS	TO NOT PASS	TO REPORT OUT ONLY	TO ABSTAIN	TO PLACE IN INACTIVE FILE
CRUZ, BENJAMIN J.F. Chairperson				1/25/14 ✓		
MUÑA BARNES, TINA ROSE Vice-Chairperson				✓		
WON PAT, JUDITH T. Speaker and Ex-Officio Member						
ADA, THOMAS C. Member		✓				
PANGELINAN, C. VICENTE Member						
RESPICIO, RORY J. Member		1-25-14 ✓				
RODRIGUEZ, DENNIS G. JR. Member						
SAN NICOLAS, MICHAEL, F.Q. Member				✓		
AGUON, Jr., FRANK B. Member						
ADA, V. ANTHONY Member						
Morrison, Thomas Member				✓		
McCreadie, Brant Member						
YAMASHITA, ALINE Member						



COMMITTEE REPORT DIGEST

I. OVERVIEW

Bill No. 224-32 (COR) was introduced by T.C. Ada / R.J. Respicio on October 25, 2013, and subsequently referred to the Committee on General Government Operations and Cultural Affairs on the same day.

The **Committee on General Government Operations and Cultural Affairs** convened a public hearing on Friday, December 13, 2013, at 2:00PM in the Public Hearing Room of *I Liheslatura*. Among the items on the agenda was the consideration was Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend Article 9 and Article 12 of Chapter 5, Title 5, the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.

Public Notice Requirements

All legal requirements for public notices were met, with requests for publication sent to all media and all Senators on December 5, 2013, and December 11, 2013, via email. Copies of the hearing notices are appended to the report.

Senators Present

Senator Tina R. Muña Barnes, *Acting Chairperson*
Senator Thomas C. Ada, *Member*
Senator Michael F.Q. San Nicolas, *Member*
Senator Thomas Morrison, *Member*
Senator Brant McCreadie, *Member*
Senator V. Anthony Ada, *Member*
Senator Aline A. Yamashita, Ph.D., *Member*
Senator Christopher M. Duenas

Oral Testimony

Doris Flores Brooks CPA CGFM, Office of Public Accountability
John Thomas Brown, General Counsel, Jones and Guerrero Co. Inc. (Guam USA)
Jessica L. Toft, Attorney, Cabot and Mantanoña LLP
Thomas J. Fisher, Attorney, Fisher and Associates Attorneys at Law

Written Testimony

Doris Flores Brooks CPA CGFM, Office of Public Accountability
John Thomas Brown, General Counsel, Jones and Guerrero Co. Inc. (Guam USA)
Jessica L. Toft, Attorney, Cabot and Mantanoña LLP
Thomas J. Fisher, Attorney, Fisher and Associates Attorneys at Law
Claudia S. Acfalle, Chief Procurement Officer, General Services Agency
John S. Unpingco, Governor's Special Assistance, Veterans Affairs Office

Charles H. Ada II, Executive Manager, Guam International Airport Authority
John J.P. Fernandez, Superintendent, Department of Education
Leonardo M. Rapadas, Attorney General, Office of the Attorney General
Daniel J. Tydingco, Executive Vice President of Legal, Regulatory and External Affairs,
GTA Teleguam
Joe T. San Agustin, Chairman, Guam Retirement Fund

II. TESTIMONY & DISCUSSION

Senator Tom Ada begins discussion on the Bill with an opening statement. He states that Bill 224 represents an initiative by the Legislature to review the procurement laws originally enacted in the 16th Guam Legislature. He further states the Bill is the first of a series of Bills that form the effort to update the Procurement Laws on Guam. He continues by stating that the Bill attempts to address the tail end of the process. That is, the legal and contractual remedies of the procurement law. He goes on by stating that the Bill asserts that the structure of the current Procurement Law is sound, but in need of updating.

*Public Auditor Doris Flores Brooks CPA CGFM, Office of Public Accountability
Provided oral and written testimony (See Attached)*

Senator Brooks states that there is the procurement advisory council and though the chairman is not present, he had written a letter to the [Chairman] requesting a moratorium until the procurement advisory council is up to speed. She further states that her testimony will explain her support for the Bill, as she is also a member of the council.

Senator Brooks states the Office of Public Accountability is in support of Bill 224 and further, that the Office applauds the Guam Legislature's efforts to reform the Guam Procurement Law. She continues, stating, "ideally, the Procurement Advisory Council should initiate the reform of the Guam Procurement Law, but its input is not present in Bill 224 due to the great amount of time it is taking for the Council to make recommendations on the Bill and the procurement law." Senator Brooks further states time is not a commodity the people of Guam have and some amendments are needed now to mitigate serious problems plaguing the procurement system.

Senator Brooks further states, that is why she is here to support the Bill with modifications. She further states Bill 224 identifies potent problem areas in Guam Procurement Law. She then lists out the Office of Public Accountability's itemized list of comments and recommended changes to the Bill (See Attached Written Testimony from Office of Public Accountability).

Senator Brooks concludes her testimony by stating the OPA appreciates some of the changes that the Bill aims to make. She further states that ideally, it would be more appropriate for the procurement advisory council to do this, but for a variety of reasons, it is not moving as expeditiously as she would like so this is an appropriate alternative.

*Attorney John Thomas Brown, (Personal Testimony)
General Counsel, Jones and Guerrero Co. Inc. (Guam USA)
Provided oral and written testimony (See Attached)*

Mr. Brown states he is in support of the Bill. Mr. Brown says that he will read portions of his testimony. He further states that the Bill is the way to change the procurement law in that it is comprehensive. In the past, more problems have been created when there were changes made in slivers, which do not take into effect the consequences in other code sections. Mr. Brown continues by stating that Articles 9 and 12 are the protest process and deal with contractual disputes (post-award issues) and other controversies involving debarments and suspensions. He states he is in support of the Bill and the changes it aims to make to the Procurement Code.

Mr. Brown states the procurement law having been adopted in the 16th Legislature (1981-1982) did not become accessible until 2005 when the Public Auditor was given authority to handle administrative review under the Procurement Law. Mr. Brown states the OPA administrative review process made the remedial scheme effective and transparent. He further states that this uncovered issues with the Guam Procurement Law that led to a great deal of paranoia and distrust.

Mr. Brown goes on by stating, Bill 224 takes into consideration several lessons learned since the Administrative Review process moved to the Office of Public Accountability. The lessons learned according to Mr. Brown are: 1) the move encouraged the private sector to engage in the remedial scheme giving real time policing of the procurement process through scrutiny, 2) by encouraging the private sector to use a rule-driven process, they mitigated the "old boys policy," 3) they found which parts of the review process were productive and which were not; such as the time lines in the law, and 4) is that the government continuously and routinely ignores the mandate of the procurement law requiring a prompt decision because there is no enforcement mechanism in place. Bill 224 seeks to establish timelines and allow protestors to demand resolution to protests or else the protests are deemed admitted. He further states it is within the power of the agency to resolve the protests in a timely manner.

Mr. Brown further states the Bill creates provisions that appeals taken to the Courts for review receive expeditious action as a writ of review or other legal redress as opposed to the current practice of appeal reviews as regular civil actions queued behind all other actions also waiting in the courts.

Mr. Brown states the protests in the courts now have been in the courts for way too long to avoid reversion to informal and corrupt processes of addressing protests. He further states the bill aims to make those court proceedings more expeditious.

Mr. Brown further states that when the procurement law was originally instated, there was and still is a claims act. The original procurement law allowed the dispute resolution process to award a penalty or damage for a contract dispute. [They] were

afraid that certain disputes might get away from the government and thus made any awards subject to the claims act. He states this process does not make any sense in that a protestor would have to go through procurement act and then through the claims act. He further states that under the procurement act, contract disputes have to go through the head of an agency or the CPO or director of Public Works. Mr. Brown then asks what can the Attorney General add to that process through the claims act?

Mr. Brown further states that other small changes made in the bill in addition to the large changes made such as the change to an expedited hearing reflect some of the changes brought up at the Procurement Advisory Council Meetings. He further states that the change to §5425(a), the change to the definition of an aggrieved person, is a good example. He also alludes to smaller substantive changes the bill makes. (See attached written testimony).

Mr. Brown goes on by stating that the bill calls for conclusions and decisions based in fact and law as opposed to current practices of decisions not containing such. If they have it, which they should, they should provide the basis of their decisions in fact and law in their decisions when they furnish the decisions to the aggrieved bidders.

Mr. Brown closes by stating the bill presents an effort to fix many of the glaring weaknesses and interpretations of existing law. He further states the Bill does so without throwing the baby out with the bathwater.

Ms. Jessica L. Toft (Personal Testimony)

Attorney, Cabot and Mantanoña LLP

Provided Oral Testimony, written testimony submitted Dec 23, 2013 (See attached)

Ms. Toft states that she is present in opposition to the bill. She states that she mostly agrees with the Public Auditor and Attorney Brown's comments, but with caveats. Ms. Toft states that the bill contains a lot of inconsistencies that will probably cause a lot of problems and extra litigations.

Ms. Toft states that right off the bat, in §5425 a protest made to the office shall be deemed properly made. She further states then it says that there is a time limit. She states those provisions are inherently conflicting and she does not know how she would resolve them. She states that we [panel] agree that the protest system needs to be cleaned up so that it's not the black hole that it is. She further states that keeping the time limits in is essential to keep things moving. She further states that the Bill will remove certain time lines and creates certain gray areas. She further states, "That sentence just cannot stay." (Referring to: Page 2, Lines 28 and 29, Bill 224 as introduced - "A protest made to the office which issued the solicitation shall be deemed properly made.")

Ms. Toft states that she agrees with Mr. Brown that there should be limits on who should be able to bring a protest. She states that currently, she would interpret the law that aggrieved bidders can bring protests and there are cases interpreting the ABA

procurement laws. According to Ms. Toft, these cases agree that an aggrieved bidder is the person who would have won if not for the point of the protest. She further states that the new provisions that define an aggrieved bidder actually open it up to who is aggrieved. She states it is no longer just the person who would have been awarded the contract, but anyone who would have been competitive. She further states this would really open it up to all bidders to be allowed to protest and she states she thinks the language is too broad. She states maybe the definition should be narrowed to prevent some of the protests and blockades. She states it should be narrowed to provide some clarity.

Ms. Toft then states she disagrees with the alternative dispute resolution provisions. She states that currently bidders have four avenues to voice concerns. First, they can file an informal complaint to the agency. Second, they can file a formal protest, and then they can appeal to the public auditor and then file a court action. This adds in a fifth avenue and adds in an extra delay and any time limit for the taking of any action shall be tolled while the alternative dispute resolution is pending. She states she thinks that is just another black hole adding a fifth option to mar the process. She states she thinks the government is not going to be able to get anything done if we start inserting an alternative dispute resolution mechanism in addition to the informal complaint procedures that is already in the law.

Ms. Toft next states that on page 5 the new provisions require that if the agency fails to issue a decision, then the protest shall be deemed admitted by the agency. She states that is unprecedented in Guam Law and every provision that she has reviewed states that it shall be denied. Agencies are already overburdened and overworked. If the protest is denied, then the protestor can follow the appeals process to the next level. According to Ms. Toft, if it is deemed admitted, now the agency has to go and appeal and cost the government of Guam more money. She states it just does not make sense in the scheme and it is really contained anywhere else. She further states the provision is not even consistent with the rest of the Bill. She alludes to under §5426 on Page 12, subsection (f) where she states 'if no decision made by purchasing officer, it goes to the Public Auditor as if the petition had been rejected...' She further states that there is one provision where in one instance if there is no decision it is admitted and then in the next section, it is deemed denied. She states that section in particular is one reason the Bill cannot be passed as written as it will make things confusing and it is unprecedented.

Ms. Toft then states that on page 6 Section G, Mr. Brown states there is no recourse once a protest is filed either right when or after an award is made, but there are provisions in the GARR (she adds that she agrees with Senator Brooks that changes need to be made to the GARR at the same time as the Bill because the GARR matches the current law). She states the current provisions contradict with the GARR. She further states that currently there is a remedy and if this is passed, then that remedy is in question as it will be conflicting with the proposed provisions.

Ms. Toft states her biggest point is on page 8, Section 3, where the new revision allows

the Public Auditor to assess costs, including attorney's fees and it says attorney's fees incurred by the government against any party including the government. She states she thinks, "the intent of the provision is to assess reasonable attorney's fees against anyone including the government and she states she can't imagine the government paying some of the attorney fees as some of the parties that protest have giant resources and hire mega firms. They hire stateside and worldwide attorneys who charge thousands of dollars an hour which raises major problems with the government which is always stretched with cash." She also alludes to potential problems with sovereign immunity where the government can only be sued if it agrees to be sued and there may be some issues with that.

Ms. Toft states her last point is with the changes to 5480(a) on page 16-19 which has been the source of most of the litigation in the Superior Court of Guam. She states the new [proposed] 5480(a) states that the Superior Court shall have jurisdiction... and she states as she reads it, it allows the Superior Court to review all administrative decisions or determinations or an OPA decision. She then states that Section (e) on exhaustion of administrative remedies states that all options have to be exhausted states that no, one has to go to the Public Auditor and it is contradictory. She states she agrees there has to be an exhaustion of administrative remedies and the Superior Court cannot review until exhaustion of remedies unless if the Public Auditor is disqualified.

Ms. Toft closes her testimony by stating, that she has a few general comments. First, there are some contradictions in the Bill that make it in its current form more confusing and contradictory than the current law. She further states it is broader which may cause the government more protests, more lawsuits, more litigation and frankly, more work. She states that without the accompanying revisions to the GARR it would be incomprehensible.

*Mr. Thomas J. Fisher (Personal Testimony)
Attorney, Fisher and Associates Attorneys at Law
Provided Oral Testimony and Visual Presentation, (Presentation Attached)*

Mr. Fisher states there is much that he supports in the Bill and that there are certain things he opposes in the Bill. He next comments on some of the Public Auditor's Points made earlier. He states he agrees that the process should stay open. He further states that this entire Bill and the ones to follow are going to go through a legislative washing machine. He further states that while he agrees that is sausage making, he feels we will have a better meal than we have now. He continues by stating that the entire procurement law is like an elaborate machine, when you tinker with one part, you may affect other parts as well. He further states he agrees the way to look at this is holistically.

Mr. Fisher also states he agrees with the public auditor that the tolling provisions should be removed. He further states that he also agrees with Attorney Brown that injustices do happen and one cannot argue with that, but sometimes it is simply too late

and we do have to shut the door at one point or another. He alludes to the tax law and filing in federal court and times when it is too late. He further states that if you do not have the shutting of the door, it destabilizes the ability of the government to move forward. Mr. Fisher states there must be a point at which the agency is satisfied that it may move forward without having to worry about the whole process coming to a halt. Mr. Fisher states he agrees there needs to be equity, but there are overarching public interests, which are finality and the ability of the government to move forward.

Mr. Fisher further states that if the agency fails to respond to a protest that it should be deemed denied. It being admitted in the Bill, according to Mr. Fisher is highly unusual. Mr. Fisher further states that the Office of the Public Auditor must be the one who determines whether or not the Office of the Public Auditor should be disqualified, not the Agency. He states this is because you don't want to encourage the Agency to Forum Shop. According to Mr. Fisher, that would have the unfortunate effect of weakening the office of the Public Auditor. He then states the intent of the Bill is to improve the procurement process and encourage prompt decisions in the process. He states that as the [Bill] is written, it misses the mark in some provisions.

In §5425, (a) (b) and (g) of the Bill, **Mr. Fisher** states, he wants to talk about who may protest. He states 'aggrieved' to a lawyer means who has standing. He further states that as written (on page 2) in (a), the standard of protest must come from 'an aggrieved' individual and then in (a)(2), the standard changes to 'a reasonably aggrieved' individual. He states he does not know the reason for the change and states [we] should jettison reasonably.

Mr. Fisher further states, under the Bill's provisions, there are two standards for a bidder to show they were aggrieved. The first, there are facts that raise a reasonable apprehension that something went wrong and second, the person would be in a competitive position to have been awarded the contract... Mr. Fisher next states that he agrees with Ms. Toff's point, that there are points where no one knows if they are competitive, for example before opening in an IFB or before evaluation in an RFP. He states the problem with that is if they are not allowed to protest, they cannot fix problems pre-award. This is because, in his opinion, this provision prevents pre-award protests since bidders will not know if they are competitive or not, which would be the standard of whether or not they can protest. Mr. Fisher suggests an alternative to the provision as amended in the bill. He states, from the Court of Federal Claims, that there is an idea called 'substantial chance,' wherein, a protestor can show that they are aggrieved if they can show but for a significant error in awarding the contract prior to award. He states this allows protests pre award.

Mr. Fisher further states that he has an alternative to section two (2), which goes back to the idea of standing. He states we have to know if the protestor has standing to appeal, which should be determined before any other merits of the protest are decided. He states he has imported a decision in deference to agency decisions because agencies are the experts are doing what they are doing. He says his provision allows for the Public

Auditor to grant deference to the Agency in order to allow agency to make a determination of whether or not the protestor has standing to appeal.

Mr. Fisher next states that in Section 3, there may be a drafting error where it says "the time limits specified for the resolution of disputes" he states it should instead say, "the time limits specified for the time to protest." He states this is surprisingly one of the important parts of the bill, which allows an estoppel on the government. Mr. Fisher asks that the committee reflect on the entirety of the Section and what it will do.

Mr. Fisher further states he wants to talk about Section (b) - the Authority and Obligation to Resolve Protests. He states the language gives the latitude to the agency and protestor in order to take advantage of the dispute resolution. This means that they may engage or may go to OPA. He states the tolling provision is problematic because it is unclear when the tolling starts and when it ends. He further states the provisions as proposed are a dream statute for attorneys. He suggests that the parties do it by stipulation and that specific time provisions are tolled until such time as one of the parties informs everyone in writing they no longer consent to the tolling provision.

Mr. Fisher states the next session is the automatic stay provision or the in the event a timely protest is filed. He states the automatic stay says that when a protest is filed, the agency cannot go forward on a solicitation and it cannot go forward on an award. In the Bill, it states that the territory cannot go forward on the solicitation, award or performance of the contract. He continues by stating the new provisions beyond the 14-day time to file a protest, performances on contracts would have to halt, even if the work has already been performed or is in progress. He states that prior to the Bill, the automatic stay was at the agency level, and once resolved at that level, then the solicitation or award was continued. Instead, now the stay is in place at the award stage of the procurement as well. He further states the section as presented in the bill codifies the Public Auditor's current position of the automatic stay. He disagrees with that position because currently the law prescribes a stay during the protest, not during the appeal. He then presents a timeline of recent decision timeline of the Office of the Public Auditor (See Attached). He states the office of the Public Auditor is making very timely decisions and generally very prompt resolution of cases. Some of the other cases are prolonged due to litigants and not all delays can be attributed to the Office of the Public Auditor, according to Mr. Fisher.

Further **Mr. Fisher** states that this stops the agency from getting things done until resolution in the Superior Court of Guam should there be any. This, to him, means inhibiting the agencies of the Government from getting things done and getting procurement done until resolution.

Mr. Fisher states he believes most Guam Agencies are doing Procurement properly. He further states that he hasn't seen that many errors. What he has seen instead are a number of protests from losing bidders. He continues by stating that businesses invest thousands of dollars in preparing bids and finding that they lost, their disappointment

is acute. He further states that if you are an incumbent, then you continue to do the work so why not protest. He also states that some companies think, "why not protest?" so they can get a piece of the pie. He suggests like securing bid bonds and other bonding to protect the government, the Legislature should consider a bid bond. He states the point is to create disincentives for protests that just run up the fees. This will deter companies from pursuing protests with chances that are marginal at best. He further states that it may lead only to meritorious protests may be heard.

Mr. Fisher also asked the Chair's permission to allow the Public Auditor to comment on the statements he made regarding the automatic stay.

QUESTION, DISCUSSION AND ANSWER

Chairperson Muña-Barnes invites Senator Brooks to respond to the comments of Mr. Fisher.

Senator Brooks states the numbers do not support the idea that there are frivolous appeals brought before the public auditor. She says since 2006, there have only been 88 appeals or on average a little over one a month. She states she rendered decisions on 46 of them, with an even split with the government -22, protestor/appellant - 18 and the rest where no one 'won'. She further states she hopes to debunk the notion that vendors are out there filing frivolous appeals. She also alludes to an example of Harbor Center Guam, which was ranked 5th or 6th when they filed a protest. She further states that the OPA did not know that until they reviewed the procurement record. She continues by stating that Agencies do not say the ranking when they announce the bidder, and they should. That, according to her would make things more transparent. She continues by stating that were it not for Harbor Center protesting, she would not have known that the RFP was the virtual privatization of the Commercial Port [of Guam]. OPA never rendered a decision and it went to Superior Court and got clogged up which she says is good because the Port exists as it does today as opposed to virtual privatization.

Senator Brooks continues by stating, the idea that there is a lot of frivolous protests is an urban legend. She states the vendors take it very seriously because they want to do business with the government. Instead, she states what she has seen is that the government knocks out these vendors before they have an opportunity to do business with the government. She further states that it is very seldom that there are bids with six or seven bidders, instead there are usually two or three. That is the area where the Auditor states she sees the Agencies are not promoting competition. She states that Agencies should, where practicable, promote competition, which is good for the government. She then refers to solicitations and states that price should not be the determining factor; instead it should be a reasonable factor. She further states that on the issue of the protest bond, which she opposes because the statistics show that vendors are not frivolous and they want to do business with the Government.

On the automatic stay, **Senator Brooks**, states that if the stay is not in place through the

appeals process, then it renders the office moot, as the Agency will become judge and jury. It is because in 2013, three agencies ignored the automatic stay (GIAA, GMHA and GDOE). She further states vendors very selectively decide when to protest because of the cost. She closes by stating that vendors do not cause the problem. She further states that the automatic stay is where they (panel) disagree and she says it will ultimately be a policy decision of how procurement is to proceed.

Chairperson Muña-Barnes states that the Guam General Services Agency also submitted comments via Ms. Claudia Acfalle, the Chief Procurement Officer of the Government of Guam and that Mr. John Unpingco, Chairman of the Procurement Advisory Council also submitted testimony.

Senator Tom Ada states the panel has raised some very cogent points. He states that he disagrees that the bill falls short because it does not make the corresponding changes to the GARR as it does to the Code. He further states that he has always understood that the Code is what sets the foundation and it's the GARR that has to get changed to be consistent with the Code. He does however agree that there should be more specificity as to who's undertaking changing the GARR should be. He closes by stating that by taking the Procurement Reform effort in bite-size pieces, which allows us a better chance to move forward with this initiative.

Senator San Nicolas poses a question regarding §5425(g) to **Attorney Fisher**. He asks if Attorney Fishers states that on page 8, §5425(h)(3) would be a deterrent to that? He asks "...wouldn't the Public Auditor be able to say that delaying the process may have made it frivolous and we're going to recover the costs you incurred to the government and to the people of Guam because [the vendor] made this take so long?

Mr. Fisher responds, stating, it might operate as a disincentive, but the large question is under the stay provision because it allows a timely protest and raise and estoppel against the government and the litigation in front of the Public Auditor and while it might operate as a disincentive, there must be some sort of cut off even if there is no equity, there must, according to Mr. Fisher, be a cut off. He closes by stating the (h)(3) may give some pause, but the original point that it lengthens the ability to lodge and maintain a protest remains valid.

Senator San Nicolas states he agrees with the point that the window to protest should be narrowed. He further states that subsections (g) and (h)(3) work hand in hand. He states he agrees with the OPA that the stay should remain through the process so the government can't be sued for a contract violation. He asks about the chart of Mr. Fisher's presentation showing the lengths of debates, he states that the numbers of days translate to dollars.

Mr. Fisher states he agrees and it's important to make this whole process short but it has to be just and the government has to do its business. He states he agrees the OPA is operating efficiently and that as they make changes to the procurement law, it must be

done slowly and carefully because it's all so interwoven.

Senator San Nicolas asks the OPA if the Government quantifies the cost of protests/appeals?

Senator Brooks states they started quantifying in 2012 and she has to break down the numbers. She also states that the numbers for 2013 are in process.

Senator San Nicolas asks if all of the dollars that the people of Guam have lost because of the delays (refers to Attorney Fisher's Chart in presentation), are recoverable under the law (because of the absence of §5425(b))?

Senator Brooks clarifies what it means by recovered and alludes to DFS and the six days listed is because DFS went to court, which took it out of her hands. She also alludes to GIAA and K Cleaning where there were many extensions due to availability of the parties. She says the goal is to resolve in 90 to 120 days.

Senator San Nicolas asks, but in the event one of these were to be found frivolous?

Senator Brooks states, no, none of these [were found to be frivolous].

Senator San Nicolas asks, but what if any protest were to be found frivolous, there is no way to recover those costs currently?

Senator Brooks states sure.

Senator San Nicolas asks if §5425(h)(3) would remedy that?

Senator Brooks states this is new to her and she does not know.

Ms. Toft states (h)(3) currently exists and the Public Auditor has the power to impose costs against a frivolous protestor.

Senator Brooks states there have not been any frivolous protests. She alludes to a PDS and GTA issue about caller ID on a model. PDS brought it up to GSA and GSA awarded to GTA after reversing its decision. The OPA upheld the decision. She further states she has yet to see a frivolous appeal and therefore has not made any awards.

Ms. Toft states that the provision does exist already.

Senator San Nicolas states it does exist, but from what he understands, it is to protect against a party frivolously appealing. But what if in the event the government were to frivolously be awarding or stretching or going around or expediting with respect to the procurement process? As it is proposed to be amended would allow the government to do the awarding. He alludes to autonomous agencies costing the government agencies

money and the opportunity to recover costs from the autonomous agencies. He states that is where the government may need to take another entity through the process.

Ms. Toft states there are two answers to that question. First, the Public Auditor has already provided, out of 46 appeals, more than half decided in favor of the government. She states the government is not frivolously awarding. Second she states that in the other part there were problems found, but neither side won. Ms. Toft further states that (g), which the Senator has an issue with, as currently written already contains language about not proceeding further with the solicitation or award but there are exceptions. She further states this provision as proposed does not contain need based exceptions. She cites a situation where a school needs toilets. She asks if they would halt performance of contract and halt school?

Senator San Nicolas states he sees her point and agrees. He states that what he has seen and worried about though is manufactured crises. He states the reality is the crisis should have been addressed at the onset and the government is being held hostage by the crises. He further states he does not want to hold up the process, but at the same time does not want put the government in \$200M of debt.

Ms. Toft states the current (g) does not contain the middle ground.

Senator San Nicolas states that with the other sections, it does, because the Auditor could levy costs for drawing the process out.

Ms. Toft states that if there are no need-based exceptions, then there is not going to be recovery. She cites if the government moves against a plumbing company for stopping school for \$10M, the government probably wont be paid and it will probably end up costing the government money. She states there must be need-based exceptions.

Senator San Nicolas states he agrees. But on the other side, what has been happening according to Senator San Nicolas is the toilets are not fixed until the day before school and the cost is \$2M and the government is stuck with that Bill.

Senator Duenas states he enjoyed the presentation and that it was very exciting. He asks whether or not comprehensive legislation reform would require the Committee of the Whole Process when the Bill is discussed.

Senator Brooks states she agrees because ideally the Procurement Advisory Council would want to have input. She further states there will be differences of opinion and the discussion would be very helpful. She hopes there will be another opportunity to comment so that all the connected pieces all work in unison.

Senator Duenas states he just wanted that on record so that when the time comes those members that missed may have the opportunity to ask questions as well.

Chairperson Muña-Barnes asks about the RFP process and when the Agency submits the specifications for an RFP and an IFB, and a vendor is awarded the contract and after award cannot meet the specifications, can provisions be put in place so the next ranked qualified bidder may be awarded the contract?

Senator Brooks states she has an appeal ongoing for that very issue. She further states that the awarded vendor defaulted and another vendor was awarded. She states she cannot state anymore because she will be hearing the appeal but the problem she saw was that there was no public notice. She states transparency would open a lot of things and for whatever reason the agencies do not release rankings. She states there are supposed to be some mechanisms to do that.

Mr. Brown states they have to distinguish, there is a protest decision and one is a post award contract dispute decision. He further states that if there is a doable change, then it is a contract dispute. He states the government should enforce that and go after damages for entering the contract and not being able to complete. He states there is a GARR that says you can give to next highest bidders, but that assumes no changes. When there are changes to specifications after the award, a new solicitation is required. He states that pre solicitation or without changes, there is a GARR that allows for the next bidder.

Chairperson Muña-Barnes asks if the government entity can make the change after the fact?

Mr. Brown states no, not if it's a material change in the scope of the specifications.

Senator Yamashita states she is so energized by the intellectual energy.

Chairperson Muña-Barnes asks for further questions or testimonies and there being none calls for an end to discussion on Bill No. 224-32 (COR).

III. FINDINGS AND RECOMMENDATIONS

The author made the following changes to the proposed legislation:

- The short title was amended to include only the Articles 9 and 12 to be amended instead of all sections and subsections being listed.
- Findings and Intent Lines 9: pg 2 thru line 23: pg 3. Several paragraphs were added to the findings and intent of the Bill to add further context to certain changes in the Bill.
- Section 2 Page 4 Lines 25-26 and 28. Language was added to clarify who has standing to bring protests in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency.
- Section 2 Page 5, Lines 8-9. At the recommendation of the Office of the Attorney General, language was added to assure that the changes made to the provision

and their application are enacted 'notwithstanding any other provision of law.'

