EDDIE BAZA CALVO
Governor

RAY TENORIO
Lieutenant Governor

Office of the Governor Of Guam

October 17, 2018

The Honorable Therese M. Terlaje
Interim Speaker
I Mina'trentai Kuåttro Na Liheslaturan Guåhan
Guam Congress Building
163 Chalan Santo Papa, Hagåtña, Guam 96910

Vice Speaker Therese M. Terlaje
34GL-18-2440
OCT 17 2018
Time: 16:02
Received by:

Håfa Adai Madame Speaker:

Attached is Bill No. 28-34 (COR) entitled, *"An act to Amend. . .Article 12, all of Chapter 5, Title 5, Guam Code Annotated Relative to Legal and Contractual Remedies in Guam Procurement Law ,"* which I have **VETOED.**

2018 OCT 17 PM 4:29

Neither the Office of the Attorney General nor the General Services Agency (GSA) supports the enactment of this bill into law. The Attorney General and GSA are the agencies charged with overseeing nearly all the Government's procurements and with defending it in the event of a protest or dispute. The procurement process is not perfect, and a need for reformation certainly exists. As a steward of the public's money, however, the government has a duty to achieve the best value for the Territory while still supporting local businesses and encouraging healthy competition. And although Bill 28 seeks to the address some of the issues that have plagued the procurement process, the bill nevertheless contains several provisions that are troubling:

(1) The Legal Remedies Available To A Party Who Files A Protest Must Be Clear And Unambiguous, And Should Be Expedited.

The proposed revisions in Bill 28 create ambiguity with regard to the legal remedies available to a protestor. Proposed Sections 5425(i), 5480(a), 5480(d), 5480(f), 5480(g), and 5481(a), contain language that shifts between labeling the Superior Court's jurisdiction as a judicial review process through a "special proceeding," which is an

expedited administrative appeal, or labeling it as an "action," which is a full trial of the merits of the protest.

These two processes are very different. The new revisions are not cohesive, and create ambiguity and complications in the review process. In its current state, Bill 28 fails to place clear limitations and delineations between these two very different processes— full civil litigation and limited writ review—and essentially offers both procedures to protestors.

The revisions also include a new *"Good Cause"* determination as part of the Superior Court's review under 5 G.C.A. § 5480(f) and (f)(1). The legal remedies available to a party who files a protest are not only confusing, but would now be more complicated with the addition of this "good cause" determination process. Although the revisions attempt to indicate that expedited judicial review is the preferred/default method of proceeding, the statute creates a broad exception for any protestor who can show "good cause" to have the matter proceed as a civil action.

In this regard, the bill fails to clarify how the "good cause" determination will be heard by the courts. It is further unclear when this determination of "good cause" will be made: either *before* a case is filed, or *after*. Adding this type of pre-determination to the legal proceedings will be a source of additional delay and will hinder the speedy resolution of protests. The lack of clarity as to the filing of a matter and legal processes will increase the amount of litigation following a protest, will confuse protestors and the courts, and will increase the costs and time involved in the litigation.

(2) Protests Should Be Limited To "Aggrieved" Parties, Not Merely "Interested" Parties.

Proposed Sections 5425(b) and 5425(d) contains new language that grants "interested parties" a right in the outcome of a procurement. Under these sections, anyone who shows any undefined "interest" in the procurement, a protest, or the resolution of a protest will be able to file their own protest and become a party to all other protests, settlements, negotiations, and lawsuits, *even if they never submitted a bid or offer*. In this form, the provision creates an opportunity for a multiplicity of frivolous protests.

Doc. No. 34GL-18-2440

This conflicts with the well-settled law on "interested" parties, for which there is already a standard rule and legal test under the Guam Rules of Civil Procedure. *See* GRCP Rules 20 and 24. More importantly, these "interested" parties would be able to indefinitely stall any or all parts of a protest, including settlements, where they have no legal or vested interest. Moreover, proposed Section 5425(d) is alarming to the extent that it seems to place an insupportable burden on the Government to seek and give notice of the protest and the protest decision to any party who might be "interested

(3) Equitable Tolling Of Protests Should Be Minimized.

In previous procurement reform bills, it was related that the equitable tolling provisions contained in those bills are problematic. Bill 28-34 is no different. In Bill 28, the equitable tolling provision is contained in proposed Section 5425(b) and supported by the operations of proposed Sections 5425 (a), (e), (f), and Sections 5480 and 5481.

