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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 8/16/2013  
TIME: 4:25  AM  PM BY: R. Field  
FILE NO OPA-PA: 13208

Office of Public Accountability  
Suite 401 DNA Building  
238 Archbishop Flores Street  
Hagatna, Guam 96910

August 16, 2013

RE: Opposition to the Government's Objection to Appeal / Motion to Dismiss  
OPA-PA-008-2013

We are in receipt and have read the Government's Objection to Appeal and Motion to dismiss OPA-OPA-008-2013 and are opposed to this motion for the following reasons.

While it is correct that our request for appeal was filed 19 days after GSA's initial decision to deny our protest, Triple J's appeal was filed within the 15 days of GSA's final rejection of our protest dated June 28, 2013. 2 GAR, Division 4 Section 9101(h), **Requests for Reconsideration**, Subsection (1) **Requests** states in part "Reconsideration of a decision of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may be requested by the protestor, within (15 days) after receipt by the protestor of the notice of decision..." Furthermore in Subsection (3) **Time for Acting** it states "a request for reconsideration shall be acted upon as expeditiously as possible".

Based on the above rule we filed a Request for Reconsideration in good faith and were anticipating an expeditious reply. Our protest of June 3<sup>rd</sup> 2013 was replied to in 24 hours so we expected a similar response time. However GSA took 18 days to respond to our Request for Reconsideration. Because of the delay at first we felt optimistic that GSA was reconsidering our request and would reply favorably based on the new information we provided. In fact, based on documents (Attachment A) received through a Sunshine Act request it is clear that further discussions and considerations did take place as result of our Request for Reconsideration so there was a real possibility of reconsideration. Unfortunately it took an additional two weeks after their internal decision to reject our Request for Reconsideration for GSA to reply to us. This was not expeditious and caused us to miss the deadline to file an appeal with the OPA.

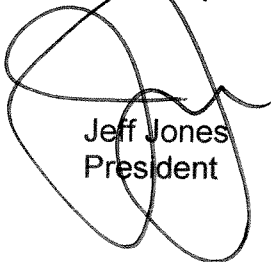
Further we feel that it is a possibility that GSA's delay may have been intended to cause us to miss the deadline for appeal so that the protest could be dismissed

without discussing the true facts and merits of the protest. The reason we feel this way is that in a June 14<sup>th</sup> 2013 email (Attachment B) obtained through the same Sunshine Act request mentioned above there was a conversation between the Attorney General's office and GSA in which Robert Kono states "I will draft a response to Triple J denying their reiteration in a few days, as it is the CPO's responsibility to address protests." It took GSA two more weeks to draft and deliver their response after this email.

Finally, considering the above facts and the possibility of an intent to delay, it is our position that our request for reconsideration dated June 11, 2013 in essence "tolled" the deadline for appeal. In the case of *Pacific Security Alarm v. Department of Public Works* (Attachment C) the court ruled that "*The time for filing review of final agency action is a limitation issue and not a jurisdictional issue. HRI, Inc v E.P.A. 198 F.3d 1224, 1239 (10<sup>th</sup> Cir. 2000) Sendra Corporation v. Magaw, 111F.3d 162, 167 (D.C.Cir.1997) ('If for any reason the agency reopens a matter and after reconsideration, issues a new and final order, that order is reviewable on its merits, even though the agency merely reaffirms its original decision...The new order is, in other words, final agency action and as such, a new right of action accrues and starts the running of a new limitations period for judicial review')*"

In conclusion we feel that based on the information presented above the Government's Objection to Appeal and Motion to Dismiss should be dismissed and the Appeal should be allowed to proceed so the true merits can be presented and discussed.

Sincerely,



Jeff Jones  
President

# **ATTACHMENT**

**“A”**



ATTACHMENT A

Claudia Acfalle <claudia.acfalle@gsa.guam.gov>

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**RE: New School Bus Procurement Protest - GSA-0116-12**

3 messages

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**John Weisenberger** <jweisenberger@guamag.org>

Mon, Jun 17, 2013 at 2:46 PM

To: Robert Kono <robert.kono@gsa.guam.gov>

Cc: Claudia Acfalle <claudia.acfalle@gsa.guam.gov>, "Carl V. Dominguez" <carl.dominguez@dpw.guam.gov>

Good Afternoon Robert,

This is to memorialize our brief phone conversation held on Friday, June 14, 2013. I had asked whether GSA wanted me to contact Kevin fowler, attorney for Morrico Equipment, to advise him that he should direct all of his future correspondence to me. I referenced his June 13, 2013 letter to you, which I had received a copy of earlier in the day on June 14.