- Section 2, Page 5, Lines 6, 8, and 11. The language: 'absent just cause or compelling prejudice,' 'and obligation,' and 'are encouraged and,' were deleted after various testimonies from the Public Auditor Brooks, Attorney Jessica Toft, the Attorney General's Office, and Procurement Advisory Council Chairman Unpingco stated various concerns regarding the language. The language was to avoid potential ambiguity in the Bill's application.
- Section 2 Page 5 Line 15. The language: 'It is in the best interest of the government of Guam to resolve and settle such protests expeditiously and informally without administrative if judicial review so long as its minimum needs may be satisfied and effective competition fostered,' was deleted.
- Section 2, Page 5 Line 17, the following language: 'Regulations shall establish and objective means by [which] any,' was added. Section 2, Page 5 Line 18, the following language: 'may include use of settlement conference, expedited Alternative Dispute Resolution (ADR) and debriefing methods. Any,' was deleted.
- Section 2, Page 5 Line 19, the following language: 'identified and,' was added.
- Section 2, Page 6 Line 1-3, the following language was deleted, 'grounds for,' and the following was added 'Government's understanding of [the protest] that has been filed, [and the factual and legal reasons for the action taken decision made] to accept or reject, in whole or in part,' was added.
- Section 2, Page 6 Lines 4-7, a new section was added to assure that decisions to reject or accept protests in writing clearly outline the reasons for rejecting the protest is that the protest is either untimely or that the protestor was not found to be aggrieved and the reasons why the substantive arguments of the protest, if any, are rejected among the other requirements outlined in the section for written protest decisions.
- Section 2, Page 6, Line 10, the following language was deleted: ';and state if the reason for denying the protest is that the protest is untimely or that the protestor was not found to be aggrieved and the reasons why the substantive arguments of the protests, if any, must be rejected.'
- Section 2, Page 6 line 26 thru Page 7 line 4, the word 'appeal' was deleted and language was added to provide that should the government fail to render a decision on a protest under the law's prescribed timelines, the protest will be deemed rejected. The Language added further requires the government to establish there was good and sufficient reason to reject the protest based on evidence that was known to it or should have been known to it at the time the protest was rejected,' on any appeal related to the protest deemed rejected by lack of decision in a prescribed timeline.
- Section 2, Page 7, Line 11 thru 19, language deleted to remain consistent with the change made above where a protest is deemed rejected should the agency fail to respond within the time allotted in the Law. Further language was added to solidify that the public auditor has the discretion to determine whether or not she is disqualified from hearing the appeal. Further, language was also added to

clarify that when the Public Auditor disqualifies himself, the presiding judge of the Superior Court of Guam shall appoint a hearing officer to proceed with the administrative hearing at the OPA level under OPA rules.

- Section 2, Page 8, Lines 13 thru 17, Language was added to establish the procedures for emergency procurement when there is no declaration of emergency procurement by the governor.
- Section 2, Page 8, Lines 18 thru 26, Language was added to allow for an expedited hearing of the Public Auditor or the court to confirm any determination or declaration of emergency allowed in the previous section.
- Section 2, Page 9, Line 1 thru 7, Language was added to establish the two days allowed in the previous section, regarding emergency procurements and the allowable timeframes to protest, are tolled consistently with weekends government holidays in the Guam Code. Language from the Bill *As Introduced that established the expedited hearing for protesting emergency procurements was also deleted from this section.
- Section 3, Page 11 Line 14, the word 'petition' was replaced with the word, 'finding' to eliminate ambiguity in what is required of the section.
- Section 4, Page 15, Lines 8-10, language was added to clarify the authority of the Chief Procurement Officer, the Director of the DPW, the head of a purchasing agency or designee of one of these officers is authorized to settle a controversy arising from a contract dispute provided that the funds are available to facilitate a timely resolution. Language from the original bill requiring concurrence of the Attorney General was also removed from this Section.
- Section 4, Page 16, Lines 18-22, language was added to bar a contractor from taking any action to request a final decision after two years from the date the contract controversy arose.
- Section 5, Page 17, Line 1, language was deleted to establish explicitly where the provisions of §5450 apply.
- Section 7, Page 18 Line 24 - 26, the section, specifically the lines noted were amended to clarify the Court has jurisdiction to review any administrative decisions arising under §5425 and §5707 of Chapter 5, the Procurement Code.
- Section 7, Page 20, Line 6, language was deleted to eliminate potential ambiguity.
- Section 8, Page 21, Lines 14 and 15, Language was deleted to make the provisions consistent with earlier changes that allow for the Public Auditor to determine if he should be disqualified.
- Section 10, Page 22, Line 22 language was deleted to avoid potential ambiguity.

The Committee on General Government Operations and Cultural Affairs to which was referred "Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend Article 9 and Article 12 of Chapter 5, Title 5, the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law" hereby submits these findings to *I Mina' Trentai Dos na Liheslaturan Guåhan* and reports out Substitute Bill No. 224-32 (COR) with a recommendation TO REPORT OUT ONLY

I MINA'TRENTAI DOS NA LIHESLATURAN GUÅHAN
2013 (FIRST) Regular Session

Bill No. 224-32(COR)

Introduced by:

T. C. Ada 
R.J. Respicio 

AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a), §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1. Findings and Intent.**

3 *I Liheslaturan Guåhan* finds that the procurement system is
4 intentionally created to “outsource” the real time policing of the
5 procurement process to the private sector by way of protests, and that
6 the only way procurement will remain effective is if the review process
7 is as expedited as the original procurement process.

8 *I Liheslaturan Guåhan* finds that there is a need for the prompt
9 issuance of decisions on protests related to solicitations or awards as
10 mandated by 5 GCA §5425(c) of the procurement law, and further
11 finds that the lack of a timely decision or other resolution of such
12 protests is a significant factor in prolonged procurement disputes,

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1 oftentimes lasting for months.

2 *I Liheslaturan Guåhan* finds that a comprehensive review of the
3 administrative and judicial remedial scheme of the procurement law,
4 set out in Articles 9 and 12 of the Procurement Act (5 GCA Division 1,
5 Chapter 5) is appropriate and necessary to improve the efficiency and
6 efficacy of the administrative and judicial remedial scheme. *I*
7 *Liheslaturan Guahan* further finds that the general structure of the
8 remedial scheme is sound but in need of critical changes to achieve
9 this goal.

10 *I Liheslaturan Guahan* intends to enroll the good faith
11 participation of private sector participants in the procurement process
12 to assure the efficacy and integrity of the procurement system, and to
13 establish an effective and expeditious resolution of the disputes that
14 participation invites.

15
16 **Section 2. §5425 of 5GCA Chapter 5 Article 9 Legal and**
17 **Contractual Remedies is amended as follows:**

18
19 **§5425. Authority to Resolve Resolution of Protested Solicitations**
20 **and Awards.**

21
22 (a) Right to Protest. Any actual or prospective bidder, offeror,
23 or contractor who may be aggrieved in connection with the method
24 of source selection, solicitation or award of a contract, may protest to
25 the Chief Procurement Officer, the Director of Public Works or the
26 head of a purchasing agency. ~~The protest shall be submitted in~~
27 ~~writing within fourteen (14) days after such aggrieved person knows~~
28 ~~or should know of the facts giving rise thereto.~~ A protest made to the
29 office which issued a solicitation shall be deemed properly made.

1 (1) The protest shall be submitted in writing within fourteen
2 (14) days after such aggrieved person knows or should know of the
3 facts giving rise to the belief such person may be aggrieved.

4 (2) A person may reasonably be aggrieved if:

5 (i) there are facts sufficient to raise a reasonable
6 apprehension that the method of source selection, the
7 solicitation, or the award of a contract may be contrary to law or
8 regulation; and

9 (ii) there is a reasonable likelihood, based on information
10 available at the time of protest, that such person would have
11 been in a competitive position to be awarded the contract.

12 (3) The time limits specified for the resolution of disputes
13 arising under this Section, including any administrative and judicial
14 review provided in this Article 9, are not intended to be
15 jurisdictional, but shall be treated as a bar absent just cause or
16 compelling prejudice.

17
18 (b) Authority and Obligation to Resolve Protests. The Chief
19 Procurement Officer, the Director of Public Works, the head of a
20 purchasing agency, or a designee of one of these officers are
21 encouraged and shall have the authority, prior to the commencement
22 of an appeal to the Public Auditor or an action in court concerning
23 the controversy, to settle and resolve a protest of an aggrieved bidder,
24 offeror, or contractor, actual or prospective, concerning the
25 solicitation or award of a contract. It is in the best interest of the
26 Government of Guam to resolve and settle such protests

1 expeditiously and informally without administrative or judicial
2 review so long as its minimum needs may be satisfied and effective
3 competition fostered. This authority shall be exercised in accordance
4 with regulations promulgated by the Policy Office, which may
5 include use of settlement conference, expedited Alternative Dispute
6 Resolution (ADR) and debriefing methods. Any time limit
7 established by this Article for the taking of any action, administrative
8 or judicial, shall be tolled during any period in which the parties are
9 in good faith engaged to resolve and settle any dispute arising under
10 this Article.

11 (c) Decision. If the protest is not resolved by mutual agreement,
12 the Chief Procurement Officer, the Director of Public Works, the
13 head of a purchasing agency, or a designee of one of these officers
14 shall promptly issue a decision in writing accepting or rejecting the
15 protest, in whole or part. The decision shall:

16 (1) state the grounds for the protest and the factual and legal
17 reasons for the ~~action taken~~ decision made; and

18 (2) inform the ~~protestant~~ protestor that the decision of the
19 officer to whom the protest was made is final, and of it's the
20 protestor's right to administrative and judicial review; and

21 (3) state if the reason for denying the protest is that the protest
22 is untimely or that the protestor was not found to be aggrieved and
23 the reasons why the substantive arguments of the protest, if any,
24 must be rejected.

25

1 (d) Notice of Decision. A copy of the decision under Subsection
2 (c) of this Section shall be mailed or otherwise furnished immediately
3 to the ~~protestant~~ protestor and any other party intervening.
4

5 (e) Failure to Render Timely Decision. If the protestor does not
6 receive a decision of the protest as required under Subsection (c) of
7 this Section within twenty-one (21) days from the date of the protest,
8 the protestor may make a written request to the office wherein the
9 protest was made to render such a decision on the protest. If no
10 decision as required under Subsection (c) of this Section is made and
11 served upon the protestor within seven (7) days after receipt of such
12 written request, or within such longer period as may be expressly and
13 in writing agreed upon by the parties, then the protest shall be
14 deemed admitted.
15

16 ~~(e)~~(f) Appeal. A decision under Subsection (c) of this Section
17 including a decision there under regarding entitlement to costs as
18 provided by Subsection (h) of this Section, may be appealed by the
19 ~~protestant~~ protestor, to the Public Auditor within fifteen (15) days
20 after receipt by the ~~protestant~~ protestor of the notice of decision, on
21 the protest, and a decision deemed admitted under Subsection (e) of
22 this Section may be appealed by the office to which the protest was
23 made, to the Public Auditor, within fifteen (15) days after the date the
24 protest is deemed admitted ~~within fifteen (15) days after receipt by~~
25 ~~the protestor of the notice of decision as provided in Subsection (e)(i)~~
26 of this Section. If for any reason the Public Auditor is determined to
27 be disqualified to hear such an appeal, a decision under Subsection

1 (c) of this Section may be appealed directly to the Superior Court in
2 accordance with Subsection (a) of § 5480 of this Chapter.

3
4 ~~(f) Finality. A decision of the Public Auditor is final unless a~~
5 ~~person adversely affected by the decision commences an action in the~~
6 ~~Superior Court in accordance with Subsection (a) of §5480 of this~~
7 ~~Chapter.~~

8
9 (g) In the event of a timely protest under Subsection (a) of this
10 Section ~~or under Subsection (a) of § 5480 of this Chapter~~, the
11 Territory shall not proceed further with the solicitation, ~~or with the~~
12 ~~award, or performance of the contract prior to the time allowed to~~
13 ~~appeal from, or the final resolution of, such protest, and any such~~
14 further action is void, unless:

15 (1) The Chief Procurement Officer or the Director of Public
16 Works, ~~after consultation with and~~ written concurrence of the head
17 of the using or purchasing agency and the Attorney General or
18 designated Deputy Attorney General, ~~then~~ makes a written
19 determination that the award of the contract without delay is
20 necessary to protect substantial interests of the Territory, ~~or the~~
21 ~~Governor then issues a Declaration of Emergency Procurement as~~
22 ~~authorized by § 5215 of this Chapter; and~~

23
24 (2) Absent a declaration of emergency procurement by the
25 Governor, the ~~protestant~~ protestor has been given at least two (2)
26 days notice of such determination ~~(exclusive of territorial holidays~~

1 as provided in 1 GCA § 1004); and

2
3 (3) If the protest is pending before the Public Auditor or the
4 Court, the Public Auditor or Court has confirmed the validity of
5 such determination and declaration, or if no such protest is pending,
6 no protest to the Public Auditor or the Court of such determination
7 or declaration is filed prior to expiration of the two (2) day period
8 specified in Item (2) of Subsection (g) of this Section; but if such a
9 protest is filed, an expedited hearing shall be noticed to all
10 interested parties and held to determine whether to confirm any
11 such determination of necessity and substantial interest or
12 declaration of emergency procurement.

13
14 (h) Entitlement to Costs. In addition to any other relief or
15 remedy granted under Subsection (c) or (e) of this Section or under
16 Subsection (a) of § 5480 of this Chapter, including the remedies
17 provided by Part B of Article 9 of this Chapter, when a protest is
18 sustained, the ~~protestant~~ protestor shall be entitled to the reasonable
19 costs incurred in connection with the solicitation and protest,
20 including bid preparation costs, excluding attorney's fees, if:

21
22 (1) the ~~protestant~~ protestor should have been awarded the
23 contract under the solicitation but was not; or

24
25 (2) there is a reasonable likelihood that the ~~protestant~~ protestor
26 may have been awarded the contract but for the breach of any
27 ethical obligation imposed by Part B of Article 11 of this Chapter or

1 the willful or reckless violation of any applicable procurement law
2 or regulation.

3
4 (3) The Public Auditor shall have the power to assess
5 reasonable costs including reasonable attorney fees incurred by the
6 government, including its autonomous agencies and public
7 corporations, or any protestor or interested party against a
8 ~~protestant upon its finding that the~~ any party, including the
9 government, making a the protest, motion or ~~taking any position~~
10 bringing any action ~~was made~~ fraudulently, frivolously or ~~solely~~
11 with predominant intent to delay or disrupt the procurement
12 process.

13
14 (i) Finality. A decision of the Public Auditor is final unless a
15 person adversely affected by the decision commences an appeal in
16 the Superior Court as provided by §5707(a) of this Chapter and in
17 accordance with the waiver of sovereign immunity conferred by
18 Subsection (a) of §5480 of this Chapter.

19
20 **Section 3. §5426 Authority to Debar or Suspend of 5GCA Chapter**
21 **5 Article 9 is amended as follows:**

22
23 **§ 5426. Authority to Debar or Suspend.**

24 (a) Authority. After reasonable notice to the person involved and
25 reasonable opportunity for that person to be heard, the Chief
26 Procurement Officer, the Director of Public Works or the head of a
27 purchasing agency, after consultation with the using agency and the

1 Attorney General, shall have authority to debar a person for cause, or
2 to suspend a person for probable cause, from consideration for award
3 of contracts. The debarment shall not be for a period of more than
4 two (2) years. ~~The same officer, after consultation with the using~~
5 ~~agency and the Attorney General, shall have authority to suspend a~~
6 ~~person from consideration for award of contracts if there is probable~~
7 ~~cause for debarment.~~ The suspension shall not be for a period
8 exceeding three (3) months. The authority to debar or suspend shall
9 be exercised in accordance with regulations promulgated by the
10 Policy Office.

11
12 (b) Causes for Debarment or Suspension. The causes for
13 debarment or suspension include the following:

14
15 (1) conviction for commission of a criminal offense as an
16 incident to obtaining or attempting to obtain a private contract or
17 subcontract, or in the performance of such contract or subcontract;

18
19 (2) conviction under territorial or federal statutes of
20 embezzlement, theft, forgery, bribery, falsification or destruction of
21 records, receiving stolen property, or any other offense indicating a
22 lack of business integrity or business honesty which currently,
23 seriously and directly affects responsibility as a territorial
24 contractor;

25
26 (3) conviction under federal antitrust statutes arising out of the
27 submission of bids or proposals;

1
2 (4) violation of contract provisions, as set forth below, of a
3 character which is regarded by the Chief Procurement Officer, the
4 Director of Public Works or the head of a purchasing agency to be
5 so serious as to justify debarment action:
6

7 (~~A~~)i. deliberate failure without good cause to perform in
8 accordance with the specifications or within the time limit
9 provided in the contract; or
10

11 (~~B~~)ii. a recent record of failure to perform or of
12 unsatisfactory performance in accordance with the terms of one
13 or more procurement contracts, provided, that failure to perform
14 or unsatisfactory performance caused by acts beyond the control
15 of the contractor shall not be considered to be a basis for
16 debarment; or
17

18 iii. upon a petition of the Department of Labor, failure to
19 pay employees engaged on the contract in violation of Wage
20 Determination law or contract conditions.
21

22 (5) any other cause the Chief Procurement Officer, the
23 Director of Public Works or the head of a purchasing agency
24 determines to be so serious and compelling as to affect
25 responsibility as a territorial contractor, including debarment by
26 another governmental entity for any cause listed in regulations of
27 the Policy Office;

1
2 (6) for violation of the ethical standards set forth in Article 11
3 of this Chapter.

4
5 (7) filing a frivolous or fraudulent petition, protest or appeal
6 under § 5425(e), § 5426~~(f)~~(e) or of § 5427(e) of this Chapter.

7
8 (c) Decision. The Chief Procurement Officer, the Director of
9 Public Works or the head of a purchasing agency shall issue a written
10 decision to debar or suspend or to reject any petition to do so brought
11 under Subsection (f) of this Section. The decision shall:

12
13 (1) state the reasons for the ~~action taken~~ decision made; and

14
15 (2) inform the debarred or suspended person involved, or any
16 person whose petition is rejected, of its rights to judicial or
17 administrative review as provided in this Chapter.

18
19 (d) Notice of Decision. A copy of the decision under Subsection
20 (c) of this Section shall be mailed or otherwise furnished immediately
21 to the debarred or suspended person and any other party intervening
22 or petitioning, and the head of all governmental bodies or purchasing
23 agencies.

24
25 (e) Finality of Decision. A decision under Subsections (c) or (f)
26 of this Section shall be final and conclusive, unless fraudulent, or an
27 appeal is taken to the Public Auditor in accordance with § 5706 of

1 this Chapter. Such a decision shall be automatically stayed during
2 the pendency of any appeal, but any such appeal does not preclude
3 nor require a determination of non-responsibility in any solicitation
4 in which the person charged may participate. The officer issuing
5 such decision shall immediately notify all persons, governmental
6 bodies and purchasing agencies of the fact and effect of such appeal.

7
8 (f) Any member of the public, including bidder, offeror or
9 contractor as well as any elected official or employee of the
10 government, may petition the Chief Procurement Officer, the
11 Director of Public Works or the head of a purchasing agency to take
12 action to debar or suspend pursuant to Subsection (a) of this Section.
13 Immediately upon the receipt of such a petition, the person petitioned
14 shall cause ~~An~~ an investigation of each petition shall to be conducted
15 and hold a hearing as authorized in Subsection (a) promptly and a
16 writ ten report should be made of findings of fact and action taken
17 and issue a decision as required in Subsection (c). If the petitioned
18 officer does not issue the written decision required under Subsection
19 (c) of this Section within sixty (60) days after written request by the
20 petitioner for a final decision, then the petitioner may proceed with
21 an appeal to the Public Auditor as if a the petition had been rejected.

22
23 **Section 4. §5427 of 5GCA Chapter 5 Article 9 Legal and**
24 **Contractual Remedies is amended as follows:**

25 **§ 5427. Authority to Resolve Contract and Breach of Contract**
26 **Controversies.**

27

1 (a) Applicability. This Section applies to controversies between
2 the Territory and a contractor and which arise under, or by virtue of,
3 a procurement contract between them, as evidenced by the written
4 demand of either party to the other for redress of a particularized
5 claim or controversy. This includes without limitation controversies
6 based upon breach of contract, mistake, misrepresentation, or other
7 cause for contract damages, modification or rescission.

8
9 (b) Authority. The Chief Procurement Officer, the Director of
10 Public Works, the head of a purchasing agency, or a designee of one
11 of these officers is authorized, prior to commencement of an action in
12 a court concerning the controversy, to settle and resolve a
13 controversy described in Subsection (a) of this Section, including:
14 with the concurrence of the Attorney General, liquidating the amount
15 of any claim. This authority shall be exercised in accordance with
16 regulations promulgated by the Policy Office.

17
18 (c) Decision. If such a controversy is not resolved by mutual
19 agreement, the Chief Procurement Officer, the Director of Public
20 Works, the head of a purchasing agency, or the designee of one of
21 these officers shall promptly issue a decision in writing. The decision
22 shall:

23
24 (1) state the reasons for the ~~action taken~~ decision made; and

25
26 (2) state the liquidated amount of damages, if any, determined
27 to be payable to the contractor, with the concurrence of the

1 Attorney General, regardless whether the contractor accepts said
2 sum in mutual settlement of the controversy; and

3
4 ~~(2)~~(3) inform the contractor of its rights to judicial or
5 administrative review as provided in this Chapter.

6
7 (d) Notice of Decision. A copy of the decision under Subsection
8 (c) of this Section shall be mailed or otherwise furnished immediately
9 to the contractor.

10
11 (e) Finality of Decision. The decision reached pursuant to
12 Subsection (c) of this Section shall be final and conclusive, unless
13 fraudulent, or the contractor appeals administratively to the Public
14 Auditor in accordance with § 5706 of this Chapter.

15
16 (f) Failure to Render Timely Decision. If the Chief
17 Procurement Officer, the Director of Public Works, the head of a
18 purchasing agency, or the designee of one of these officers does not
19 issue the written decision required under Subsection (c) of this
20 Section within sixty (60) days after written request for a final
21 decision, or within such longer period as may be agreed upon by the
22 parties, then the contractor may proceed as if an adverse decision had
23 been received.

24
25 **Section 5. §5450 of 5GCA Chapter 5 Article 9 Legal and**
26 **Contractual Remedies is amended as follows:**

1 **§ 5450. Applicability of this Part.**

2 The provisions of this Part only apply where it is determined
3 administratively, or upon administrative or judicial review of a
4 protest under the provisions of § 5425, that a solicitation or award of
5 a contract is in violation of law, and are in addition to any other
6 remedy or relief allowed by law or equity.

7
8 **Section 6. §5452 of 5GCA Chapter 5 Article 9 Legal and**
9 **Contractual Remedies is amended as follows:**

10
11 **§ 5452. Remedies After an Award.**

12 ~~(a)~~ If after an award it is determined that a solicitation or award of a
13 contract is in violation of law, then:

14
15 ~~(A)~~(a) if the person awarded the contract has not acted
16 fraudulently or in bad faith:

17
18 ~~(A)~~(1) the contract may be ratified and affirmed, provided it is
19 determined that doing so is in the best interests of the Territory; or

20
21 ~~(B)~~(2) the contract may be terminated and the person awarded
22 the contract shall be compensated for the actual expenses
23 reasonably incurred under the contract, plus a reasonable profit,
24 prior to the termination.

25
26 ~~(A)~~(b) if the person awarded the contract has acted fraudulently
27 or in bad faith:

1
2 ~~(A)(1)~~ the contract may be declared null and void; or

3
4 ~~(B)(2)~~ the contract may be ratified and affirmed if such action
5 is in the best interests of the Territory, without prejudice to the
6 Territory's rights to such damages as may be appropriate.

7
8 ~~(c) In either case, the determination to ratify or affirm the~~
9 ~~contract shall be made without regard to the position of the person~~
10 ~~awarded the contract and shall conclusively admit violation of law.~~

11
12 ~~(b) This Section shall be read as being in addition to and not in~~
13 ~~conflict with, or repealing 4 GCA § 4137 (Prohibitions on the~~
14 ~~Activities of Government Employees).~~

15
16 **Section 7.** §5480 of 5GCA Chapter 5 Article 9 Legal and Contractual
17 Remedies is amended as follows:

18 **§ 5480. Waiver of Sovereign Immunity by Grant of Jurisdiction**
19 **in Connection with ~~Contracts~~ Controversies Arising Under Part A**
20 **of this Article.**

21 (a) Solicitation and Award of Contracts. The Superior Court of
22 Guam shall have jurisdiction ~~over an action between the Territory~~
23 ~~and a bidder, offeror, or contractor, either actual or prospective, to~~
24 ~~determine whether a solicitation or award of a contract is in~~
25 ~~accordance with the statutes, regulations, and the terms and~~
26 ~~conditions of the solicitation to review any administrative decision of~~
27 ~~the Public Auditor or determination arising under §5425 of this~~

1 Chapter, whether brought pursuant to §5707 of this Chapter after
2 appeal to the Public Auditor or brought in the absence of the
3 qualification of the Public Auditor to hear an appeal under §5425(f)
4 of this Chapter. The Superior Court shall have such jurisdiction in
5 actions at law or in equity, and whether the actions are for monetary
6 damages or for injunctive, declaratory, or other equitable relief, and
7 whether the matter is procedural or substantive in nature.

8
9 (b) Debarment or Suspension. The Superior Court shall have
10 jurisdiction ~~over an action between the Territory and~~ to review any
11 decision of the Public Auditor brought pursuant to § 5705 of this
12 Chapter ~~a person who is subject to a suspension or debarment~~
13 ~~proceeding, to determine whether~~ concerning the debarment or
14 suspension or rejection of a petition to debar or suspend, is in
15 accordance with ~~the statutes~~ §5426 and §5705 of this Chapter and
16 relevant statutes and regulations. The Superior Court shall have such
17 jurisdiction, in actions at law or in equity, and whether the actions are
18 for injunctive, declaratory, or other equitable relief.

19
20 (c) ~~In addition to other relief and remedies, the Superior Court~~
21 ~~shall have jurisdiction to grant injunctive relief in any action brought~~
22 ~~under Subsections (a), or (b) or (c) of this Section. Actions Under~~
23 ~~Contract or for Breach of Contract. The Superior Court shall have~~
24 ~~jurisdiction over an action between the Territory and a contractor,~~
25 ~~brought after review of the Public Auditor in accordance with § 5706~~
26 ~~of this Chapter, for any cause of action which arises under, or by~~
27 ~~virtue of, the contract, whether the action is at law or equity, whether~~

1 the action is on contract or for breach of contract, and whether the
2 action is for monetary damages or injunctive, declaratory or other
3 equitable relief.

4
5 (d) Limited Finality for Administrative Determinations. In any
6 judicial action under this Section, factual or legal determinations by
7 employees, agents or other persons appointed by the Territory shall
8 have no finality and shall not be conclusive, notwithstanding any
9 contract provision, or regulation, except to the extent provided in §§
10 5245, ~~5705 and 5706~~ and in Article 12 of this Chapter. In the event
11 any judicial action arises under Subsection (a) of this Section by
12 reason of the disqualification of the Public Auditor, the Superior
13 Court shall have such jurisdiction and authority of the Public Auditor
14 as is specified in §§ 5703 and 5704 of this Chapter.

15
16 (c) ~~For purposes of this Section a “prospective” bidder,~~
17 ~~contractor or offeror is one who will actually submit a bid, contract~~
18 ~~or otherwise offer his services if, in the actions permitted by this~~
19 ~~Section, such person would prevail.~~ Exhaustion of Administrative
20 Remedies. No action shall be brought under any provision of this
21 Section until all administrative remedies provided in this Chapter
22 under Part A of Article 9 and Article 12 have been exhausted.

23
24 (f) ~~All actions permitted by this Article shall be conducted as~~
25 ~~provided in the Government Claims Act. Form of Action Under §~~
26 ~~5480(a).~~ All actions and appeals permitted by Subsection (a) of this
27 Section shall be treated as special proceedings for expeditious review

1 of the administrative decision below, and may be brought by way of
2 or treated as a writ of review however captioned.

3
4 (g) Expedited Review of Appeals Under § 5480(a). Except as to
5 cases the Court considers of greater importance, proceedings before
6 the Superior Court, as authorized by Subsection (a) of this Section,
7 and appeals therefrom, take precedence over all cases and shall be
8 assigned for hearing and trial or for argument at the earliest
9 practicable date and expedited in every way. The times for
10 responsive pleadings and for hearings in these proceedings shall be
11 set by the judge of the Court with the object of securing a decision as
12 to these matters at the earliest possible time.

13
14 **Section 8.** §5481 of 5GCA Chapter 5 Article 9 Legal and Contractual
15 Remedies is amended as follows:

16
17 **§ 5481. Time Limitations on Actions.**

18
19 (a) Protested Solicitations and Awards. Any action under §
20 5480(a) of this Chapter shall be initiated, absent compelling cause or
21 unfair prejudice, within fourteen (14) days after receipt of a final
22 administrative decision, including a decision of disqualification of
23 the Public Auditor in accordance with § 5425(f) of this Chapter.

24
25 (b) Debarments and Suspensions for Cause. Any action under §
26 5480(b) of this Chapter shall be commenced within six (6) months
27 after receipt of the decision of the Policy Office under § 5651 of this

1 Chapter, or the decision of the ~~Procurement Appeals Board~~ Public
2 Auditor under § ~~5707~~ 5705 of this Chapter, whichever is applicable.

3
4 (c) Actions Under Contracts or for Breach of Contract. Any
5 action commenced under 5480(c) of this Chapter shall be
6 commenced within twelve (12) months after the date of the
7 ~~Procurement Appeals Board~~ Public Auditor's decision.

8
9 (d) The limitations on actions provided by this Section are tolled
10 during the pendency of any proceeding brought pursuant to § 5485 of
11 this Chapter.