When read together, these sections allow any "interested parties" to indefinitely delay a procurement at any time and at any point in the process, even after award and contract performance. This is highly prejudicial to the Government of Guam and successful bidders, and the proposed revisions are not fairly balanced to consider the needs of all parties involved in the procurement process.

(4) Automatic Stays Should Only Be Used To Encourage The Filing Of Timely Protests, Not To Allow Indefinite Protests.

Proposed Section 5425(h) includes a new automatic stay and appeal provisions that operates to limit the government's ability to engage in procurement and which would create an automatic stay of any procurement at any stage of the proceedings, including any time after a contract has been awarded and is being performed.

If enacted, this will create a "chilling" effect on both bidders and the Government of Guam alike. Winning bidders will have no assurance that they will reap the benefits of a successful bid and contract award, and the Government will have no assurance that it will be able to obtain necessary goods and services when they are needed. This provision only benefits unsuccessful bidders or even resentful parties who did not bid at all. Again, these revisions are not in keeping with a fair and balanced procurement system which accounts for the needs and interests of all parties involved: winning bidders, losing bidders, and the procuring agencies.

Doc. No. 34GL-18-2440.

(5) Attorney's Fees Should Not Be Assessed Against The Government Of Guam.

Bill 28 proposes at Section 5425(i)(3) to allow a protestor to collect attorney fees from the Government of Guam in the absence bad faith or misconduct. It additionally presumes that the Government might intend to delay or disrupt its own procurement, and that it could act fraudulently or frivolously in order to achieve this purpose. The collection of attorney fees against the Government in the procurement context is unprecedented and serves no purpose except to encourage more protests and more delays in the procurement process. There is also no identified funding source for these fees. Again, this proposed revision does not adequately balance the needs of all parties involved in the procurement process and only benefits unsuccessful bidders.

(6) The Office Of Public Accountability (OPA) And The Public Auditor Should Not Have Administrative Jurisdiction Over Governmental Contract Disputes, Particularly Those Disputes Involving Money Owed; This Proposed Grant Of Jurisdiction Creates A Conflict Of Law As Jurisdiction Of Such Disputes Is Already Settled Under The Government Claims Act.

With respect to proposed Sections 5703, 5706, 5707, 5427(e), and 5480(c), the Public Auditor should not be charged with resolving contract disputes that do not involve a protest. The Government of Guam already has a statutory resolution process for contract disputes: disputes between the Government of Guam and any contractor must proceed under the Government Claims Act.

The proposed sections 5703, 5706, 5707, 5427(e), and 5480(c) create a new, ambiguous administrative remedy which is precluded by existing statutory remedies, and will only cause delay and additional expense in the filing of valid claims under the Government Claims Act. The proposed changes create additional complications in the processing of valid claims. This may result in prejudice against protestors in the timing of their filings, and will result in invalid and unenforceable decrees, because the Public Auditor is not vested with the judicial power to issue judgments for money. *See* 7 GCA §§ 1105 and 7107(d); Organic Act § 1424-1(d).

Doc. No. 34GL-18-2440.

(7) The OPA's Independence From The Administrative Operations Of The Government Of Guam Under The Organic Act Should Be Preserved.

The new Section 5710 proposes that the OPA shall perform the Policy Office until the Policy Office is established with its full complement of members. Under the Organic Act 1421(g)(c), 1 G.C.A. §1900, et seq., and P.L. 30-027 the duties and responsibilities of the OPA mirror the duties and responsibilities of the 2004 U.S. Government Office of Accountability: with emphasis on independence and impartiality.

This is a purposeful separation of powers. *See* 1 GCA § 1900. The OPA is independent of the Government of Guam; and independent of the executive, legislative, and judicial branches. The OPA's mission is to perform impartially, effectively and efficiently. There are fundamental checks and balances in place in this separation of roles. In contrast, the new language imposes governmental administrative duties on the OPA that are not consistent with the OPA's primary mission and responsibility to stay independent from the administration of the day-to-day operations of the government of Guam, or with 5 G.C.A. § 5001 and the integrity of the procurement system.