You have advised me that you would refer my question to the Chief Procurement Officer. Further, you mentioned that it was likely that GSA would respond to Mr. Fowler's letter.

As you are aware, I have been assigned to provide legal advice to the General Services Agency during all phases of the solicitation of the school busses in GSA-0116-12 as provided for in 5 GCA §5150. Please let me know at your earliest convenience in what manner I may assist you further with this matter

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**From:** Robert Kono [mailto:robert.kono@gsa.guam.gov]

**Sent:** Friday, June 14, 2013 6:50 AM

**To:** John Weisenberger

**Subject:** Fwd: New School Bus Procurement Protest

Please see the forwarded memo from the director of dpw.. Also, I will send you a copy of Kervin Flower's letter asserting Morrico was in the right. I will draft a response to Triple J denying their reiteration in a few days, as it is the CPO's repsonseibility to address portestxs.....rhkono

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

From: **Carl V. Dominguez** <carl.dominguez@dpw.guam.gov>

Date: Thu, Jun 13, 2013 at 3:14 PM

Subject: New School Bus Procurement Protest

To: "Robert H. Kono" <robert.kono@gsa.guam.gov>

Cc: Claudia Acfalle <claudia.acfalle@gsa.guam.gov>, Anita Cruz <anita.cruz@gsa.guam.gov>

**ATTACHMENT**

**“B”**



**RIVETS versus SCREWS:**

FMVSS is silent on rivets and screws. This is a manufacturing difference. DPW mechanics prefer anti-corrosion rivets to anti-corrosion screws as the more durable fastener for the body of the buses. The 2005 TBB buses were all assembled with anti-corrosion screws. I have seen some of the 2005 TBB buses and saw no evidence of corrosion or fastening failure. Only additional time can tell if rivets are, in fact, more durable than the screws. Our oldest bus, a 23 year old, is fastened with rivets.

With regards to Mr. Jones' assertion that MORRICO acted fraudulently or in bad faith and that Triple J was the most responsible bidder, I will leave that up to Claudia or higher authority to decide.

I reiterate that I submitted my April 11, 2013 memorandum to Claudia that the TBB buses exceed FMVSS minimum requirements and therefore, in the best interests of the Territory to accept them, but, at that time, not being aware of the rivets versus screw issue. My motivation was to have the badly needed new school buses ready for the 2013-2104 school year which starts on AUG 19, 2013.

Please let me know if you need more information than I have provided up to this point. Best regards.

**Carl V. Dominguez**

Director

Department of Public Works

Government of Guam

542 North Marine Corps Drive

Tamuning, Guam 96913

Tel: 671-646-3232 Cell: 671-488-7860

E-mail: carl.dominguez@dpw.guam.gov

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**John Weisenberger** <jweisenberger@guamag.org>

Tue, Jun 18, 2013 at 4:23 PM

To: Claudia Acfalle <claudia.acfalle@gsa.guam.gov>, Robert Kono <robert.kono@gsa.guam.gov>

Cc: Paul Llanes <paul.llanes@gsa.guam.gov>

# **ATTACHMENT**

**“C”**



ATTACHMENT C

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IN THE SUPERIOR COURT OF GUAM

PACIFIC SECURITY ALARM, INC.  
Plaintiff  
v.  
DEPARTMENT OF PUBLIC WORKS  
Defendant

CIVIL CASE NO: CV 0591 - 05  
DECISION AND ORDER DENYING  
MOTION TO DISMISS

This matter came before the court pursuant to defendant Department of Public Works' motion to dismiss. Upon consideration of the memoranda submitted by the parties and the presentation of counsel during oral argument, the dismissal motion is denied for the reasons set forth herein.