12
13 **Section 9.** §5485(a) of 5GCA Chapter 5 Article 9 Legal and
14 Contractual Remedies is amended as follows:

15
16 **§ 5485(a). Complaints that Procurement Data was Withheld.**

17 (a) On complaint by any member of the public, the Superior
18 Court has jurisdiction to enjoin a governmental body from
19 withholding procurement data and to order the production of any
20 government data improperly withheld from the complainant. In such
21 a case, the court shall determine the matter *de novo*, and may
22 examine the contents of such procurement data in camera to
23 determine whether such records or any part thereof shall be withheld
24 under any of the exceptions set forth in ~~6 GCA § 4202~~ this Chapter
25 and, to the extent not inconsistent, Title 5, Chapter 10, Guam Code
26 Annotated and the burden is on the agency to sustain its action.

27

1 **Section 10.** §5485(b) of 5GCA Chapter 5 Article 9 Legal and
2 Contractual Remedies is amended as follows:

3 (b) Notwithstanding any other provision of law, the government
4 or a governmental body or purchasing agency shall serve an answer or
5 otherwise plead to any complaint made under this Section within thirty
6 (3) days after service of the pleading in which such complaint is made,
7 unless the court otherwise directs, for good cause shown.

8
9 **Section 11.** §5703 of Article 12, Chapter 5 of Title 5 Guam Code
10 Annotated is amended to read as follows:

11 **§ 5703. Jurisdiction of the Public Auditor.**

12 The Public Auditor shall have the power to review and
13 determine de novo any matter properly submitted to her or him. The
14 Public Auditor shall not have jurisdiction over disputes having to do
15 with money owed to or by the government of Guam except as
16 authorized under §§ 5427 and 5706 of this Chapter. Notwithstanding
17 § 5245 of this Chapter, no prior determination shall be final or
18 conclusive on the Public Auditor or upon any appeal from the Public
19 Auditor. The Public Auditor shall have the power to compel
20 attendance and testimony of, and production of documents by any
21 employee of the government of Guam, including any employee of any
22 autonomous agency or public corporation. The Public Auditor may
23 consider testimony and evidence submitted by any competing bidder,
24 offeror or contractor of the protestant. The Public Auditor's
25 jurisdiction shall be utilized to promote the integrity of the
26 procurement process and the purposes of 5 GCA Chapter 5.

27

1 **Section 12.** §5705 of Article 12, Chapter 5 of Title 5 Guam Code
2 Annotated is amended to read as follows:

3 **§ 5705. Suspension or Debarment Proceedings.**

4 (a) Scope. This § 5705 applies to a review by the Public Auditor
5 of a decision under § 5426(c) or (f) of this Chapter.

6 (b) Time Limitation on Filing an Appeal. ~~The aggrieved person~~
7 ~~receiving an adverse decision under Subsection (c) or (f) of § 5426 of~~
8 ~~this Chapter, including a person suspended or debarred or a rejected~~
9 ~~petitioner, shall file his/her an appeal with the Public Auditor within~~
10 ~~sixty (60) thirty (30) days from the date of the receipt of a decision or~~
11 ~~the date a petition is deemed rejected under Subsection (e) of § 5426~~
12 ~~of this Chapter.~~

13
14 (c) Decision. The Public Auditor shall decide whether, or the
15 extent to which, the ~~decision to debar or suspend, or reject a petition~~
16 ~~to do so, debarment or suspension~~ was in accordance with the statutes,
17 regulations and the best interest of the government or any autonomous
18 agency or public corporation, and was fair. The Public Auditor shall
19 issue her or his decision within thirty (30) days of the completion of
20 the hearing on the issue.

21 (d) Appeal. ~~Any person receiving an adverse decision, including~~
22 ~~the Chief Procurement Officer, the Director of Public Works or the~~
23 ~~head of a purchasing agency, a person suspended or debarred, or a~~
24 ~~rejected petitioner, may appeal from a decision by the Public Auditor~~
25 ~~to the Superior Court of Guam under the waiver of sovereign~~
26 ~~immunity provided in § 5480(b) of this Chapter, way of writ of~~
27 review.

1
2 **Section 13.** §5706(b) of 5 GCA Chapter 5 Article 12 Procurement
3 Appeals is amended as follows:
4

5 **§ 5706(b).** Time Limitation on Filing an Appeal. The
6 aggrieved contractor shall file ~~his/her~~ an appeal with the Public
7 Auditor within sixty (60) days of the receipt of the decision or
8 within ~~sixty (60)~~ thirty (30) days following the failure to render a
9 timely decision as provided in § 5427(f) of this Chapter.
10

11 **Section 14.** §5707(a) of 5 GCA Chapter 5 Article 12 Procurement
12 Appeals is amended as follows:

13 **§ 5707(a).** Appeal. Any person receiving an adverse decision,
14 including the contractor, the a governmental body or purchasing
15 agency any autonomous agency or public corporation, or both,
16 may appeal from a decision by the Public Auditor to the Superior
17 Court of Guam as provided in ~~Article~~ Part D of Chapter Article 9
18 of this Chapter.

19 **Section 15.** §5708 of 5 GCA Chapter 5 Article 12 Procurement
20 Appeals is amended as follows:

21 **§ 5708. Discontinuance of Contractor's Appeal.**

22 It is the policy of this Act that procurement disputes be resolved
23 expeditiously, therefore, settlement agreements between the parties
24 are encouraged, and appeals by a protestor or by the Chief
25 Procurement Officer, the Director of Public Works or the head of the
26 Purchasing Agency may be settled by them, with or without prejudice,
27 except to the extent that the Public Auditor determines that such a

1 settlement would work an injustice on the integrity of the procurement
2 system and an unconscionable prejudice on an intervening party.
3 After notice of an appeal to the Public Auditor has been filed by the
4 Chief Procurement Officer, the Director of Public Works or the head
5 of the Purchasing Agency, a contractor may not unilaterally
6 discontinue such appeal without prejudice, except as authorized by the
7 Public Auditor.”

8

9 **Section 16.** Severability. *If* any provision of this law or its
10 application to any person or circumstance is found to be invalid or
11 contrary to law, such invalidity *shall not* affect other provisions or
12 applications of this law which can be given effect without the invalid
13 provisions or application, and to this end the provisions of this law are
14 severable.

15

16

17

I MINA'TRENTAI DOS NA LIHESLATURAN GUÅHAN
2014 (SECOND) Regular Session

Bill No. 224-32 (COR)

***As Substituted by the Committee on General Government
Operations and Cultural Affairs**

Introduced by:

T. C. Ada
R.J. Respicio

**AN ACT TO AMEND ARTICLE 9 AND ARTICLE 12 OF
CHAPTER 5, TITLE 5, THE GUAM CODE ANNOTATED
RELATIVE TO CLARIFYING LEGAL AND
CONTRACTUAL REMEDIES IN GUAM PROCUREMENT
LAW.**

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1. Findings and Intent.**

3 *I Liheslaturan Guåhan* finds that the procurement system is
4 intentionally created to “outsource” the real time policing of the
5 procurement process to the private sector by way of protests, and that
6 the only way procurement will remain effective is if the review process
7 is as expedited as the original procurement process.

8 *I Liheslaturan Guåhan* finds that there is a need for the prompt
9 issuance of decisions on protests related to solicitations or awards as
10 mandated by 5 GCA §5425(c) of the procurement law, and further
11 finds that the lack of a timely decision or other resolution of such
12 protests is a significant factor in prolonged procurement disputes,

1 *I Liheslaturan Guåhan* finds that a comprehensive review of the
2 administrative and judicial remedial scheme of the procurement law,
3 set out in Articles 9 and 12 of the Procurement Act (5 GCA Division 1,
4 Chapter 5) is appropriate and necessary to improve the efficiency and
5 efficacy of the administrative and judicial remedial scheme. *I*
6 *Liheslaturan Guahan* further finds that the general structure of the
7 remedial scheme is sound but in need of critical changes to achieve
8 this goal.

9 *I Liheslaturan Guahan* finds that an automatic stay should
10 take effect upon the timely filing of a protest and, unless lifted by
11 the appropriate determinations of necessity and substantial
12 interests as provided or a state of emergency has been declared by
13 the Governor of Guam, remain in effect until “final resolution of
14 such protest”, as stated in 5 GCA § 5425(g). However, the
15 Legislature is aware that the Court and Public Auditor have
16 rendered decisions that have refused to apply the automatic stay of
17 a contract which was awarded prior to a protest which was
18 otherwise timely. (See, *Guam Imaging Consultants v. GMHA*,
19 2004 Guam 15; *In the Appeal of Guam Publications*, Guam
20 Publications OPA-PA-08-00.) The Public Auditor has more
21 recently ruled that the automatic stay remains in effect until
22 final resolution of the protest, precluding any award of
23 contract or any performance under the awarded contract.
24 (See, *In the Appeal of JMI Edison*, OPA-PA-13-010, Order
25 Granting Motion Re Automatic Stay.) The Legislature
26 intends that the automatic stay provisions of § 5425(g) shall
27 apply to any protest timely filed under § 5425(a) until final

1 resolution of the protest, including expiration of all rights of
2 appeal.

3

4 *I Liheslaturan Guahan further finds* that the changes made by
5 the 18th Guam Legislature to remove jurisdiction under the
6 Procurement Act over monetary damage awards for contract
7 disputes, in deference to the Claims Act, has had the effect of
8 duplicating administrative review and extending the time for
9 resolution for such contract controversies, as recognized by the
10 Guam Supreme Court in the cases known as Pacific Rock I and
11 Pacific Rock II (see, *Pacific Rock v. Department of Education*, 2001
12 Guam 21). This Bill restores such jurisdiction and thereby waives
13 sovereign immunity for judicial review of contract dispute claims for
14 monetary damages arising under the Procurement Act. The
15 Legislature intends that the Claims Act shall not apply to contract
16 disputes which arise under cognizance of the Procurement Act.

17

18 *I Liheslaturan Guahan is mindful that the drafters of the ABA*
19 *Model Procurement Code have commented that “It is essential that*
20 *bidders, offerors, and contractors have confidence in the procedures*
21 *for soliciting and awarding contracts. This can best be assured by*
22 *allowing an aggrieved person to protest the solicitation, award, or*
23 *related decision.”* This bill is intended to engage the good faith
24 participation of private sector participants in the procurement process
25 to assure the efficacy and integrity of the procurement system, and to
26 establish an effective and expeditious resolution of the disputes that
27 participation invites.

1
2 **Section 2. §5425 of Chapter 5, Title 5, Guam Code Annotated is**
3 **hereby amended as follows:**

4
5 **§5425. ~~Authority to Resolve~~ Resolution of Protested Solicitations**
6 **and Awards.**

7
8 (a) Right to Protest. Any actual or prospective bidder, offeror,
9 or contractor who may be aggrieved in connection with the method
10 of source selection, solicitation or award of a contract, may protest to
11 the Chief Procurement Officer, the Director of Public Works or the
12 head of a purchasing agency. ~~The protest shall be submitted in~~
13 ~~writing within fourteen (14) days after such aggrieved person knows~~
14 ~~or should know of the facts giving rise thereto.~~ A protest made to the
15 office which issued a solicitation shall be deemed properly made.

16 (1) The protest shall be submitted in writing within fourteen
17 (14) days after such aggrieved person knows or should know of the
18 facts giving rise to the belief such person may be submitted.

19 (2) A person may reasonably be aggrieved if:

20 (i) there are facts sufficient to raise a reasonable
21 apprehension that the method of source selection, the
22 solicitation, or the award of a contract may be contrary to law or
23 regulation; and

24 (ii) there is a reasonable likelihood, based on information
25 available at the time of protest during the pre-submission or pre-
26 opening period, that such person would have been in a
27 competitive position to be awarded the contract.

28 (iii) notwithstanding such person's competitive position, the

1 protest of such person raises issues significant to the
2 procurement system or its integrity.

3 (3) The time limits specified for the resolution of disputes
4 arising under this Section, including any administrative and judicial
5 review provided in this Article 9, are not intended to be
6 jurisdictional, but shall be treated as a bar.

7
8 (b) Authority to Resolve Protests. Notwithstanding any other
9 provisions of law, the Chief Procurement Officer, the Director of
10 Public Works, the head of a purchasing agency, or a designee of one
11 of these officers shall have the authority, prior to the commencement
12 of an appeal to the Public Auditor or an action in court concerning
13 the controversy, to settle and resolve a protest of an aggrieved bidder,
14 offeror, or contractor, actual or prospective, concerning the
15 solicitation or award of a contract. This authority shall be exercised
16 in accordance with regulations promulgated by the Policy Office.
17 Regulations shall establish an objective means by which any time
18 limit established by this Article for the taking of any action,
19 administrative or judicial, shall be identified and tolled during any
20 period in which the parties are in good faith engaged to resolve and
21 settle any dispute arising under this Article.

22 (c) Decision. If the protest is not resolved by mutual agreement,
23 the Chief Procurement Officer, the Director of Public Works, the
24 head of a purchasing agency, or a designee of one of these officers
25 shall promptly issue a decision in writing accepting or rejecting the
26 protest, in whole or part. The decision shall:

1 (1) state the Government's understanding of the protest that
2 has been filed, and the factual and legal reasons for the action taken
3 decision made to accept or reject, in whole or in part; and

4 (2) state if the reason for rejecting the protest is that the
5 protest is untimely or that the protestor was not found to be
6 aggrieved and the reasons why the substantive arguments of the
7 protest, if any, are rejected; and

8 (3) ~~(2)~~ inform the protestant protestor that the decision of the
9 officer to whom the protest was made is final, and of it's the
10 protestor's right to administrative and judicial review.

11
12 (d) Notice of Decision. A copy of the decision under Subsection
13 (c) of this Section shall be mailed or otherwise furnished immediately
14 to the ~~protestant~~ protestor and any other prospective or interested
15 party intervening.

16
17 (e) Failure to Render Timely Decision. If the protestor does
18 not receive a decision of the protest as required under Subsection
19 (c) of this Section within twenty-one (21) days from the date of the
20 protest, the protestor may make a written request to the office
21 wherein the protest was made to render such a decision on the
22 protest. If no decision as required under Subsection (c) of this
23 Section is made and served upon the protestor within seven (7) days
24 after receipt of such written request, or within such longer period as
25 may be expressly and in writing agreed upon by the parties, then the
26 protest shall be deemed rejected. On any appeal from the rejection,

1 the government shall bear the burden of establishing that there was
2 good and sufficient reason to reject the protest based on evidence
3 that was known to it or should have been known to it at the time the
4 protest was rejected.

5
6 ~~(e)(f)~~ Appeal. A decision under Subsection (c) of this Section
7 including a decision there under regarding entitlement to costs as
8 provided by Subsection (h) of this Section, may be appealed by the
9 ~~protestant~~ protestor; to the Public Auditor within fifteen (15) days
10 after receipt by the ~~protestant~~ protestor of the notice of decision to
11 reject the protest, under Subsection (e) of this Section, may be
12 appealed by the protestor, to the Public Auditor, or within fifteen (15)
13 days after the date the protest is deemed rejected as provided in
14 Subsection ~~(e)~~(i) of this Section. If for any reason the Public Auditor
15 determines that he must disqualify himself from hearing the appeal,
16 the Presiding Judge of the Superior Court shall appoint a hearing
17 officer to proceed with the administrative hearing at the OPA level
18 under the OPA rules of procedure and budget. ~~Within fifteen (15)~~
19 days after receipt by the protestor of the notice of decision

20
21 ~~(f) Finality. A decision of the Public Auditor is final unless a~~
22 ~~person adversely affected by the decision commences an action in the~~
23 ~~Superior Court in accordance with Subsection (a) of §5480 of this~~
24 ~~Chapter.~~

25
26 (g) In the event of a timely protest under Subsection (a) of this
27 Section ~~or under Subsection (a) of § 5480 of this Chapter,~~ the

1 Territory shall not proceed further with the solicitation, ~~or with the~~
2 award, or performance of the contract prior to the time allowed to
3 appeal from, or the final resolution of, such protest, and any such
4 further action is void, unless:

5 (1)The Chief Procurement Officer or the Director of Public
6 Works, ~~after consultation with and~~ written concurrence of the head
7 of the using or purchasing agency and the Attorney General or
8 designated Deputy Attorney General, then makes a written
9 determination that the award of the contract without delay is
10 necessary to protect substantial interests of the Territory, or the
11 Governor then issues a Declaration of Emergency Procurement as
12 authorized by § 5215 of this Chapter; and

13 (2) ~~Absent a declaration of emergency procurement by the~~
14 ~~Governor,~~ the protestant protestor has been given a written at least
15 two (2) days notice of the determination of necessity and substantial
16 interest or Declaration of Emergency by the Governor (exclusive of
17 territorial holidays); and

18 (3) In any pending appeal of the protest before the Public
19 Auditor or the Court, or in any such appeal filed within two (2)
20 days after the notice specified in subsection (2), the Public Auditor
21 or the Court has confirmed the validity of such determination of
22 necessity and substantial interest or Declaration of Emergency
23 Procurement as authorized by § 5215 of this Chapter in an
24 expedited hearing, noticed to all interested parties, held to
25 determine whether to confirm any such determination or
26 Declaration.

1 (4) The two (2) days specified in subsection (3) shall be
2 determined as provided in 1 GCA § 1004. ~~(3) If the protest is~~
3 ~~pending before the Public Auditor or the Court, the Public Auditor~~
4 ~~or Court has confirmed the validity of such determination, or if no~~
5 ~~such protest is pending, no protest to the Public Auditor of such~~
6 ~~determination is filed prior to expiration of the two (2) day period~~
7 ~~specified in Item (2) of Subsection (g) of this Section;~~

8
9 (h) Entitlement to Costs. In addition to any other relief or
10 remedy granted under Subsection (c) or (e) of this Section or under
11 Subsection (a) of § 5480 of this Chapter, including the remedies
12 provided by Part B of Article 9 of this Chapter, when a protest is
13 sustained, the ~~protestant~~ protestor shall be entitled to the reasonable
14 costs incurred in connection with the solicitation and protest,
15 including bid preparation costs, excluding attorney's fees, if:

16
17 (1) the ~~protestant~~ protestor should have been awarded the
18 contract under the solicitation but was not; or

19
20 (2) there is a reasonable likelihood that the ~~protestant~~ protestor
21 may have been awarded the contract but for the breach of any
22 ethical obligation imposed by Part B of Article 11 of this Chapter or
23 the willful or reckless violation of any applicable procurement law
24 or regulation.

25
26 (3) The Public Auditor shall have the power to assess

1 reasonable costs including reasonable attorney fees incurred by the
2 government, including its autonomous agencies and public
3 corporations, or any protestor or interested party against a
4 ~~protestant upon its finding that the~~ any party, including the
5 government, making a the protest, motion or taking any position
6 bringing any action was made fraudulently, frivolously or solely
7 with predominant intent to delay or disrupt the procurement
8 process.

9
10 (i) Finality. A decision of the Public Auditor is final unless a
11 person adversely affected by the decision commences an appeal in
12 the Superior Court as provided by §5707(a) of this Chapter and in
13 accordance with the waiver of sovereign immunity conferred by
14 Subsection (a) of §5480 of this Chapter.

15
16 **Section 3. §5426 of Chapter 5, Title 5, Guam Code Annotated is**
17 **hereby amended as follows:**

18
19 **§ 5426. Authority to Debar or Suspend.**

20 (a) Authority. After reasonable notice to the person involved and
21 reasonable opportunity for that person to be heard, the Chief
22 Procurement Officer, the Director of Public Works or the head of a
23 purchasing agency, after consultation with the using agency and the
24 Attorney General, shall have authority to debar a person for cause, or
25 to suspend a person for probable cause, from consideration for award
26 of contracts. The debarment shall not be for a period of more than
27 two (2) years. ~~The same officer, after consultation with the using~~

1 ~~agency and the Attorney General, shall have authority to suspend a~~
2 ~~person from consideration for award of contracts if there is probable~~
3 ~~cause for debarment.~~ The suspension shall not be for a period
4 exceeding three (3) months. The authority to debar or suspend shall
5 be exercised in accordance with regulations promulgated by the
6 Policy Office.

7
8 (b) Causes for Debarment or Suspension. The causes for
9 debarment or suspension include the following:

10
11 (1) conviction for commission of a criminal offense as an
12 incident to obtaining or attempting to obtain a private contract or
13 subcontract, or in the performance of such contract or subcontract;

14
15 (2) conviction under territorial or federal statutes of
16 embezzlement, theft, forgery, bribery, falsification or destruction of
17 records, receiving stolen property, or any other offense indicating a
18 lack of business integrity or business honesty which currently,
19 seriously and directly affects responsibility as a territorial
20 contractor;

21
22 (3) conviction under federal antitrust statutes arising out of the
23 submission of bids or proposals;

24
25 (4) violation of contract provisions, as set forth below, of a
26 character which is regarded by the Chief Procurement Officer, the
27 Director of Public Works or the head of a purchasing agency to be

1 so serious as to justify debarment action:

2
3 (~~A~~)i. deliberate failure without good cause to perform in
4 accordance with the specifications or within the time limit
5 provided in the contract; or

6
7 (~~B~~)ii. a recent record of failure to perform or of
8 unsatisfactory performance in accordance with the terms of one
9 or more procurement contracts, provided, that failure to perform
10 or unsatisfactory performance caused by acts beyond the control
11 of the contractor shall not be considered to be a basis for
12 debarment; or

13
14 iii. upon a finding of the Department of Labor, failure to
15 pay employees engaged on the contract in violation of Wage
16 Determination law or contract conditions.

17
18 (5) any other cause the Chief Procurement Officer, the
19 Director of Public Works or the head of a purchasing agency
20 determines to be so serious and compelling as to affect
21 responsibility as a territorial contractor, including debarment by
22 another governmental entity for any cause listed in regulations of
23 the Policy Office;

24
25 (6) for violation of the ethical standards set forth in Article 11
26 of this Chapter.

27

1 (7) filing a frivolous or fraudulent petition, protest or appeal
2 under § 5425(e), § 5426~~(f)~~(e) or of § 5427(e) of this Chapter.

3
4 (c) Decision. The Chief Procurement Officer, the Director of
5 Public Works or the head of a purchasing agency shall issue a written
6 decision to debar or suspend or to reject any petition to do so brought
7 under Subsection (f) of this Section. The decision shall:

8
9 (1) state the reasons for the ~~action taken~~ decision made; and

10
11 (2) inform the debarred or suspended person involved, or any
12 person whose petition is rejected, of its rights to judicial or
13 administrative review as provided in this Chapter.

14
15 (d) Notice of Decision. A copy of the decision under Subsection
16 (c) of this Section shall be mailed or otherwise furnished immediately
17 to the debarred or suspended person and any other party intervening
18 or petitioning, and the head of all governmental bodies or purchasing
19 agencies.

20
21 (e) Finality of Decision. A decision under Subsections (c) or (f)
22 of this Section shall be final and conclusive, unless fraudulent, or an
23 appeal is taken to the Public Auditor in accordance with § 5706 of
24 this Chapter. Such a decision shall be automatically stayed during
25 the pendency of any appeal, but any such appeal does not preclude
26 nor require a determination of non-responsibility in any solicitation
27 in which the person charged may participate. The officer issuing

1 such decision shall immediately notify all persons, governmental
2 bodies and purchasing agencies of the fact and effect of such appeal.

3
4 (f) Any member of the public, including bidder, offeror or
5 contractor as well as any elected official or employee of the
6 government, may petition the Chief Procurement Officer, the
7 Director of Public Works or the head of a purchasing agency to take
8 action to debar or suspend pursuant to Subsection (a) of this Section.
9 Immediately upon the receipt of such a petition, the person petitioned
10 shall cause ~~An an investigation of each petition shall to~~ be conducted
11 and hold a hearing as authorized in Subsection (a) ~~promptly and a~~
12 ~~writ ten report should be made of findings of fact and action taken~~
13 and issue a decision as required in Subsection (c). If the petitioned
14 officer does not issue the written decision required under Subsection
15 (c) of this Section within sixty (60) days after written request by the
16 petitioner for a final decision, then the petitioner may proceed with
17 an appeal to the Public Auditor as if a the petition had been rejected.

18
19 **Section 4. §5427 of Chapter 5, Title 5, Guam Code Annotated is**
20 **hereby amended as follows:**

21 **§ 5427. Authority to Resolve Contract and Breach of Contract**
22 **Controversies**

23 (a) Applicability. This Section applies to controversies between
24 the Territory and a contractor and which arise under, or by virtue of,
25 a procurement contract between them, as evidenced by the written
26 demand of either party to the other for redress of a particularized
27 claim or controversy. This includes without limitation controversies

1 based upon breach of contract, mistake, misrepresentation, or other
2 cause for contract damages, modification or rescission.

3
4 (b) Authority. The Chief Procurement Officer, the Director of
5 Public Works, the head of a purchasing agency, or a designee of one
6 of these officers is authorized, prior to commencement of an action in
7 a court concerning the controversy, to settle and resolve a
8 controversy described in Subsection (a) of this Section. This
9 authority shall be exercised in accordance with regulations
10 promulgated by the Policy Office.

11
12 (c) Decision. If such a controversy is not resolved by mutual
13 agreement, the Chief Procurement Officer, the Director of Public
14 Works, the head of a purchasing agency, or the designee of one of
15 these officers shall promptly issue a decision in writing. The decision
16 shall:

17
18 (1) state the reasons for the ~~action taken~~ decision made; and

19
20 (2) state the liquidated amount of damages, if any, determined
21 to be payable to the contractor, with the concurrence of the
22 Attorney General, regardless whether the contractor accepts said
23 sum in mutual settlement of the controversy; and

24
25 ~~(2)~~(3) inform the contractor of its rights to judicial or
26 administrative review as provided in this Chapter.

27

1 (d) Notice of Decision. A copy of the decision under Subsection
2 (c) of this Section shall be mailed or otherwise furnished immediately
3 to the contractor.

4
5 (e) Finality of Decision. The decision reached pursuant to
6 Subsection (c) of this Section shall be final and conclusive, unless
7 fraudulent, or the contractor appeals administratively to the Public
8 Auditor in accordance with § 5706 of this Chapter.

9
10 (f) Failure to Render Timely Decision. If the Chief
11 Procurement Officer, the Director of Public Works, the head of a
12 purchasing agency, or the designee of one of these officers does not
13 issue the written decision required under Subsection (c) of this
14 Section within sixty (60) days after written request for a final
15 decision, or within such longer period as may be agreed upon by the
16 parties, then the contractor may proceed as if an adverse decision had
17 been received. If no decision is issued and no action is taken by the
18 contractor to request a final decision, within two (2) years from the
19 date the contract controversy arose, any claim or action thereon shall
20 be barred.

21
22 **Section 5. §5450 of Chapter 5, Title 5, Guam Code Annotated is**
23 **hereby amended as follows:**

24
25 **§ 5450. Applicability of this Part.**

26 The provisions of this Part only apply where it is determined
27 administratively, or upon administrative or judicial review, that a

1 solicitation or award of a contract is in violation of law, and are in
2 addition to any other remedy or relief allowed by law or equity.

3
4 **Section 6. §5452 of Chapter 5, Title 5, Guam Code Annotated is**
5 **hereby amended as follows:**

6
7 **§ 5452. Remedies After an Award.**

8 ~~(a)~~ If after an award it is determined that a solicitation or award of a
9 contract is in violation of law, then:

10
11 ~~(1)(a)~~ if the person awarded the contract has not acted
12 fraudulently or in bad faith:

13
14 ~~(A)(1)~~ the contract may be ratified and affirmed, provided it is
15 determined that doing so is in the best interests of the Territory; or

16
17 ~~(B)(2)~~ the contract may be terminated and the person awarded
18 the contract shall be compensated for the actual expenses
19 reasonably incurred under the contract, plus a reasonable profit,
20 prior to the termination.

21
22 ~~(1)(b)~~ if the person awarded the contract has acted fraudulently
23 or in bad faith:

24
25 ~~(A)(1)~~ the contract may be declared null and void; or

26
27 ~~(B)(2)~~ the contract may be ratified and affirmed if such action

1 is in the best interests of the Territory, without prejudice to the
2 Territory's rights to such damages as may be appropriate.

3
4 (c) In either case, the determination to ratify or affirm the
5 contract shall be made without regard to the position of the person
6 awarded the contract and shall conclusively admit violation of law.

7
8 (b) This Section shall be read as being in addition to and not in
9 conflict with, or repealing 4 GCA § 4137 (Prohibitions on the
10 Activities of Government Employees).

11
12 **Section 7. §5480 of Chapter 5, Title 5, Guam Code Annotated is**
13 **hereby amended as follows:**

14 **§ 5480. Waiver of Sovereign Immunity by Grant of Jurisdiction**
15 **in Connection with Contracts Controversies Arising Under Part A**
16 **of this Article.**

17 (a) Solicitation and Award of Contracts. The Superior Court of
18 Guam shall have jurisdiction ~~over an action between the Territory~~
19 ~~and a bidder, offeror, or contractor, either actual or prospective, to~~
20 ~~determine whether a solicitation or award of a contract is in~~
21 ~~accordance with the statutes, regulations, and the terms and~~
22 ~~conditions of the solicitation to review any administrative decision of~~
23 ~~the public auditor~~ or determination arising under §5425 of this
24 Chapter, whether brought pursuant to §5707 of this Chapter after
25 appeal to the Public Auditor. The Superior Court shall have such
26 jurisdiction in actions at law or in equity, and whether the actions are
27 for monetary damages or for injunctive, declaratory, or other

1 equitable relief, and whether the matter is procedural or substantive
2 in nature.

3 (b) Debarment or Suspension. The Superior Court shall have
4 ~~jurisdiction over an action between the Territory and~~ to review any
5 decision of the Public Auditor brought pursuant to § 5705 of this
6 Chapter ~~a person who is subject to a suspension or debarment~~
7 ~~proceeding, to determine whether~~ concerning the debarment or
8 suspension or rejection of a petition to debar or suspend, is in
9 accordance with ~~the statutes~~ §5426 and §5705 of this Chapter and
10 relevant statutes and regulations. The Superior Court shall have such
11 jurisdiction, in actions at law or in equity, and whether the actions are
12 for injunctive, declaratory, or other equitable relief.