Senseramente,

EDDIE BAZA CALVO
Governor of Guam

I MINA'TRENTAI KUÅTTRO NA LIHESLATURAN GUÅHAN
2018 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO *I MAGA'LÅHEN GUÅHAN*

This is to certify that **Bill No. 28-34 (COR), "AN ACT TO *AMEND* §§ 5425, 5426, 5427, 5450, 5452, 5480, 5481, AND 5485(a) AND (b) OF ARTICLE 9; AND *AMEND* §§ 5703, 5705, 5706(b), 5707(a) AND 5708, AND *ADD* A NEW § 5710 TO ARTICLE 12, ALL OF CHAPTER 5, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW,"** was on the 4th day of October 2018, duly and regularly passed.

Therese M. Terlaje
Acting Speaker

Attested:

Régine Biscoe Lee
Legislative Secretary

This Act was received by *I Maga'låhen Guåhan* this 5th day of OCTOBER, 2018, at 1:09 o'clock P.M.

Assistant Staff Officer
Maga'låhi's Office

APPROVED: VETO

EDWARD J.B. CALVO
I Maga'låhen Guåhan

Date:_____

Public Law No._____

I MINA'TRENTAI KUÅTTRO NA LIHESLATURAN GUÅHAN
2017 (FIRST) Regular Session

Bill No. 28-34 (COR)
As amended by the Committee on Environment,
Land, Agriculture and Procurement Reform.

Introduced by: Thomas C. Ada
FRANK B. AGUON, JR.
William M. Castro
James V. Espaldon
Fernando Barcinas Esteves
Régine Biscoe Lee
Tommy Morrison
Louise B. Muña
Telena Cruz Nelson
Dennis G. Rodriguez, Jr.
Joe S. San Agustin
Michael F.Q. San Nicolas
Therese M. Terlaje
Mary Camacho Torres

AN ACT TO *AMEND* §§ 5425, 5426, 5427, 5450, 5452, 5480, 5481, AND 5485(a) AND (b) OF ARTICLE 9; AND *AMEND* §§ 5703, 5705, 5706(b), 5707(a) AND 5708, AND *ADD* A NEW § 5710 TO ARTICLE 12, ALL OF CHAPTER 5, TITLE 5, GUAM CODE ANNOTATED, RELATIVE TO LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. § 5425 of Subarticle A, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 5425. 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 the agency issuing the solicitation. The protest *shall* be submitted in writing within fourteen (14) days after such aggrieved person knows or should have known of the facts giving rise to the protest.

(b) Authority to Resolve Protests. Notwithstanding any other provision of law, the Chief Procurement Officer, the Director of Public Works, the head of the agency issuing the solicitation, or a designee of one of these officers, *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. This authority *shall* be exercised in accordance with regulations promulgated by the Policy Office, which *shall* assure that interested parties are given notice of and opportunity to participate in any such settlement or resolution. Regulations *shall* establish an objective means by which any time limit established by this Article for the taking of any action, administrative or judicial, *shall* be identified and tolled during any period in which the parties are in good faith engaged to resolve and settle any dispute arising under this Article; provided, that the objective means includes, at a minimum, a written agreement of the interested parties. *Interested party,* for purposes of this Article, means a person who is an actual or prospective bidder, offeror, or contractor who is aggrieved in

connection with the solicitation or the award of a contract, or by the protest or resolution of it.

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

(1) the government's factual and legal reasons for the decision made to accept or reject, in whole or in part; and

(2) that the decision to reject is a final decision and that the protestant has the right to administrative and judicial review.

(d) Notice of Decision. A copy of the decision under Subsection (c) of this Section *shall* be mailed electronically or otherwise furnished immediately to the protestant and any other prospective or interested party intervening actually known to the government.

(e) Failure to Render Timely Decision. If the protestant *does not* receive a decision on the protest as required under Subsection (c) of this Section within forty-five (45) days from the date of the protest, the protestant may make a written request to the office where 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 protestant within ten (10) days after receipt of such written request, or within such longer period as may be expressly agreed upon by the parties, in writing, then the protest *shall* be deemed rejected. On any appeal from the rejection, the appellant *shall* bear the burden of

establishing that there was good and sufficient reason to accept the protest based on evidence that was known to it or should have been known to it at the time the protest was rejected.