In March, 2005 the Department of Public Works ("DPW"), a governmental body subject to the Procurement Code, solicited bids for security guard services pursuant to an Invitation For Bid No. GSA-016-05 ("IFB No: GSA-016-05"). The bids were opened on April 19, 2005 and on May 7, 2005 notice was issued to PSA rejecting its bid on grounds that its price was too high and the bid was being awarded to PISA. By letter dated May 23, 2005, PSA protested the bid decision on grounds which included (1) PISA's bid did not comply with G.L. 26-111, (2) PISA was wrongfully allowed to amend or modify its bid price after opening of the bids, and (3) PISA was allowed to post a bond in an amount less than required by IFB No: GSA-016-05. On May 27, 2005, PSA received a letter denying its protest. In addition to denying the protest, the letter advised PSA that that "[u]pon receipt of this letter, you are, therefore, notified of our determination and that you have a right to seek administrative and judicial review."

At the time of denial of PSA's protest, the Appeals Board was the statutory entity authorized to review administrative appeals involving procurement disputes. However, the Appeals Board was not a functioning entity as it did not have any members. Although the

1 Appeals Board was, in effect, defunct, the May 27 letter denying PSA's protest did not inform  
2 PSA of what steps it had to take to obtain review of the denial. The letter did not inform PSA of  
3 how many days it had to file an appeal, where to file an appeal or how to file an appeal. PSA did  
4 not seek administrative review of the protest denial. Instead, on June 13, 2005, PSA filed a  
5 complaint for judicial review with this Court. In answering the complaint, DPW plead three  
6 affirmative defenses (1) failure to state a claim, (2) immunity, and its actions were not wrongful.  
7 DPW did not plead or allege any limitations of action as an affirmative defense. A scheduling  
8 order was subsequently set in this case which, among other things, set a motions cut-off date and  
9 a March 10, 2006 trial date. The scheduling order was later amended by continuing the trial date  
10 until May 12, 2006. DPW did not file any motion prior to the motion cut off date. Then on May  
11 5, 2006, one week before the scheduled trial, DPW moved to dismiss asserting a lack of  
12 jurisdiction. DPW claims that Guam law required the complaint for judicial review to be filed  
13 fourteen (14) days after receipt of the protest denial. Fourteen days following May 27, 2005 was  
14 Friday, June 10, 2005. PSA's complaint was filed on Monday, June 13, 2005.

15 DPW claims that jurisdiction is lacking as PSA's initial protest was untimely. That  
16 argument is misguided. The procurement code allows an aggrieved bidder to file a protest in  
17 connection with the method of source selection, solicitation or award of a contract. 5 GCA §  
18 5425(a). The protest is to be filed within fourteen (14) days after an aggrieved bidder knows or  
19 should have known of the facts giving rise to the protest. *Id.* In this case, the notice of selection  
20 of PISA's bid and rejection of PSA's bid was dated May 7, 2005, a Saturday. Fourteen days after  
21 Saturday, Monday, May 7, 2005 was Saturday, May 21, 2005. Saturday's are holidays for  
22 purposes of transacting public business. 1 G.C.A. § 1002. The law further provides that  
23 "[w]henver any act of a secular nature, other than a work of necessity or mercy, is appointed by  
24 law or contract upon a particular day which falls on a holiday, such act may be performed upon  
25 the next business day with the same effect as if it had been performed upon the day appointed."  
26 The next business day following Saturday, May 21, 2005 was May 23, 2005, the date of PSA's  
27 protest. PSA timely filed its protest.

28 DPW also erroneously contends that PSA filing the complaint for judicial review on

1 Monday, June 13, 2005 necessitates dismissal of this case<sup>1</sup>.

2 The time for filing judicial review of final agency action is a limitations issue and not a  
3 jurisdictional issue. *HRI, Inc. v. E.P.A.* 198 F.3d 1224, 1239 (10<sup>th</sup> Cir. 2000); *Sendra*  
4 *Corporation v. Magaw*, 111 F.3d 162, 167 (D.C.Cir.1997) ("If for any reason the agency reopens  
5 a matter and, after reconsideration, issues a new and final order, that order is reviewable on its  
6 merits, even though the agency merely reaffirms its original decision.... The new order is, in other  
7 words, final agency action and as such, a new right of action accrues and starts the running of a  
8 new limitations period for judicial review."); *Bishop v. Apfel*, 91 F.Supp.2d 893, 894  
9 (W.D.Va.,2000)[The time limit for seeking judicial review of an administrative decision is  
10 subject to equitable tolling]. See also *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1173-74 (9th  
11 Cir.1986), as amended, 815 F.2d 570 (9<sup>th</sup> Cir. 1987)[90 day period for filing suit pursuant to right  
12 to sue letter is a limitations issue and not a jurisdictional issue]. 5 G.C.A. § 5481(a) is also a  
13 limitations statute subject to equitable tolling.