13
14 (c) ~~In addition to other relief and remedies, the Superior Court~~
15 ~~shall have jurisdiction to grant injunctive relief in any action brought~~
16 ~~under Subsections (a), or (b) or (c) of this Section.~~ Actions Under
17 Contract or for Breach of Contract. The Superior Court shall have
18 jurisdiction over an action between the Territory and a contractor,
19 brought after review of the Public Auditor in accordance with § 5706
20 of this Chapter, for any cause of action which arises under, or by
21 virtue of, the contract, whether the action is at law or equity, whether
22 the action is on contract or for breach of contract, and whether the
23 action is for monetary damages or injunctive, declaratory or other
24 equitable relief.

25
26 (d) Limited Finality for Administrative Determinations. In any
27 judicial action under this Section, factual or legal determinations by

1 employees, agents or other persons appointed by the Territory shall
2 have no finality and shall not be conclusive, notwithstanding any
3 contract provision, or regulation, except to the extent provided in §§
4 ~~5245, 5705 and 5706~~ and in Article 12 of this Chapter. In the event
5 any judicial action arises under Subsection (a) of this Section, the
6 Superior Court shall have such jurisdiction and authority of the
7 Public Auditor as is specified in §§ 5703 and 5704 of this Chapter.

8
9 (e) ~~For purposes of this Section a “prospective” bidder,~~
10 ~~contractor or offeror is one who will actually submit a bid, contract~~
11 ~~or otherwise offer his services if, in the actions permitted by this~~
12 ~~Section, such person would prevail.~~ Exhaustion of Administrative
13 Remedies. No action shall be brought under any provision of this
14 Section until all administrative remedies provided in this Chapter
15 under Part A of Article 9 and Article 12 have been exhausted.

16
17 (f) ~~All actions permitted by this Article shall be conducted as~~
18 ~~provided in the Government Claims Act.~~ Form of Action Under §
19 5480(a). All actions and appeals permitted by Subsection (a) of this
20 Section shall be treated as special proceedings for expeditious review
21 of the administrative decision below, and may be brought by way of
22 or treated as a writ of review however captioned.

23
24 (g) Expedited Review of Appeals Under § 5480(a). Except as to
25 criminal cases and such other cases of compelling importance as
26 determined by the Presiding Judge of the Superior Court, proceedings
27 before the Superior Court, as authorized by Subsection (a) of this

1 Section, and appeals therefrom, take precedence over all cases and
2 shall be assigned for hearing and trial or for argument at the earliest
3 practicable date and expedited in every way. The times for
4 responsive pleadings and for hearings in these proceedings shall be
5 set by the judge of the Court with the object of securing a decision as
6 to these matters at the earliest possible time.

7
8 **Section 8. §5481 of Chapter 5, Title 5, Guam Code Annotated is**
9 **hereby amended as follows:**

10
11 **“§ 5481. Time Limitations on Actions.**

12
13 (a) Protested Solicitations and Awards. Any action under §
14 5480(a) of this Chapter shall be initiated within fourteen (14) days
15 after receipt of a final administrative decision.

16
17 (b) Debarments and Suspensions for Cause. Any action under §
18 5480(b) of this Chapter shall be commenced within six (6) months
19 after receipt of the decision of the Policy Office under § 5651 of this
20 Chapter, or the decision of the ~~Procurement Appeals Board~~ Public
21 Auditor under § ~~5707~~ 5705 of this Chapter, whichever is applicable.

22
23 (c) Actions Under Contracts or for Breach of Contract. Any
24 action commenced under 5480(c) of this Chapter shall be
25 commenced within twelve (12) months after the date of the
26 ~~Procurement Appeals Board~~ Public Auditor's decision.

27

1 (d) The limitations on actions provided by this Section are tolled
2 during the pendency of any proceeding brought pursuant to § 5485 of
3 this Chapter.”

4
5 **Section 9. §5485(a) of Chapter 5, Title 5, Guam Code Annotated is**
6 **hereby amended as follows:**

7 **“§ 5485(a). Complaints that Procurement Data was Withheld.**

8 (a) On complaint by any member of the public, the Superior
9 Court has jurisdiction to enjoin a governmental body from
10 withholding procurement data and to order the production of any
11 government data improperly withheld from the complainant. In such
12 a case, the court shall determine the matter *de novo*, and may
13 examine the contents of such procurement data in camera to
14 determine whether such records or any part thereof shall be withheld
15 under any of the exceptions set forth in 6-GCA-§-4202 this Chapter
16 and, to the extent not inconsistent, Title 5, Chapter 10, Guam Code
17 Annotated and the burden is on the agency to sustain its action.”

18
19 **Section 10. §5485(b) of Chapter 5, Title 5, Guam Code Annotated**
20 **is hereby amended as follows:**

21 “(b) Notwithstanding any other provision of law, the government
22 or a governmental body shall serve an answer or otherwise plead to
23 any complaint made under this Section within thirty (30) days after
24 service of the pleading in which such complaint is made, unless the
25 court otherwise directs, for good cause shown.”

26
27 **Section 11. §5703 of Chapter 5, Title 5, Guam Code Annotated is**

1 **hereby amended as follows:**

2 **“§ 5703. Jurisdiction of the Public Auditor.**

3 The Public Auditor shall have the power to review and
4 determine de novo any matter properly submitted to her or him. The
5 Public Auditor shall not have jurisdiction over disputes having to do
6 with money owed to or by the government of Guam except as
7 authorized under §§ 5427 and 5706 of this Chapter. Notwithstanding
8 § 5245 of this Chapter, no prior determination shall be final or
9 conclusive on the Public Auditor or upon any appeal from the Public
10 Auditor. The Public Auditor shall have the power to compel
11 attendance and testimony of, and production of documents by any
12 employee of the government of Guam, including any employee of any
13 autonomous agency or public corporation. The Public Auditor may
14 consider testimony and evidence submitted by any competing bidder,
15 offeror or contractor of the protestant. The Public Auditor’s
16 jurisdiction shall be utilized to promote the integrity of the
17 procurement process and the purposes of 5 GCA Chapter 5.”

18

19 **Section 12. §5705 of Chapter 5, Title 5, Guam Code Annotated is**
20 **hereby amended to read as follows:**

21 **“§ 5705. Suspension or Debarment Proceedings.**

22 (a) Scope. This § 5705 applies to a review by the Public Auditor
23 of a decision under § 5426(c) or (f) of this Chapter.

24 (b) Time Limitation on Filing an Appeal. The aggrieved person
25 receiving an adverse decision under Subsection (c) or (f) of § 5426 of
26 this Chapter, including a person suspended or debarred or a rejected
27 petitioner, shall file his/her an appeal with the Public Auditor within

1 ~~sixty (60)~~ thirty (30) days from the date of the receipt of a decision or
2 the date a petition is deemed rejected under Subsection (e) of § 5426
3 ~~of this Chapter.~~

4 (c) Decision. The Public Auditor shall decide whether, or the
5 extent to which, the decision to debar or suspend, or reject a petition
6 to do so, debarment or suspension was in accordance with the statutes,
7 regulations and the best interest of the government or any autonomous
8 agency or public corporation, and was fair. The Public Auditor shall
9 issue her or his decision within thirty (30) days of the completion of
10 the hearing on the issue.

11 (d) Appeal. Any person receiving an adverse decision, including
12 the Chief Procurement Officer, the Director of Public Works or the
13 head of a purchasing agency, a person suspended or debarred, or a
14 rejected petitioner, may appeal from a decision by the Public Auditor
15 to the Superior Court of Guam under the waiver of sovereign
16 immunity provided in § 5480(b) of this Chapter, way of writ of
17 review.”

18
19 **Section 13. §5706(b) of Chapter 5, Title 5, Guam Code Annotated**
20 **is hereby amended as follows:**

21 “§ 5706(b). Time Limitation on Filing an Appeal. The
22 aggrieved contractor shall file his/her an appeal with the Public
23 Auditor within sixty (60) days of the receipt of the decision or
24 within ~~sixty (60)~~ thirty (30) days following the failure to render a
25 timely decision as provided in § 5427(f) of this Chapter.”

26
27 **Section 14. §5707(a) of Chapter 5, Title 5, Guam Code Annotated**

1 **is hereby amended to read as follows:**

2 “§ 5707(a). Appeal. Any person receiving an adverse
3 decision, including the contractor, the a governmental body or
4 purchasing agency any autonomous agency or public corporation,
5 or both, may appeal from a decision by the Public Auditor to the
6 Superior Court of Guam as provided in ~~Article~~ Part D of Chapter
7 Article 9 of this Chapter.”

8
9 **Section 15. §5708 of 5 GCA Chapter 5 Article 12 Procurement**
10 **Appeals is amended as follows:**

11 **“§ 5708. Discontinuance of Contractor’s Appeal.**

12 It is the policy of this Act that procurement disputes be resolved
13 expeditiously, therefore, settlement agreements between the parties
14 are encouraged, and appeals by a protestor or by the Chief
15 Procurement Officer, the Director of Public Works or the head of the
16 Purchasing Agency may be settled by them, with or without prejudice,
17 except to the extent that the Public Auditor determines that such a
18 settlement would work an injustice on the integrity of the procurement
19 system and an unconscionable prejudice on an intervening party.
20 After notice of an appeal to the Public Auditor has been filed by the
21 Chief Procurement Officer, the Director of Public Works or the head
22 of the Purchasing Agency, a contractor may not unilaterally
23 discontinue such appeal without prejudice, except as authorized by the
24 Public Auditor.”

25
26 **Section 16. Severability.** *If* any provision of this law or its
27 application to any person or circumstance is found to be invalid or

1 contrary to law, such invalidity *shall not* affect other provisions or
2 applications of this law which can be given effect without the invalid
3 provisions or application, and to this end the provisions of this law are
4 severable.



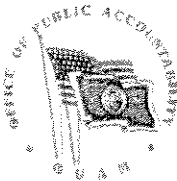
PUBLIC HEARING SIGN-IN SHEET

Friday, December 13, 2013 - 2:00PM

I Liheslatura • Public Hearing Room • Hagatna, Guam

Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend §5425, §5426, §5427, §5450, §5452, §5480, §5481, §5485(a) and §5485(b) of Article 9, and §5703, §5705, §5706(b), §5707(a), and §5708 of Article 12, Chapter 5, Title 5 of the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.

NAME	AGENCY OR ORGANIZATION	POSITION		TESTIMONY		PHONE NO.	EMAIL ADDRESS
		SUPPORT	OPPOSE	WRITTEN	ORAL		
JAMES BROWN	SECT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	477-293	jamesbrown@gmail.com gu
Thomas J. F. Ch	F. Ch & Associates	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	472-1131	thomas91910@yahoo
Jessica Toft	Robert Montoya LLP	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	646-2001	jt@Cmlaw.us
DORIS FLORES BROOKS	OPA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	475-0390	DFBROOKS@GOV.GU OPA. G.
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OFFICE OF PUBLIC ACCOUNTABILITY

Doris Flores Brooks, CPA, CGFM

Public Auditor

December 13, 2013

Committee on General Government
Operations and Cultural Affairs
32nd Guam Legislature
155 Hesler Place
Hagåtña, Guam, 96910

**RE: Written Testimony on behalf of the Office of Public Accountability (OPA) on
Bill No. 224-32 (COR)**

Hafa Adai Senators:

The Office of Public Accountability (OPA) applauds the Guam Legislature's continuous efforts to improve Guam's Procurement Laws. Ideally, amending Guam's Procurement Laws and Regulations should be a collaborative effort wherein all of Guam's Procurement Stakeholders, including representatives from the private and public sectors, provide their input, negotiate, compromise, and express their agreement in a bill, that if passed, will give our island a more efficient, transparent, and fair procurement system. P.L. 31-93 attempted to do this by creating a Procurement Advisory Council. Unfortunately, despite the creation of this council, the government's appointments to it, and its active review of the Guam's Procurement Laws and Regulations, input from the council is not present in Bill 224-32(COR) due to the great amount of time it is taking the council to make recommendations on what amendments are necessary to improve Guam's Procurement Laws and Regulations. However, time is not a commodity the People of Guam have and that some amendments are needed now to mitigate serious and persistent problems troubling our procurement system. Hence, bills such as Bill 224-32(COR) are necessary to fill the void that will exist until the Procurement Advisory Council steadily gains more traction and increases the speed at which it develops its recommendations.

Bill 224-32(COR) identifies potent problem areas in Guam's Procurement Law. It contains some fair solutions to these problems that deserve further discussion and acceptance by Guam's Procurement Stakeholders. The following are the OPA's comments on some of these problems and the OPA's recommended amendments to Bill 224-32(COR), which the OPA believes, will improve Bill 224-32.

1. Regulations. Although Bill 224-32 proposes amendments to the procurement laws, there are no proposed amendments to Guam's Procurement Regulations which almost mirror Guam's Procurement Laws. Without amending Guam's Procurement Regulations via Public Law, said regulations will not be amended to ensure they are consistent with Bill 224-32's amendments to Guam's Procurement Law. Currently, amendments to Guam's Procurement Regulations are impossible without action by the Guam Legislature. Only the Procurement Policy Office has the authority to promulgate regulations governing the procurement, management, control, and disposal of any and all supplies, services, and construction to be procured by the Government of Guam. See 5 G.C.A. §5102. The Procurement Policy Office is supposed to be part of the Office of the Governor and consist of three (3) Government of Guam employees appointed by the Governor. However, since the enactment of Guam's Procurement Laws in 1983, said Procurement Policy Office has never been appointed resulting in procurement regulations that have not been updated since they were enacted in 1983 with Guam's original Procurement Laws.

To resolve this issue, the Guam Legislature should include the same amendments it is making to Guam Procurement Laws in the Guam Procurement Regulations that are affected. If this is not possible, the OPA or the Attorney General's office should be given the task of amending the Guam Procurement Regulations to ensure they keep up with amendments to Guam Procurement Laws. To achieve the latter goal, 5 G.C.A. §5101 and §5102, creating the Procurement Policy Office, should be repealed, and 5 G.C.A. §5130 by replacing the term "Policy Office" with the term "OPA" or "Attorney General" in that statute, and other statute where the term "Policy Office" is used.

2. Amendments to 5 G.C.A. §5425. The amendments to 5 G.C.A. §5425 as set forth in Section 2 of Bill 224-32 (COR) require certain amendments:

a. The tolling provisions on Lines 6-10, Page 4, should be deleted to ensure an expeditious resolution of a protest at the agency level. Allowing the agencies to engage in protracted settlement negotiations will not ensure they will issue timely protest decisions nor will it result in achieving a faster final resolution of protests.

b. The proposed amendments to 5 G.C.A. §5425(e), found on Lines 5-14, Page 5 should be amended to ensure an expeditious resolution of a protest at the agency level. A Purchasing Agency should issue a decision of a protest no later than thirty (30) days after receiving a protest. If a Purchasing Agency fails to meet this deadline, the protest should be deemed denied as a matter of law, and the protestor should then have fifteen (15) days to file an appeal of the Office of Public Accountability. Additionally, a protest should not be deemed admitted if unanswered because it would allow the Purchasing Agency to avoid the constraints imposed by Guam's Procurement Law and Regulations.

Based on the foregoing, 5 G.C.A. §5425(e) should be amended to read:

(e) Failure to Render Timely Decision. If the protestor does not receive a decision on the protest as required under Subsection (c) of this Section within thirty (30) days from the date of the protest, the failure to issue a decision within the foregoing time period shall be deemed a decision denying the protest and the fifteen (15) day period for the protestor to file an appeal shall begin immediately after such automatic denial of the protest.

c. An Amendment to Subsection (e) as set forth in paragraph b. above, would require the language of Subsection (f), as found on Line 16, Page 5, thru Line 2, Page 6, to be amended by the deletion of the language: "...and a decision deemed admitted under Subsection (e) of this Section may be appealed by the office to which the protest was made, to the Public Auditor, within fifteen (15) days after the date the protest is deemed admitted." as found in Lines 21-24, Page 5.

d. The language: "If for any reason the Public Auditor is determined to be disqualified to hear such an appeal, a decision under Subsection (c) of this Section may be appealed directly to the Superior Court in accordance with Subsection (a) of §5480 of this Chapter," in Line 26, Page 5 thru Line 2, Page 6, should be deleted. The Public Auditor should be the person who determines whether she is disqualified and not the Purchasing Agency or the Protestor.

e. Line 8-9, Page 8, should be amended by the deletion of the language: "including the government," to ensure that the costs of protests are minimized, the Government should not be assessed the attorney fees of a protestor, even if the protestor is another government agency.

f. The word: "appeal" in Line 15, Page 8, should be replaced with "Action for Judicial Review," because the function of the Superior Court is to review the administrative decisions of the Public Auditor on appeals of Procurement Protests, Debarments and Suspensions, and Contract Controversies.

4. Amendments to 5 G.C.A. §5426. The language: "The officer issuing such decision shall immediately notify all persons, governmental bodies and purchasing agencies of the fact and effect of such appeal," in the proposed amendment to Subsection (e), Lines 4-6, Page 12, should be deleted. If a contractor is barred or suspended from procurement and files an appeal, it should be such contractor's responsibility to notify the purchasing agency where such contractor responds to a solicitation of such appeal and not the Purchasing Agency that is involved in the appeal.

5. Amendments to 5 G.C.A. §5452. The language: "and shall conclusively admit violation of law" in the proposed amendment to Subsection (c), Line 10, Page 16 should be deleted. Requiring a contractor to admit a contract violates law may violate a contractor's Constitutional right to remain silent.

6. Amendments to 5 G.C.A. §5480. The amendments to 5 G.C.A. §5480 as set forth in Section 7 of Bill 224-32 (COR) require the following amendments:

a. Subsection (a) Line 26 -27, Page 16, should be amended to read: “to review any administrative decision of the Public Auditor.” This language is necessary to prevent a protestor from filing an appeal to the Superior Court prior to the Public Auditor rendering a decision on the appeal.

b. The language: “...or brought in the absence of the qualification of the Public Auditor to hear an appeal under §5425(f) of this Chapter,; should be deleted from Subsection (a), Lines 2-4, Page 17. As stated above, the Public Auditor should be the person who decides whether she is disqualified from a case. Further protestors should not be allowed to file appeals directly to the Superior Court of Guam until after the Public Auditor has rendered a decision on the protest.

c. The language: “...and may be brought by way of or treated as a writ of review however captioned,” should be deleted from Lines 1-2, Page 19. Pursuant to 7 G.C.A. §31102, a Writ of Review may only be granted if the petitioner has no appeal, and there is no plain, speedy, or adequate remedy of law. Further, a Writ of Review is limited to determining whether a government official was acting within their jurisdictional authority. Here, 5 G.C.A. §5480 gives a protestor a plain, speedy, and adequate remedy of law, that is the right to file an action for Judicial Review of the Public Auditor’s decision. Further, the Public Auditor’s jurisdiction is seldom an issue, the merits of the Public Auditor’s administrative decision is the usual subject of a Court’s Judicial Review. Hence, allowing a Writ of Review will provide no relief to a protestor seeking Judicial Review of a Public Auditor decision.

d. The language: “absent a compelling cause or unfair prejudice,” in Line 21-21, Page 19, and the language: “..including a decision of disqualification of the Public Auditor in accordance with §5425(f) of this Chapter,” in Line 22-23 should be deleted. The fourteen (14) day deadline for a protestor to file an action seeking judicial review of a Public Auditor decision should be preserved to ensure the expeditious resolution of protests. Further, as stated above, the Public Auditor should be the person who decides whether she is disqualified. Whatever her decision, the protestor, purchasing agency, or other interested party can file an action for judicial review of that decision.

e. Subsection (c), Lines 4-7, Page 20, should be amended by reducing the deadline for a contractor to file an action for judicial review of a Public Auditor decision regarding a Contract Controversy from twelve (12) months to thirty (30) days. This is necessary to ensure the expeditious resolution of contract controversies.

The foregoing are the substantial amendments recommended prior to the passage of Bill 224-32 (COR). Thank you for your time and consideration. Please contact me if you have any questions.

Senseramente,

A handwritten signature in black ink, appearing to read 'D. Brooks', written in a cursive style.

DORIS FLORES BROOKS, CPA, CGFM
Public Auditor

JOHN THOS. BROWN
ATTORNEY AT LAW *

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Hon. Benjamin B.F. Cruz, Chair, Committee on General Government Operations
and Cultural Affairs

Hon. Senator Thomas C. Ada, Sponsor

Hon. Senator Rory J. Respicio, Sponsor

RE: Bill 224-32 (COR) pertaining to reform of Articles 9 and 12,
Title 5, Chapt. 5, Guam Code Annotated

Senators,

I support Bill 224-32, which seeks to bring together a comprehensive and coordinated reform of Articles 9 and 12 of the Procurement Act. These articles, integrated as they are together, establish the review authority for all agency, administrative and judicial review of the three controversies arising under the procurement law: controversies regarding solicitations and award of procurement contracts, actions and petitions to suspend or debar persons from contracting with the government, and controversies regarding post-award contract disputes.

The seminal Procurement Act was PL 16-124, which created the structure and basis upon which our procurement law today is founded. That law identified the three controversies which are revisited in this Bill. The controversies have previously been affected by amendments, the most significant being the creation of administrative review of agency decisions arising from the controversies. It was not until 2005, however, that administrative review was made effective and accessible by transfer of administrative review authority to the Office of Public Accountability in PL 28-068.

With an effective and accessible administrative review process, a few things became apparent. First, it encouraged the private sector to engage the arduous protest process, which in turn opened the window on the theretofore opaque if not smoke filled rooms wherein a mysterious contract award process took place.

* Admitted to Practice: California, Guam and Commonwealth of Northern Mariana Islands, USA [Inactive in NSW, Australia]*

[†] Micronesian Brokers, Inc. (Guam and CNMI)/Town House Department Stores, Inc. (Guam)/J&G Distributors/Aquarius Beach Towers, (Saipan, CNMI)/Livno Holdings PTY LTD (A.C.N. 003 585 331)/Townhouse, Inc. (Saipan, CNMI)/ IBSS (Guam and Saipan)

At last, we had real time policing of procurement and a hard look at the kinds of things that happen and often go wrong when the process is unscrutinised. Discovery of the source and cause of ailment is the first step to cure; learning from mistakes is an effective time-proven, if clumsy, pedagogic device.

Second, by encouraging the private sector to pursue a rules-based system of grievance and rectification, we discouraged use of the old-boys' network of political fixes and back door influence; we mitigated the need for and reliance on corruptive influences.

Third, we began to see which parts of the review process were productive and which were not. The Public Auditor, through a steep learning curve, set out to achieve a 90 day limit from receipt of appeal to decision. This compares very well to the agency handling of protests where, too many times, protests were simply unanswered. One early OPA appeal involved a protest that was ignored for years. It also showed the judicial review process to be a virtual black hole. One recent Superior Court decision that ended up in appeal to the Supreme Court admitted that the protest appeal had "languished" in the court for a year before actually coming before a judge.

A fourth lesson learned is that the government routinely ignores the mandate of the procurement law requiring a prompt decision because there is no enforcement mechanism. The Bill aims to assure a prompt protest response with enforceable time limits for agency protest decisions, and an expeditious judicial review after OPA appeals. The OPA has already shown credible success in keeping the administrative review process reasonably expeditious.

Based in a similar model for agency decisions on contract disputes (in 5 GCA § 5427), amended § 5425(e) allows a protester to demand a decision if one is not made within three weeks of the protest, and if a decision is still not rendered after a week from demand, the protest is deemed admitted. If the agency is not satisfied with that outcome, it must appeal to the OPA (§ 5425(f)) and convince the Public Auditor that the protest should have been denied; it is entirely within the power of the agency to avoid that consequence by promptly responding to protests as the law has required since inception.

The combined protest decision and OPA appeal process should normally, with this change, take no more than 120 days to conclude.

To make the protest process truly efficient, however, the judicial review method must be modified. The recent Guam Supreme Court decision from the Superior Court case that languished for a year, ruled that existing procurement law requires appeals of protests from OPA to take the form of an ordinary civil action, and is not to be considered as a special, or expedited, proceeding. An appellant takes a number and lines up behind all the other ordinary civil matters. In effect, the form of the action determines how expeditious this is treated, not the substance.

The “offending” section slowing down judicial review of protests is principally 5 GCA § 5480(a). It currently allows “an action” to be brought to the Superior Court to appeal an OPA decision. That term has been interpreted to mean an “ordinary” action; not a writ or other expeditious form of review. This Bill amends that section to allow the court “to review” the decision without reference to whether the review is an “action” or other form of legal redress. Subsection 5480(f) makes it clear that any action or appeal “shall be treated as special proceedings for expeditious review ... [whether] brought by way of or treated as a writ of review however captioned.”

To reinforce the importance of expedited judicial review, and taking note of another existing model in § 5485 of the procurement law, amended § 5480(g) provides that appeals from OPA protest decisions “take precedence over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way” except for “cases the Court considers of greater importance”. Precedence for hearing and argument is intended to apply to appeals both to and from the Superior Court.

There are procurement protest cases pending in the courts now that have been in the courts for way too long. For Guam to have an efficient and effective real time policing system that promotes public confidence in the governance of public expenditures and discourages reversion to informal processes and corruptive influence, it must require an expeditious rules-based process of administrative and judicial review, from inception to final decision.

That is the biggest change, but there is another historic turning point in the contract disputes provision of procurement law, § 5426. Under PL 16-124, original procurement law contemplated a settlement of a contract dispute brought to an agency for a decision, including a determination of breach of contract, which is commonly one for monetary damages.

PL 16-124 did not provide for administrative review of any procurement controversy, including a contract dispute. A contractor could only appeal a decision on the contract dispute directly to the Superior Court under § 5480(c) “whether the action is for monetary damages” or other relief. However, § 5480(f) required that the judicial review of the contract dispute decision to “be conducted as provided in the Government Claims Act”.

The Claims Act doesn’t describe how such actions are to be conducted, other than to suggest they are to be treated as ordinary civil actions. PL 16-124 was not helpful, either, in describing how such an action would be conducted under either the Procurement Act¹ or the Claims Act. PL 16-124:4² amended GC § 6500.02 of *the Claims Act*³. The amendment required that “claims arising under Title VII-A [the Procurement Act] shall be governed by [the Procurement Act] and this Title [the Claims Act] as prescribed in [the Procurement Act]”. Section 5480(f) of the Procurement Act takes us right back again to the Claims Act.

The confusion over the applicability of the Claims Act to contract disputes arising under the Procurement Act ultimately made its way to the Supreme Court, twice, in cases known as *Pacific Rock I* and *Pacific Rock II*. In *Pacific Rock I*, the Supreme Court noted that compliance with the Claims Act would require a contractor to engage in two separate and successive administrative actions, which was contrary to procurement law policies. Subsequently, in *Pacific Rock II*, the Supreme Court ruled that, while generally, decisions arising from contract disputes under the Procurement Act are governed solely by the Procurement Act, if the contract dispute involves monetary damages, a contractor must first exhaust all administrative remedies under the Procurement Act, and then undertake further administrative processes under the Claims Act to obtain the monetary award.

¹ Here it is important to know that the Procurement Act was initially enacted as Title VII-A of the Government Code (PL 16-124:1)

² A provision that seems never to have come to the attention of the Compiler or codified in law (see 5 GCA § 6104 and Compiler's Comment).

³ This section specifically excludes certain government claims from the coverage of the Claims Act, such as claims for tax refunds, Workers Compensation claims, and Retirement Fund claims.

So, what brought about this needless duplication of administrative efforts and entanglement of the Procurement Act and the Claims Act? The answer requires the knowledge that, under the Claims Act, before the Procurement Act was adopted, all contract claims were presented to and settled by a rank and file Claims Officer, and frequently were never brought to the attention of the Attorney General or more senior departmental officers⁴.

So, the Attorney General was concerned to keep tabs on contract claims using the AG's authority under the Claims Act. "[T]he Government Claims Act, while not ideal (and substantially amended by PL 17-29, after the enactment of this Chapter), has provided very adequate remedies in contract actions against the government." (Comment to 5 GCA § 5480.)

But, the AG was not so concerned over settlement of contract claims when the settlement of claims "keep[s] the policy makers aware of the settlement and permit[s] them to bring other policy considerations into the larger settlements"⁵. Under the Procurement Act (§ 5427), contract dispute claims are directed to "the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency" or a designee, that is, policy makers. Procurement Act contract disputes are not made to or decided by rank and file Claims.

With the addition of administrative review of contract disputes by the Public Auditor, even more scrutiny by a director-level policy maker trained in contract accounting rules is brought to bear under the procurement law than exists under the Claims Act. The Procurement Act thus provides even more careful assessment of contract claims than does the Claims Act.

Taking the Attorney General out of the contract dispute process of the Claims Act, as a primary actor, facilitates the AG's role, under the mandates of the Procurement Act, as a legal counsel and legal advisor; it eliminates the conflict between acting as a decision-making client and advising a client.

⁴ "[T]he Attorney General, having cognizance over all legal matters concerning the government of Guam, must be made aware of all suits against the government, or any of its parts, as soon as possible. *Waiting upon delivery by the affected agency could lose, and has lost under prior law, valuable time and sometimes money.*" (Comment, 6 GCA § 6209, of the Claims Act; italics added for emphasis.)

⁵ Comment, 6 GCA § 6206, of the Claims Act.

There is no longer any need to encumber the contract dispute process over monetary claims with the claims procedures of the Claims Act. This Bill disentangles the Claims Act from the Procurement Act. It amends 5 GCA § 5427 to allow the agency head, CPO or Director of Public Works to settle any contract dispute, including liquidating the amount of any claim “with the concurrence of the Attorney General”. The Bill further reinstates the provisions of § 5480(c), originally granted in PL 16-124, to authorize the Superior Court to hear an appeal from the Public Auditor arising from a procurement contract dispute.