(f) Appeal. A decision under Subsection (c) of this Section, including a decision thereunder regarding entitlement to costs as provided by Subsection (i) of this Section, may be appealed by the protestant, to the Public Auditor: (1) within fifteen (15) days after receipt by the protestant of the notice of decision to reject the protest; or (2) within fifteen (15) days after the date the protest is deemed rejected as provided in Subsection (e) of this Section.

(g) Disqualification of Public Auditor. The Public Auditor may recuse herself or himself at any time and *shall* notify all parties in such circumstances. Any party may raise the issue of disqualification and state the relevant fact(s) prior to the hearing. The Public Auditor *shall* make a determination and notify all parties. In the event of disqualification or recusal of the Public Auditor, the Public Auditor *shall* designate the senior member of the audit staff to be the appointed hearing officer for procurement appeals to preside over the matter. If no member of the Public Auditor's staff or the appointed hearing officer is able to preside over the matter due to disqualification, then such matter may be taken to the Superior Court of Guam in accordance with § 5480 of this Chapter.

(h) Automatic Stay. In the event of a timely protest under Subsection (a) of this Section, the government of Guam *shall not* proceed further with the solicitation, award, or performance of the contract prior to the time allowed to appeal, or the final resolution of such protest, including a final entry of judgment, or the settlement of

the protest evidenced by a writing signed by all interested parties, and any such further action is void, unless:

(1) the Chief Procurement Officer or the Director of Public Works, with the written concurrence of the head of the using or purchasing agency and the Attorney General or designated Deputy Attorney General, then makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the government of Guam; and

(2) absent a declaration of emergency procurement by *I Maga'låhi* (the Governor) pursuant to § 5215, the protestant has been given *at least* two (2) days' notice of the determination (excluding government of Guam holidays); and

(3) if the protest is pending before the Public Auditor or the Court, the Public Auditor or the Court has confirmed the validity of such determination, or if no such protest is pending, no protest to the Public Auditor of such determination is filed prior to expiration of the two (2) day period specified in Item (2) of this Subsection (h) of this Section.

(4) The two (2) days specified in Items (2) and (3) of this Subsection *shall* be determined as provided in 1 GCA § 1004.

(5) An immediate appeal of a decision of the Public Auditor to confirm or reject the determination of necessity and substantial interest may be taken to the Superior Court as provided in § 5480(a) of this Chapter without regard to the obligation to first fully exhaust administrative remedies.

Following judicial review of such decision, the matter *shall* be returned to the Public Auditor for final decision of the protest.

(i) Entitlement to Costs. In addition to any other relief or remedy granted under Subsections (c) or (e) of this Section, or under Subsection (a) of § 5480 of this Chapter, including the remedies provided by Subarticle B of Article 9 of this Chapter, 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, if:

(1) the protestant should have been awarded the contract under the solicitation but was not; or

(2) there is a reasonable likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Subarticle B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation.

(3) The Public Auditor *shall* have the power to assess reasonable costs, including reasonable attorney fees incurred by the government, to include its autonomous agencies and public corporations, or by any protestant or interested party, against any party, including the government, making a protest, motion, or bringing any action fraudulently, frivolously, or with predominant intent to delay or disrupt the procurement process.

(j) Finality. A decision of the Public Auditor is final unless a person adversely affected by the decision commences an appeal in the Superior Court as provided by § 5707(a) of this Chapter, and in

accordance with the waiver of sovereign immunity conferred by § 5480(a) of this Chapter."

Section 2. § 5426 of Subarticle A, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 5426. Authority to Debar or Suspend.**

(a) Authority. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer, the Director of Public Works, or the head of the agency issuing the solicitation, after consultation with the using agency and the Attorney General, *shall* have authority to debar a person for cause, or to suspend a person for probable cause, from consideration for award of contracts. The debarment *shall not* be for a period of more than two (2) years. The suspension *shall not* be for a period exceeding three (3) months. The authority to debar or suspend *shall* be exercised in accordance with regulations promulgated by the Policy Office.

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

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

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

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

(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 the agency issuing the solicitation, to be so serious as to justify debarment action, to include:

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

(B) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one (1) 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

(C) upon a finding of the Department of Labor, failure to pay employees engaged on the contract in violation of the wage determination law or contract conditions;

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

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

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

(c) Decision. The Chief Procurement Officer, the Director of Public Works, or the head of the agency issuing the solicitation, *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 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 electronically 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 this Chapter. Such a decision *shall* be automatically stayed during the pendency of any appeal, but any such appeal *does not* preclude nor require a determination of non-responsibility in any solicitation in which the person charged may participate. The officer issuing such decision *shall* immediately notify all persons, governmental bodies, and purchasing agencies of the fact and effect of such appeal.