14 5 G.C.A. § 5480(a) vests this Court with jurisdiction to consider a procurement protest.

15 The plain language of § 5481(a) is that:

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

18 Jurisprudence shows this language establishes a limitation period as opposed to an inflexible  
19 jurisdictional bar. As the Supreme Court noted in *Pacific Rock Corporation v. Department of*  
20 *Education*, 2000 Guam 19, 2000 WL 979988 (2000), "[i]t is clear that in the Procurement Law  
21 the Legislature wisely envisioned a comprehensive, detailed scheme for settlement of contract  
22 controversies before proceeding to court. Moreover, as the statute contains provisions dealing  
23 with judicial and administrative relief and language providing for limitations on actions." 2000  
24 Guam 19 at ¶ 23, 2000 WL 979988 at 5 (*Pacific Rock I*). See *Pacific Rock v. Department of*  
25 *Education*, 2001 Guam 21 at ¶ 53, 2001 WL 1360155 at 15 (2005) ("*Pacific Rock II*") [The  
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27 <sup>1</sup>Since PSA's complaint requests damages it can be deemed to be subject to 5 G.C.A. §  
28 6106(c)'s 18 month limitation period. See e.g. *Pacific Rock II*, 2001 Guam 21 at ¶¶ 50 - 53,  
2001 WL 1360155 at 14- - 15.

1 period for filing suit under the Claims Act is a statute of limitations]. See also *Guam Housing and*  
2 *Urban Renewal Authority v. Dongbu Insurance Co.*, 2001 Guam 24 at ¶¶ 10 -14, 2001 WL  
3 1555206 at 2 - 3 (2001)[Adopting equitable tolling doctrine]. Moreover, *Pacific Rock I*  
4 specifically noted that § 5481(a) is a limitations period which governed that action. 2000 Guam  
5 19 at ¶ 28, 2000 WL 979988 at 6. The Court also held that since plaintiff “did not timely file its  
6 action at the Superior Court, its claim was time-barred.” *Id.* In being a limitations statute, the 14  
7 day period of § 5481(a) is subject to equitable tolling<sup>2</sup>. See *Bishop, supra*. As concluded in  
8 *Pacific Rock*, “the company waited an inordinate length of time to bring its action. The laws  
9 assist those who are vigilant, not those who sleep over their rights.” 2000 Guam 19 at ¶ 32, 2000  
10 WL 979988 at 7. Likewise, in *Perez v. Guam Housing & Urban Renewal Authority*, 2000 Guam  
11 33, 2000 WL 1876788 (2000), the Supreme Court acknowledged that the time for filing suit  
12 under the Claims Act is a limitations period which is subject to tolling in equity. Indeed, *Perez*  
13 examined the facts to determine whether equity justified tolling the limitations period. 2000  
14 Guam 33 at ¶¶ 12 - 18, 2000 WL 1876788 at 3-4. After reviewing the facts *Perez* concluded  
15 equitable tolling was not proper because of the “neglect in filing the Complaint in this case well  
16 beyond the Claims Act limitations period is not excusable. Unlike *Pacific Rock I* and *Perez*, the  
17 facts in this case justify equitable tolling. PSA not being advised how to navigate the appeal  
18 process, especially given the non existence of the Appeals Board, justifies equitable tolling of the  
19 limitations period from Friday, June 10, 2005 until Monday, June 13, 2005, at a minimum<sup>3</sup>.

20 Furthermore, equitable tolling is justified and dismissal is not appropriate as the May 27,  
21 2005 letter violates due process since it did not inform or advise PSA how to exercise its right to  
22 administrative and judicial review. See *Gonzalez v. Sullivan*, 914 F.2d 1197 (9th Cir.1990).