These two features, a more expedient procurement protest process and removal of the administratively duplicative contract dispute process, form the major changes in this Bill. Other changes include many small technical changes, for example conforming Articles 9 and 12, and editorially to make the language less cluttered.

Lastly, there are some changes of note to reflect interests expressed by Guam Procurement Advisory Council members and others of the procurement and broader community. These are principally:

- Adding a provision to § 5425(a) which limits the definition of an “aggrieved” person to one who has a reasonable likelihood of being awarded a contract, based on information known at the time of protest.
- Adding another provision to that section treating filing time limits as a bar to an action, waivable for just cause or compelling justice, rather than jurisdictional.
- Emphasizing in § 5425(b) and § 5708 that the existing language authorizing settlement of disputes is intended to be proactive, making dispute resolution, not litigation, the aim of the process.
- Various provisions requiring that decisions be based on articulable reason and fact.
- Provisions in §5425(f) and § 5480(d) which will mitigate claims of disqualification against the Public Auditor to avoid the Auditor’s *de novo* review of a protest decision; in case of disqualification, the matter can be appealed to the Superior Court, which is then charged to review it according to the standards and jurisdiction of the Public Auditor.
- Provisions in § 5425(g) giving effect to the distinctions between a mere decision at the agency protest level and a “final” decision on appeal to OPA or the court, such that it is clear that an agency cannot game the protest due process by negating an express right of appeal of the protest decision

by means of issuing an award after the protest decision, before time allowed for appeal is exhausted.

- Provisions in § 5426 and § 5705 regarding suspension or debarment of contractors giving greater effect to the existing right of members of the public to bring petitions to suspend or debar allegedly errant contractors.
- In § 5480(e), making express that which was implied, namely that the administrative remedies of the Procurement Act must be exhausted prior to bringing any appeal to the Superior Court concerning one of the three cognizable controversies in the Procurement Act.

In my view, this represents a fix, at least an effort to fix, many of the glaring weaknesses in the interpretation and implementation of existing law. And it does so without throwing the baby out with the bath water. For all who have pilloried the procurement law, this Bill represents a chance to make a good faith effort to improve it.

Thank you for carefully considering the matters in this Bill. They have been carefully considered before airing them with you.

Respectfully,

/s/

John Thos. Brown

NB: The usual disclaimers are made: I am not speaking for anyone other than myself. Statements in this testimonial letter do not necessarily reflect the views of my employer or any organization with which I may be affiliated, however much I would hope they do.

December 23, 2013

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12/23/2013 2:03pm
#32-183 JTW

VIA HAND DELIVERY

Committee on General Government Operations and Cultural Affairs
32nd Guam Legislature
155 Hesler Place
Hagåtña, GU 96932

Re: **Written Commentary on Bill No. 224-32 (COR)**

Hafa Adai Senators and Members of the Committee:

My name is Jessica Toff, and I am an associate attorney at the firm of Cabot Mantanona LLP. The views represented herein are not necessarily that of my employer.

Thank you for allowing me the opportunity to present additional written commentary on the important issues raised at the legislative hearing held on December 13, 2013.

Although most commentators would agree that some revision of Guam's procurement laws is necessary, proposed Bill No. 224-32 contains many revisions which do not adequately address the problems of the current law, and may be more harmful than helpful. Thus, respectfully, Bill No. 224-32 should not be passed in its current state. Please find below a categorized listing of some of the chief problems which would result from the proposed changes.

1) **Elimination of Timeliness Requirements**

The new language proposed in Bill No. 224-32 eliminates many of the existing unambiguous time limits required to begin and continue the protest process.

A) **No More Time Limit on Filing a Protest**

Currently, a private party seeking to protest an agency action or other problem with procurement must file a protest within 14 days of the date that the protestor "knew or should have known" of the problem. This current standard is relatively clear and

easy to understand. It does not place overly burdensome limits on a protestor. It only requires that a protestor file its protest within two weeks of the time it discovers a problem with the procurement process. However, if the protestor waits more than two weeks from the time it discovers the problem to file a protest, then the protest is untimely, and the protestor waives its right to protest the problem. This current provision encourages protestors to bring the protest as soon as possible after discovering a problem.

The new proposed provisions on pp. 1–2, at Section 5425(a), (a)(1), and (a)(3), completely eliminate the current clear time limit of 5 GCA § 5425(a).

First, the new language in Section 5425(a) states that "A protest made to the office which issued a solicitation shall be deemed properly made." Next, Section 5425(a)(3) states that the time limits specified "are not intended to be jurisdictional," but are intended to bar late protests "absent just cause or compelling prejudice."

These provisions remove an agency's ability to deny late protests outright. Under the new provisions, any protest must be deemed properly filed, and the agency loses the discretion to immediately deny protests on procedural grounds. In addition, a protestor can simply claim that they had an excuse for filing the protest late, and the agency can no longer deny the protest for untimeliness.

The very first legislative finding of the bill states that the purpose of the bill is to expedite the review process. However, the new provisions eliminate the requirement that a protestor file its protest on time. This does not accomplish the legislature's stated objective, and in actually undermines the legislature's intent, because it allows a protestor to drag its feet in the very beginning of the procurement review process with no consequences to the protestor. These new provisions are not in keeping with the intent of the law, and therefore, the bill should not pass as currently proposed.

B) Protest Can Now be Tolloed Indefinitely

The newly revised Section 5425(b), located on p. 4, lines 6–10 of the bill, will allow parties to indefinitely stall the procurement process. The added language allows a party to merely state that they are engaged in some sort of unspecified negotiations or efforts to settle a dispute with anyone, and then "any time limit" for "any action" in the procurement process "shall be tolled."

This additional language is too vague and too broad. It will allow parties to delay the process by claiming that they are attempting to settle a dispute, and allow them to suffer no consequences, because every procurement time limit will be subject to tolling under the language used in the new provision. Further, the new provision does not specify the method of dispute resolution. Any type of dispute resolution will toll the time limits. This provision will result in a virtual black hole in the procurement process, by which any party may delay the procurement for as long as they want, resulting in unfairness to everyone, including the agency, other bidders, and the people of Guam.

C) Arbitration Will Delay the Protest Review Process

As noted above, a new element of delay will be introduced into the procurement review process by allowing all time periods to be tolled during any settlement negotiations, this will also include alternative dispute resolution.

The current law already provides for informal dispute resolution between an agency and a disgruntled bidder through the informal complaint process. However, the informal complaint procedure is under the control of the agency, which then makes the determination of the outcome. More importantly, use of the informal complaint process does not relieve the bidder of the duty to pursue a formal protest, if the informal complaint is not resolved. This ensures that the bidder timely uses the formal protest procedure.

Under the new provisions, use of alternative dispute resolution would place the determination of the outcome of the informal dispute in the hands of an outside party, not the agency, and all time periods for use of the formal protest procedure would be indefinitely suspended, awaiting the outcome. This will absolutely delay the proper filing of formal protests by bidders.

2) Default Agency Determinations in Favor of the Bidder

The new provisions contained in Section 5425(e) and (f), on p. 5 of the bill state that if the agency fails to make a determination on a bidder's protest within 21 days of filing, the protest will be deemed admitted *in favor of the bidder and against the agency*.

This is an unprecedented provision. The Guam Legislature has never adopted a provision with this effect. Every similar provision in Guam law where an agency is required to decide some type of complaint states that if the complaint is not addressed, then it is deemed denied. This is because over-burdened agencies have enough work to deal with already.

First, 21 days is simply not enough time for the agencies to conduct a proper investigation and make sufficient findings in their decisions. Next, the effect of this provision would require an agency to have to appeal anytime the agency was unable to render a decision within 21 days because the decision would automatically be adverse to the agency, meaning automatically increased costs to the Government. The agencies do not have the time or the money to be required to file such appeals.

3) Exigent Circumstances and Emergency Procurement Exceptions

The bill, at p. 6, lines 9–14, of Section 5425(g), also includes new automatic stay provisions which, in effect, eliminate the existing emergency procurement exceptions,

and will operate to prohibit the government's ability to engage in emergency procurement based on need.

The new provision will require an automatic stay of procurement at **any** stage of the proceedings, including after a contract has awarded, and has progressed, even if the contract is almost completed. This main provision is extremely broad, and essentially contradicts its own included subsections, which make clear that the provisions of (g)(1), (g)(2), and (g)(3) only apply *before* an agency's "award of the contract." This means that a bidder can halt an agency procurement after a contract has been awarded, and there are no steps the government can take to make a finding that the procurement contract must proceed in the best interests of the government. In effect, simply by filing a protest, even late in the game and after a contract award, a bidder can bring the procurement process to a grinding halt, with no recourse left to the government, even if the contract is essential to government function.

4) GARR

The current proposed bill contains no legislatively adopted changes to the Guam Administrative Rules and Regulations.

Guam adopted all of its current procurement statutes AND all of its rules and regulations (GARR) directly from the ABA Model Procurement Code of 1979. The 1979 ABA Code included a set of administrative rules and regulations which were intended to be adopted with the Code, and which mirror the ABA Code provisions, but also contain more specific directions to guide the administrative agencies who are responsible for applying the rules. The Code and the administrative rules were meant to go hand in hand together. Thus, when Guam originally decided to adopt a comprehensive procurement system, almost all of the ABA Model Procurement Code provisions were adopted as Guam's statutes, and almost all of the administrative rules and regulations were adopted as the GARR in Guam.

As noted by the Office of the Public Auditor, it may be effectively impossible to pass new GARR separately.

If the new provisions are adopted without any change to the GARR, the new Guam code provisions will be inconsistent with the existing GARR, and will cause confusion at the agency level, because the GARR were adopted to provide guidance to the agencies and the OPA, and they contain explicit and specific instructions as to agency procedures. As currently proposed, the existing specific instructions for agencies will be invalidated by the statutes, and there will be no new instructions to replace them.

5) Overall Effect of New Provisions Encouraging Delayed Protests and Litigation

Finally, the overall effect of the new provisions will be to allow protestors to delay the protest review process from the very beginning, and to encourage more litigation by protestors.

A) No Established Basis in Law

Currently, because Guam's procurement laws were adopted from the ABA Model Procurement Rules and accompanying Regulations, there is a history of case law interpreting these laws. This history of case law from other jurisdictions, such as Hawaii, which have adopted similar laws, provides stability and easy reference for those attempting to engage in the procurement process in Guam.

The proposed revisions have no similar history of interpretation. The new provisions have no similarities to other laws, and have no point of reference for new protests. This means that every new provision will be subject to challenge. In practical effect, there will be an incentive for every losing bidder to file a protest, because there is no body of established law which would discourage the protests before they are filed.

B) Sovereign Immunity Implications and Contradiction re: Attorney's Fees

The new proposed Section 5425(h) in Bill No. 224-32 raises two major initial problems: 1) the government's waiver of Sovereign Immunity is implicated in a manner which is very negative for the government; and 2) the provisions are completely inconsistent as to the allowance of attorney's fees in favor of the protestor.

1) Sovereign Immunity Implications

The Government of Guam may only be sued by its own consent. Currently, the Government of Guam only agrees to be sued for claims based on existing contracts, torts, land takings, and review of procurement under 5 GCA § 5480.

The Government of Guam has *never before* consented to be sued for attorney's fees based on a private party's mere expectation of a contract. See Organic Act Section 3, the Government Claims Act, and current 5 GCA §§ 5425(h) and 5480.

The newly proposed revisions to the procurement laws, under proposed Section 5425(h)(3), p. 8, lines 4–12, attempt to give protestors the right to collect private attorney's fees from the Government of Guam. There is no benefit to the Government to allow this, and no other jurisdiction in the United States has adopted such a provision.

2) Protestor's Right to Attorney's Fees

Next, even if the Legislature considers this change, the newly proposed provision is drafted so that it contradicts itself.

The first portion of the proposed Section 5425(h), at p. 7, lines 14–20 states: "(h) Entitlement to Costs....when a protest is sustained, the protestant shall be entitled to the

reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees,"

However, the third portion of proposed Section 5425(h), at p. 8, lines 14–20 states: "(3) The Public Auditor shall have the power to assess reasonable costs including reasonable attorney fees incurred by the government, including its autonomous agencies and public corporations, or any protestor or interested party against any party, including the government, making a protest, motion or bringing any action...."

These two provisions squarely contradict each other. The first portion states that a protestor is not entitled to attorney's fees, and the later portion states that a protestor is entitled to attorney's fees. If the bill were to pass with this provision, any court attempting to interpret this provision would most likely strike it for inconsistency.

This provision is the portion of the law that allows the Government to collect attorney's fees against frivolous protestors, and which discourages needless protests and litigation. Therefore, this provision must be clear and correct in order to be applied. The new revisions would cause confusion and would remove the current built-in disincentive against frivolous protests. More importantly, because of its inherent contradiction in terms, it would most likely be found void. A clear and unambiguous version of this provision must exist in order to prevent meritless protests and litigation, and thus, the bill should be re-drafted in order to effectively accomplish the objectives of the Legislature.

In closing, I humbly thank you for the opportunity to present written testimony on Bill No. 224-32. I respectfully submit that this bill should be further revised before it is considered for passage into law.

Sincerely,



Jessica L. Toft

§5425. Authority to Resolve Resolution of Protested Solicitations and Awards.

(a) Right to Protest. Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. ~~The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.~~ A protest made to the office which issued a solicitation shall be deemed properly made.

(1) The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise to the belief such person may be aggrieved.

(2) A person may reasonably be aggrieved if:

(i) there are facts sufficient to raise a reasonable apprehension that the method of source selection, the solicitation, or the award of a contract may be contrary to law or regulation; and

(ii) there is a reasonable likelihood, based on information available at the time of protest, that such person would have been in a competitive position to be awarded the contract.

(3) The time limits specified for the resolution of disputes arising under this Section, including any administrative and judicial review provided in this Article 9, are not intended to be jurisdictional, but shall be treated as a bar absent just cause or compelling prejudice.

Comments

- Standard for protest changes from “aggrieved” in (a) to “reasonably aggrieved” in (a)(2)

- “Aggrievement” or “standing” has two components;
 1. Facts raise a reasonable apprehension that the solicitation may be contrary to law or regulation (a)(2); and
 2. Person would have been in a *competitive position* to be awarded the contract.

Problem; No bidder/offeror knows if it is in a *competitive position* until post bid-opening in the context of Invitations for Bid and post-ranking in the context of Requests for Proposal. Deprives agency of opportunity to fix a defective solicitation

Alternative:

(2) A protestor may be aggrieved if it can show that, but for a significant error in the procurement process, it would have had a substantial chance of securing the contract

(i) Aggrievement goes directly to the question of standing; the issue must be reached before addressing the merits of either a protest or an appeal. In the event of an appeal before the Office of Public Accountability, and in deciding whether a protestor would have had a substantial chance of securing the contract, the Public Auditor shall show proper deference to the views of the procuring agency. When an agency's decision is reasonable, the Public Auditor may not substitute its judgment for that of the agency.

Amazon Web Services, Inc. v. United States, 113 Fed.Cl. 102 (Fed.Cl., 2013)

Comments

- Section (3) appears to contain a drafting error. It refers to “resolution of disputes” when what is meant is “time to protest”.
- As amended, Because of the “just cause”/ “compelling prejudice” estoppel, this section requires serious reflection. Conceivably a protest could be filed months after performance has begun.

§5425. (b) Authority and Obligation to Resolve Protests. The Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers are encouraged and shall have the authority, prior to the commencement of an appeal to the Public Auditor or an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. It is in the best interest of the Government of Guam to resolve and settle such protests expeditiously and informally without administrative or judicial review so long as its minimum needs may be satisfied and effective competition fostered. This authority shall be exercised in accordance with regulations promulgated by the Policy Office, which may include use of settlement conference, expedited Alternative Dispute Resolution (ADR) and debriefing methods. Any time limit established by this Article for the taking of any action, administrative or judicial, shall be tolled during any period in which the parties are in good faith engaged to resolve and settle any dispute arising under this Article.

Comments

- Section entitled “Authority and Obligation to Resolve Protests”

Language doesn't make informal resolution mandatory. This is appropriate; neither side should be forced into ADR

- Problem. When does resolution tolling period begin and end?

Alternative;

“Any time limit established by this Article for the taking of any administrative action may be tolled by stipulation of the parties made during the applicable time period. This period of tolling shall cease upon written notice that a party has withdrawn from the stipulation served upon all parties.”

§5425. (g) In the event of a timely protest under Subsection (a) of this Section ~~or under Subsection (a) of § 5480 of this Chapter~~, the Territory shall not proceed further with the solicitation, ~~or with the~~ award, or performance of the contract prior to the time allowed to appeal from, or the resolution of, such protest, and any such further action is void, unless:

Comments

- This is the automatic stay.
- This section as amended would require, in the case of a protest a stay of performance even though the contract had been awarded. Because new section (a)(3) removes the time bar, contracts can be disrupted at any time.
- Current law; stay in place upon filing of protest. Once protest is resolved stay is lifted *In the Appeal of Guam Publications, Inc., OPA-PA-08-007*
- OPA has reversed itself and now states the stay in place throughout the appeals process. Current law does not support this position
- This proposed amendment codifies the OPA's new interpretation
- Consequences are very serious. Agency needs could go unaddressed for months.

Appeal	Filed	Resolved	Days
Cars Plus, LLC	10/22/13	11/8/13(DI)	17
JMI-Edison	8/2/13	9/25/13 (DE)	54
Triple J. Motors	10/2/13	11/8/13 (DI)	37
Triple J. Motors	9/25/13	11/8/13 (DI)	44
Triple J. Motors	7/8/13	9/11/13 (DI)	65
Able Industries of the Pacific	6/10/13	7/23/13 (DI)	43
JMI-Edison	8/1/13	11/27/13 (DE)	118
DFS Guam L.P.	5/30/13	6/5/13 (DI)	6
VITOL Asia Private Limited	5/20/13	8/2/13 (DI)	74
K Cleaning Services	5/8/13	10/28/13 (DE)	173
J&B Modern Tech	4/5/13	6/14/13 (DE)	70
J&B Modern Tech	1/31/13	4/19/13 (DE)	78
J&B Modern Tech	11/5/12	3/6/13 (DE)	112
Pacific Data System	10/19/12	3/6/13 (DE)	138
Teleguam Holdings LLC (GTA)	10/8/12	3/6/13 (DE)	149

§5425. (h) Entitlement of Costs. In addition to any other relief or remedy granted under Subsection (c) or (e) of this Section or under Subsection (s) of § 5480 of this Chapter, including the remedies provided by Part B of Article 9 of this Chapter, when a protest is sustained, the ~~protestant~~ protestor shall be entitled to the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorney's fees, if . . . :

Comments

- Disincentivize protests
- Agency mistakes are not the problem
- Disappointed bidders have an economic incentive to protest

If incumbent, they can continue performance

Price of entry is low compared to potential reward

- Require posting of an Appeals Bond

Not overly burdensome; already require bid and performance bonds

- Award attorney's fees to Agency if protestor does not prevail

Eddie Baza Calvo
Governor



GENERAL SERVICES AGENCY

(Ahensian Setbision Hinirat)
Department of Administration

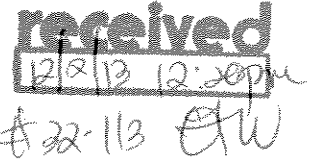
148 Route 1 Marine Drive, Piti, Guam 96915
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Ray Tenorio
Lieutenant Governor

Benita A. Manglona
Director

Anthony C. Blaz
Deputy Director

November 19, 2013



Memorandum

The Honorable Benjamin JF. Cruz
Vice-Speaker 32nd Guam Legislature
Chairman of the Committee General Governmental
Operations, Procurement and Cultural Affairs
155 Hesler Street
Hagatna, Guam 96910

Re: Comments on Bill 224-32

I am in receipt of bill 224-32 "An Act to Amend Sections 5425, 5426, 5427, 5450, 5452, 5480, 5481 and 5485(a) and (b) of Article 9, and Section 5703, 5705, 5706(b) 5707(a), 5708 of Article 12, Chapter 5, Title 5 of the Guam Code Annotated Relative to Clarifying Legal and Contractual Remedies in Guam Procurement Law." And have the following comments:

Section 5425(b)(2) is unclear. "What is the intent of "...to be competitive position to be awarded the contract."

Section 4325(b) ;s use of an expedited Alternative Dispute Resolution and debriefing methods, does not ensure an expedited process of resolution. We recommend that this be taken out.

Further on in this same section, if the intent of this legislation is to expedite the process, we recommend the remainder of this section be deleted.

In Section 5425(e) "Failure to Render Timely Decision, a new subsection (1) be added to read: Should a government agency or department needs more time to address the protest, an additional twenty-one (21) days will be granted. Such an extension shall be sent to the protestor "

In Section 5425(f), Appeal, The last sentence of this section should be deleted and replace with the following: "If for any reason the Public Auditor is determined to be

disqualified to hear such an appeal, the assigned legal officer from the OPA that hears the case, may hear the case.”

The last phrase in Section 5425(g)(1)”...or the Governor then issues a Declaration of Emergency Procurement as authorized by Section 5215 of this Chapter, and...” does not make sense. The declaration of Emergency by the Governor is for a thirty (30) day supply of goods or service. The use of the emergency is not intended to be for the final disposition of the contract, but for a temporary basis of getting the supplies or equipment. We believe that this phrase should be deleted.


In Section 5425((g)(3), the proposed addition should be deleted. The Public Auditor should not have the authority to override the Governor in determining whether an emergency is necessary for the procurement, since the procurement is for a temporary matter. The contract in question is subject to the Public Auditor’s determination, not a temporary one questioning the substantial interest.

In Section 5426(f), the proposed language requires that the government must immediately investigate a petition for a debarment or suspension filed and if no answer is provided in sixty (6) days, that it may go forward to the Office of Public Accountability. This is another unfunded mandate placed upon the government and should the legislature require this, it should provide the funding for requiring an immediate action.

Section 5452(c) should stop after”...awarded the contract.” The rest of the sentence is unnecessary.

In Section 5703, the proposed additional language, should be deleted.

Thank you for the opportunity to comment on this bill.


CLAUDIA S. ACFALLE
Chief Procurement Officer



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December 23, 2013

VIA HAND DELIVERY

Honorable Thomas C. Ada
Assistant Majority Leader
MINA' TRENTAI DOS NA LIHESLATURAN GUAHAN
Committee on Public Safety, Infrastructure & Maritime Transportation
Ste. 207, Ada Plaza Ctr., 173 Aspinall Ave.
Hagåtña, Guam 96910

RE: BILL NO. 224-32

Hafa Adai Senator Ada:

I am writing to provide you with the comments of the Antonio B. Won Pat International Airport Authority, Guam ("GIAA") on the amendments to the Guam Procurement Law proposed in Bill 224-32.

- §5425(a)(1):

The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise to the belief that such person may be aggrieved, provided, however, that in no event shall a protest based upon alleged improprieties in a solicitation be filed after the bid submission deadline or the time set for receipt of proposals, as the case may be.

This suggested revision is intended to require bidders and proposers to immediately raise improprieties in the solicitation documents. This allows the agency to address any improprieties or mistakes in the solicitation document prior to the bid or proposal submission deadline and avoids the time and expense associated with going through an entire procurement process, only to have the solicitation delayed or cancelled because of a matter that should have and could have been raised earlier.

- §5425(a)(3):

~~The time limits specified for the resolution of disputes arising under this Section, including any administrative and judicial review provided in this Article 9, are not intended to be jurisdictional, but shall be treated as a bar absent just cause or compelling prejudice.~~



GIAA proposes that this entire section be stricken. Allowing bidders or proposers an opportunity to provide excuses for their delay in filing a protest causes uncertainty in the process. “Just cause” and “compelling prejudice” are not defined and will likely result in additional litigation as parties disagree over what constitutes just cause or compelling prejudice. Further, with the current 14 day protest deadline, bidders and proposer are encouraged to closely and expeditiously review the procurement process to determine if a basis for protest exists.

- §5425(e):

Failure to Render Timely Decision. If the protestor does not receive a decision ~~of~~ on the protest as required under Subsection (c) of this Section within twenty-one (21) days from the date of receipt of the protest, the protestor may make a written request to the office wherein the protest was made to render such a decision on the protest. If no decision as required under Subsection (c) of this Section is made and served upon the protestor within seven (7) business days after receipt of such written request, or within such longer period as may be expressly and in writing agreed upon by the parties, then the protest shall be deemed admitted.

The suggested changes are to clarify when the 21-day time period commences, and to clarify that weekends and holidays are not to be counted when calculating the 7-day time period.

- §5425(f):

Appeal. A decision under Subsection (c) of this Section including a decision there under regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestor to the Public Auditor within fifteen (15) days after receipt by the protestor of the notice of decision on the protest, and a ~~decision~~ protest deemed admitted under Subsection (e) of this Section may be appealed by the office to which the protest was made, to the Public Auditor, within fifteen (15) days after the date the protest is deemed admitted ~~as provided in Subsection (i) of this Section~~. If for any reason the Public Auditor is determined to be disqualified to hear such an appeal, a decision under Subsection (c) or a protest deemed admitted under Subsection (e) of this Section may be appealed directly to the Superior Court in accordance with Subsection (a) of § 5480 of this Chapter

The first change was made to correctly state that it is a protest that is deemed admitted under Subsection (e), not a decision. The deletion of “as provided in Subsection (i) of this Section” was made because Subsection (f) already provides that the appeal shall be made to the Public Auditor; Subsection (i) refers to appeals to the Superior Court of a decision of the Public Auditor, and is thus not applicable. The last change was made to allow an agency to appeal a protest deemed admitted under Subsection (e) directly to the Superior Court in the event of disqualification of the Public Auditor.

- §5245(g)

In the event of a timely protest under Subsection (a) of this Section and the posting of bond or such other security by the protestor upon such terms as is approved by the Public Auditor or Court, as the case may be, the Territory or governmental body shall not proceed further with the solicitation, award, or performance of the contract prior to the time allowed to appeal from, or the final resolution of, such protest, and any such further action is void, unless:

- (1) The Chief Procurement Officer, ~~or the Director of Public Works, or the head of the purchasing agency,~~ with written concurrence of ~~the head of the using or purchasing agency and the Attorney General or designated Special Assistant or Deputy Attorney General,~~ then makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Territory, or the Governor then issues a Declaration of Emergency Procurement as authorized by § 5215 of this Chapter; and
- (2) Absent a ~~d~~Declaration of ~~e~~Emergency ~~p~~Procurement by the Governor, the protestor has been given at least (2) days notice of such determination (as provided in 1 G.C.A. § 1004); and
- (3) If the protest is pending before the Public Auditor or the Court, the Public Auditor or Court has confirmed the validity of such determination ~~and or d~~Declaration, or if no such protest is pending, no protest to the Public Auditor ~~or the Court~~ challenging the validity of such determination or ~~d~~Declaration is filed prior to expiration of the two (2) day period specified in ~~Item (2) of~~ Subsection (g)(2) of this Section; but if such a protest is filed, an expedited hearing shall be noticed to all interested parties and held to determine the validity of whether to confirm any such determination of necessity and substantial interest or ~~d~~Declaration of ~~e~~Emergency ~~p~~Procurement.

The first change was made to require the posting of bond or security approved by the Public Auditor or Court in order for a stay to be effective. The requirement for the posting of bond is consistent with civil practice where a stay pending appeal is only effective if a supersedeas bond is posted and approved by the Court. Requiring the bond or security assures that the agency has protection for not being able to carry on its business during the appeal process, which could go on for many months.

The change to add “or governmental body” was done to address the situation where the solicitation is issued by an autonomous agency or public corporation. The change to Subsection (1) was made to allow the head of the purchasing agency to make the determination of substantial interest and to recognize the appointment of Special Assistant Attorney Generals under § 5150 of the Procurement Law. The changes in Subsection (3) were made to clarify that if no protest is pending, the protest on the validity of the determination or Declaration should first go to the Public Auditor before the Court and to clarify that the protest is one to challenge the validity of the determination or Declaration.

- §5481(a):

Protested Solicitations and Awards. Any action under § 5480(a) of this Chapter shall be initiated, ~~absent compelling cause or unfair prejudice~~, within fourteen (14) days after receipt of a final administrative decision, including a decision of disqualification of the Public Auditor in accordance with § 5425(f) of this Chapter.

“Compelling cause” and “unfair prejudice” are undefined. As stated above, allowing bidders or proposers an opportunity to provide excuses for their delay in filing a protest causes uncertainty in the process. Rather than promoting the policy of resolving procurement protests expeditiously, allowing a delay for “compelling cause” or “unfair prejudice” will result in additional litigation as parties disagree over what constitutes compelling cause or unfair prejudice.

GIAA recommends that the following provisions be added to Bill 224-32:

- A new § 5030(y) is hereby added as follows:

Attorney General means the Attorney General of Guam or any Special Assistant Attorney General designated under § 5150 of this Chapter.

This change is requested to recognize the appointment of Special Assistant AGs under § 5150.

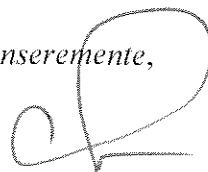
- A new Section 17.

Section 17. No Retroactive Application. This law shall not be construed to have retroactive effect and shall not apply to protests filed as of the date of enactment.

This addition explicitly states the general rule that retroactivity is not favored in the law.

GIAA supports the efforts made in Bill 224-32 to promote the expeditious resolution of protests and resolution employing alternative dispute resolution methods. GIAA respectfully requests that the Legislature consider the changes suggested above as it considers Bill 224-32.