(f) Any member of the public, including the bidder, offeror or contractor, as well as any elected official or employee of the government, may petition the Chief Procurement Officer, the Director of Public Works, or the head of the agency issuing the solicitation, to take action to debar or suspend pursuant to Subsection (a) of this Section. The petition *shall* state the facts

that the complainant believes to be true that warrant a suspension or debarment pursuant to this § 5426. Immediately upon the receipt of such a petition, the person petitioned *shall* cause an investigation to be conducted. If the petitioned officer finds insufficient facts to proceed with a debarment or suspension hearing, he or she *shall* state the reasons in a written decision within sixty (60) days of receipt of the petition. If the person petitioned determines that sufficient facts may exist to debar or suspend the individual or company, then he or she *shall* hold a hearing as authorized in Subsection (a), and issue a decision as required in Subsection (c). If the petitioned officer *does not* issue the written decision required under Subsection (c) of this Section within sixty (60) days after written request by the petitioner for a final decision, then the petitioner may proceed with an appeal to the Public Auditor as if the petition had been rejected."

Section 3. § 5427 of Subarticle A, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

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

(a) Applicability. This Section applies to controversies between the government of Guam 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. This includes, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or other cause, for contract damages, modification, or rescission.

(b) Authority. The Chief Procurement Officer, the Director of Public Works, the head of the agency issuing the solicitation, or a designee of one of these officers, is authorized, prior to commencement of an action in a court

concerning the controversy, to settle and resolve a controversy described in Subsection (a) of this Section. This authority *shall* be exercised in accordance with regulations promulgated by the Policy Office.

(c) Decision. If such a controversy is *not* resolved by mutual agreement, the Chief Procurement Officer, the Director of Public Works, the head of the agency issuing the solicitation, or the designee of one of these officers, *shall* promptly issue a decision in writing. The decision *shall*:

(1) state the reasons for the decision made; and

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

(d) Notice of Decision. A copy of any decision under Subsection (c) of this Section *shall* be immediately served, mailed, communicated by any electronic or telephonic means used in the ordinary course of business that makes an electronic record of the communication, or otherwise provided to the contractor, and any right of the contractor to appeal *shall* be tolled by any delay of such notice.

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

(f) Failure to Render Timely Decision. If the Chief Procurement Officer, the Director of Public Works, the head of the agency issuing the solicitation, or the designee of one of these officers, does *not* issue the written decision required under Subsection (c) of this Section within sixty (60) days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received. If no decision is issued and no action is taken by

the contractor to request a final decision, within two (2) years from the date the contract controversy arose, any claim or action thereon *shall* be barred."

Section 4. § 5450 of Subarticle B, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

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

The provisions of this Subarticle *only* apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law, and are in addition to any other remedy or relief allowed by law or equity."

Section 5. § 5452 of Subarticle B, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 5452. Remedies After an Award.**

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(a) if the person awarded the contract has *not* acted fraudulently or in bad faith:

(1) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the government of Guam; or

(2) the contract may be terminated and the person awarded the contract *shall* be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.;

(b) if the person awarded the contract has acted fraudulently or in bad faith:

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

(2) the contract may be ratified and affirmed if such action is in the best interests of the government of Guam, without prejudice to the government of Guam'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 interests of the person awarded the contract."

Section 6. § 5480 of Subarticle D, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 5480. Waiver of Sovereign Immunity by Grant of Jurisdiction in Connection with Controversies Arising Under Subarticle A of this Article.**

(a) Solicitation and Award of Contracts. The Superior Court of Guam *shall* have jurisdiction over an action between the government of Guam and a bidder, offeror, or contractor, either actual or prospective, to review any administrative decision or determination arising under § 5425 of this Chapter, after appeal to the Public Auditor, to whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. The Superior Court *shall* have such jurisdiction in actions at law or in equity, and whether the actions are for monetary or other relief allowed under this Chapter; or for injunctive, declaratory, or other equitable relief, and whether the matter raised by the appeal is procedural or substantive in nature.