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24 <sup>2</sup>The statute of limitations is an affirmative defense which is waived if not pled and the  
25 failure prejudices the plaintiff. See *Manvil Corp. v. E.C. Gozum & Co., Inc.*, 1998 Guam 20 at ¶¶  
26 13 - 14, 1998 WL 689650 at 6 (1998). DPW did not plead the affirmative defense in its answer  
27 and waiting until one week before the scheduled trial date to raise the issue is prejudicial to  
28 plaintiff.

<sup>3</sup>The fourteenth day was on a Friday, May 10, 2005. PSA filed this case on Monday, May  
13, 2005, which was the next business day. See 1 G.C.A. § 1004

1            *Gonzalez* addressed the sufficiency of a notice advising a party of an adverse  
2 administrative decision. In ruling on this issue, *Gonzalez* noted “[o]ne of the fundamental  
3 requirements of procedural due process is that a notice must be reasonably calculated to afford  
4 parties their right to present objections.”<sup>9</sup> 14 F.2d at 1203. It was then reasoned that “[r]equiring  
5 notices to accurately state how a claimant might appeal an initial decision does not impose a  
6 significant financial or administrative burden” on the administrative agency. *Id.* The Court then  
7 held that the notice in that case was “sufficiently misleading” concerning the administrative  
8 process that it violated due process. *Id.*

9            The procurement code also expressly requires that an agency decision denying a protest  
10 “(1) state the reasons for the action taken; and (2) inform the protestant of its right to  
11 administrative and judicial review.” 5 GCA § 5425( c)[emphasis added]. The applicable law at  
12 the time of the denial of PSA’s protest provided for an appeal to the Appeals Board, a non  
13 existent body. The denial in this case did not inform PSA of how to navigate review process  
14 given the absence of an Appeals Board. Instead, the denial letter simply parroted the language of  
15 § 5425( c)(2) by informing PSA that “[u]pon receipt of this letter, you are, therefore, notified of  
16 our determination and that you have a right to seek administrative and judicial review.” PSA was  
17 not given any guidance on how to navigate obtaining review of the protest denial given the non-  
18 existent Appeals Board<sup>4</sup>. Even more so, the May 27 letter was misleading as it expressly  
19 indicated that PSA had the right to administrative review of the denial even though that right was  
20 non existence. In fact, the protest denial did not even inform PSA that the Appeals Board was  
21 non-existence. It is clear that the denial of PSA’s protest failed to provide any guidance on how  
22 PSA should proceed with an appeal despite being required to do so by § 5425( c). This results in  
23 the May 27, 2005 letter violating due process. *Id.* See also *Pickens v. Shelton-Thompson*, 3 P.3d

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26            <sup>4</sup>Although an Appeals Board decision was necessary before a party could seek judicial  
27 review in this Court. Since an Appeals Board did not exist, seeking administrative review from  
28 the Appeals Board of the protest denial would have been futile. See *Amerault v. Intelcom Support  
Services, Inc.*, 2004 Guam 23 at ¶ 6 n.4, 2004 WL 2938912 at 2 n. 4.(2004). This renders the  
protest denial a final administrative decision for purposes of seeking judicial review.

1 603, 607 - 608 (Mont.,2000); *Bidstrup v. Wisconsin Dept. of Health and Family Services*, 632  
2 N.W.2d 866, 870 - 871 (Wis. App. 2001); *Alexander & Alexander, Inc. v. Louisiana*, 596 So.2d  
3 822 (La.App. 1991). This due process violation precludes dismissal of this case. *Id.*

4  
5 **CONCLUSION**

6 Jurisdiction exists over this action as the time for filing a complaint for judicial review  
7 under the procurement code is a limitations period subject to equitable tolling as opposed to  
8 being an inflexible jurisdictional bar. Although DPW waived any limitations defense as it did not  
9 plead a limitations period as an affirmative defense, that is immaterial in that the facts justify an  
10 equitable tolling of the limitations period. In any event, dismissing this case would violate due  
11 process given the insufficient notice of the appeal process in the May 27, 2005 protest denial  
12 letter.

13 A status conference for setting a trial date shall be held on AUG 14 2006 at  
14 2:30pm.

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16 So ORDERED this 11 day of July, 2006.

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19 HONORABLE STEVEN S. UNPINGCO  
Judge, Superior Court of Guam

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JUL 12 2006