Senseramente,



CHARLES H. ADA II
Executive Manager





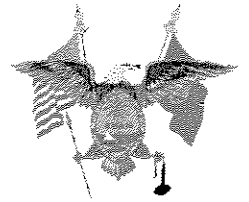
Eddie B. Calvo
Governor

Ray Tenorio
Lieutenant Governor

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John S. Unpingco
Governor's Special Assistant



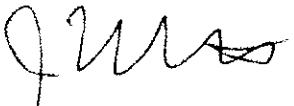
December 13, 2013

Senator Benjamin F. Cruz
32nd Guam Legislature
Hagatna, Guam 96910

Dear Senator Cruz,

I will like to give a carefully considered testimony on Bill 224 authored by Senator Tom Ada. Unfortunately, I have returned from an off-island business trip only last night and am unable to put such testimony together in the time remaining before the hearing. I would like to give you the testimony next week so that I can properly analyze the bill. I would therefore appreciate your consideration of my request to submit my testimony after the hearing of the bill scheduled for tonight.

Your kind consideration of my request is most appreciated. I shall give you my written testimony on the bill next week.


JOHN S. UNPINGCO

TESTIMONY OF JOHN S. UNPINGCO
ON
BILL 221-32

received
2/23/2019 3:04pm
#32-184 BTW

Thank you for the opportunity to testify today. It is an honor and a pleasure.

Bill 221-32 is flawed. It seeks to make it easier for private industry to ensnarl procurements in protest. It changes the procurement law to favor private businesses to the detriment of the Government. It is for this reason, that I am opposed to it.

From the start, Bill 221-32's Findings and Intent is wrong. It states that "the procurement system is intentionally created to 'outsource' the real time policing of the procurement process to the private sector by way of protests"...

This is a novel yet erroneous approach. The question here is who is doing the outsourcing? Under the Federal Acquisition Desk Reference by Steven Tomanelli, it is the government agencies which regulate and control contracting with federal government. Section 1-201-1, Section 1-201-2, Section 1-202 and most importantly Section 1-304. Granted, this is the approach in federal procurement. But, state procurement laws are modeled after the federal procurement law and this is a bedrock principle of government contracting.

We must not forget that it is private industry which seeks to do business with the government and not the other way around. Thus, private industry must accept the rules laid down by the government. This is also a basic difference between government contracting and ordinary contracting. In government contracting, it is the government which dictates how the private sector does business with it. This is one of the fundamental differences between

protest bond. That is order to protest one must file a 10% bond and then one can protest. If one prevails then he gets the entire bond refunded. If he fails to prevail, the protest bond is forfeited to the government. This will force protestors before they file a protest to think of the strength of their protest. It will force a protestor who did not submit a bid to carefully think out his position before protesting. Passage of this bill in its present form without adding a protest bond will result in more protests paralyzing the government which the government can ill-afford and which all Senators do not want to see happen.

One last thing should be covered. Why can't we have time limits for the hearing officers at the OPA to decide a case rather than them setting their own discovery schedules, hearing schedules and then issuing a decision when they well please? Give them time limits as they are administrative judges not judicial judges. And, even the judges in the Superior Court have time limits in which they must decide a case. The government cannot be paralyzed while an OPA hearing officer decides a case. There should be some time limits set on rendering their decisions.

Thank you for your kind attention, this concludes my testimony.

Thank-you for allowing me to submit this testimony. When the hearing for this Bill was occurring I had just returned from an off-island business trip & I was in no shape to testify.



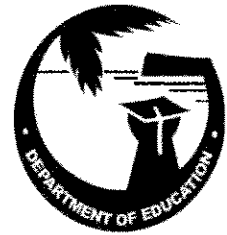
DEPARTMENT OF EDUCATION OFFICE OF THE SUPERINTENDENT

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JON J.P. FERNANDEZ
Superintendent of Education

December 30, 2013

Honorable Benjamin J.F. Cruz
Vice-Speaker, 32nd Guam Legislature
Chairperson, Committee on General Government Operations and Cultural Affairs
155 Hesler St.
Hagatna, Guam 96910

Dear Vice-Speaker Cruz,

Thank you for allowing me to provide testimony on **Bill No. 224-32**, An Act to Amend §5425, §5426, §5427, §5450, §5452, §5480, §5481 and §§5485 (a) and (b) of Article 9, and §5703, §5705, §5706(b), §5707(a), §5708 of Article 12, Chapter 5, Title 5 of the Guam, Code Annotated Relative to clarifying legal and contractual remedies in the Guam Procurement Law.

As the Superintendent of the Guam Department of Education (“GDOE”), I recognize the need for an efficient and effective procurement process in order to provide supplies and services to our schools, teachers and students. I am in full support of any amendment to the Guam Procurement Law that will assist GDOE in obtaining critical supplies and services in a manner that is expeditious and efficient. I am also in support of treating all potential vendors fairly, and in garnering all benefits that a competitive, yet fair, process has to offer. We are after all, stewards of public funds.

After a thorough reading of the Bill No. 224-32, I am providing the following comments in the hope that it will assist the Legislature in the ultimate goal of producing a procurement process that is efficient and effective. I provide the following comments because though the goal of this legislation is to make the procurement process efficient, language contained in this legislation may thwart that goal.

The proposed revision of a time standard, contained in §5425(e), for an agency to issue a decision after a procurement protest is filed will support the goal of making the procurement process efficient and effective. However, the proposed consequence of an agency not responding to protest within the time allotted may not accomplish this goal. As the current proposal is written, if an agency does not respond to a protest within the time allotted the protest will be treated as admitted. This may lead to confusion and further delay of the procurement process. For example, if the fourth lowest bidder files a protest and demanded that it be selected for award, will a non-response to this bidder’s protest automatically result in an award to this bidder? If passed in this form, Bill No. 224-32 would allow for that scenario to occur. It would be prudent instead to treat a non-response as a denial of the protest and trigger a bidder’s right to appeal.

Bill No. 224-32 does not contain any proposed time standard for the Public Auditor to hear the merits of a procurement appeal after it has been filed in the Office of Public Accountability (“OPA”). Therefore, a time standard for the OPA would assist in resolving procurement appeals in a prompt manner. Additionally, it is noteworthy that even the Judiciary of Guam has adopted time standards for the final disposition of cases from

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the date a case is filed with the court system. Therefore, the addition of a similar type of time standard for OPA will accomplish the goal of making the procurement process efficient and effective for both the agency and the aggrieved bidder.

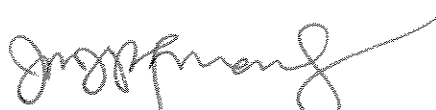
The proposed revision of §5425(g) by adding the word "performance" is problematic and would not accomplish the goal of making the procurement process efficient and effective. As an example, a contract between an agency and a vendor performed for months or even years may be protested. If the proposed §5425(g) is adopted, a stay would be in place after this contract has been substantially performed. There is no objection that a valid protest may be filed. Nonetheless, there should be no interruption of a valid contract if performance has occurred. The adoption of this revision would effectively allow the ability for a third party to interfere with a validly executed contract between the agency and its contractor.

Another proposed revision of §5425(g)(3) that is problematic would effectively give the Public Auditor the authority to review the Governor of Guam's declaration of an emergency procurement. This grant of authority to the Public Auditor may go beyond the scope of her intended duties and oversight. The Governor of Guam alone has the authority through an executive order to declare an emergency through his Organic powers. In addition, this proposed section requires the Public Auditor to conduct an expedited hearing to confirm either the determination of substantial need or the Governor's declaration of an emergency procurement, but this proposed section neither defines the an expedited schedule for the OPA to hear this type of matter.

The proposed revision of §5426 is of concern because it gives a party the right of appellate review by the Public Auditor when an agency has denied a petition to debar or suspend a vendor. This is problematic because, for example, this allows a competing business to complain about a vendor despite the agency being satisfied with this vendor's performance, and will clog the Office of Public Accountability with needless litigation. If waste of government resources is the issue, there are other provisions in Guam Law that allow for a party to seek redress. Vendor performance is best evaluated by the agency, and the agency ultimately makes the determination whether to debar or suspend based on a vendor's performance.

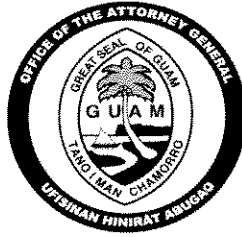
GDOE appreciates the efforts of the Legislature to accomplish an efficient and effective procurement process. Thank you for this opportunity to submit the testimony. Please feel free to contact me with any further questions or comments.

Senseramente,



JON J.P. FERNANDEZ
Superintendent of Education

Leonardo M. Rapadas
Attorney General



Phillip J. Tydingco
Chief Deputy Attorney General

Office of the Attorney General

received
1/7/2014 10:05am
22-200 BTW

January 6, 2014

Honorable Benjamin J. F. Cruz
Vice Speaker, 32nd Guam Legislature, and
Chairman, Committee on Government
Operations and Cultural Affairs
Suite 107, 155 Hesler Street
Hagatna, Guam U.S.A. 96910

CONFIRMATION

Re: Written Testimony for Bill No. 224-30 Amending Various Sections of the
Guam Procurement Law (5 GCA Chapter 5)

Dear Vice Speaker Cruz:

Thank you for allowing me to submit my Office's written testimony and comments to Bill No. 224-30 at this late date. Enclosed are the comments, section by section.

The bill proposes to make numerous critical changes to the Guam Procurement Law in the name of expediting the procurement process as especially relates to the handling of protests, but also with respect to debarments and contract controversies. Some new deadlines are added, which is not necessarily a bad thing, but many of the changes are extremely government-unfriendly.

The findings also state it "necessary to improve the efficiency and efficacy of the administrative and judicial remedial scheme" set out in the Guam Procurement Law. What this means, as is apparent from a reading of the bill, is that the amendments effectively take the handling of certain contract controversies out of the Government Claims Act.

The biggest danger with this bill is to adopt it wholesale without giving it great thought and a studied review. This bill needs to be dissected line-by-line as the implications are deep, including monetary ones, and there should be mark-up meetings with the stakeholders.

We hope you will consider our comments, and we would be willing to discuss any of our comments with you, Senator Tom Ada and others if anyone has any questions. Thank you.


LEONARDO M. RAPADAS
Attorney General

cc: Senator Tom Ada

Note: All references herein to "AGO" means the "Attorney General's Office."

Section 1. Findings and Intent. This section states that the intent of the bill is to expedite the review process, and finds the need for prompt issuance of decisions on protests to avoid prolonged procurement disputes. While a few of the changes in the bill do indeed provide for deadlines for decisions to be made, the majority of the bill does exactly the opposite of speeding up the disputes process. Instead, this bill, if passed as is, will result in more disputes being filed with a longer resolution period, and more being paid by the government, for the reasons noted below. Finally, the meaning of the last paragraph is lost on the AGO.

Section 2. Amends 5 GCA § 5425.

§ 5425(a)(1) - - The AGO does not have objections to the proposed amendment.

§ 5425(a)(2) - - In lieu of the proposed language, the AGO suggest that the following be substituted. The following was the AGO's recommended language in Bill 336-30: "An aggrieved person or party means an actual or prospective bidder or offeror, or contractor, whose economic interest might be affected substantially and directly by the issuance of a solicitation, the award of a contract, or by the failure to award a contract, and whether an actual or prospective bidder or offeror has economic interests will depend upon the circumstances of each case."

§ 5425(a)(3) - - The proposed amendment states that time limits are not meant to be jurisdictional. In other words, if a protesting party misses the deadline to file a protest, he can still file one and be heard if he thinks he has "just cause" or can show "compelling prejudice." This amendment is not consistent with the intent to make the dispute resolution process expedited and timely. Such timelines *should* be jurisdictional, and adding in such concepts as "just cause" and "compelling prejudice" as justification for missing a timeline is going to introduce into the process lengthy pre-hearing motions over unintelligible concepts of "just cause" and "compelling prejudice." All lawyers know and understand that having time limits is not an unreasonable standard, and is in fact good and an accepted standard in western jurisprudence. All procedures should have certain preliminary hurdles that one has to pass in order to get into the game. The AGO suggests that the proposed amendment to § 5425(a)(3) be omitted, or else the language should be changed to say that time limits are in fact jurisdictional.

§ 5425(b) - - (1) The AGO suggests that the words "Notwithstanding any other law" precede the first sentence because the last few appropriations acts for the government have included requirements that specific appropriations must be available for settlements. Without the suggested phrase, no settlements will be possible unless there is a specific appropriation. (2) The phrase "are encouraged" in the first sentence should be omitted because it does not belong in the Guam Procurement Law. Adding the phrase here does not make it so, and there is no effective way of enforcing this statutory admonition. If it must be given at all, then encouragement should be placed in the bill's intent and findings. (3) The sentence beginning "It is in the best interest of . . ." and ending "effective competition

fostered” does not make much sense, and in any event does not belong in the Guam Procurement Law. If anything, it is better placed in the findings and intent of this bill. (4) The phrase “which may include use of settlement conference, expedited Alternative Dispute Resolution (ADR) and debriefing methods” is superfluous as the Policy Office may promulgate procurement rules. However, the AGO does not object to keeping the language as a suggestion for the Policy Office. Later, if the Policy Office proposed to make rules about these stated methods, then we would have the following questions: Is expedited ADR available? Is the government responsible for the expenses to go through an expedited ADR? What does “expedited” mean in this context? What are “debriefing methods”? (5) The AGO’s position is that the last sentence of § 5425(b) should be removed entirely. Any tolling prolongs the overall process. However, if tolling is necessary, it should be done only if both parties mutually agree to toll the process. (6) Finally, adding “and Obligation” to the title of this section is not helpful. It is a title and under general statutory construction would have little or no effect. And, what does it mean if a party fails to fulfill its “obligation” or a party accuses another party of failure to fulfill its “obligation”, what is its meaning? These questions are unanswered in the proposed language.

§ 5425(c)(1) and (c)(2) - - The AGO does not object to the proposed language.

§ 5425(c)(3) - - The last phrase “must be rejected” should be changed to “are rejected.”

§ 5425(d) - - The AGO does not object to the proposed language.

§ 5425(e) - - The last word “admitted” means that if the government is unable to provide a timely response (and very often there are valid reasons why it is unable to), then the protest is sustained. This just puts the government in a more difficult position, and is probably unusual as far as procurement procedures go. There is really no reason for the government to place itself at a disadvantage here, since it is the government that is writing the rules for government procurement and can give itself this advantage without violating any of the intent stated here or the policies set out in 5 GCA § 5001. However, as is everything else with this bill, this is a policy call, but the AGO does not find that putting the burden on the government in this instance promotes a better or more streamlined procurement process. The AGO prefers to see the word “admitted” changed to “denied.”

§ 5425(f) - - (1) For the same reasons stated in the AGO’s comment to § 5425(e), the word “admitted” in § 5425(f) should be changed to “denied.” The burden should be on the protesting party, not the government. If the AGO’s comment is adopted, then the phrase “by the office to which the protest was made” should be omitted. (2) The last sentence of subsection (f) addresses disqualification of the Public Auditor, and moves the matter directly to the Superior Court using court rules. It is a mistake to open the courthouse door here. There should be a mechanism for appointing an alternative hearing officer, probably still through the auspices of the OPA and its budget. The AGO believes that if the intent of the bill is to save time, then the better solution is for the Presiding Judge of the Superior Court to appoint a hearing officer to proceed at the OPA level under the OPA rules.

§ 5425(g) - - As to the clarification that a stay remains in place for the 15 days awaiting action by the protestor in the event of a denial of the protest, the AGO has no objection. It is good to have this clarified in the statute, just as the OPA has already decided. However, the revised language also will reverse or undo the effect of *Guam Imaging Consultants v. GMHA*, 2004 Guam 15. *Guam Imaging Consultants* is cited for the proposition that once an award is made in a procurement, there is no stay of procurement pending the outcome of a protest or appeal; in effect, the execution of the awarded contract may proceed. The AGO believes that if the Legislature intends to set aside the effect of the ruling in *Guam Imaging Consultants* it should specifically state as much in Section 1 of Bill 224's findings and intent. Otherwise, the effect of the proposed change (the addition of the words "or performance") is that the performance of an ongoing contract will stop if there is a protest. Stopping a contract already being performed will undoubtedly place an enormous burden on the government's ability to perform its functions and provide services.

§ 5425(g)(1) - - The new language provides for a separate and independent process for overcoming the automatic stay provided for in § 5425(g); that is, the Governor may issue a declaration of emergency. However, § 5215 sets out a method of source selection, and so ambiguity would then exist as to whether the new language invokes a separate method of source selection, *i.e.*, emergency procurement, or is limited to the use of that part of § 5215 that provides a standard by which the Governor can declare an emergency, to wit, "there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations" and the Governor makes a "declaration of an emergency situation by Executive Order." In either event, it would be clearer to simply state what the process and standard of a Governor's emergency declaration is in § 5425 rather than make a reference to a section of law that is intended to set out a method of source selection.

§ 5425(g)(2) - - The words "exclusive of territorial holidays" should not be crossed out as they are a part of the phrase that follows on the next page.

§ 5425(g)(3) - - A declaration of emergency is again mentioned at the end of subsection (3), but should be removed for the same reasons mentioned in the AGO's comments to § 5425(g)(1).

§ 5425(h) - - The AGO does not object to the proposed language, but is concerned with subsection (h)(4) which essentially waives the government's sovereign immunity with respect to paying for a protestor's attorneys fees and costs. This is certainly a policy call by the Legislature, but the Legislature should be very aware of opening this door and its effects, especially on the government's coffers. For your information, thus far, the Legislature has only opened this door with respect to bonds and long-term financing.

§ 5425(i) - - The AGO does not object to the proposed language.

Section 3. Amends 5 GCA § 5426. The majority of the amendments are technical in nature. The AGO does not object to any of the proposed language, except for one word in § 5426(b)(4)(iii). The word "petition" should be changed to "finding" because the government needs something more than a

petition to justify a debarment action. A petition is a mere accusation that has not yet been proven, and should not be the basis for a debarment action until proven.

Section 4. Amends 5 GCA § 5427. The AGO objects to all the changes to § 5427 and finds that § 5427 should not be changed at all.

However, if the § 5427 must be changed as stated in the bill, then the AGO has the following two comments to § 5427(b).

§ 5427(b) - - (1) The paragraph should begin with the phrase "Notwithstanding any other law" because settlements have been made subject to the last few annual appropriations act which states that there must be an appropriation before a settlement may occur. If a quick settlement is desired, then procurement settlements should be independent of the appropriations act language. Otherwise, all procurement settlements will have to await a special appropriation or an appropriation in the next fiscal year's appropriation act. (2) The phrase "including: with the concurrence of the Attorney General, liquidating the amount of any claim" creates problems with settlement of contract disputes and is unnecessary.

Section 5. Amends 5 GCA § 5450. It is unclear why the proposed changes to § 5450 are being made. As best as the AGO can tell, the changes do not do anything that the law on the books as presently written do not already do. In fact, the proposed changes may add confusion.

Section 6. Amends 5 GCA § 5452. Subsection (c) states that there shall be a conclusive admission of a violation of law if a contract is ratified or affirmed. This opens up the government and government personnel to liability and is unwise.

Section 7. Amends 5 GCA § 5480. In subsection (a) of § 5480, the language about the OPA being disqualifying to hear an appeal should conform with our prior suggestion that the Presiding Judge of the Superior Court should appoint a hearing officer at the OPA level rather than removing the entire procedure to the court level.

Regarding contract controversies, 5 GCA § 5480 seems intended to overturn the decision in *Pacific Rock v. Department of Education*, 2001 Guam 21. Subsection (f) of § 5480 removes breach of contract cases from the Government Claims Act and places them under the Guam Procurement Law. According to subsection (c) of § 5480, administrative review of breach of contract issues would be done by the Office of Public Accountability instead of the Attorney General pursuant to the Government Claims Act. This would shorten the timelines for breach of contract and other contract controversies. It might be helpful for the intent section of the Bill to include a comment about changing the *Pacific Rock* decision.

Currently, under the Government Claims Act, a claim must be filed within *18 months* from the date the claim arose. Under the bill, there is no timeline requirement to resolve a breach of contract dispute between the parties. Breaches of contract may occur well into the beginning of work on a contract or after a contract is completed. There is an ambiguity as to when the contractor must make a demand on

the agency. If there is an alleged breach of contract or other contract dispute, the time line ambiguity could be resolved by setting a time limit to file a demand on the agency after a breach of contract or other contract dispute occurs.

Section 8. Amends 5 GCA § 5481.

§ 5481(a) - - (1) The AGO prefers that this section remain as it is presently exists on the books. The proposed changes (“absent compelling cause or unfair prejudice”) merely open up the language to arguments. Inclusion of the phrase “absent compelling cause or unfair prejudice” allows actions to be filed after the 14-day period if the filing party shows a compelling reason or unfair prejudice. In other words, an exception to the statute of limitations is being made. The AGO thinks this is an unwise policy, and that is far better to have time limits without exceptions. Lawyers understand statutes of limitations and how they work, and there is nothing unreasonable about time limitations. (2) The last phrase is relative to the disqualification of the Public Auditor. The AGO has suggested that if the Public Auditor may not hear a case, then the Presiding Judge should appoint a hearing officer. If this suggestion is adopted, then this last phrase in § 5481(a) must accordingly be changed, or removed.

§ 5481(b), § 5481(c) and § 5481(d) - - the AGO does not object to the proposed changes.

Section 9. Amends 5 GCA § 5485(a). The AGO objects to the removal of the phrase “6 GCA § 4202.” There are important reasons why the government must rely on the privileges stated in this code section in defending the government, and therefore the AGO strenuously objects to the removal of this code section from § 5485(a).

Section 10. Amends 5 GCA 5485(b). The addition of the phrase “or purchasing agency” does not do anything really, and so the AGO does not have any objections, but wonders why the words must be added. However, we do note that there is a typographical error and that the number “3” should be the number “30.”

Section 11. Amends 5 GCA § 5703. The added language (“except as authorized under §§ 5427 and 5706 of this Chapter”) must comport with any changes made to the cited sections in this bill.

Section 12. Amends 5 GCA § 5705. Of the many changes to this section, the only one the AGO objects to is the inclusion of the phrase “or a rejected petitioner” in subsection (d), the section allowing appeals to the Superior Court from an Public Auditor decision to suspend or debar. The inclusion of this phrase in effect allows court actions to be filed by anyone under the sun, even those not even remotely connected to a suspension or debarment matter but who files a petition before the OPA and was rejected. Thus, if the bill’s intent is to improve procurement appeals processes and shorten the time for the resolution of protests and contract issues, then this phrase does exactly the opposite.

Section 13. Amends 5 GCA § 5706(b). The AGO does not object to the proposed language.

Section 14. Amends 5 GCA § 5707(a). The AGO does not object to the proposed language.

Section 15. Amends 5 GCA § 5708. The AGO is uncertain of the implications of this section, and therefore has no comment at this time.

Section 16. Severability. The AGO does not object to the proposed language.



Fwd: Comments to Bill 224

Carlo Branch <carlo.branch@senatorbjcruz.com>
To: Tessa Weidenbacher <tessa@senatorbjcruz.com>

Tue, Jan 14, 2014 at 11:47 AM

----- Forwarded message -----

From: **William Brennan** <will@senatorada.org>
Date: Tue, Jan 14, 2014 at 10:14 AM
Subject: Fwd: Comments to Bill 224
To: Carlo Branch <carlo.branch@senatorbjcruz.com>

FYI we received testimony on 224 from GTA.

See below.

Thanks,

-

William Bucky Brennan
Policy Analyst
Office of Senator Thomas C. Ada
I Mina' Trentai Dos Na Liheslaturan Guåhan - 32nd Guam Legislature
Office (671) 473 - 3301

----- Forwarded message -----

From: <tom@senatorada.org>
Date: Mon, Jan 13, 2014 at 4:49 PM
Subject: Fwd: Comments to Bill 224
To: "Brown John Thos." <jngo@ozemail.com.au>
Cc: Brennan Willy <will@senatorada.org>

John, just received this fr GTA.

Tom Ada
Sent from my iPhone

Begin forwarded message:

From: "Daniel J. Tydingco" <djtydingco@gta.net>
Date: January 13, 2014 at 2:58:41 PM GMT+10
To: Sen Tom Ada <tom@senatorada.org>
Cc: Serge Quenga <squenga@gta.net>
Subject: **Comments to Bill 224**

Senator:

We pored over your measure and ask you to consider the points in the attachment.

Thanks.

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Comments to Bill 224.docx

14K

Comments to Bill 224-32 An act to amend §5425, §5426, §5427, § 5450, §5452, §5480, §5481, and §§5485 (a) and (b) of Article 9, and § 5703, § 5705, §5706(b), §5707(a), § 5708 of Article 12, Chapter 4, Title 5 of the Guam Code Annotated Relative to Clarifying Legal and Contractual Remedies in Guam Procurement Law.

- Proposed amendment to §5425(a)(3). Eliminating the jurisdictional nature of the time limits for resolution of disputes may result in procurement delays and confusion.
- Proposed amendment to §5425(b). Use of alternative dispute resolution should be subject to mutual agreement of the procuring agency and the aggrieved bidder. If the parties cannot mutually agree on ADR, the normal dispute resolution process should continue.
- Proposed amendment to §5425(e). The amendment should clarify whether calendar days or work days apply to the time limits for failure to render a timely decision.
- Proposed amendment to §5425(f). This amendment deletes the entire original subsection (f) and removes important language reserving the finality of a decision of the Public Auditor unless an appeal is filed to the Superior Court. The last sentence of the proposed amendment provides: "If for any reason the Public Auditor is determined to be disqualified to hear such an appeal, a decision under Subsection (c) of this Section may be appealed to the Superior Court in accordance with Subsection (a) of § 5480 of this Chapter." This proposed language does not reserve finality of a Public Auditor decision pending any appeal and may be interpreted to limit an appeal only to when the Public Auditor is determined to be disqualified. The amendment should be modified or stricken.
- Proposed amendment to §5425(g). GTA is in full agreement that a protest should stay any action by the purchasing agency until the time for an appeal has run or a final resolution by the courts is rendered. The emergency procurement process adequately protects the government's ability to receive necessary services during any dispute. The amendment should include language expressly providing for appeals of protests to the Public Auditor and subsequent appeals to the Superior Court.

**GOVERNMENT OF GUAM RETIREMENT FUND
BOARD OF TRUSTEES
POSITION STATEMENT ON BILL 224-32**

January 24, 2014

I. INTRODUCTION

The Board of Trustees of the Government of Guam Retirement Fund (the "Fund") hereby submits its position statement opposing the passage of Bill 224-32.

II. OPPOSITION TO BILL 224-32

Bill 224-32 would amend various sections of Guam's Procurement Code purportedly by "CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW". Because the proposed amendments go far beyond clarifying the law to include significant and material changes to the Procurement Law, which are likely to discourage competition and hinder the Retirement Fund's ability to procure qualified professional services at reasonable costs, the Fund OPPOSES passage of Bill 224-32.

III. POSITION STATEMENT

A. Bill 224 Intends To Promote Efficiency In Pre-Contract Protests, But Will Unnecessarily Expand Authority to Resolve Post-Contract Disputes

Bill 224 appears to be focused on improving the efficiency of protests, but inappropriately expands into the area of post-contract performance, and the process for resolving alleged breaches of contract and other controversies. The proposed revisions are likely to harm the Fund and its ability to manage its professional service contracts.

Bill 224 would amend Section 5427 and 5703 by adding "contract damages" to the list of controversies that administrative agencies, and not the judiciary, have the authority to determine; and authorizing the Public Auditor to review such determinations de novo. These two provisions are more than "clarifications" to the current law; they are significant changes that merit further discussions to determine if these changes are necessary and desirable to promote overall procurement purposes. As further discussed below, the Fund believes such changes will be harmful to the Fund.

B. Bill 224 Would Reduce Competition and Hinder the Fund's Ability to Retain Qualified Service Contractors at Reasonable Cost.

From the Fund's perspective, passage of Bill 224-32 would adversely impact the professional service contracts procured by the Fund. The Fund retains custodians, investment counsel, investment managers, actuary firms, law firms, and third party administrators to provide professional services to the Fund. When potential contractors review the Fund's Requests for Proposals (RFPs) and the Procurement Law's provisions that are required to be

included in all government contracts, they will review the proposed contract terms in light of the compensation paid versus the risks of performing those professional services. In recent years, the risks of providing professional services to public pension plans has increased, and caused qualified vendors to terminate contracts with public sector plans, and cease to bid on RFPs if mandatory contract terms result in unacceptable levels of risk relative to the value of the contracts.

Bill 224-32 would change, not clarify, the Procurement Law by removing a function that is typically relegated to a judicial tribunal: to determine whether or not damages should be permitted in a breach of contract action. Bill 224-32, if passed, would confer such authority to the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers, to resolve contract disputes (controversies) between the Territory and a contractor and which arise under, or by virtue of, a procurement contract between them, as evidenced by the written demand of either party to the other for redress of a particularized claim or controversy. Controversies would be expanded to include, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract damages (added by Bill 224), modification or rescission. The controversy can be settled with the concurrence of the Attorney General, liquidating the amount of the claim. The determination of contract damages, as determined by the agency, would be reviewable de novo by the Public Auditor under the proposed changes to Section 5703. This represents a major change to the current expectations of the Fund's vendors and potential contractors.

From the perspective of potential contractors, the additions to Section 5427 and 5703 will add more uncertainty and ambiguity as to their potential exposure to risk and liability for controversies arising from their performance of their service contracts. Under current law, the Public Auditor does not have jurisdiction over disputes having to do with money owed to or by the government of Guam. Accordingly, an agency's determination of money owed to or by the government of Guam if appealed would go to the court, not the Public Auditor. Bill 224 not only would give the Public Auditor jurisdiction over disputes having to do with money owed under contract, but also jurisdiction over disputes involving contract damages. In the case of service contracts, "money owed" typically refers to the contractor's compensation for services performed, as set forth in the applicable contract. In contrast, "contract damages" goes beyond "money owed" and can mean an agency's claim against a contractor for breach of contract in the form of not performing as contracted for. In the Fund's case, its professional service providers understand the risks associated with public sector pension plans, and are extremely cautious about exposure to multi-million dollar claims due to, for example, alleged non-performance or underperformance. The material exposure to asset managers include claims of missed opportunities in the market – such as purchasing stocks that in hindsight did not perform as well as other stocks – and such claims are of the type that should be determined under appropriate standards by arbitrators or courts. If agency personnel and the Public Auditor are authorized to determine contract damages, then for contractors retained by the Fund, this level of risk and potential liability is likely to be unacceptable and too uncertain to bear. A significant reduction to the pool of competitors will adversely impact the Fund's ability to obtain quality contractors at reasonable costs. Therefore, the Fund strongly opposes changes to the Procurement Law that would authorize agencies or the Public Auditor to determine contract damages.