(b) Debarment or Suspension. The Superior Court *shall* have jurisdiction over an action between the government of Guam and a person who is subject to a suspension or debarment proceeding, to review any decision of the Public Auditor brought pursuant to § 5705 of this Chapter

concerning the debarment or suspension or rejection of a petition to debar or suspend, in accordance with § 5426 and § 5705 of this Chapter, and relevant statutes and regulations, whether a debarment or suspension is in accordance with § 5426 and § 5705 of this Chapter, and relevant statutes and regulations. The Superior Court *shall* have such jurisdiction, in actions at law or in equity, and whether the actions are for injunctive, declaratory, or other equitable relief.

(c) Actions Under Contract or for Breach of Contract. The Superior Court *shall* have jurisdiction over an action between the government of Guam and a contractor, brought after review by the Public Auditor in accordance with § 5706 of this Chapter, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or equity, whether the action is on the contract or for breach of contract, and whether the action is for monetary damages or injunctive, declaratory, or other equitable relief.

(d) Limited Finality for Administrative Determinations. In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by the government of Guam, shall have no finality and shall not be conclusive, notwithstanding any contract provision, or regulation, *except* to the extent provided in § 5245 and in Article 12 of this Chapter.

(e) Exhaustion of Administrative Remedies. No action shall be brought under any provision of this Section until all administrative remedies provided in this Chapter under Subarticle A of Article 9, and Article 12, have been exhausted.

(f) Form of Review Under Subsection (a) of this Section. All appeals permitted by Subsection (a) of this Section *shall* be treated as special

proceedings for expeditious review of the administrative decision below, *unless* good cause is shown that it should proceed as a civil action.

(1) Form. All appeals permitted by Subsection (a) of this Section *shall* be treated as special proceedings for expeditious review of the administrative decision below, and judgment entered for any remedy or relief allowed thereunder. The review *shall* be a special proceeding conducted, however captioned, in accordance with the procedures for a Petition for Judicial Review, and otherwise as compatible with the provisions of this Subarticle D.

(2) Effect on Automatic Stay. Upon timely appeal, the automatic stay *shall* be continued until there is a final decision; provided, the stay *shall not* be continued unless the appellant posts security in the manner required by GRCP Rule 65(c) and the provisions of Subsection (f)(3) of this Section.

(3) Security. The purpose of the security required by this Section is only to deter frivolous protests or appeals, including appeals made or conducted with the substantial purpose to harass or delay, and *shall not* be required without a finding that the protest or appeal is or is likely to be found to be frivolous. The amount of security required *shall* be determined by the court in a sum as it deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been injured by reason of the frivolous protest or appeal; provided, the sum of security *shall not* exceed an amount greater than ten percent (10%) of the appellant's bid or proposal.

(g) Expedited Review of Appeals Under Subsection (a) of this Section. *Except* as to criminal cases and such other cases of compelling importance as determined by the Presiding Judge of the Superior Court,

proceedings before the Superior Court, as authorized by Subsection (a) of this Section, and appeals therefrom, 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. The times for responsive pleadings and for hearings in these proceedings *shall* be set by the judge of the court with the object of securing a decision as to these matters at the earliest possible time."

Section 7. § 5481 of Subarticle D, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"**§ 5481. Time Limitations on Actions.**

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

(b) Debarments and Suspensions for Cause. Any action under § 5480(b) of this Chapter *shall* be commenced within six (6) months after receipt of the decision of the Policy Office under § 5651 of Subarticle C, Article 11 of this Chapter, or the decision of the Public Auditor under § 5705 of Article 12 of this Chapter, whichever is applicable.

(c) Actions Under Contracts or for Breach of Contract. Any action commenced under § 5480(c) of this Chapter *shall* be commenced within twelve (12) months after the date of the Public Auditor's decision.

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

Section 8. § 5485(a) of Subarticle E, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"(a) On complaint by any member of the public, the Superior Court has jurisdiction to enjoin a governmental body from withholding procurement

data and to order the production of any government data improperly withheld from the complainant. In such a case, the court *shall* determine the matter *de novo*, and may examine the contents of such procurement data in camera to determine whether such records or any part thereof *shall* be withheld under any of the exceptions set forth in this Chapter and, to the extent not inconsistent, Chapter 10 of Title 5, Guam Code Annotated; and the burden is on the agency to sustain its action."