C. Significant Changes to the Procurement Code (Statute) Should Be Accompanied by Corresponding Changes to the Procurement Regulations to Avoid Conflict and Improve Implementation by Agencies.

The significant changes to the Procurement Law, if enacted, would conflict with existing provisions in Guam's Procurement Regulations. Typically, conflicting regulations would no longer be implemented upon the enactment of amendments to the statute, but any ambiguity about the continued applicability of regulations would be unnecessary and burdensome. If the changes are truly designed to improve efficiency and integrity of the procurement process, then the changes should be made in connection with corresponding regulations.

D. Bill 224 Conflicts With Existing Procurement Law Requiring the Guam Procurement Advisory Council to Address Government Procurement and Contracting.

The Legislative Intent of Bill 224-32 conflicts directly with Public Law No. 31-093:1, which established in a new Article 14 to the Guam Procurement Law, the Guam Procurement Advisory Council (Council) to research, evaluate, analyze, review, and make recommendations to improve, address and modernize government procurement and contracting. There is no indication that the Council provided input on Bill 224-32. Without the Council's input, there is no assurance that the proposed amendments to the Procurement Law are necessary, desirable, or that they will achieve the desired purposes underlying the Procurement Law.

For all of these reasons, the Board of Trustees of the Retirement Fund opposes the passage of Bill 224-32.

/s/

Joe T. San Agustin
Chairman
Government of Guam Retirement Fund



COMMITTEE ON RULES

I Mina'trentai Dos na Liheslaturan Guåhan • The 32nd Guam Legislature
155 Hesler Place, Hagåtña, Guam 96910 • www.guamlegislature.com
E-mail: roryforguam@gmail.com • Tel: (671)472-7679 • Fax: (671)472-3547

Senator
Rory J. Respicio
CHAIRPERSON
MAJORITY LEADER

Senator
Thomas C. Ada
VICE CHAIRPERSON
ASSISTANT MAJORITY LEADER

Senator
Vicente (Ben) C. Pangelinan
Member

Speaker
Judith T.P. Won Pat, Ed.D.
Member

Senator
Dennis G. Rodriguez, Jr.
Member

Vice-Speaker
Benjamin J.F. Cruz
Member

Legislative Secretary
Tina Rose Muña Barnes
Member

Senator
Frank Blas Aguon, Jr.
Member

Senator
Michael E.Q. San Nicolas
Member

Senator
V. Anthony Ada
Member
MINORITY LEADER

Senator
Aline Yamashita
Member

December 26, 2013

Memorandum

To: Rennae Meno
Clerk of the Legislature

From: Senator Rory J. Respicio
Majority Leader & Rules Chair

Subject: Waiver

Hafa Adai!

Attached please find the waiver for the bill number listed below.
Please note that the fiscal notes, or waivers, are issued on the bills as introduced.

WAIVERS:
Bill No. 224-32(COR)

Please forward the same to MIS for posting on our website. Please contact our office should you have any questions regarding this matter.

Si Yu'os ma'åse'!

2013 DEC 26 AM 11:13

**BUREAU OF BUDGET & MANAGEMENT RESEARCH**

OFFICE OF THE GOVERNOR
Post Office Box 2950, Hagåtña Guam 96932

EDDIE BAZA CALVO
GOVERNOR

RAY TENORIO
LIEUTENANT GOVERNOR

JOHN A. RIOS
DIRECTOR

FACSIMILE INFORMATION PAGE

PLEASE DELIVER TO: Senator Rory Respicio

FACSIMILE NUMBER: 472-3547

FROM: BBMR

Total Pages including this page: 2

If you do not receive legible copies of all the pages, please call back as soon as possible. Phone numbers (671) 475-9412/9450. Fax number (671) 472-2825

RE: Fiscal Note Waiver on the following Bill Nos.: 224-32(COR).

COMMENTS: Fiscal Notes to be picked up via Central Files.

Thank You!

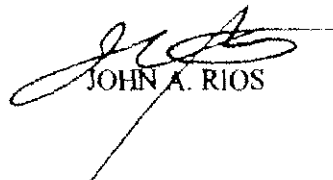
**BUREAU OF BUDGET & MANAGEMENT RESEARCH**OFFICE OF THE GOVERNOR
Post Office Box 2950, Hagåtña, Guam 96932**EDDIE BAZA CALVO**
GOVERNOR**RAY TENORIO**
LIEUTENANT GOVERNOR**DEC 12 2013****JOHN A. RIOS**
DIRECTOR**JOSE S. CALVO**
DEPUTY DIRECTOR

The Bureau requests that Bill No. 224-32 (COR) be granted a waiver pursuant to Public Law 12-229 as amended for the following reason(s):

The Bill is administrative in nature in that it proposes to amend several subsections of Article 9 and Article 12 of Title 5 of the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam procurement law. The subject legislation intends to improve the procurement system by way of ensuring prompt issuance of decisions on procurement protests and to improve the efficiency and efficacy of the administrative and judicial remedial scheme for the Government of Guam's procurement system.

The attached memorandum from one of the affected entities, the Department of Administration's General Services Agency, provides general comments on proposed amendments to the subject legislation. Based on the Bureau's review, such amendments are administrative in nature.

Based on the foregoing, there is no fiscal impact posed by the subject legislation.


JOHN A. RIOS

Attachment



COMMITTEE ON RULES

I Mina'trentai Dos na Liheslaturan Guåhan • The 32nd Guam Legislature
155 Hesler Place, Hagåtña, Guam 96910 • www.guamlegislature.com
E-mail: roryforguam@gmail.com • Tel: (671)472-7679 • Fax: (671)472-3547

Senator
Rory J. Respicio
CHAIRPERSON
MAJORITY LEADER

Senator
Thomas C. Ada
VICE CHAIRPERSON
ASSISTANT MAJORITY LEADER

Senator
Vicente (Ben) C. Pangelinan
Member

Speaker
Judith T.P. Won Pat, Ed.D.
Member

Senator
Dennis G. Rodriguez, Jr.
Member

Vice-Speaker
Benjamin J.F. Cruz
Member

Legislative Secretary
Tina Rose Muña Barnes
Member

Senator
Frank Blas Aguon, Jr.
Member

Senator
Michael F.Q. San Nicolas
Member

Senator
V. Anthony Ada
Member
MINORITY LEADER

Senator
Aline Yamashita
Member

November 25, 2013

VIA E-MAIL
john.rios@bbmr.guam.gov

John A. Rios
Director
Bureau of Budget & Management Research
P.O. Box 2950
Hagåtña, Guam 96910

RE: Request for Fiscal Notes– Bill Nos. 222-32 (COR) through 227-32(COR)

Hafa Adai Mr. Rios:

Transmitted herewith is a listing of *I Mina'trentai Dos na Liheslaturan Guåhan's* most recently introduced bills. Pursuant to 2 GCA §9103, I respectfully request the preparation of fiscal notes for the referenced bills.

Si Yu'os ma'åse' for your attention to this matter.

Very Truly Yours,

Senator Thomas C. Ada
Acting Chairperson of the Committee on Rules

Attachment (1)

Cc: Clerk of the Legislature

2013 NOV 25 PM 5:29

Bill Nos.	Sponsor	Title
222-32 (COR)	Vicente (ben) C. Pangutinan	AN ACT TO AMEND §89.01(a)(2); TO AMEND §89.01(a)(2)(B); TO ADD A NEW SUBSECTION (C) TO §89.01(a)(2); TO AMEND §89.02(a)(2); TO AMEND §89.02(a)(3); TO AMEND §89.02(b)(2); TO AMEND §89.02(a)(1) AND TO ADD A NEW SUBSECTION (a) TO §89.02 ALL OF CHAPTER 89.9 GUAM CODE ANNOTATED RELATIVE TO THE CRIMES AGAINST MINORS AND SEX OFFENDER REGISTRY
223-32 (COR)	Vicente (ben) C. Pangutinan	AN ACT TO APPROPRIATE THE SUM OF FOUR HUNDRED THOUSAND DOLLARS (\$400,000) FOR THE COMPENSATION TO FARMERS FOR CROP DAMAGES PROGRAM ESTABLISHED PURSUANT TO CHAPTER 64A, TITLE 5 OF THE GUAM CODE ANNOTATED.
224-32 (COR)	T.C. Ada, R.J. Respicio	AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a) §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW
225-32 (COR)	Juan T. Won Pat, Ed.D. T.R. Mona Barnes Aimee A. Yamashita, Ph.D	AN ACT TO ADD A NEW CHAPTER 58C TO TITLE 5 OF THE GUAM CODE ANNOTATED, RELATIVE TO THE RENOVATION OR CONSTRUCTION OF A NEW SIMON SANCHEZ HIGH SCHOOL AND TO AMEND AND RENUMBER §22425(a) ARTICLE 4, CHAPTER 22, DIVISION 2, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO REVALUATION OF REAL PROPERTY TAXES AND TO AMEND §53101 OF TITLE 17 GUAM CODE ANNOTATED, RELATIVE TO EARLY CHILDHOOD PROGRAM FUND.
226-32 (COR)	Juan T. Won Pat, Ed.D. T.R. Mona Barnes Aimee A. Yamashita, Ph.D	AN ACT TO ADD A NEW CHAPTER 58D TO TITLE 5 GUAM CODE ANNOTATED RELATIVE TO THE FINANCE, DESIGN, RENOVATION, REHABILITATION, CONSTRUCTION OR MAINTENANCE OF PUBLIC SCHOOLS
227-32 (COR)	T.C. Ada R.J. Respicio	AN ACT TO AUTHORIZE THE CREATION OF THE GUAM STREETLIGHT AUTHORITY TO ISSUE BONDS TO FINANCE THE PURCHASE AND INSTALLATION OF NEW LED STREETLIGHTS



COMMITTEE ON RULES

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Senator
Rory J. Respicio
CHAIRPERSON
MAJORITY LEADER

November 18, 2013

Senator
Thomas C. Ada
VICE CHAIRPERSON
ASSISTANT MAJORITY LEADER

MEMORANDUM


Senator
Vicente (Ben) C. Pangelinan
Member

To: **Rennae Meno**
Clerk of the Legislature

Speaker
Judith T.P. Won Pat, Ed.D.
Member

Attorney Therese M. Terlaje
Legislative Legal Counsel

Senator
Dennis G. Rodriguez, Jr.
Member

From: **Senator Thomas C. Ada** 
Acting Chairperson of the Committee on Rules

Vice-Speaker
Benjamin J.F. Cruz
Member

Subject: **Referral of Bill No. 224-32(COR)**

Legislative Secretary
Tina Rose Muña Barnes
Member

As the Acting Chairperson of the Committee on Rules, I am forwarding my referral of **Bill No. 224-32(COR)**.

Senator
Frank Blas Aguon, Jr.
Member

Please ensure that the subject bill is referred, in my name, to the respective committee, as shown on the attachment. I also request that the same be forwarded to all members of *I Mina'trentai Dos na Liheslaturan Guåhan*.

Senator
Michael F.Q. San Nicolas
Member

Should you have any questions, please feel free to contact our office at 472-7679.

Senator
V. Anthony Ada
Member
MINORITY LEADER

Si Yu'os Ma'åse!

Senator
Aline Yamashita
Member

Attachment

I Mina'Trentai Dos Na Liheslaturan Guahan

Bill Log Sheet

BILL NO.	SPONSOR	TITLE	DATE INTRODUCED	DATE REFERRED	CMTE REFERRED	PUBLIC HEARING DATE	DATE COMMITTEE REPORT FILED	FISCAL NOTES
224-32 (COR)	T.C. Ada, R.J. Respicio	AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a), §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.	11/15/13 4:49 p.m.	11/18/13	Committee on General Governmental Operations and Cultural Affairs			



Tessa Weidenbacher <tessa@senatorbjcruz.com>

FIRST NOTICE of Public Hearing – December 13, 2013

Tessa Weidenbacher <tessa@senatorbjcruz.com>
 To: phnotice@guamlegislature.org
 Cc: cor@guamlegislature.org, mis <mis@guamlegislature.org>

Thu, Dec 5, 2013 at 1:31 PM

December 5, 2013

MEMORANDUM

To: All Members /All Senators
 From: Vice Speaker Benjamin J.F. Cruz, Chairman
 Re: FIRST NOTICE of Public Hearing – December 13, 2013

Håfa Adai! The Committee on General Government Operations and Cultural Affairs will conduct a **Public Hearing of Bills** beginning at **2:00PM** and a **Confirmation Hearing** beginning at **5:00PM** on Friday, December 13, 2013, in the *I Liheslatura* Public Hearing Room with the following agenda:

2:00PM - Public Hearing of Bills

- **Bill No. 214-32 (COR)** – M.F.Q. San Nicolas – An act to allow employees of Government of Guam agencies and instrumentalities to apply payroll deductions to registered non-profits, by amending §20111 of Article 1, Chapter 20, Title 5, Guam Code Annotated.
- **Bill No. 220-32 (LS)** – R.J. Respicio / T.R. Muña Barnes / J.T. Won Pat, Ed.D. – An act to require the Mayors Council of Guam (MCOG) and the Guam Environmental Protection Agency (GEPA) to collaborate on development of an operational plan for the implementation of this act, and to appropriate Two Million Dollars (\$2,000,000) from the recycling revolving fund to the Mayors Council of Guam for the purchase of heavy equipment to be utilized by the MCOG for that collection and disposal of recyclables, junk cars, green waste and other debris.
- **Bill No. 224-32 (COR)** – T.C. Ada / R.J. Respicio – An act to amend §5425, §5426, §5427, §5450, §5452, §5480, §5481, §5485(a) and §5485(b) of Article 9, and §5703, §5705, §5706(b), §5707(a), and §5708 of Article 12, Chapter 5, Title 5 of the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.
- **Bill No. 227-32 (COR)** – T.C. Ada / R.J. Respicio – An act to authorize the creation of the Guam Streetlight Authority to issue bonds to finance the purchase and installation of new LED streetlights.
- **Bill No. 229-32 (COR)** – M.F.Q. San Nicolas – An act to require that the Office of Technology establish a web-based meeting protocol to allow agencies to hold non-public meetings remotely by adding a new subsection (k) to §20204.1 of Article 2, Chapter 20, Title 5, Guam Code Annotated.
- **Bill No. 230-32 (COR)** – M.F.Q. San Nicolas – An act to require that the Office of Technology establish a secure web-based communications protocol to allow agencies to securely share information with authorized recipients by adding a new subsection (j) to §20204.1 of Article 2, Chapter 20, Title 5, Guam Code Annotated.
- **Bill No. 233-32 (COR)** – M.F.Q. San Nicolas – An act to require a period for public comment at every public meeting of an agency or instrumentality of the Government of Guam, by adding a new §8117 to Chapter 8, Title 5, Guam Code Annotated.

5:00PM - Confirmation Hearing

- The Executive Appointment of **Donna W. Kloppenburg** as Performing Arts Member of the Council on the Arts and Humanities Agency.

Testimonies may be submitted via hand delivery to the Office of Vice Speaker Benjamin J.F Cruz at the Guam Legislature; via postal mail to 155 Hesler Street, Hagåtña Guam 96910; via facsimile to 477-2522; or via e-mail to senator@senatorbjcruz.com. Please submit testimonies at least one day prior to the date of the hearing.

All government activities, programs, and services are accessible for people with disabilities in compliance with Title II of the Americans with Disabilities Act (ADA). Should you or interested parties require assistance or special accommodations to fully participate in this public hearing, please contact Mr. Carlo J. Branch at the Office of the Vice Speaker at 477-2521 or via e-mail at carlo.branch@senatorbjcruz.com.

We look forward to your attendance and participation.

cc: COR
MIS
Media

n.b. The link for each item will open the pertinent document, e.g. Bill as introduced, Executive M&C.

—
Tessa Weidenbacher
/senior research analyst/

Vice Speaker Benjamin J.F. Cruz
I Mina'trentai Dos Na Liheslaturan Guåhan
Phone: (671) 477-2520/1 | Fax: (671) 477-2522
<http://www.senatorbjcruz.com>

2 attachments

 **1st Notice PH 12132013.pdf**
263K

 **1st Notice PR PH 12132013.pdf**
258K



Tessa Weidenbacher <tessa@senatorbjcruz.com>

SECOND NOTICE of Public Hearing – December 13, 2013 (AMENDED)

Tessa Weidenbacher <tessa@senatorbjcruz.com>

Wed, Dec 11, 2013 at 1:30 PM

To: phnotice@guamlegislature.org

Cc: cor@guamlegislature.org, mis <mis@guamlegislature.org>

December 11, 2013

MEMORANDUM

To: All Members / All Senators

From: Senator Tina R. Muña Barnes, Acting Chair

Re: SECOND NOTICE of Public Hearing – December 13, 2013

Håfa Adai! The Committee on General Government Operations and Cultural Affairs will conduct a **Public Hearing of Bills** beginning at **2:00PM** and a **Confirmation Hearing** beginning at **5:00PM** on **Friday, December 13, 2013**, in the / *Liheslatura* Public Hearing Room with the following agenda:

2:00PM - Public Hearing of Bills

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- **Bill No. 220-32 (LS)** – R.J. Respicio / T.R. Muña Barnes / J.T. Won Pat, Ed.D. – An act to require the Mayors Council of Guam (MCOG) and the Guam Environmental Protection Agency (GEPA) to collaborate on development of an operational plan for the implementation of this act, and to appropriate Two Million Dollars (\$2,000,000) from the recycling revolving fund to the Mayors Council of Guam for the purchase of heavy equipment to be utilized by the MCOG for that collection and disposal of recyclables, junk cars, green waste and other debris.
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- **Bill No. 227-32 (COR)** – T.C. Ada / R.J. Respicio – An act to authorize the creation of the Guam Streetlight Authority to issue bonds to finance the purchase and installation of new LED streetlights.
- **Bill No. 229-32 (COR)** – M.F.Q. San Nicolas – An act to require that the Office of Technology establish a web-based meeting protocol to allow agencies to hold non-public meetings remotely by adding a new subsection (k) to §20204.1 of Article 2, Chapter 20, Title 5, Guam Code Annotated.
- **Bill No. 230-32 (COR)** – M.F.Q. San Nicolas – An act to require that the Office of Technology establish a secure web-based communications protocol to allow agencies to securely share information with authorized recipients by adding a new subsection (j) to §20204.1 of Article 2, Chapter 20, Title 5, Guam Code Annotated.
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We look forward to your attendance and participation.


cc: COR
MIS
Media

n.b. The link for each item will open the pertinent document, e.g. Bill as introduced, Executive M&C.

—
Tessa Weidenbacher
/senior research analyst/

Vice Speaker Benjamin J.F. Cruz
I Mina'trentai Dos Na Liheslaturan Guåhan
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2 attachments

 **2nd Notice PH 12132013.pdf**
245K

 **2nd Notice PR PH 12132013.pdf**
258K

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As of December 2, 2013**

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As of December 2, 2013**

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PUBLIC HEARING AGENDA

Friday, December 13, 2013

I Liheslatura • Public Hearing Room • Hagåtña, Guam

Public Hearing of Bills - 2:00PM

Bill No. 214-32 (COR) - M.F.Q. San Nicolas - An act to allow employees of government of Guam agencies and instrumentalities to apply payroll deductions to registered non-profits, by amending §20111 of Article 1, Chapter 20, Title 5, Guam Code Annotated.

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Bill No. 224-32 (COR) - T.C. Ada / R.J. Respicio - An act to amend §5425, §5426, §5427, §5450, §5452, §5480, §5481, §5485(a) and §5485(b) of Article 9, and §5703, §5705, §5706(b), §5707(a), and §5708 of Article 12, Chapter 5, Title 5 of the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement Law.

Bill No. 227-32 (COR) - T.C. Ada / R.J. Respicio - An act to authorize the creation of the Guam Streetlight Authority to issue bonds to finance the purchase and installation of new LED streetlights.

Bill No. 229-32 (COR) - M.F.Q. San Nicolas - An act to require that the Office of Technology establish a web-based meeting protocol to allow agencies to hold non-public meetings remotely by adding a new subsection (k) to §20204.1 of Article 2, Chapter 20, Title 5, Guam Code Annotated.

Bill No. 230-32 (COR) - M.F.Q. San Nicolas - An act to require that the Office of Technology establish a secure web-based communications protocol to allow agencies to securely share information with authorized recipients by adding a new subsection (j) to §20204.1 of Article 2, Chapter 20, Title 5, Guam Code Annotated.

Bill No. 233-32 (COR) - M.F.Q. San Nicolas - An act to require a period for public comment at every public meeting of an agency or instrumentality of the Government of Guam, by adding a new §8117 to Chapter 8, Title 5, Guam Code Annotated.

Confirmation Hearing - 5:00PM

The Executive Appointment of Donna W. Kloppenburg as Performing Arts Member of the Council on the Arts and Humanities Agency.



COMMITTEE ON RULES

I Mina'trentai Dos na Liheslaturan Guåhan • The 32nd Guam Legislature
155 Hesler Place, Hagåtña, Guam 96910 • www.guamlegislature.com
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Senator
Rory J. Respicio
CHAIRPERSON
MAJORITY LEADER

Senator
Thomas C. Ada
VICE CHAIRPERSON
ASSISTANT MAJORITY LEADER

Senator
Vicente (Ben) C. Pangelinan
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Legislative Secretary
Tina Rose Muña Barnes
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Senator
Frank Blas Aguon, Jr.
Member

Senator
Michael E.Q. San Nicolas
Member

Senator
V. Anthony Ada
Member
MINORITY LEADER

Senator
Aline Yamashita
Member

December 26, 2013

Memorandum

To: Rennae Meno
Clerk of the Legislature

From: Senator Rory J. Respicio
Majority Leader & Rules Chair

Subject: Waiver

Hafa Adai!

Attached please find the waiver for the bill number listed below.
Please note that the fiscal notes, or waivers, are issued on the bills as introduced.

WAIVERS:
Bill No. 224-32(COR)

Please forward the same to MIS for posting on our website. Please contact our office should you have any questions regarding this matter.

Si Yu'os ma'åse'!

2013 DEC 26 AM 11:13

**BUREAU OF BUDGET & MANAGEMENT RESEARCH**

OFFICE OF THE GOVERNOR
Post Office Box 2950, Hagåtña Guam 96932

EDDIE BAZA CALVO
GOVERNOR

JOHN A. RIOS
DIRECTOR

RAY TENORIO
LIEUTENANT GOVERNOR

FACSIMILE INFORMATION PAGE

PLEASE DELIVER TO: Senator Rory Respicio

FACSIMILE NUMBER: 472-3547

FROM: BBMR

Total Pages including this page: 2

If you do not receive legible copies of all the pages, please call back as soon as possible. Phone numbers (671) 475-9412/9450. Fax number (671) 472-2825

RE: Fiscal Note Waiver on the following Bill Nos.: 224-32(COR).

COMMENTS: Fiscal Notes to be picked up via Central Files.

Thank You!

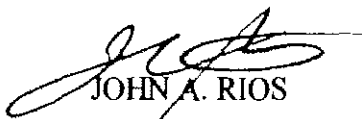
**BUREAU OF BUDGET & MANAGEMENT RESEARCH**OFFICE OF THE GOVERNOR
Post Office Box 2950, Hagåtña Guam 96932**EDDIE BAZA CALVO**
GOVERNOR**RAY TENORIO**
LIEUTENANT GOVERNOR**DEC 12 2013****JOHN A. RIOS**
DIRECTOR**JOSE S. CALVO**
DEPUTY DIRECTOR

The Bureau requests that Bill No. 224-32 (COR) be granted a waiver pursuant to Public Law 12-229 as amended for the following reason(s):

The Bill is administrative in nature in that it proposes to amend several subsections of Article 9 and Article 12 of Title 5 of the Guam Code Annotated relative to clarifying legal and contractual remedies in Guam procurement law. The subject legislation intends to improve the procurement system by way of ensuring prompt issuance of decisions on procurement protests and to improve the efficiency and efficacy of the administrative and judicial remedial scheme for the Government of Guam's procurement system.

The attached memorandum from one of the affected entities, the Department of Administration's General Services Agency, provides general comments on proposed amendments to the subject legislation. Based on the Bureau's review, such amendments are administrative in nature.

Based on the foregoing, there is no fiscal impact posed by the subject legislation.


JOHN A. RIOS

Attachment



COMMITTEE ON RULES

I Mina'trentai Dos na Liheslaturan Guåhan • The 32nd Guam Legislature
155 Hesler Place, Hagåtña, Guam 96910 • www.guamlegislature.com
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Senator
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MAJORITY LEADER

Senator
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VICE CHAIRPERSON
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Member

Senator
Michael F.Q. San Nicolas
Member

Senator
V. Anthony Ada
Member
MINORITY LEADER

Senator
Aline Yamashita
Member

November 25, 2013

VIA E-MAIL
john.rios@bbmr.guam.gov

John A. Rios
Director
Bureau of Budget & Management Research
P.O. Box 2950
Hagåtña, Guam 96910

RE: Request for Fiscal Notes– Bill Nos. 222-32 (COR) through 227-32(COR)

Hafa Adai Mr. Rios:

Transmitted herewith is a listing of *I Mina'trentai Dos na Liheslaturan Guåhan's* most recently introduced bills. Pursuant to 2 GCA §9103, I respectfully request the preparation of fiscal notes for the referenced bills.

Si Yu'os ma'åse' for your attention to this matter.

Very Truly Yours,

Senator Thomas C. Ada
Acting Chairperson of the Committee on Rules

Attachment (1)

Cc: Clerk of the Legislature

2013 NOV 25 PM 5:29

Bill Nos.	Sponsor	Title
222-32 (COR)	Vicente (ben) C. Pangelinan	AN ACT TO AMEND §89.01(a)(2); TO AMEND §89.01(a)(2)(B); TO ADD A NEW SUBSECTION (C) TO §89.01(a)(2); TO AMEND §89.02(a)(2); TO AMEND §89.02(a)(3); TO AMEND §89.02(b)(2); TO AMEND §89.02(c)(1) AND TO ADD A NEW SUBSECTION (a) TO §89.02 ALL OF CHAPTER 89, 9 GUAM CODE ANNOTATED RELATIVE TO THE CRIMES AGAINST MINORS AND SEX OFFENDER REGISTRY.
223-32 (COR)	Vicente (ben) C. Pangelinan	AN ACT TO APPROPRIATE THE SUM OF FOUR HUNDRED THOUSAND DOLLARS (\$400,000) FOR THE COMPENSATION TO FARMERS FOR CROP DAMAGES PROGRAM ESTABLISHED PURSUANT TO CHAPTER 64A, TITLE 5 OF THE GUAM CODE ANNOTATED.
224-32 (COR)	T.C. Ada, R.J. Respicio	AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a), §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.
225-32 (COR)	Judith T. Won Pat, Ed.D. T.R. Muna Barnes Aline A. Yamashita, Ph.D.	AN ACT TO ADD A NEW CHAPTER 58C TO TITLE 5 OF THE GUAM CODE ANNOTATED, RELATIVE TO THE RENOVATION OR CONSTRUCTION OF A NEW SIMON SANCHEZ HIGH SCHOOL AND TO AMEND AND RENUMBER §22425(a) ARTICLE 4, CHAPTER 22, DIVISION 2, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO REVALUATION OF REAL PROPERTY TAXES AND TO AMEND §53101 OF TITLE 17 GUAM CODE ANNOTATED, RELATIVE TO EARLY CHILDHOOD PROGRAM FUND.
226-32 (COR)	Judith T. Won Pat, Ed.D. T.R. Muna Barnes Aline A. Yamashita, Ph.D.	AN ACT TO ADD A NEW CHAPTER 58D TO TITLE 5 GUAM CODE ANNOTATED RELATIVE TO THE FINANCE, DESIGN, RENOVATION, REHABILITATION, CONSTRUCTION OR MAINTENANCE OF PUBLIC SCHOOLS.
227-32 (COR)	T.C. Ada R.J. Respicio	AN ACT TO AUTHORIZE THE CREATION OF THE GUAM STREETLIGHT AUTHORITY TO ISSUE BONDS TO FINANCE THE PURCHASE AND INSTALLATION OF NEW LED STREETLIGHTS.



COMMITTEE ON RULES

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Senator
Rory J. Respicio
CHAIRPERSON
MAJORITY LEADER

November 18, 2013

Senator
Thomas C. Ada
VICE CHAIRPERSON
ASSISTANT MAJORITY LEADER

MEMORANDUM


Senator
Vicente (Ben) C. Pangelinan
Member

To: Rennae Meno
Clerk of the Legislature

Speaker
Judith T.P. Won Pat, Ed.D.
Member

Attorney Therese M. Terlaje
Legislative Legal Counsel

Senator
Dennis G. Rodriguez, Jr.
Member

From: Senator Thomas C. Ada 
Acting Chairperson of the Committee on Rules

Vice-Speaker
Benjamin J.F. Cruz
Member

Subject: Referral of Bill No. 224-32(COR)

Legislative Secretary
Tina Rose Muña Barnes
Member

As the Acting Chairperson of the Committee on Rules, I am forwarding my referral of **Bill No. 224-32(COR)**.

Senator
Frank Blas Aguon, Jr.
Member

Please ensure that the subject bill is referred, in my name, to the respective committee, as shown on the attachment. I also request that the same be forwarded to all members of *I Mina'trentai Dos na Liheslaturan Guåhan*.

Senator
Michael F.Q. San Nicolas
Member

Should you have any questions, please feel free to contact our office at 472-7679.

Senator
V. Anthony Ada
Member
MINORITY LEADER

Si Yu'os Ma'åse!

Senator
Aline Yamashita
Member

Attachment

I MINA'TRENTAI DOS NA LIHESLATURAN GUÅHAN
2013 (FIRST) Regular Session

Bill No. 224-32(COR)

Introduced by:

T. C. Ada 
R.J. Respicio 

AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a), §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1. Findings and Intent.**

3 *I Liheslaturan Guåhan* finds that the procurement system is
4 intentionally created to “outsource” the real time policing of the
5 procurement process to the private sector by way of protests, and that
6 the only way procurement will remain effective is if the review process
7 is as expedited as the original procurement process.

8 *I Liheslaturan Guåhan* finds that there is a need for the prompt
9 issuance of decisions on protests related to solicitations or awards as
10 mandated by 5 GCA §5425(c) of the procurement law, and further
11 finds that the lack of a timely decision or other resolution of such
12 protests is a significant factor in prolonged procurement disputes,

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1 oftentimes lasting for months.

2 *I Liheslaturan Guåhan* finds that a comprehensive review of the
3 administrative and judicial remedial scheme of the procurement law,
4 set out in Articles 9 and 12 of the Procurement Act (5 GCA Division 1,
5 Chapter 5) is appropriate and necessary to improve the efficiency and
6 efficacy of the administrative and judicial remedial scheme. *I*
7 *Liheslaturan Guahan* further finds that the general structure of the
8 remedial scheme is sound but in need of critical changes to achieve
9 this goal.

10 *I Liheslaturan Guahan* intends to enroll the good faith
11 participation of private sector participants in the procurement process
12 to assure the efficacy and integrity of the procurement system, and to
13 establish an effective and expeditious resolution of the disputes that
14 participation invites.

15

16 **Section 2. §5425 of 5GCA Chapter 5 Article 9 Legal and**
17 **Contractual Remedies is amended as follows:**

18

19 **§5425. Authority to Resolve Resolution of Protested Solicitations**
20 **and Awards.**

21

22 (a) Right to Protest. Any actual or prospective bidder, offeror,
23 or contractor who may be aggrieved in connection with the method
24 of source selection, solicitation or award of a contract, may protest to
25 the Chief Procurement Officer, the Director of Public Works or the
26 head of a purchasing agency. ~~The protest shall be submitted in~~
27 ~~writing within fourteen (14) days after such aggrieved person knows~~
28 ~~or should know of the facts giving rise thereto.~~ A protest made to the
29 office which issued a solicitation shall be deemed properly made.

1 (1) The protest shall be submitted in writing within fourteen
2 (14) days after such aggrieved person knows or should know of the
3 facts giving rise to the belief such person may be aggrieved.

4 (2) A person may reasonably be aggrieved if:

5 (i) there are facts sufficient to raise a reasonable
6 apprehension that the method of source selection, the
7 solicitation, or the award of a contract may be contrary to law or
8 regulation; and

9 (ii) there is a reasonable likelihood, based on information
10 available at the time of protest, that such person would have
11 been in a competitive position to be awarded the contract.

12 (3) The time limits specified for the resolution of disputes
13 arising under this Section, including any administrative and judicial
14 review provided in this Article 9, are not intended to be
15 jurisdictional, but shall be treated as a bar absent just cause or
16 compelling prejudice.

17
18 (b) Authority and Obligation to Resolve Protests. The Chief
19 Procurement Officer, the Director of Public Works, the head of a
20 purchasing agency, or a designee of one of these officers are
21 encouraged and shall have the authority, prior to the commencement
22 of an appeal to the Public Auditor or an action in court concerning
23 the controversy, to settle and resolve a protest of an aggrieved bidder,
24 offeror, or contractor, actual or prospective, concerning the
25 solicitation or award of a contract. It is in the best interest of the
26 Government of Guam to resolve and settle such protests

1 expeditiously and informally without administrative or judicial
2 review so long as its minimum needs may be satisfied and effective
3 competition fostered. This authority shall be exercised in accordance
4 with regulations promulgated by the Policy Office, which may
5 include use of settlement conference, expedited Alternative Dispute
6 Resolution (ADR) and debriefing methods. Any time limit
7 established by this Article for the taking of any action, administrative
8 or judicial, shall be tolled during any period in which the parties are
9 in good faith engaged to resolve and settle any dispute arising under
10 this Article.

11 (c) Decision. If the protest is not resolved by mutual agreement,
12 the Chief Procurement Officer, the Director of Public Works, the
13 head of a purchasing agency, or a designee of one of these officers
14 shall promptly issue a decision in writing accepting or rejecting the
15 protest, in whole or part. The decision shall:

16 (1) state the grounds for the protest and the factual and legal
17 reasons for the ~~action taken~~ decision made; and

18 (2) inform the ~~protestant~~ protestor that the decision of the
19 officer to whom the protest was made is final, and of ~~it's~~ the
20 protestor's right to administrative and judicial review; and

21 (3) state if the reason for denying the protest is that the protest
22 is untimely or that the protestor was not found to be aggrieved and
23 the reasons why the substantive arguments of the protest, if any,
24 must be rejected.

25

1 (d) Notice of Decision. A copy of the decision under Subsection
2 (c) of this Section shall be mailed or otherwise furnished immediately
3 to the ~~protestant~~ protestor and any other party intervening.

4
5 (e) Failure to Render Timely Decision. If the protestor does not
6 receive a decision of the protest as required under Subsection (c) of
7 this Section within twenty-one (21) days from the date of the protest,
8 the protestor may make a written request to the office wherein the
9 protest was made to render such a decision on the protest. If no
10 decision as required under Subsection (c) of this Section is made and
11 served upon the protestor within seven (7) days after receipt of such
12 written request, or within such longer period as may be expressly and
13 in writing agreed upon by the parties, then the protest shall be
14 deemed admitted.

15
16 ~~(e)(f)~~ Appeal. A decision under Subsection (c) of this Section
17 including a decision there under regarding entitlement to costs as
18 provided by Subsection (h) of this Section, may be appealed by the
19 ~~protestant~~ protestor, to the Public Auditor within fifteen (15) days
20 after receipt by the ~~protestant~~ protestor of the notice of decision: on
21 the protest, and a decision deemed admitted under Subsection (e) of
22 this Section may be appealed by the office to which the protest was
23 made, to the Public Auditor, within fifteen (15) days after the date the
24 protest is deemed admitted within fifteen (15) days after receipt by
25 the protestor of the notice of decision as provided in Subsection ~~(e)~~(i)
26 of this Section. If for any reason the Public Auditor is determined to
27 be disqualified to hear such an appeal, a decision under Subsection

1 (c) of this Section may be appealed directly to the Superior Court in
2 accordance with Subsection (a) of § 5480 of this Chapter.

3
4 ~~(f) Finality. A decision of the Public Auditor is final unless a~~
5 ~~person adversely affected by the decision commences an action in the~~
6 ~~Superior Court in accordance with Subsection (a) of §5480 of this~~
7 ~~Chapter.~~

8
9 (g) In the event of a timely protest under Subsection (a) of this
10 Section ~~or under Subsection (a) of § 5480 of this Chapter~~, the
11 Territory shall not proceed further with the solicitation, ~~or with the~~
12 award, or performance of the contract prior to the time allowed to
13 appeal from, or the final resolution of, such protest, and any such
14 further action is void, unless:

15 (1) The Chief Procurement Officer or the Director of Public
16 Works, ~~after consultation with and~~ written concurrence of the head
17 of the using or purchasing agency and the Attorney General or
18 designated Deputy Attorney General, then makes a written
19 determination that the award of the contract without delay is
20 necessary to protect substantial interests of the Territory, or the
21 Governor then issues a Declaration of Emergency Procurement as
22 authorized by § 5215 of this Chapter; and

23
24 (2) Absent a declaration of emergency procurement by the
25 Governor, the ~~protestant~~ protestor has been given at least two (2)
26 days notice of such determination ~~(exclusive of territorial holidays~~

1 as provided in 1 GCA § 1004); and
2

3 (3) If the protest is pending before the Public Auditor or the
4 Court, the Public Auditor or Court has confirmed the validity of
5 such determination and declaration, or if no such protest is pending,
6 no protest to the Public Auditor or the Court of such determination
7 or declaration is filed prior to expiration of the two (2) day period
8 specified in Item (2) of Subsection (g) of this Section; but if such a
9 protest is filed, an expedited hearing shall be noticed to all
10 interested parties and held to determine whether to confirm any
11 such determination of necessity and substantial interest or
12 declaration of emergency procurement.
13

14 (h) Entitlement to Costs. In addition to any other relief or
15 remedy granted under Subsection (c) or (e) of this Section or under
16 Subsection (a) of § 5480 of this Chapter, including the remedies
17 provided by Part B of Article 9 of this Chapter, when a protest is
18 sustained, the ~~protestant~~ protestor shall be entitled to the reasonable
19 costs incurred in connection with the solicitation and protest,
20 including bid preparation costs, excluding attorney's fees, if:

21
22 (1) the ~~protestant~~ protestor should have been awarded the
23 contract under the solicitation but was not; or
24

25 (2) there is a reasonable likelihood that the ~~protestant~~ protestor
26 may have been awarded the contract but for the breach of any
27 ethical obligation imposed by Part B of Article 11 of this Chapter or

1 the willful or reckless violation of any applicable procurement law
2 or regulation.

3
4 (3) The Public Auditor shall have the power to assess
5 reasonable costs including reasonable attorney fees incurred by the
6 government, including its autonomous agencies and public
7 corporations, or any protestor or interested party against a
8 protestant upon its finding that the any party, including the
9 government, making a the protest, motion or taking any position
10 bringing any action was made fraudulently, frivolously or solely
11 with predominant intent to delay or disrupt the procurement
12 process.

13
14 (i) Finality. A decision of the Public Auditor is final unless a
15 person adversely affected by the decision commences an appeal in
16 the Superior Court as provided by §5707(a) of this Chapter and in
17 accordance with the waiver of sovereign immunity conferred by
18 Subsection (a) of §5480 of this Chapter.

19
20 **Section 3. §5426 Authority to Debar or Suspend of 5GCA Chapter**
21 **5 Article 9 is amended as follows:**

22
23 **§ 5426. Authority to Debar or Suspend.**

24 (a) Authority. After reasonable notice to the person involved and
25 reasonable opportunity for that person to be heard, the Chief
26 Procurement Officer, the Director of Public Works or the head of a
27 purchasing agency, after consultation with the using agency and the

1 Attorney General, shall have authority to debar a person for cause, or
2 to suspend a person for probable cause, from consideration for award
3 of contracts. The debarment shall not be for a period of more than
4 two (2) years. ~~The same officer, after consultation with the using~~
5 ~~agency and the Attorney General, shall have authority to suspend a~~
6 ~~person from consideration for award of contracts if there is probable~~
7 ~~cause for debarment.~~ The suspension shall not be for a period
8 exceeding three (3) months. The authority to debar or suspend shall
9 be exercised in accordance with regulations promulgated by the
10 Policy Office.

11
12 (b) Causes for Debarment or Suspension. The causes for
13 debarment or suspension include the following:

14
15 (1) conviction for commission of a criminal offense as an
16 incident to obtaining or attempting to obtain a private contract or
17 subcontract, or in the performance of such contract or subcontract;

18
19 (2) conviction under territorial or federal statutes of
20 embezzlement, theft, forgery, bribery, falsification or destruction of
21 records, receiving stolen property, or any other offense indicating a
22 lack of business integrity or business honesty which currently,
23 seriously and directly affects responsibility as a territorial
24 contractor;

25
26 (3) conviction under federal antitrust statutes arising out of the
27 submission of bids or proposals;

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(4) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency to be so serious as to justify debarment action:

~~(A)~~i. deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

~~(B)~~ii. a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more procurement contracts, provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; or

iii. upon a petition of the Department of Labor, failure to pay employees engaged on the contract in violation of Wage Determination law or contract conditions.

(5) any other cause the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a territorial contractor, including debarment by another governmental entity for any cause listed in regulations of the Policy Office;

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(6) for violation of the ethical standards set forth in Article 11 of this Chapter.

(7) filing a frivolous or fraudulent petition, protest or appeal under § 5425(e), § 5426~~(f)~~(e) or of § 5427(e) of this Chapter.

(c) Decision. The Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency shall issue a written decision to debar or suspend or to reject any petition to do so brought under Subsection (f) of this Section. The decision shall:

(1) state the reasons for the ~~action taken~~ decision made; and

(2) inform the debarred or suspended person involved, or any person whose petition is rejected, of its rights to judicial or administrative review as provided in this Chapter.

(d) Notice of Decision. A copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening or petitioning, and the head of all governmental bodies or purchasing agencies.

(e) Finality of Decision. A decision under Subsections (c) or (f) of this Section shall be final and conclusive, unless fraudulent, or an appeal is taken to the Public Auditor in accordance with § 5706 of

1 this Chapter. Such a decision shall be automatically stayed during
2 the pendency of any appeal, but any such appeal does not preclude
3 nor require a determination of non-responsibility in any solicitation
4 in which the person charged may participate. The officer issuing
5 such decision shall immediately notify all persons, governmental
6 bodies and purchasing agencies of the fact and effect of such appeal.

7
8 (f) Any member of the public, including bidder, offeror or
9 contractor as well as any elected official or employee of the
10 government, may petition the Chief Procurement Officer, the
11 Director of Public Works or the head of a purchasing agency to take
12 action to debar or suspend pursuant to Subsection (a) of this Section.
13 Immediately upon the receipt of such a petition, the person petitioned
14 shall cause An an investigation of each petition shall to be conducted
15 and hold a hearing as authorized in Subsection (a) promptly and a
16 writ ten report should be made of findings of fact and action taken
17 and issue a decision as required in Subsection (c). If the petitioned
18 officer does not issue the written decision required under Subsection
19 (c) of this Section within sixty (60) days after written request by the
20 petitioner for a final decision, then the petitioner may proceed with
21 an appeal to the Public Auditor as if a the petition had been rejected.

22
23 **Section 4. §5427 of 5GCA Chapter 5 Article 9 Legal and**

24 **Contractual Remedies is amended as follows:**

25 **§ 5427. Authority to Resolve Contract and Breach of Contract**
26 **Controversies.**

1 (a) Applicability. This Section applies to controversies between
2 the Territory and a contractor and which arise under, or by virtue of,
3 a procurement contract between them, as evidenced by the written
4 demand of either party to the other for redress of a particularized
5 claim or controversy. This includes without limitation controversies
6 based upon breach of contract, mistake, misrepresentation, or other
7 cause for contract damages, modification or rescission.

8
9 (b) Authority. The Chief Procurement Officer, the Director of
10 Public Works, the head of a purchasing agency, or a designee of one
11 of these officers is authorized, prior to commencement of an action in
12 a court concerning the controversy, to settle and resolve a
13 controversy described in Subsection (a) of this Section, including:
14 with the concurrence of the Attorney General, liquidating the amount
15 of any claim. This authority shall be exercised in accordance with
16 regulations promulgated by the Policy Office.

17
18 (c) Decision. If such a controversy is not resolved by mutual
19 agreement, the Chief Procurement Officer, the Director of Public
20 Works, the head of a purchasing agency, or the designee of one of
21 these officers shall promptly issue a decision in writing. The decision
22 shall:

23
24 (1) state the reasons for the ~~action taken~~ decision made; and

25
26 (2) state the liquidated amount of damages, if any, determined
27 to be payable to the contractor, with the concurrence of the

1 Attorney General, regardless whether the contractor accepts said
2 sum in mutual settlement of the controversy; and

3
4 (2)(3) inform the contractor of its rights to judicial or
5 administrative review as provided in this Chapter.

6
7 (d) Notice of Decision. A copy of the decision under Subsection
8 (c) of this Section shall be mailed or otherwise furnished immediately
9 to the contractor.

10
11 (e) Finality of Decision. The decision reached pursuant to
12 Subsection (c) of this Section shall be final and conclusive, unless
13 fraudulent, or the contractor appeals administratively to the Public
14 Auditor in accordance with § 5706 of this Chapter.

15
16 (f) Failure to Render Timely Decision. If the Chief
17 Procurement Officer, the Director of Public Works, the head of a
18 purchasing agency, or the designee of one of these officers does not
19 issue the written decision required under Subsection (c) of this
20 Section within sixty (60) days after written request for a final
21 decision, or within such longer period as may be agreed upon by the
22 parties, then the contractor may proceed as if an adverse decision had
23 been received.

24
25 **Section 5. §5450 of 5GCA Chapter 5 Article 9 Legal and**
26 **Contractual Remedies is amended as follows:**

27

1 **§ 5450. Applicability of this Part.**

2 The provisions of this Part only apply where it is determined
3 administratively, or upon administrative or judicial review of a
4 protest under the provisions of § 5425, that a solicitation or award of
5 a contract is in violation of law, and are in addition to any other
6 remedy or relief allowed by law or equity.

7

8 **Section 6. §5452 of 5GCA Chapter 5 Article 9 Legal and**
9 **Contractual Remedies is amended as follows:**

10

11 **§ 5452. Remedies After an Award.**

12 ~~(a)~~ If after an award it is determined that a solicitation or award of a
13 contract is in violation of law, then:

14

15 ~~(A)~~(a) if the person awarded the contract has not acted
16 fraudulently or in bad faith:

17

18 ~~(A)~~(1) the contract may be ratified and affirmed, provided it is
19 determined that doing so is in the best interests of the Territory; or

20

21 ~~(B)~~(2) the contract may be terminated and the person awarded
22 the contract shall be compensated for the actual expenses
23 reasonably incurred under the contract, plus a reasonable profit,
24 prior to the termination.

25

26 ~~(A)~~(b) if the person awarded the contract has acted fraudulently
27 or in bad faith:

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~~(A)(1) the contract may be declared null and void; or~~

~~(B)(2) the contract may be ratified and affirmed if such action is in the best interests of the Territory, without prejudice to the Territory's rights to such damages as may be appropriate.~~

~~(c) In either case, the determination to ratify or affirm the contract shall be made without regard to the position of the person awarded the contract and shall conclusively admit violation of law.~~

~~(b) This Section shall be read as being in addition to and not in conflict with, or repealing 4 GCA § 4137 (Prohibitions on the Activities of Government Employees).~~

Section 7. §5480 of 5GCA Chapter 5 Article 9 Legal and Contractual Remedies is amended as follows:

§ 5480. Waiver of Sovereign Immunity by Grant of Jurisdiction in Connection with Contracts Controversies Arising Under Part A of this Article.

(a) Solicitation and Award of Contracts. The Superior Court of Guam shall have jurisdiction ~~over an action between the Territory and a bidder, offeror, or contractor, either actual or prospective, to determine whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation~~ to review any administrative decision ~~of the Public Auditor or determination arising under §5425 of this~~

1 Chapter, whether brought pursuant to §5707 of this Chapter after
2 appeal to the Public Auditor or brought in the absence of the
3 qualification of the Public Auditor to hear an appeal under §5425(f)
4 of this Chapter. The Superior Court shall have such jurisdiction in
5 actions at law or in equity, and whether the actions are for monetary
6 damages or for injunctive, declaratory, or other equitable relief, and
7 whether the matter is procedural or substantive in nature.

8
9 (b) Debarment or Suspension. The Superior Court shall have
10 ~~jurisdiction over an action between the Territory and to review any~~
11 ~~decision of the Public Auditor brought pursuant to § 5705 of this~~
12 ~~Chapter a person who is subject to a suspension or debarment~~
13 ~~proceeding, to determine whether concerning the debarment or~~
14 ~~suspension or rejection of a petition to debar or suspend, is in~~
15 ~~accordance with the statutes §5426 and §5705 of this Chapter and~~
16 ~~relevant statutes and regulations. The Superior Court shall have such~~
17 ~~jurisdiction, in actions at law or in equity, and whether the actions are~~
18 ~~for injunctive, declaratory, or other equitable relief.~~

19
20 (c) ~~In addition to other relief and remedies, the Superior Court~~
21 ~~shall have jurisdiction to grant injunctive relief in any action brought~~
22 ~~under Subsections (a), or (b) or (c) of this Section. Actions Under~~
23 ~~Contract or for Breach of Contract. The Superior Court shall have~~
24 ~~jurisdiction over an action between the Territory and a contractor,~~
25 ~~brought after review of the Public Auditor in accordance with § 5706~~
26 ~~of this Chapter, for any cause of action which arises under, or by~~
27 ~~virtue of, the contract, whether the action is at law or equity, whether~~

1 the action is on contract or for breach of contract, and whether the
2 action is for monetary damages or injunctive, declaratory or other
3 equitable relief.
4

5 (d) Limited Finality for Administrative Determinations. In any
6 judicial action under this Section, factual or legal determinations by
7 employees, agents or other persons appointed by the Territory shall
8 have no finality and shall not be conclusive, notwithstanding any
9 contract provision, or regulation, except to the extent provided in §§
10 5245, 5705 and 5706 and in Article 12 of this Chapter. In the event
11 any judicial action arises under Subsection (a) of this Section by
12 reason of the disqualification of the Public Auditor, the Superior
13 Court shall have such jurisdiction and authority of the Public Auditor
14 as is specified in §§ 5703 and 5704 of this Chapter.
15

16 ~~(c) For purposes of this Section a “prospective” bidder,~~
17 ~~contractor or offeror is one who will actually submit a bid, contract~~
18 ~~or otherwise offer his services if, in the actions permitted by this~~
19 ~~Section, such person would prevail. Exhaustion of Administrative~~
20 ~~Remedies. No action shall be brought under any provision of this~~
21 ~~Section until all administrative remedies provided in this Chapter~~
22 ~~under Part A of Article 9 and Article 12 have been exhausted.~~
23

24 ~~(f) All actions permitted by this Article shall be conducted as~~
25 ~~provided in the Government Claims Act. Form of Action Under §~~
26 ~~5480(a). All actions and appeals permitted by Subsection (a) of this~~
27 ~~Section shall be treated as special proceedings for expeditious review~~

1 of the administrative decision below, and may be brought by way of
2 or treated as a writ of review however captioned.

3
4 (g) Expedited Review of Appeals Under § 5480(a). Except as to
5 cases the Court considers of greater importance, proceedings before
6 the Superior Court, as authorized by Subsection (a) of this Section,
7 and appeals therefrom, take precedence over all cases and shall be
8 assigned for hearing and trial or for argument at the earliest
9 practicable date and expedited in every way. The times for
10 responsive pleadings and for hearings in these proceedings shall be
11 set by the judge of the Court with the object of securing a decision as
12 to these matters at the earliest possible time.

13
14 **Section 8.** §5481 of 5GCA Chapter 5 Article 9 Legal and Contractual
15 Remedies is amended as follows:

16
17 **§ 5481. Time Limitations on Actions.**

18
19 (a) Protested Solicitations and Awards. Any action under §
20 5480(a) of this Chapter shall be initiated, absent compelling cause or
21 unfair prejudice, within fourteen (14) days after receipt of a final
22 administrative decision, including a decision of disqualification of
23 the Public Auditor in accordance with § 5425(f) of this Chapter.

24
25 (b) Debarments and Suspensions for Cause. Any action under §
26 5480(b) of this Chapter shall be commenced within six (6) months
27 after receipt of the decision of the Policy Office under § 5651 of this

1 Chapter, or the decision of the ~~Procurement Appeals Board~~ Public
2 Auditor under § ~~5707~~ 5705 of this Chapter, whichever is applicable.

3
4 (c) Actions Under Contracts or for Breach of Contract. Any
5 action commenced under 5480(c) of this Chapter shall be
6 commenced within twelve (12) months after the date of the
7 ~~Procurement Appeals Board~~ Public Auditor's decision.

8
9 (d) The limitations on actions provided by this Section are tolled
10 during the pendency of any proceeding brought pursuant to § 5485 of
11 this Chapter.

12
13 **Section 9.** §5485(a) of 5GCA Chapter 5 Article 9 Legal and
14 Contractual Remedies is amended as follows:

15
16 **§ 5485(a). Complaints that Procurement Data was Withheld.**

17 (a) On complaint by any member of the public, the Superior
18 Court has jurisdiction to enjoin a governmental body from
19 withholding procurement data and to order the production of any
20 government data improperly withheld from the complainant. In such
21 a case, the court shall determine the matter *de novo*, and may
22 examine the contents of such procurement data in camera to
23 determine whether such records or any part thereof shall be withheld
24 under any of the exceptions set forth in ~~6-GCA § 4202~~ this Chapter
25 and, to the extent not inconsistent, Title 5, Chapter 10, Guam Code
26 Annotated and the burden is on the agency to sustain its action.

27

1 **Section 10.** §5485(b) of 5GCA Chapter 5 Article 9 Legal and
2 Contractual Remedies is amended as follows:

3 (b) Notwithstanding any other provision of law, the government
4 or a governmental body or purchasing agency shall serve an answer or
5 otherwise plead to any complaint made under this Section within thirty
6 (3) days after service of the pleading in which such complaint is made,
7 unless the court otherwise directs, for good cause shown.

8
9 **Section 11.** §5703 of Article 12, Chapter 5 of Title 5 Guam Code
10 Annotated is amended to read as follows:

11 **§ 5703. Jurisdiction of the Public Auditor.**

12 The Public Auditor shall have the power to review and
13 determine de novo any matter properly submitted to her or him. The
14 Public Auditor shall not have jurisdiction over disputes having to do
15 with money owed to or by the government of Guam except as
16 authorized under §§ 5427 and 5706 of this Chapter. Notwithstanding
17 § 5245 of this Chapter, no prior determination shall be final or
18 conclusive on the Public Auditor or upon any appeal from the Public
19 Auditor. The Public Auditor shall have the power to compel
20 attendance and testimony of, and production of documents by any
21 employee of the government of Guam, including any employee of any
22 autonomous agency or public corporation. The Public Auditor may
23 consider testimony and evidence submitted by any competing bidder,
24 offeror or contractor of the protestant. The Public Auditor's
25 jurisdiction shall be utilized to promote the integrity of the
26 procurement process and the purposes of 5 GCA Chapter 5.

1 **Section 12.** §5705 of Article 12, Chapter 5 of Title 5 Guam Code
2 Annotated is amended to read as follows:

3 **§ 5705. Suspension or Debarment Proceedings.**

4 (a) Scope. This § 5705 applies to a review by the Public Auditor
5 of a decision under § 5426(c) or (f) of this Chapter.

6 (b) Time Limitation on Filing an Appeal. The aggrieved person
7 receiving an adverse decision under Subsection (c) or (f) of § 5426 of
8 this Chapter, including a person suspended or debarred or a rejected
9 petitioner, shall file his/her an appeal with the Public Auditor within
10 sixty (60) thirty (30) days from the date of the receipt of a decision or
11 the date a petition is deemed rejected under Subsection (e) of § 5426
12 of this Chapter.

13
14 (c) Decision. The Public Auditor shall decide whether, or the
15 extent to which, the decision to debar or suspend, or reject a petition
16 to do so, debarment or suspension was in accordance with the statutes,
17 regulations and the best interest of the government or any autonomous
18 agency or public corporation, and was fair. The Public Auditor shall
19 issue her or his decision within thirty (30) days of the completion of
20 the hearing on the issue.

21 (d) Appeal. Any person receiving an adverse decision, including
22 the Chief Procurement Officer, the Director of Public Works or the
23 head of a purchasing agency, a person suspended or debarred, or a
24 rejected petitioner, may appeal from a decision by the Public Auditor
25 to the Superior Court of Guam under the waiver of sovereign
26 immunity provided in § 5480(b) of this Chapter, way of writ of
27 review.

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Section 13. §5706(b) of 5 GCA Chapter 5 Article 12 Procurement Appeals is amended as follows:

§ **5706(b).** Time Limitation on Filing an Appeal. The aggrieved contractor shall file ~~his/her~~ an appeal with the Public Auditor within sixty (60) days of the receipt of the decision or within ~~sixty (60)~~ thirty (30) days following the failure to render a timely decision as provided in § 5427(f) of this Chapter.

Section 14. §5707(a) of 5 GCA Chapter 5 Article 12 Procurement Appeals is amended as follows:

§ **5707(a).** Appeal. Any person receiving an adverse decision, including the contractor, the a governmental body or purchasing agency ~~any autonomous agency or public corporation, or both,~~ may appeal from a decision by the Public Auditor to the Superior Court of Guam as provided in ~~Article Part D of Chapter~~ Article 9 of this Chapter.

Section 15. §5708 of 5 GCA Chapter 5 Article 12 Procurement Appeals is amended as follows:

§ 5708. Discontinuance of Contractor’s Appeal.

It is the policy of this Act that procurement disputes be resolved expeditiously, therefore, settlement agreements between the parties are encouraged, and appeals by a protestor or by the Chief Procurement Officer, the Director of Public Works or the head of the Purchasing Agency may be settled by them, with or without prejudice, except to the extent that the Public Auditor determines that such a

1 settlement would work an injustice on the integrity of the procurement
2 system and an unconscionable prejudice on an intervening party.
3 After notice of an appeal to the Public Auditor has been filed by the
4 Chief Procurement Officer, the Director of Public Works or the head
5 of the Purchasing Agency, a contractor may not unilaterally
6 discontinue such appeal without prejudice, except as authorized by the
7 Public Auditor.”

8

9 **Section 16.** Severability. *If* any provision of this law or its
10 application to any person or circumstance is found to be invalid or
11 contrary to law, such invalidity *shall not* affect other provisions or
12 applications of this law which can be given effect without the invalid
13 provisions or application, and to this end the provisions of this law are
14 severable.

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