Section 9. § 5485(b) of Subarticle E, Article 9, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

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

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

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

The Public Auditor *shall* have the power to review and determine *de novo* any matter properly submitted to her or him. The Public Auditor *shall not* have jurisdiction over disputes having to do with money owed to or by the government of Guam, *except* as authorized under §§ 5427 and 5706 of this Chapter. Notwithstanding § 5245 of this Chapter, no prior determination shall be final or conclusive on the Public Auditor or upon any appeal from the Public Auditor. The Public Auditor *shall* have the power to compel attendance and testimony of, and production of documents by any employee of the government of Guam, including any employee of any autonomous agency or public corporation. The Public Auditor may consider testimony and evidence

submitted by any competing bidder, offeror, or contractor of the protestant. The Public Auditor's jurisdiction *shall* be utilized to promote the integrity of the procurement process and the purposes of Title 5 GCA Chapter 5."

Section 11. § 5705 of Article 12, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

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

(a) Scope. This § 5705 applies to a review by the Public Auditor of a decision under § 5426(c) or (f) of Subarticle A, Article 9 of this Chapter.

(b) Time Limitation on Filing an Appeal. The person receiving an adverse decision under Subsection (c) or (f) of § 5426, Subarticle A, Article 9 of this Chapter, including a person suspended or debarred or a rejected petitioner, *shall* file an appeal with the Public Auditor within thirty (30) days from the date of the receipt of a decision, or the date a petition is deemed rejected.

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

(d) Appeal. Any person receiving an adverse decision, including the Chief Procurement Officer, the Director of Public Works, the head of the agency issuing the solicitation, a person suspended or debarred, or a rejected petitioner, may appeal from a decision by the Public Auditor to the Superior Court of Guam under the waiver of sovereign immunity provided in § 5480(b), Subarticle D, Article 9 of this Chapter."

Section 12. § 5706(b) of Article 12, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"(b) Time Limitation on Filing an Appeal. The aggrieved contractor *shall* file an appeal with the Public Auditor within sixty (60) days of the receipt of the decision, or within thirty (30) days following the failure to render a timely decision as provided in § 5427(f) of Subarticle A, Article 9 of this Chapter."

Section 13. § 5707(a) of Article 12, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

"(a) Appeal. Any person receiving an adverse decision, including the contractor, the governmental body, or the agency issuing the solicitation, may appeal from a decision by the Public Auditor to the Superior Court of Guam, as provided in Article 9 of this Chapter."

Section 14. § 5708 of Article 12, Chapter 5, Title 5, Guam Code Annotated, is *amended* to read as follows:

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

It is the policy of this Chapter that procurement disputes be resolved expeditiously. Therefore, settlement agreements between the parties are encouraged, and appeals by a protestant or by the Chief Procurement Officer, the Director of Public Works, or the head of the agency issuing the solicitation, may be settled by them, with or without prejudice, *except* to the extent that the Public Auditor determines that such a settlement would work an injustice on the integrity of the procurement system and an unconscionable prejudice on an intervening party. After notice of an appeal to the Public Auditor has been filed by the Chief Procurement Officer, the Director of Public Works, or the head of the agency issuing the solicitation, a contractor

may *not* unilaterally discontinue such appeal without prejudice, except as authorized by the Public Auditor."

Section 15. A new § 5710 is hereby *added* to Article 12 of Chapter 5, Title 5, Guam Code Annotated, to read as follows:

"**§ 5710. Promulgation of Regulations by the Office of Public Accountability (OPA).**

Notwithstanding any other provision of Article 2 of this Chapter, the Public Auditor *shall* promulgate regulations consistent with this Act, in accordance with the applicable provisions of the Administrative Adjudication Law, within one hundred eighty (180) days from the date of enactment of this Act. Regulations adopted by the Office of Public Accountability (OPA) may be changed or rescinded by the Policy Office acting under the authority granted in § 5102. The OPA *shall* perform as the Policy Office until the Policy Office is established with its full complement of members."

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

Section 17. Effective Date. This Act *shall* be effective one hundred eighty (180) days after enactment, but *shall not* apply to controversies that have been filed or administratively or judicially appealed prior to the date of enactment of this Act.